IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Action No. 55 of 1977

Between:

THE COMPTROLLER OF CUSTOMS OF FIJI AND THE ATTORNEY-GENERAL

Appellants
(Original Defendants)

\- and -

SHANTILAL BROTHERS

Respondents
(Original Plaintiffs)

J.R. Flower and A. Rabuka for the Appellants
F.S. Lateef for the Respondents

Date of Hearing: 28th February, 1978
Delivery of Judgment: 22nd March, 1978

JUDGMENT OF GOULD V.P.

The Attorney-General and the Comptroller of Customs of Fiji are the appellants in this appeal against a judgment of the Supreme Court allowing a claim by the respondents for the sum of $3,091.80c by way of drawback in relation to a Customs transaction. The judgment was in the event given only against the Attorney-General.

The subject of drawback is dealt with in Part XI of the Customs Ordinance (Cap.170) and in particular Section 125(1) provides as follows:

"125.(1) Where any goods capable of being easily identified have been imported from any foreign port and are thereafter exported to any foreign port or as ship's stores, an amount not exceeding the duty paid in respect of the importation of the goods may be repaid as drawback if the following conditions are complied with:-

(a) the goods must be identified to the satisfaction of the Comptroller with the original import invoice and with the entry for the payment of duty within Fiji;

(b) the re-exportation is made within two years from the time of importation;

(c) the claim for drawback is of not less than three pounds in respect of any one commodity entered as a separate item on the original entry;

(d) the claim for drawback is established at the time of the re-export, and payment is demanded within six months from the date of the entry for shipment;

(e) the goods are of greater value for home consumption than the amount of drawback claimed:

Provided that no drawback shall be payable on any damaged goods, or on any goods that are not in all respects in as good and sound condition as when imported."

It will be well to say at once that in his judgment the learned Judge in the Supreme Court stated that the word "may" used in the opening words of that section has the force of "shall" and there has been no argument on the appeal against this finding.

In allowing the claim the learned Judge rejected an argument, which was taken as a preliminary issue, that the respondents' claim was barred by the provisions of the Public Officers' Protection Ordinance (Cap.19). It will be necessary to refer to the wording of Section 2 of that Ordinance and it will be suffice for this purpose to set out the opening words and paragraph (a) of the Section, which are as follows:

> "2. Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Ordinance or other law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority the following provisions shall have effect:-
>
> (a) the action, prosecution or pleading shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within six months next after the ceasing thereof;"

The appeal as lodged is confined to the effect of this finding by the learned Judge and the grounds are shortly stated as follows:-

> "The learned trial judge erred in law in holding
>
> (a) That the provisions of section 2 of the Public Officers' Protection Act, Cap.19, has no application in any action other than a tortious one;

(b) <u>That</u> the provisions of section 2 of the Public Officers' Protection Act has no application to any action brought under the provisions of the Customs Act, Cap.170."

During his reply to the argument for the appellants, Mr. Lateef, for the respondents, raised a new question and in effect sought to uphold the judgment of the learned Judge, on grounds other than those relied upon by the latter. This strictly requires a respondent's notice, which had not been filed, but with the acquiescence of Mr. Flower the Court gave leave to argue the question, and I will refer again to it at a later stage. The passage of his judgment in which the learned Judge ruled against the argument on limitation is as follows:-

> " This action was commenced a little over three years after the cause of action arose and if the Public Officers' Protection Ordinance has application the plaintiff is considerably out of time. I ruled that the Ordinance had no application to a claim in the nature of the plaintiff's claim which is for payment of a sum payable under the provisions of the Customs Ordinance. I stated at the time that I would deal more fully with the submissions in my judgment.
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> In support of his submission Mr. Rabuka referred to three authorities:
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> C.A. No. 6 of 1975 Shiu Ram v. Attorney-General
>
> The Attorney-General for Kenya v. Hayter (1958) E.A. Reports 393 and
>
> Mohammed v. Attorney-General and Another (1971) E.A. Court of Appeal Reports 241.
>
> "In all these cases the claims were founded in tort and were for damages for negligence.

The plaintiff's claim is to recover a sum of money alleged to be recoverable under section 125 of the Customs Ordinance. It is not an action arising from tort.

Under section 4(1) of the Limitation Act 1971 an action brought to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture, can be brought within six years from the date on which the cause of action arises.

Section 27 of the Limitation Act applies the act to proceedings by or against the Crown save where in that Act or any other Act otherwise provided.

Section 25 of the Crown Proceedings Ordinance provides that nothing in that Ordinance shall prejudice the right of the Crown to rely upon the law relating to limitation of time for bringing proceedings against public authorities. If the Public Officers' Protection Ordinance has application in the instant case it is clear the plaintiff's claim would be barred.

In my view however, the Public Officers' Protection Ordinance is concerned with actions arising in tort and that is clear from the wording of section 2 of the Ordinance. It has no application to a claim for payment of a sum payable under section 125 of the Customs Ordinance. I hold that section 4 of the Limitation Act applies and the plaintiffs are not barred from prosecuting their claim."

I will say, at once, with respect, that in so far as the learned Judge purported to limit the effect of the Public Officers' Protection Ordinance to actions arising in tort, in my opinion he was in error. The authorities which he quoted, though they may be concerned with actions in tort, do not support any proposition that the Ordinance applies only to actions in that category. The learned Judge does not in fact say that they do but was of

the opinion that such a limitation was clear from the wording of Section 2 of the Ordinance in question. While I agree that the question is one to be resolved by consideration of the wording of the section I am unable to see any reason whatever for limiting its effect to the realm of tort. Similar sections have been considered by a number of courts of high authority and the very greatest difficulty has been found in laying down a line which shows what is included, and what is not included, in the statutory words. In Firestone Tire and Rubber Co. (S.S.) Ltd. v. Singapore Harbour Board /1952/ A.C. 452 their Lordships of the Privy Council, after examining the cases of Bradford Corporation v. Myers /1916/ 1 A.C. 242 and Griffiths v. Smith /1941/ A.C.170 stated that it would not cause surprise if their Lordships did not attempt to accomplish what the noble Lords in the cases referred to found well nigh impossible, but they contented themselves with examining the two cases cited with a view to extracting the considerations that were relevant. They said:-

> "1. It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a public duty or the exercise of a public authority. This assumes that there are duties and authorities which are not public. (See per Lord Buckmaster in the Bradford Corporation case);

2. In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract:

3. The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test. (See per Lord Shaw in the Bradford Corporation case);

4. Effect must be given to the word "authority". This excludes the test of obligatory, as opposed to permissive, powers. (See per Viscount Maugham in Griffiths' case)."

It will be seen that the concept of contract is by no means excluded and there is no suggestion that the matter is limited to cases of tort. Again in Bradford Corporation v. Myers (supra) Lord Shaw, at p.264, said:-

> "The same principle applies whether the act complained arose through breach of contract or through tort. I take no stock of such distinction, for the act does not: it speaks of 'an act done'. In numerous cases the one legal denomination and the other may be convertible according to the will and skill of the pleader, and I must record my dissent from all those judicial opinions which have been cited in which such a distinction is treated as having a vital bearing on the question."

I therefore turn to ground 2 of the Notice of Appeal which raises the question whether the Public Officers' Protection Ordinance should have prevailed and the action accordingly should have failed. The text has been quoted above and it was Mr. Rabuka's submission that the Comptroller of Customs was a "person" within the meaning of section 2 and the action was for an alleged "neglect or default" in the execution of an Ordinance, namely the Customs Ordinance, or of a public duty or authority.

It is relevant to note the position of the Comptroller of Customs. His appointment is authorised by section 4(1) of the Customs Ordinance and he is by that section charged with the administration of that Ordinance and any other relating to Customs and Excise. Customs officers, authorised by section 4(2) are to act "under the direction of the Comptroller". Part IV of the Ordinance gives the Comptroller control over the landing and entry of goods; Part V, the control of goods imported, including those under drawback. By Section 38 entries in the prescribed form are to be made for all goods subject to Customs control. Part VII deals with the collection and management of duties, clearly a function of the Comptroller. Part IX deals with exportation and by Section 108 the Comptroller has power in the case of (inter alia) drawback goods to call for security that they will be exported as entered. Part XI deals specifically with drawback and contains Section 125, which

has been set out at the beginning of this judgment. Having regard to the position and functions of the Comptroller, some of which are outlined above, it would seem clear that, once the conditions of Section 125 were satisfied, a duty lay upon him to pay to the respondents the amount due by way of drawback. I do not think it necessary, for the purposes of this case to distinguish between "duty" and "authority", and while I think it is also clear that the Comptroller as such was a public authority, having duties and functions towards the public in general, the question is whether this particular duty had the necessary public quality or whether it was of a private nature.

A number of authorities were quoted by counsel, in which such a distinction was made. Bradford Corporation v. Myers has already been mentioned. The claim there was for damages for damage done during the negligent delivery of a load of coke which the Corporation had authority to manufacture and sell; but it was not compelled to do so by its statute in the sense that it was compelled to provide and supply gas. It was held that the contract to supply the coke was a private matter, the terms of which could be arranged at will and the duty was towards the private person, and not in the nature of a duty owed to the public. A helpful passage in the judgment is what was said by Lord Buckmaster (and referred to in the Firestone Tyre case (supra)) at p.247 -

" In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

A similar distinction was made in Sharpington v. Fulham Guardians [1904] 2 Ch. 449 in which the power of the guardians to enter into a contract with a builder to erect a receiving house was one which arose in the exercise of a public duty, but they were not under a duty to enter into that particular contract; they need not have made that contract at all. The breach of it was therefore no more than a breach of a private duty to the individual builder.

On the other hand in the case of McManus v. Bowes [1937] 3 All E.R. 227 it was held that the Public Authorities Protection Act, 1893, did apply. The plaintiff was engaged as a medical officer of a county mental hospital. The power vested in the Committee by the relevant Act was to appoint and to remove, which was construed to mean "remove at pleasure". Though other terms of the engagement could be the subject of agreement it was held that in view of the power to remove at pleasure the appointment and removal were directly statutory, not by reason of any contract, and the case was not one of a contract of a voluntary nature of the type suggested in Bradford v. Myers.

So far as the present case is concerned it does not appear to me to involve any question of contract. The Comptroller does not enter into contracts to pay money in respect of goods under drawback. I do not think that the relationship of Comptroller and exporter, even when all conditions of drawback have been fulfilled, can be reduced to any form of implied or quasi contract. It is a clear case of an obligation being placed upon the Comptroller, when certain conditions have been fulfilled, to make the appropriate payment. Failure to make it must be, in my judgment, a neglect or default in the execution of the Customs Ordinance, with the administration of which, as has been seen, he is charged. At what point of time, however, the failure occurred so as to make the neglect or default something which could be complained of, is another question.

The question remains, also, whether the duty so imposed is a public duty, as is pointed out as the first of the "considerations" listed by the Privy Council in the Firestone Tyre and Rubber Co. (S.S.) Ltd. case (supra). To this, the second of the considerations listed may be relevant if read so as to substitute "enter into relations with" for "contract". This last proposition, however, has only to be stated to be rejected. Any member of the public might have approached the Bradford Corporation for the

purchase of coke, but although he would probably have been successful, there was no legal obligation on the Corporation to comply. Here the approach for a drawback refund may be made by any importer, who is obliged to fulfil certain conditions, but once that is done a corresponding statutory duty is imposed by the legislation upon the Comptroller.

The question then is whether that duty, though statutory, is a public duty. Mr. Lateef, for the respondents, argued that it was not. It was of a private nature - merely a debt. He relied upon Milford Docks Company v. Milford Haven U.D.C. (1901) 65 J.P. 483. There Romer L.J. said at p.484 -

> "The Public Authorities Protection Act, 1893, does not apply to actions for the price of goods sold and delivered and for work and labour done. That is obvious if section 1 is looked at. What was the only act complained of in this case? The non-payment of the money. How can it be said that such non-payment was an act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or an alleged neglect or default in the execution of any such act, duty or authority? The fact is that the Act deals with cases of some wrong done by a public authority. In this case there was a contract to pay conditional upon liability to repair."

The money in that case was payable under a contract entered into voluntarily by the Council. Midland Railway Co. v. Withington Local Board (1883) 11 Q.B.D. 788 was another money case but it went the other way. The plaintiff paid for some road work

at the order of the Board but it was subsequently found that the plaintiff was not liable to do the work. The plaintiff sued to recover money paid under a mistake of fact, without giving the six months' notice. It was held that the Board was entitled to the protection of the limitation period. Lindley L.J. said, at p.796.

> " The question is, did the defendants keep the money intending to act under the provisions of the Public Health Act, 1875? The answer must clearly be in the affirmative."

I do not, therefore, consider that there is authority for saying that because an act or neglect results in a money claim the duty in question is necessarily translated from a public duty to a private one. I agree with Mr. Flower that if that were so it would have been difficult to distinguish the torts cases or the Firestone Tyre and Rubber Co. (S.S.) Ltd. case itself - that was an action against bailees. Pleading is no guide in such matters but it might have been possible to plead the present claim as one for damages for breach of a statutory duty, which would tend to remove it from the "mere debtor and creditor" category.

Apart from this argument I do not think there is any reason to say that the Comptroller was not acting under a public duty. He was fulfilling one part of the duty for which he had been given statutory powers - the control of import and export of cargo. In Lord Buckmaster's

words already quoted it was - "a duty owed to all the public alike or an authority exercised impartially with regard to all the public". The fact that only one section of the public, importers and exporters, would be likely to be affected, does not in my opinion change the nature of the duty.

It follows that in my respectful opinion, the learned Judge was wrong to the extent that he held that the Public Officers' Protection Ordinance had no application to a claim in the nature of the plaintiff's claim. (Ground 2 of the grounds of appeal, incidentally is worded far too widely to be properly descriptive of the learned Judge's finding, but nothing turns on this). It does not follow, however, that the appeal must succeed. As I have mentioned earlier, Mr. Lateef was permitted to raise a matter which ought to have been the subject of a respondent's notice. Mr. Flower very fairly did not object to this, even though it had not been the subject of argument in the Supreme Court. I say very fairly because on the facts as found by the learned trial Judge and not now challenged, the money claimed by way of drawback, was and is properly due to the respondents by the Comptroller subject only to the effect of any limitation period which the Public Officers' Protection Ordinance may be held to impose.

Mr. Lateef's argument is that the action was in fact commenced within the prescribed period of six months "next after the act, neglect or default complained of," and he claims that such is the case is demonstrable from the record. The question is when did that act, neglect or default occur. The conditions set out in Section 125 of the Customs Ordinance are imposed upon the exporter. As to (a) and (e) at least the Comptroller would have to be satisfied and so indicate. He would have to be satisfied over all before he could authorise or be required to authorise payment. The learned Judge went in some detail in his judgment into the procedure involved. The final step by the exporter is the completion of an application for payment of drawback on form C.37. These are placed (and the Customs insist on this) in a box in the Long Room marked "Refunds" and are not acknowledged by the Customs. All the exporter can do is wait for payment and the learned Judge laconically observed that he can sometimes wait a long time.

Assuming that the words "neglect or default" in Section 2 of the Public Officers' Protection Ordinance are referable to the failure to pay the amount claimed, when does it occur. It has been held in Freeborn v. Leeming [1926] 1 K.B. 160 (following Carey v. Bermondsey Borough Council (1903) 67 J.P. 447) that in order to ascertain the time limit imposed by the section it is to the words of the section

that reference must be made. The arising of the cause of action may, it seems, not necessarily be the same thing as "next after the act complained of or in the case of a continuance of injury or damage within six months next after the ceasing thereof," the words used in the section. It was held that the "continuance of injury or damage" means the continuance of the act which caused the damage, not the continuance of the damage itself. Those were torts cases, but I think that they eliminate any idea that the continuance of the Comptroller's neglect to pay enlarges the time within which action could be brought.

It is therefore to a particular point of time that an exporter must look to ascertain when a neglect has taken place, in order that he may know when time has commenced to run against him. There appears to be no way, under the system, in which he can ascertain this point of time with any certainty. He has made his demand for payment in accordance with condition (d) of Section 125 on Form C.37. That cannot create an instant default or neglect on the part of the Comptroller. He is entitled to a proper time to consider the application and to satisfy himself that everything is in order. He is entitled to a proper time to pay. If he refuses to consider the matter at all or decides against the exporter and fails to notify him, that could constitute a default but who is to know when it took place. Even if

the exporter gave a notice of the kind resorted to by parties to a contract when they seek to make time of the essence, that would not necessarily decide the question if the Comptroller required more time. If the exporter brings an action too soon he may be penalised in solicitor and client costs under the provisions of the Public Officers' Protection Ordinance.

It can be seen that questions may continually arise in practice to which no firm answer can be given in this case. Mr. Lateef, however, relies on the nature of the correspondence between the parties. The relevant drawback C.37 forms were lodged in 1972. There is a letter in evidence dated the 25th August, 1973 in the following terms:-

"The Comptroller,
H.M. Customs,
S u v a.

Dear Sir,

Please give us your reason for holding the payments of our standing drawback which to date aggregate to F$23,261-35.

Your early attention on the matter is appreciated.

Yours faithfully,
SHANTILAL BROTHERS

Sgd.

Managing Partner
Hasmukhlal Hargovind"

The total sum mentioned, we were informed, included the relevant claims. The reply was dated the 4th September, 1973:-

"The Managing Partner,
Messrs. Shantilal Brothers,
P.O. Box 263,
S U V A.

Dear Sir,

I refer to your letter H/C/File/HH/Lb of 25th August and have to advise that a number of outstanding drawback claims are now in the course of being paid.

Yours faithfully,
Sgd.
(C.F. Wooley)
Comptroller of Customs & Excise"

I think that letter, though in vague terms, must be taken as indicating that those claims not presently being paid, were still under consideration. In January 1974 there were two more letters. On the 2nd January, the respondents wrote:-

"The Comptroller,
H.M. Customs,
S u v a.

Dear Sir,

Re: Standing Drawback

We refer to your letter Ref.3/6 Pt. VI dated 4th September 1973 advising us, that our drawback claims are now in the course of being paid.

So far we have received your cheque of F$4,364-10, although substantial amount is still pending.

Please confirm when do we expect payment of the standing claim?

Yours faithfully,
SHANTILAL BROTHERS

Sgd.

Partner"

In reply, dated the 17th January, was:-

"The Managing Partner,
Shantilal Brothers,
G.P.O. Box 263,
S U V A.

Dear Sir,

Thank you for your letter of 2nd January, 1974.

It is advised that outstanding drawback are being processed for payment.

Yours faithfully,

Sgd.

(S.L. Singh)
for Comptroller of Customs & Excise"

During July and August the respondents took opportunities of asking again for settlement and on the 14th November, 1974, threatened action. Only then, on the 25th November, 1974 did the Comptroller change his attitude, and expressed his determination as follows:-

"The Manager,
Shantilal Brothers,
G.P.O. Box No. 263,
S U V A.

Dear Sir,

Thank you for your letter ref: 291/HH/Sa dated 14th November, 1974, regarding Drawback claims.

According to our records Form 37 has not been received, resulting in your claim being time barred. Therefore, the Drawback Entries as undermentioned are not acceptable.

"K2004	of	12/2/72	K2607	of	23/2/72
K2071	'	14/2/72	K2608	'	23/2/72
K2420	'	18/2/72	K1544	'	4/2/72
K2600	'	23/2/72	K4115	'	18/3/72
K2601	'	'	K4116	'	'
K2602	'	'	K4117	'	'
K2603	'	'	K4118	'	'
K2604	'	'	K4119	'	'
K2605	'	'	K4347	'	23/3/72
K2606	'	'	K4348	'	'

Furthermore, we wish to advise you that the Drawback entries mentioned below are now being processed:

K4931	of	10/4/72	K12108	of	4/9/72
K6654	'	10/5/72	K12109	'	'
K12014	'	1/9/72	K12601	'	14/9/72
K12106	'	4/9/72	K12602	'	'
K12107	'	'	K12603	'	'

Yours faithfully,

Sgd.

(T.K. Brown)
for Comptroller of Customs & Excise"

Mr. Lateef argues that that is the date at which the neglect or default commenced, and it is agreed that the writ, dated the 13th May, 1975,

was issued within six months thereafter. In support of his argument Mr. Lateef relied upon the case of Turburville v. West Ham Corporation [1950] 2 All E.R. 54. The brief facts are that a local education authority had agreed to augment the salaries of those of their staff who joined the armed forces with their approval. A dispute later arose as to amounts payable and an action was brought. Limitation was pleaded, but it was held that the Council was not acting "in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority", and the action was not time barred. But the interest of the matter is almost by way of addendum. Lord Oaksey said at the conclusion of his judgment at p.58 of the report:

> " On the last question, I am of opinion that in any event the defendants cannot succeed, in view of the correspondence, which shows that they led the plaintiffs to believe that the question whether these payments were going to be made was under consideration until February, 1946, and that, in such circumstances, the defendants cannot be heard to say that there was a cause of action before that date."

On the same subject Singleton L.J. said, at pp.60-61:

> " That which has to be decided in the first place is: What is the effect of this correspondence? The defendants say that the question is under consideration by them. The result of their deliberations

> is shown by the letter of Jan. 31, 1946, to the National Union of Teachers - that was the awaited communication. The action was commenced within one year from that date. The answer to the question depends on the construction of the memorandum of May 30, 1945. That contains a promise that any necessary adjustment will be made in due course. Does it mean: "If you do not take any steps to enforce your rights meanwhile, we will make any necessary adjustment, and in the meantime time shall not run"? No steps were taken by the plaintiffs' advisers until the defendants had signified their decision not to make any adjustment. It is claimed on behalf of the plaintiffs that time does not run until the defendants indicate their decision to them. Certainly, a strong case is made that the defendants ought not to be allowed to take advantage of the plaintiffs' forbearance, in view of the correspondence, and, particularly, in view of the document of May 30, 1945. I prefer, however, to base my opinion on the applicability of s.20(1) of the Limitation Act, 1939, on another ground."

The third member of the Court of Appeal, Wynn-Parry J. said, at p.65 of the report:

> " Lastly, I agree that, even had our conclusion on this point been otherwise, the defendants by their conduct are not entitled to rely on s.21(1) of this case. In my view, the effect of the correspondence which was read to us was clearly to establish an agreement between the parties that the plaintiffs should hold their hands until the defendants had finally determined their attitude. The defendants' final determination was not communicated to the plaintiffs until Feb. 25, 1946, less than a year before the issue of the writ on Jan. 23, 1947."

Havind given the matter my best consideration, I am of the opinion that the reasoning behind these passages can and should be applied here. The Comptroller took the attitude over a period of some two years that the question of payment was still under consideration - whether it was for reasons of presure of work or other considerations does not appear, and is not material. Surely there was a promise implied that he would either pay or let the respondents know if (and perhaps why) he decided to the contrary. I do not consider it a case of an estoppel against a statute. The Comptroller was saying he required further time before he decided on his course of action, and as long as that situation remained unchanged he would not be in default or neglect. He was not refusing to execute the Ordinance; merely saying or implying that he needed time. On the 25th November, 1974, he wrote, in effect indicating that his researches were complete, that the respondents had never made proper application and that he (relying on the Ordinance) refused to make the payments. I do not think in the circumstances that it has been shown (and I think it must be on the Comptroller, who pleads the limitation, to show it) that there was a neglect or default in the execution of the Customs Ordinance prior to that point of time.

In my judgment therefore, the plea of limitation does not avail the appellants. The only hesitation I have in giving effect to this

view arises from the fact that it was raised only upon the appeal. It was not necessary for the learned Judge to consider it as he decided the question to the same effect but on other grounds. I understood Mr. Flower, however, as indicating that if the Court arrived at the conclusion I have expressed he did not wish to rely on procedural considerations, an attitude which I think was perfectly correct in counsel representing a public department in the circumstances of this case.

I would dismiss the appeal with costs and as all members of the Court are of the same opinion it is so ordered.

(Sgd.) T.J. Gould
VICE PRESIDENT

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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

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Between:

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Appellants

- and -

SHANTILAL BROTHERS Respondents

J.R. Flower & A. Rabuka for Appellants
F.S. Lateef for Respondent

Date of Hearing : 28th February, 1978.
Date of Judgment : 22nd March, 1978

JUDGMENT OF HENRY J.A.

I have read, and agree with, the judgment of the learned Vice President but since we are differing from a finding of the learned Judge, and further, that a point, not determined in the Court below, is now being dealt with I propose to give short reasons for the conclusions which I have reached.

This was an action brought by respondents against the Attorney General for the recovery of certain sums of money which respondents claimed were payable to them for "drawbacks" on goods re-exported from Fiji. Claims for drawbacks are

governed by Part XI of the Customs Ordinance (Cap.170). The Customs Ordinance is under the direction of the Comptroller of Customs, and, the Comptroller, through his responsible officers deals with claims for drawbacks. The Attorney General was sued pursuant to the provisions of the Crown Proceedings Ordinance (Cap.17). The Supreme Court held that applications for drawbacks had been made in due form and that respondents were entitled to certain drawbacks claimed and gave judgment. Appellant pleaded that the provisions of the Public Officers' Protection Ordinance (Cap.19) was a bar to the action. Two questions arise, namely, (a) does the Ordinance apply to this action, and, (b) if so, is the action barred as pleaded by appellant?

The relevant portion of the Public Officers' Protection Ordinance which requires consideration reads as follows:

> "Section 2. Where any action ..... is commenced against any person ..... in respect of any alleged neglect or default in the execution ..... of any Ordinance duty or authority the following provisions shall have effect:-
>
> (a) the action ..... shall not lie ..... unless it is commenced within six months next after the ..... neglect or default complained of ....."

It was not contended that in this action the Attorney General did not come within the term "any person". The crucial question was whether

the action was one for neglect or default in the execution of any Ordinance duty or authority. The learned trial Judge held that Public Officers' Protection Ordinance (Cap.17) was confined to actions of a tortious nature meaning that the Ordinance applied only to an action which is properly described as being an action based on tort. With the greatest respect I am unable to accept that this is so. The preamble says that it is an Ordinance to provide for the protection of persons acting in the execution of statutory or other public duties. Section 2 has been fully set out in judgment of the learned Vice President. I will not set it out again.

The first form of action included in section 2 is "for any act done in pursuance or execution or intended execution of any Ordinance or other law or of any public duty or authority". These words must be given their plain meaning, namely, any act so done. There is nothing in the Ordinance which requires a Court to qualify the words "any act" by the insertion of the word "tortious". Similar reasoning applies to the words "neglect or default". There is no ground for qualifying these words by confining them only to such neglect or default as would support an action in tort. I accept the contention of counsel for appellant that the Ordinance is not confined to actions based on tort. I now turn to the question whether or not this was an action barred by that Ordinance.

Section 125(1) of the Customs Ordinance provides that, in respect of certain goods (of the nature of those concerned in this action), customs duty paid in respect of the importation of such goods "may be repaid as a drawback" if certain conditions have been complied with after such goods have been re-exported. The Comptroller is charged with the administration of the Ordinance: vide section 4(1). The Minister has power to appoint such other officers as he may deem fit and they are required to act under the direction of the Comptroller. In administering the Ordinance the Comptroller and the officers are given wide powers including the exercise of the powers conferred by Part XI in relation to drawbacks. In my opinion the Comptroller has a duty to consider and deal with claims for a drawback, and, if the claim is established, and payment is demanded within the specified period (in this case six months) the Comptroller is under a duty to make provision for payment. It is his function to deal with claims for drawbacks, and, until he has done so, the drawback does not become payable. The learned Judge in the Supreme Court held that respondent had placed the Comptroller in possession of all requirements to enable him to decide whether or not the claim had been established. No such decision was conveyed to respondents. It was conceded that, once an exporter had satisfied the conditions of section 125, he was entitled to be paid the amount of the drawback. The learned Judge found that respondent had satisfied all such conditions in respect of three claims and gave judgmentaccordingly.

The question then is whether the present action was barred by reason of the limitation provided for in section 2. The learned Judge was not, on the view he took, required to determine this point. The words "neglect or default" must be considered on this topic. They are words of general import and are wide enough to include the failure of the Comptroller to pay the claims that the learned Judge found were payable. They are not mutually exclusive expressions so it is unnecessary to determine more than that the action comes within these expressions. Each action must be determined on its own facts and the present facts are such that they constitute an action based on "neglect or default". There is no claim that a cause of action had not arisen before the action was commenced. What is now put forward is that the cause of action is barred. The burden is therefore on appellant to show that the requisite period had expired before the action was commenced. I respectfully agree with the learned Vice President that that has not been established on the facts of this case so the plea must fail.

I agree with the result proposed by Gould V.P.

(Sgd.) T. Henry
JUDGE OF APPEAL

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 55 of 1977

Between:

THE COMPTROLLER OF CUSTOMS OF FIJI AND THE ATTORNEY GENERAL

Appellants

- and -

SHANTILAL BROTHERS Respondents

J.R. Flower and A. Rabuka for Appellants
F.S. Lateef for Respondents

Date of Hearing: 28th February, 1978

Date of Judgment: 22nd March, 1978.

JUDGMENT OF MARSACK, J.A.

I have had the advantage of reading the comprehensive judgment of the learned Vice President and fully agree that this appeal should be dismissed for the reasons set out in that judgment. There are however, two aspects of the argument before us upon which I should like briefly to comment.

The first is the holding by the learned trial Judge that the actions referred to in section 2 of the Public Officers Protection Ordinance (Cap.19) are limited to actions in tort. The wording of the section, in my opinion, does not justify such a conclusion. It is true that the definition "tort" is, as the authorities have made clear, very wide indeed, and would cover

many of the "neglects or defaults" referred to in the section· but not, as I see it, all such. In my view a limitation of the section to tort would unduly restrict its intended scope.

The second is the question, when did the cause of action arise? It is clear that under section 2 action must be brought within six months of that time. It is common ground that the respondents in the first instance notified the Comptroller of their claim within the specified period of six months. It is also clear, from the copies of correspondence cited in the judgment of the learned Vice President, that it was not until the 25th November 1974 that the Comptroller finally notified the respondents that their claim was rejected. That was the date when in my opinion, the cause of action arose· and as proceedings were commenced in the Supreme Court on the 13th May 1975, action was taken within the period of six months laid down in section 2.

Consequently, as I have said, I fully concur with the judgment proposed by the learned Vice President.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

SUVA,
22nd March, 1978.