In The Supreme Court of Bermuda

COMMERCIAL COURT

2012: No. 237

BETWEEN:

MAILBOXES UNLIMITED LTD

Plaintiff

-v-

THE COLLECTOR OF CUSTOMS

Defendant

JUDGMENT
(In Court)

Date of Trial: July 24, 2012
Date of Judgment: August 22, 2012

Mr. Alan Dunch & Mrs Jennifer Haworth, MJM Ltd, for the Plaintiff
Mr. Martin Johnson, Attorney-General's Chambers, for the Defendant

Introductory

1. The Applicant's business involves for present purposes arranging through established courier companies for the delivery to its customers in Bermuda of goods purchased by such customers and initially delivered by vendors to mailboxes supplied in the US to the Applicant's Bermuda-based clientele. On April 1, 2012, the import duty on all items imported by businesses or individuals for personal use was fixed at a flat rate of

25%[1] but an exemption was introduced for "business end-use" importers who were entitled to pay the rates specified for various classes of goods under the First Schedule to the Customs Tariff Act 1970.

2. The Applicant primarily contends that it is entitled to the business end-use exemption from the increased 25% flat rate according to the terms of the relevant legislation as enacted. The services it provides to its customers are in relevant legal terms indistinguishable from those supplied by other retail businesses who it is conceded qualify for the exemption, it was argued.

3. By its Originating Summons issued on June 29, 2012, the Applicant sought the following principal relief:

   (i) A declaration that the Applicant qualifies as a 'business' within the meaning provided for by the Customs Procedure Code 4000 ("CPC 4000") contained in the Fifth Schedule of the Customs Tariff Act 1970 ("the Act") and, as such, is entitled to the benefit of the end-use relief provided by CPC 4000 as read with Section 2 of the First Schedule of the Act;

   (ii) An Order of mandamus and/or a mandatory injunction to compel the Respondent to recognise the Applicant as a 'business' for the purposes of CPC 4000 and to provide the Applicant with authorization to import goods with the benefit of the end-use relief provided by CPC 4000.

4. By an Ex Parte Summons, which was adjourned for hearing together with the Originating Summons, the Applicant also sought an Order that, *inter alia*, it be entitled "*to produce **one** Bermuda Customs Declaration with multiple items on it, as has been permitted ab initio*…" There were accordingly two issues placed before the Court: firstly a point of statutory interpretation in relation to a recently enacted legislative provision, and, secondly, a complaint which effectively invited the Court to invalidate the administrative processes of the Respondent.

5. Mr. Johnson for the Respondent raised a jurisdictional objection and sought to strike-out the entire action. He primarily queried the propriety of suing the Collector at all as opposed to the appropriate Minister of the Crown pursuant to the Crown Proceedings Act (the Attorney-General). He further submitted that the Applicant had failed to comply with the procedural requirements of section 123 of the Revenue Act 1898 in respect of actions against customs officers and that the proper remedy for the Applicant to pursue was the review procedure prescribed by section 122 of the same Act.

[1] This rate does not apply to "special rate" items where either no duty is payable at all, duty is assessed otherwise than on value or duty is payable at a rate higher than 25%.

6. The Applicant implied that the Collector had introduced an un-commercial new documentary system after the commencement of the present proceedings to punish the Applicant for challenging the new duty regime. Having heard the Collector's oral evidence, I was satisfied that the Applicant had not been singled out for special treatment and that some of the difficulties experienced could not fairly be laid at the Collector's door. This issue related to the Applicant's interlocutory Summons, which for reasons which are set out below did not ultimately have to be determined.

The strike-out application

The Crown Proceedings Act 1966 point

7. Mr. Johnson referred the Court to the key provisions of the 1966 Act. The governing provision states as follows:

> "*14 (1) Proceedings against the Crown under this Act shall be instituted against the appropriate Minister in his style as such or, as the case may be, against the appropriate Government Board, in the corporate name of the Government Board, or if none of the Ministers or Government Boards is appropriate or the person instituting the proceedings has any reasonable doubt whether and if so which Minister or Government Board is appropriate, then against the Attorney-General in his title as such."*

8. To the extent that injunctive relief is sought, however I also consider the following provisions of the Act to be germane in terms of illustrating the practical relevance of the 1966 Act in the present context:

> *"**Nature of relief***
> *16 (1) In any proceedings against the Crown instituted under this Act, the court shall have power to make all such orders as it has power to make in like proceedings between subject and subject, and otherwise to give such appropriate relief as the case may require:*
>
> *Provided that—*
>
> *(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subject and subject be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*
>
> *(b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or for the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is*

entitled as against the Crown to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against a servant of the Crown if the effect of granting such injunction or making such order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

(3) No execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any money, and no person shall be individually liable under any order for the payment by the Crown of any money." [emphasis added]

9. It was not disputed that the Collector is a servant of the Crown. It follows that the injunctive relief sought cannot be pursued against the Collector because it could not be pursued if the Minister of Finance (to my mind the most logical respondent) or the Attorney-General had been the named as Respondent to the present application.

10. More fundamentally however, Mr. Dunch was unable advance any or any coherent response to Mr. Johnson's submission that the present proceedings fell within the ambit of the Crown Proceedings Act 1966. Order 15 of the Rules provides as follows:

"***15/6 Misjoinder and non-joinder of parties***

6 (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely—

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue

> *arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;*
>
> *but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."*

11. In paragraph 8 of the Respondent's Submissions prepared by counsel for the Attorney-General, it is submitted that: "*The Attorney General should have been named in the Originating Summons as Respondent.*"

12. In my judgment this is sufficient written consent for the purposes of Order 16 rule 6(2) to enable this Court of its own motion to substitute the Attorney-General for the Collector of Customs as Respondent to the present action, in all the circumstances of the present case. The scheme of the Rules does not envisage an action being struck-out altogether because the wrong party has been joined in circumstances where the proper party could be sued in a fresh action based on the same facts.

13. On the other hand it is plain and obvious having regard to section 16(2) of the Crown Proceedings Act 1966 that this Court "*does not have jurisdiction to grant* [an] *injunction in civil proceedings against the Crown*": Respondent's Submissions at paragraph 21. The prayer for injunctive relief in the Originating Summons is accordingly liable to be struck-out.

The exclusive statutory remedy point

14. The proposition that the present action cannot be brought against the Collector because the Revenue Act prescribes a special statutory procedure for complaints such as those raised by the Applicant does potentially support strike-out relief.

15. However, once the complaint that the present proceedings are brought in substance against the Crown is acceded to, any need to consider the implications of the procedural requirements of section 123 of the 1898 Act falls away.

16. What remains is the question of whether the provisions of sections 122-122A (review by the Collector) and 122B-122E (appeals to Tax Appeal Tribunal) provide the exclusive remedies for challenging an assessment of liability by the Collector. The assessments covered by the review procedure under section 122(1)(a) include:

> "*any decision by the Collector of Customs, in relation to any relevant duty, as to-...*
>
> *(iv)whether or not any person is entitled in any case to relief...of any such duty...*"

17. Section 122(2) of the 1898 Act provides that any person to whom the section applies "*may by notice in writing to the Collector of Customs require him to review that decision*" [emphasis added]. Mr. Johnson submitted that in this statutory context, "may" meant "shall" as regards any person wishing to challenge a decision which is reviewable under the terms of section 122.

18. It is settled law that where legislation expressly purports to oust the jurisdiction of the courts, this Court retains the jurisdiction to review the legality of a statutory tribunal's decisions within the limited framework of judicial review applications. Where there is no express ouster clause, it is more problematic to assess whether or not a statutory review procedure is intended to provide an exclusive remedy. This point did not receive the benefit of full argument.

19. In *Telecommunications (Bermuda and West Indies) Ltd (Trading as Digicel) et al-v-Bermuda Digital Communications Ltd (trading as CellOne)* et al [2012] Bda LR 11, Ground CJ in refusing to lift a stay of civil proceedings in a telecommunications dispute explained his reasons for granting the original stay:

> "*17. On 14 December I stayed the proceedings in order to allow the disputes between the parties to be referred to the Commission under the Act. Section 21(1)(b) of the Act places a statutory duty upon Carriers to interconnect:*
>
> *'(1) Subject to this section, it shall be the duty of every Carrier -*
>
> *...*
>
> *(b)to establish upon reasonable terms and conditions, interconnection, at any technically feasible point within its network, with other Carriers; and such interconnection shall be at least equal in quality to that provided to itself . . .;*
>
> *The Act also provides, in section 22(4), a mechanism for resolving disputes between Carriers:*

> *'(4) A Carrier aggrieved by the failure of another carrier to discharge a duty to which it is subject by virtue of this Act or any regulation may make a written complaint on that account to the Commission and shall provide a copy of the complaint to the Carrier concerned."*

18. In my oral reasons I said:

> *'I think it plain that the scheme of the legislation envisages a section 22 mechanism as the primary dispute resolution mechanism. The use of "may" notwithstanding, I consider that it is obvious and beyond argument that the statutory mechanism is what Parliament, what the Legislature intended to be the first recourse of someone aggrieved by something in the field of telecommunications. I therefore stay these proceedings so that the Commission may adjudicate the interconnection dispute. That's on the assumption that the Plaintiffs choose to have recourse to them. They don't have to, but if they don't, the courts will intercess [sic] them.*"

20. This case was not referred to in argument but I have it very much in mind because it was referred to in a case argued before me shortly before the trial of the present action. The reasoning does provide strong support for the view that Parliament (in the present legislative context) intended the mechanism of inviting the Collector to review any adverse customs decisions and appealing to the Tax Appeal Tribunal to be the "*first recourse of someone aggrieved by something in the field of*" customs duty disputes.

21. In the present case I accept that I have the discretion to refuse to consider the Originating Summons on its merits on the grounds that the Applicant has an alternative remedy. However, I decline to refuse relief on such discretionary grounds for the following reasons:

    (1) it would be inconsistent with Order 1A of the Rules ("the overriding objective") for the Court having tried an action on its merits to require a litigant to have the same dispute re-determined in another forum;

    (2) as occurred in the *Digicel* case, the appropriate time for a stay to be sought is at the earliest possible stage in the civil action, not at trial;

    (3) the main relief sought was declaratory in nature involving a question of statutory interpretation. It is not obvious that the statutory procedure is designed to deal effectively and promptly with such

legal (as contrasted with factual) issues. There was no material before the Court to provide any comfort that the statutory machinery is a fully-functioning and well-oiled machine capable of affording the Applicant a fair hearing within a reasonable time;

(4) having regard to the fact that in the modern era commercial enterprises can suffer significant losses in short periods of time, this Court must always give primacy to the right of access to the Court under section 6(8) of the Bermuda Constitution in the face of purely procedural impediments to speedy substantive justice.

22. However, the position is somewhat different as regards the 'interim' relief sought by the Applicant's Ex Parte Summons. What type of documentation importers of goods should be required to produce is precisely the sort of technical and policy issue which should be adjudicated by the Collector in the first instance. Part IIA of the Act permits persons to apply for simplified procedures and a refusal may be reviewed by the Collector (section 122(1)(c) as read with paragraph 1(d) of the Fourth Schedule).

23. Businesses and the Collector have a shared interest in devising procedures which are sufficiently transparent to meet fiscal and public safety concerns while avoiding bureaucracy which is inconsistent with commercial efficiency. Ideally any problems which arise should be resolved through negotiation in the first instance. In the second instance they should be resolved through the review and statutory appeal procedure- assuming it is functional. What is required as regards such practical and essentially factual matters should only be determined by the courts as a very last resort in cases where all reasonable attempts to pursue the statutory remedies have been exhausted.

24. Having heard the Acting Collector in amplification of her written evidence, I was not satisfied that the matters in controversy could only be resolved by this Court or should be resolved in any event in the context of the present action. The new documentation requested raised public safety concerns as to which there was insufficient evidence before the Court. The Ex Parte Summons was not to my mind capable of being fairly determined in the context of the present action and it is accordingly dismissed.

The statutory interpretation point

25. The present application started and ended with a very short point. Mr. Dunch, in his typically direct manner, freely admitted that the construction he contended for might well be inconsistent with the actual (as opposed to the legally presumed) legislative intention which prompted the enactment. However, he submitted that on a straightforward reading of the relevant statutory words, it was clear that the Applicant was entitled to the exemption in question. The key provisions are found in the following table in the Fifth Schedule to the Customs Tariff Act 1970:

"***Description*** *Goods eligible for business end-use relief*
CPC *4000*
Duty Rate *The applicable rate specified in the First Schedule.*
Eligible Beneficiary *All importers*
Qualifying Goods *All goods*
End-Use Conditions / Restrictions

1. The goods must be imported wholly and exclusively for business use, and must be so used.

2. In this CPC "business" means—

(a) business carried on for profit;
(b) the performance by a public authority of its functions; or
(c) the performance by a charitable organization, within the meaning of the Charities Act 1978, of its functions.

Specific Controls /Diversion
Security for relieved duty shall be provided in such form and manner as the Collector of Customs may require as a condition of authorization."

26. However, the dominant statutory provisions are found in sections 1 and 2 of the Act itself:

"**Interpretation**

1. In this Act unless the context otherwise requires,-

... 'importer' includes—

(a) the owner or any other person for the time being possessed of or beneficially interested in any goods at the time of their importation or at the time of taking the goods out of bond from a bonded warehouse;
(b) any person who signs as authorized agent on behalf of any such person any document relating to such goods…

Import duties

2.(1) The Rules of Interpretation in the First Schedule and Sections I to XXII of that Schedule have effect with respect to the classification of goods and, subject to subsection (2), the assignment of rates of duty.

(2) Except as otherwise provided in this Act or any other Act, on goods imported into Bermuda or taken out of bond from any bonded warehouse in Bermuda, there shall be imposed duty—

(a) at the rate specified in the First Schedule with respect to goods of that class or description, calculated by reference to the unit for duty specified in relation thereto—

(i) if the goods are eligible for business end-use relief under CPC 4000 of the Fifth Schedule; or

(ii) if the goods are not eligible for business end-use relief under CPC 4000 of the Fifth Schedule but the rate specified in the First Schedule, with respect to goods of that class or description, is a special rate; or

(b) at a standard rate of 25% of the value of the goods if—

(i) the goods are not eligible for business end-use relief under CPC 4000 of the Fifth Schedule; and

(ii) the rate specified in the First Schedule, with respect to goods of that class or description, is not a special rate.

(3) Subject to the exemptions listed in the Eighth Schedule, there shall in addition be imposed on goods imported into Bermuda duty in lieu of wharfage at the rate of 1.25 per centum of the value of the goods."

27. The nub of the controversy is whether or not the Applicant is eligible for business end-use relief under section 2(2)(a) as read with CPC 4000 or whether the 25% flat rate applies under section 2(2)(b) of the Act. In my judgment it is clear beyond serious argument that the Applicant is on the agreed facts an "*importer*" as defined by the Act. The goods are when imported "*for the time being possessed*" by the Applicant and/or the Applicant signs as authorized agent for the beneficial owners of the goods. It is equally obvious that the Applicant imports the goods as part of its business.

28. What is somewhat more difficult to ascertain is whether the goods imported for the Applicant's clients meet the requirement of being "*wholly and exclusively for business use, and must be so used*". However, if one is concerned with the use to which the importer puts the goods, the natural first assumption would be that on the agreed facts the goods are indeed exclusively used by the Applicant for business purposes alone. It is noteworthy however, that although the name of the relief ("end-use") implies regard for the ultimate use of the goods, this phrase appears nowhere in the operative words of the legislation itself.

29. Against this background it perhaps unsurprising that roughly 80% of the Respondent's Submissions were concerned with issues other than the central statutory interpretation question which formed the original basis of the present proceedings. However, eventually, Mr. Johnson manfully grasped the nettle and advanced the following crucial initial submission. CPC 4000 did not apply to the Applicant because the term "*business carried on for a profit*" in the relevant legislative context "*simply means that if an importer imports good which are not used for resale to make a profit, he would not come under the relief of end-use relief*" (Respondent's Submissions, page 5). However, in his oral submissions, counsel refined his argument sensibly conceding that the Applicant was a business. Rather, he argued that the mischief

targeted by the legislation was individuals purchasing goods online to the detriment of local retailers. Accordingly, the business use accorded relief by CPC 4000 necessarily envisaged importation by a business involved in making a profit through the buying and selling of goods.

30. The main difficulty with the Respondent's argument, as Mr. Dunch pointed out, is that it flies in the face of the plain words of CPC 4000. CPC 4000 does not, as it easily might, limit the relief to a specific class of importers such as retailers. Nor indeed does the legislation exclude importers bringing in goods on behalf of third parties as opposed to on their own behalf. It expressly applies to "*all importers*". What the Act does do is to require that the goods be imported by a business "*wholly and exclusively for business use, and must be so used*". What use is contemplated by these words? Use by the importer or ultimate use by any third parties (who might also as beneficial owners fall within the statutory definition of "importer" although not directly involved in the importation process)? The operative words of the enactment do not, curiously, repeat the phrase used in the title of CPC 4000: "business end-use".

31. These words in my judgment focus on the use to which the goods are put by the importing business, not the ultimate use to which they are put by any ultimate owner or purchaser of the goods. If the rate of tax fell to be determined based on the use to which the ultimate recipients the goods put the items in question, this would create insurmountable tax collection and monitoring problems for the Collector. It would potentially transform a well-recognised and straightforward customs duty into a sales tax or 'use' tax barely recognisable as a customs duty at all. Most significantly, it would exclude from the ambit of relief every importer who sells the imported goods on an ordinary retail basis to non-business consumers.

32. Not only is it necessary to take into account how unworkable it would be to distinguish between goods sold for ultimate personal use and ultimate business use at the point of sale. Any sensible construction of the statutory language must take into account the fact that the legislative scheme is designed to levy duty at the point of importation, not at the point of sale. At the point of importation therefore, it is possible to determine whether the importer is a business importing goods for the purposes of its business (whatever that may be). It is almost impossible, particularly in the case of goods intended for ultimate sale, to determine whether the ultimate purchaser of the goods will be a personal or business purchaser.

33. The mischief rule in any event is an interpretative tool for resolving ambiguities, not a basis for displacing the natural and ordinary meaning of the statute altogether. The same applies to the rule that allows reference to be made to the legislative history of statutory provisions to clarify their meaning, although no such material was formally cited in argument.

34. Although it was not suggested that the interpretation contended for by either party would lead to absurd (as opposed to problematic) results, it is useful to consider a number of simple examples of how the competing constructions would likely operate

in practice. On the Applicant's case, the relief would appear to apply to the following business contexts[2]:

(a) a business importing goods for sale on a wholesale basis;

(b) a business importing goods for sale on a retail basis;

(c) a business which primarily engages in the sale of goods on a retail basis importing goods which have been purchased overseas by a customer using ordering facilities on the business' premises for supply to the local customer otherwise than by way of sale;

(d) a business importing goods for its own business purposes (e.g. a construction company importing materials and equipment; an exempt company importing office fixtures and fittings and/or marketing materials; a retail store importing uniforms for its staff and other equipment).

35. On the Respondent's construction of CPC 4000, the relief would only apply to categories (a) and (b) above, but not to categories (c) and (d) at all. If one ignores as exceptional example (c), which was referred to in argument, the exclusion of relief to category (d) businesses could produce surprising results wholly inconsistent with the mischief which allegedly inspired the idea of increasing the duty to fixed rate of 25% for the private importation of goods purchased abroad for personal use. The scheme of the governing section 2 is that any importer other than an importer entitled to relief under CPC 4000 is required to pay the 25% rate (save where a special rate applies). The Respondent's interpretation increases the tax liability not just for individuals purchasing goods for personal consumption overseas; it equally increases the tax liability for any businesses not importing goods for onward sale which imports goods from abroad for its own business purposes.

36. The Respondent's analysis is also inconsistent with the Customs Department's own published '*Guidance note on CPC 4000 (Goods eligible for business end-use relief)*', which provides in salient part as follows:

"***1. Duty rate***

The duty rates for goods for business use are listed in Chapters 1-98 of the Customs Tariff (First Schedule to the Customs Tariff Act 1970).

2. Eligible beneficiary

Any person (real or corporate) may apply for authorization to import goods or take goods out of a bonded warehouse which qualify for CPC 4000 business

[2] These examples have been formulated for broad illustrative purposes only. It is appreciated that where "special rates" apply, the special rates are payable in any event and the new 25% standard rate does not apply. On a superficial review of the First Schedule, however, special rate items seem to include only limited range of items such as trade material associated with imported goods and promoting overseas travel (0%), petroleum oils (duty payable on weight units rather than value), cars, boats and other vehicles (duty in excess of 25% payable). If CPC 4000 relief is not available, it appears that businesses importing construction materials and office fixtures and fittings would pay the increased standard rate.

end-use relief. That is because business end-use relief is based on objective evidence of the use of the goods rather than the identity of the importer or the subjective purpose of importation (refer to the note on end-use below).

3. Qualifying goods

All goods qualify for business end-use relief under CPC 4000, as long as the goods are used for business purposes (see definition of "business" in CPC 4000).

Qualifying goods includes –

a) Goods for use as business inventory, such as –

• Goods to support production (raw materials, construction materials, subassemblies etc);
• Goods for support activities (repair, maintenance, consumables);
• Goods for sale (wholesale or retail) or for customer service (merchandise, finished goods, spare parts); and
• Goods for promotions (branded goods).

b) Goods for use as business operating supplies –

• Goods required for the running of a manufacturing production or service facility owned by a business. Operating supplies include consumable materials used by the business on an on-going basis (stationery, janitorial supplies, fuel etc).

c) Goods for use in business operations or functions –

• Goods that are not consumed or sold during the normal course of business (tools, equipment, machinery, furniture, vehicles etc).

d) Goods for use in the creation of business premises –

• Goods that are to be used, or used up, in the construction or erection of permanent or temporary business structures, including all attached apparatus, equipment, and fixtures (construction materials, goods for air conditioning systems, plumbing systems, electrical systems, fire suppression systems, security systems etc).

4. End-use condition

CPC 4000 has only one end-use condition. That is, the goods must be imported and used wholly and exclusively for business use. "Business" is defined for the purposes of CPC 4000. In effect, goods will be dutiable at the First Schedule rates where the goods are imported for business use by –

a) a business carried on for profit (the supply of goods or services for valuable consideration);

b) a public authority in the performance of its functions (Government of Bermuda, Government boards or commissions, quangos, municipalities etc); or

c) a registered charity in the performance of its functions .

Goods benefitting from CPC 4000 duty relief may not be used by any person (real or corporate) for personal (non-business) use.

5. Goods not eligible for business end-use relief

Goods not eligible for business end-use relief includes –

a) Goods that are imported by an individual for their own personal use (non-business use);

b) Goods imported by a business for a non-business use; and

c) Goods imported by a not-for-profit organization that is not a registered charity –

• chambers of commerce;
• labor organizations;
• business leagues;

• certain religious, educational, charitable, social and recreational organizations etc."

37. This document has no direct bearing on the proper construction to be placed on CPC 4000. But the stark contrast between the scope of the relief the Customs Department has officially asserted to be available and the narrow canvass of the relief implied by counsel's submissions on behalf of the Respondent at trial only serve to underline the problematic nature of the Respondent's attempts to refute the comparatively straightforward interpretation advanced by the Applicant. Because the Guidance Note suggests, in line with the statutory language used, that CPC 4000 has a broad application to all importations of goods by businesses of any description provided that the end-use of the goods has a business character. It is not asserted in the Guidance Note that the relief is only applicable to businesses making a profit through the sale of the relevant goods or that it is not applicable where the <u>ultimate</u> end-use is personal as opposed to business in character. On the other hand, the Guidance Note explicitly makes the following statement about what type of end-use is <u>not</u> eligible for CPC 4000 relief:

"*Goods benefitting from CPC 4000 duty relief may not be used by any person (real or corporate) for personal (non-business) use.*"

38. This single sentence is both consistent and inconsistent with the Respondent's oral argument advanced at the trial of the present action. It is consistent in that it asserts that the ultimate use governs the availability of relief. It is inconsistent in that it

refutes the contention that eligible business activity must involve the selling of goods to a third party as opposed to merely delivering the goods in return for a financial reward. According to this aspect of the Guidance Note, relief is not available if the goods are "*used by any person...for personal...use...*" This would exclude from relief any business importing goods ultimately intended for personal use and dramatically narrow the categories of businesses eligible for business end-use relief, excluding in particular the retail sector it is said CPC 4000 is designed to protect. Assuming the mischief CPC 4000 is designed to cure is as described by the Respondent's counsel (without dissent from the Applicant's counsel) this would produce not simply a surprising but an absurd result.

39. Most of these complexities disappear if one simply reads CPC 4000 as providing relief in respect of goods imported by a business for the purposes of its business and excluding relief where the importation is effected by an individual or business for non-business purposes. The relevant "use" being regulated is logically that of the importer being charged with duty, not the use of any ultimate consumer who is not being charged with duty at all. In terms of exclusive business use, it makes no difference conceptually whether the importer is selling goods it owns for ultimate personal use or merely delivering for a commercial reward goods owned by an individual who will use them ultimately on personal terms. Obviously, those of the Applicant's customers who would not otherwise be eligible for CPC 4000 relief would be avoiding the standard rate of duty otherwise payable because the goods are being imported and delivered by a business for the purposes if its business. But this result is not wholly incompatible with the scheme of CPC 4000.

40. If Parliament wishes importers of goods <u>ultimately</u> destined for personal use to pay duty at the recently uplifted standard rate (if it is possible to formulate such a legislative objective in a coherent and practically viable terms), it should say so in plain terms. CPC 4000 as presently worded can only rationally be construed as looking to the use to which the goods are put by the business importer, not to the use of any subsequent purchaser or other recipient of the goods.

41. It is helpful to remind oneself of the applicable general principles of statutory interpretation even though they did not appear to be in controversy. In *Chryses Limited et al-v-Accountant General* [1994] Bda LR 6, Kempster JA on behalf of the Court of Appeal for Bermuda opined as follows (at pages 2-3):

> "*It was argued by the Solicitor General below and before us that the exemptions should so be construed as to apply only to instruments which relate to contracts or to the proceeds of sales concluded on the Exchange; the parties to the trades being otherwise liable for payment. The basis of his argument was that the 1992 Act, providing for the incorporation of the Exchange, was promoted by three banks which, having previously operated the Exchange on a contractual basis, had no interest in securing fiscal exemptions for "off-Exchange" transactions. As against this, it would, I anticipate, be to the economic advantage of the promoters to encourage the listing of shares on the Exchange and it is the intention of the legislature, as expressed in the words of the Act, that falls for determination…*

Viscount Haldane, L. C. explained that "… a mere conjecture that Parliament entertains a purpose which, however natural, has not been embodied in the words it has used if they are literally interpreted gives no sufficient reason for departing from the literal interpretation." To like effect Lord Scarman in Duport Steels -v-Sirs (1980) 1 W.L.R. 142 at p. 168: "But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law; the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible." Applying these principles to the instant case I am not persuaded that any but a literal construction of the terms of Section 15(3), read in context as the expression of the intention of the legislature, is possible…."

42. This *dictum* is extremely apposite to the circumstances of the present case. For these reasons I find that the Applicant is entitled to the declaratory relief prayed for in its Originating Summons.

43. If I were held to be wrong in reaching the conclusion that the interpretation of CPC 4000 is free from ambiguity, I would nevertheless still resolve the point of construction in favour of the Applicant. The mere fact that a provision is difficult to interpret does not mean that a Court cannot conclude after due deliberation that the controversial statutory words are free from doubt:

> "As *Bennion* (3rd edition, page15) points out: '*In his Apologia Pro Vita Sua, Cardinal Newman observed that ten thousand difficulties do not make a doubt. Though he spoke of theological difficulties, the point is valid in relation to statute law.*"[3]

44. It is a trite rule of statutory construction that penal or taxing statutes (and indeed statutes affecting property rights) are to be construed strictly with any ambiguities being resolved against the Crown. In the present case the interpretation contended for by the Crown would not just deprive the Applicant of business end-use relief. It would potentially deprive a wide array of businesses which the Customs Department itself has previously suggested are intended to benefit from CPC 4000 from entitlement to relief impacting on their tax burden in a significant way during a period of economic recession. As has been stated in a leading text:

> "*The court…should strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear…One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.*"[4]

[3] *Minister of the Environment-v-Rodrigues Trucking and Excavating* [2004] Bda LR 39 at page 5.
[4] Bennion, '*Statutory interpretation: a Code*', 2nd edition, sections 271,278, cited in *Minister of the Environment-v-Rodrigues Trucking and Excavating* [2004] Bda LR 39 at page 4.

Summary

45. The Applicant is entitled to a declaration substantially in the terms of paragraph 1 of the prayer to the Originating Summons. The construction of the scope of the Customs Tariff Act 1970's Business End-Use Relief provisions contended for by Mr. Dunch is the only straightforward way of giving effect to the natural and ordinary meaning of the statutory language in its context.

46. However, of the Court's own motion, the Attorney-General is substituted for the Collector of Customs as the Respondent and should be named as such in the formal order drawn up to give effect to the present judgment. This Order is made by way of acceptance of the submissions advanced by Mr. Johnson for the Respondent in respect of the implications of the Crown Proceedings Act 1966 on the grounds that striking-out the action altogether would be a disproportionate response to a merely technical defect in the constitution of the present proceedings.

47. The prayer for injunctive relief is struck-out on the grounds that it is bound to fail by virtue of the provisions of section 16(2) of the Crown Proceedings Act as counsel for the Respondent also submitted. The application for interim relief in relation to the form of customs declarations that the Applicant should be required to complete is refused on the grounds that:

    (a) the primary statutory remedies have not been exhausted and/or adequately pursued; and
    (b) all the relevant evidence is not presently before the Court.

48. I will hear counsel as to costs and would indicate my provisional view that the Applicant should be awarded 50% of its costs, to be taxed if not agreed.

Dated this 22nd day of August, 2012 _____
IAN R.C. KAWALEY CJ