IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBJ 32 OF 2006

BETWEEN:

THE STATE v. FIJI ISLANDS REVENUE & CUSTOMS AUTHORITY

RESPONDENT

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EX-PARTE: **WESTERN WRECKERS LIMITED**

SUZIE DANFORD NAILOLO

APPLICANTS

Mr. G. O'Driscoll for the Applicants

No Appearance for the Respondent

Date of Hearing: **21st February 2007**

Date of Judgment: **27th February 2007**

JUDGMENT

Western Wreckers Limited imports used vehicles and motor vehicle parts. In May 2003 it imported a second hand Toyota car Chassis number CT 196 – 5027817. The vehicle was held by Customs authorities to assess duty payable on it.

In order to get the release of the vehicle so it could be registered by the Land Transport Authority, the applicants submitted a fake bill of lading to the respondent, whether deliberately or accidentally, I am not told. The Customs authority accordingly impounded the vehicle.

To get out of the impasse, the applicants' parties resorted to Section 155 of the Customs Act. This section permits a person to settle matters out of court by ***"pleading guilty"***. It empowers the Comptroller of Customs to then impose a penalty.

The second applicant ***"pleaded"*** to four counts as follows and fined :

> ***"Count 1:- That pursuant to section 137(a) of the Customs Act 1986: You prepared, passed, presented or caused to be prepared, as genuine a document required to be produced under any customs law which is not in fact a genuine document or which is untrue or incorrect in any material, is hereby fined the sum of $500.00 (five hundred dollars);***
>
> ***Count 2:- That pursuant to Section 138(a) of the Customs Act 1986: You falsified a document which is required under the customs laws or which is used for the transaction of any business relating to customs is hereby fined the sum of $5000.00 (five thousand dollars);***
>
> ***Count 3:- That pursuant to Section 138(b) of the Customs Act 1986: You knowingly used a document so falsified, is hereby fined the sum of $5000.00 (five thousand dollars);***
>
> ***Count 4:- That pursuant to Section 138(c) of the Customs Act 1986: You altered a document which required under customs laws or which is used for the transaction of business relating to the customs after it has been officially issued, is hereby fined the sum of $5000.00 (five thousand dollars)."***

The fines imposed in counts 2, 3 and 4 were the maximum permitted for those offences.

The applicant filed this application for judicial review of the respondent's decision dated 24th August 2006 seeking a certiorari to quash the decision and declarations that the respondent failed to take applicants' mitigation in reaching its decision and secondly that the respondent acted arbitrarily in its assessment and contrary to the intention behind Section 155 of the Act.

The grounds on which the relief is sought are that the respondent failed to explain the basis of its decision and failed to consider submissions and discussions between the solicitors for the parties at the Lautoka High Court.

In the final affidavit in reply by the applicants, they attempted to raise an additional issue that Lorima Vosa an employee of the respondent had no authority to impose the penalty under Section 155 and they will not accept such penalties.

As this allegation was raised in the final affidavit, the respondent had no opportunity to reply to it. Under Section 155(3) the Minister may delegate to any officer all or any of the powers of the Controller. Had this issue been raised in the affidavit in support, the respondent could have answered to the allegations. It is not proper for applicants in judicial review to keep raising issues in their affidavits. The proper course is to seek to amend the application. Besides it also appears that Lorima Vosa was writing on instructions of the Controller – Annexure RH2 being letter dated 24th August 2006. Lorima Vosa was merely advising the applicants of the outcome of the Controller's decision. The actual decision it appears was made by the Comptroller himself. Hence this ground would not succeed.

The applicants' case was dealt with under Section 155 of the Customs Act 11 of 1986. It is part XX of the Act with the heading ***"settlement of cases by the Comptroller"***. The section empowers the Controller to deal with certain

cases, where a monetary penalty or forfeiture is the prescribed penalty to impose a monetary penalty. The Comptroller can only impose the penalty if a person admits the offence in writing and requests the Comptroller to deal with the offence.

The advantage to the applicants in such cases is obvious. It allows expeditious dispatch of the matter out of court. A person cannot be charged again in respect of the offence. It prevents any conviction being registered against a person's name. The person dealt with can rest assured that unlike a court, there is not even a remote possibility of a prison sentence. In this case since three counts were in respect of Section 138 offences, the penalty was imprisonment for two years or maximum fine of $5,000.00 or both.

Section 155(2)(e) also provides that a comptroller's order ***"shall be final and shall not be subject to appeal"***. However this is a judicial review not an appeal.

The Comptroller's reasons for imposing the fines imposed are explained in his letter dated 31st august 2006. The Commissioner has bracketed offences as a matter of policy into three categories as common offences, serious offences, and very serious offences. The very serious offences are those where the maximum penalty is over $4,000.00. For such offences the penalty imposed is consistently 100 percent that is the maximum fine regardless of whether a person is first offender or has prior record. In common offence it is 25 percent of the fines for first offender, 50 percent of legislated penalty for second offence and 100 percent thereafter. In between the common offence and very serious offence is the serious offence. For serious offence the penalty is 5o percent of legislated penalty for first offender and thereafter 100 percent of legislated penalty. In short, the policy boils down to application of penalties by a percentage formula.

On basis of this, three counts under Section 138 would be considered very serious as they all have maximum penalty of $5,000.00. The Comptroller imposed those penalties on each count in accordance with the policy.

Section 155 gives the Comptroller a discretion in that he ***"may order such person to pay such sum of money, not exceeding the maximum amount of the pecuniary penalty ..."***. In other words he has the discretion to levy a lower than the maximum penalty. The Comptroller's policy is a rigid policy in case of very serious offences. It is to impose the maximum penalty.

A public body or statutory authority vested with a discretion may have a policy for guidelines but it ought not to have a policy the nature of which is so rigid that the outcome is automatically determined, regardless of the circumstances. Such policy represents a shut mind. Lord Reid explained the need for a policy in cases of large authorities in British Oxygen Col. Ltd. v. Board of Trade – 1971 AC 610 at 625 D as follows :

> ***"A Ministry or a large authority may have to deal already with a multitude of similar application and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say."***

Policies provide for certainty and consistency in decision making but to apply the policies rigidly and slavishly is to defeat the very purpose of discretion vested by Parliament.

"But the position is different. If the policy adopted is to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decision

taken pursuant to it will be unlawful" : R. v. Secretary of State for the Environment, ex-parte: Brent London Borough Council - 1982 QB 593 143 G-H.

Policies therefore are put in place to provide for a consistent approach to individual cases. However cases are likely to differ in detail and circumstances. Each case therefore must be considered in light of the policy but one cannot allow the policy to automatically decide the final result as it was done in the present case.

On the material before me, I consider the Comptroller applied the policy, which was like a mathematical formula, without considering whether the individual circumstances of the second applicant warranted a departure from that policy. The Comptroller had a shut mind.

The second applicant had explained that she was sorry and that it was her first offence. She had explained that she had attached a wrong copy of the bill of lading and then sent the correct copy to the Comptroller.

Accordingly, I order that a certiorari shall issue and I quash the decision of the Comptroller dated 24th August 2006. I further order that the Comptroller to consider afresh the penalty he wishes to impose in light of what I have said in this judgment. I order the respondent to pay $400.00 costs to be paid in twenty-one (21) days.

[Jiten Singh]
JUDGE

At Suva
27th February 2007