REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-02750

BETWEEN

IN THE MATTER OF THE JUDICIAL REVIEW ACT, NO 60 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY BAMBOO MARKETING LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE CONTINUING FAILURE AND/OR NEGLECT AND/OR OMISSION OF THE COMPTROLLER OF CUSTOMS AND EXCISE TO RELEASE THE CLAIMANT'S CONSIGNMENTS OF GOODS

BETWEEN

BAMBOO MARKETING LIMITED

Claimant

AND

THE COMPTROLLER OF CUSTOMS AND EXCISE

Defendant

Before The Hon. Madam Justice Pemberton

Appearances:

For the Plaintiff: **Mr K. Ramkissoon and Mr Ramlackhan**

For the Defendant: **Mr Douglas instructed by Mr S. Julien.**

JUDGMENT

[1] **BACKGROUND**

The Applicant Bamboo Marketing Limited ("BML") brought this action against the Respondent, the Comptroller of Customs ("The Customs") seeking a review of the Customs's decision not to accept the values of the goods declared by BML and to issue a Notification of query and referral and to impose further or additional duties by way of deposits of monies with respect to five (5) consignments of automotive used and spare parts.

[2] BML claimed that the decision to issue the Notification of Query and referral stated above ought to be removed to this court to be declared to be as follows:

(1) Procedurally unfair/improper;

(2) Irrational;

(3) Null, void and of no effect,

and therefore should be quashed by order of *certiorari*. The dispute stemmed from the declared values stated on the documents presented by BML seeking clearance for the importation of five (5) consignments of used automotive and spare parts and a Notification by way of endorsement on the Form C83 requesting documentary evidence "to support consideration given in price re: Engine" The parties agreed that there was no final decision made with respect to acceptance of the values declared and that BML did not provide the information requested, but responded with a letter from its Attorneys challenging the Notification of Query of the value and request for information.

[3] **AGREED FACTS**

"BML" essentially family owned and run, is an experienced business house located in South Trinidad. The nature of the business was and is the importation of automotive spares and replacement parts and accessories into Trinidad and Tobago from Japan. BML sold those items on the open market. Sometime around 23rd June 2008, BML caused the relevant documentation for the importation of five (5) consignments of various goods to be presented at the Long Room, Customs and Excise Department in the quest

for approval for importation. Suffice it to say that BML was unsuccessful. Instead of the values provided on the related invoices being approved by the Customs and duties calculated, BML received a Form C83 dated 24th June 2008 bearing the endorsement ***"Values inconsistent with trade levels. Provide doc evidence to support consideration given in price re: Engines"*** under the rubric "*Query*". Since the filing of these proceedings, the Customs released to BML the five (5) consignments, the subject of these proceedings. The issues relating to the values of the consignments and the resulting duties that are payable, hinge upon the decision made in these proceedings.

[4] **BML'S POSITION**

There are two (2) prongs of attack:

(A) The Decision to Query the values declared, whilst asking for documentary evidence to support the claim;

(B) Delay occasioning increased costs of storage, demurrage and other losses.

(A) **THE DECISION TO QUERY THE VALUES DECLARED WHILST ASKING FOR DOCUMENTARY EVIDENCE TO SUPPORT THE CLAIM.**

BML alleges that over the period 14th May 2008 to 14th July 2008 the company imported five (5) consignments of automotive parts. These five (5) consignments formed part of a larger shipment of fifteen (15) containers, the first sets being imported around March/April 2008.

[5] Queries were raised, the necessary information supplied and the ten (10) containers were released. In attempting to secure the release of the five (5) containers, the Customs queried BML's declared value of the goods. According to BML, they provided information re the previous shipments and that ought to have satisfied the Customs once and for all. Mr Rajcoomar stated in his affidavit evidence in support of BML's claim as follows:

34. *In respect of the containers forming the subject matter of these proceedings described in paragraph 9 of this affidavit, when the Customs entries and supporting documents in support thereof were lodged with the Customs in June 2008, I anticipated that with all of the previous meetings and explanations provided and documentation forwarded, that the position of the company was well known in the Customs and that these issues surrounding valuation had been adequately and sufficiently explained. It was therefore surprising for me to learn that these entries came back with endorsements in red ink on a document known as Notification of Query and referral. These endorsements each read:*

> *'Values inconsistent with trade levels. Provide doc. evidence to support consideration given in prices, Re: Engines.'*

These endorsements are seen in the first page of the bundle of documents hereinbefore exhibited and marked "A.R.2" and were affixed by the Valuations Officer of the Customs and Excise.

35. *Bamboo Marketing Limited stands by the letters* ***earlier*** *provided to the Comptroller of Customs and Excise from* ***various suppliers including those concerning these consignments*** *explaining the fact that they are recycling companies and that the goods which are shipped constitute items which are destined for recycling and have little or no economic value. The said letters provide the rationale for the pricing of these goods.*

[Emphasis mine].

36. *By letter dated 30th June 2008, the company's Attorney at Law, Mr Kelvin Ramkissoon wrote to the Comptroller of Customs and Excise referring to the five (5) containers forming the subject matter of these proceedings and to the queries raised as stated in the paragraph above. The said letter further explained that the company was a long standing importer and the consignee of several containers of goods and that*

within recent times, the company had experienced numerous difficulties with the Customs. It further explained as follows:

At that meeting, my client adequately and clearly explained to your officials its purchasing mechanisms and the fact that it was beneficiary to certain conditions by virtue of its long standing relationships with its suppliers …

Further, in respect of Bamboo Marketing Limited, my client recently provided your Valuations Department with Recycling Certificates, together with Translation Certificates with duly affixed Appostile seals affixed by the Ministry of Foreign Affairs, ***confirming the status of its consigned goods****. These documents were presented to your Valuations Department* ***with the understanding that they were to be used and applied mutatis mutandi and considered in all future consignments imported by my client****. (copies attached).*

Notwithstanding this, my client continues to experience difficulties and delays in the delivery of its cargos due to the inordinately long period taken by your division in processing its documents. Further, the entries relating to the subject consignments are likely to have additional duties imposed upon them thereby suggesting that your department has failed to take heed of ***the necessary documentary proof submitted by my client.*** *Indeed, I am instructed that upon providing the aforesaid documents, all such deposits imposed on previous consignments had been waived.*

My client now considers that your decision to determine that its values are inconsistent with trade level, apart from lacking specifics, is irrational and cannot be supported on the weight of evidence adduced in its previous similar transactions.

I therefore call upon you to forthwith reconsider your stated position that my client's consignments cannot be released because of apparent valuations issues.

Should you fail to do so by Thursday 3rd July, 2008, my client shall take such steps as it is so advised."

[Emphasis mine].

37. I say further that insofar as the said endorsements are concerned, I am at a total loss to understand what documentary or other proof is now required since I can provide the Customs with nothing and absolutely nothing more than that which it already has in its possession and which I have already provided. Further, similar issues arose with the Customs in respect of Bamboo Marketing's sister company, Motorland Distributors Limited which resulted in litigation filed in the High Court between Motorland Distributors Limited and the Comptroller of Customs and Excise in Claim No. CV. 2008-00734.

.....

40. Further, it has accepted the information in the past, recognized its mistake, issued letters recommending a waiver of rents and continues to behave in the same manner.

[6] This is the crux of BML's case. The explanation given for the ten (10) previous consignments ought to have sufficed. The treatment meted out to its sister company which "saw" a different result ought to have enlightened the Customs on the way forward. The Customs acted in a particular way in the past. Why change now? To ask for verification of values of these five (5) consignments was irrational, procedurally improper, null, void and of no effect.

[7] **CUSTOMS'S POSITION**

The Customs filed two (2) affidavits in response, Ms Brenda Wills and Mr Larry Siefert. Suffice it to say that they maintained that the release of the five (5) consignments is no admission that the Customs was in error in issuing the C83 form with the endorsement.

[8] **MS BRENDA WILLS's EVIDENCE**

Ms Wills deposed[1] that at the relevant time she had worked at the Customs for thirty-six (36) years and was in charge of staff and operations at the Valuation Department. Ms Wills informed the court of the practice and procedure used by the Department. The salient points are as follows:

...

7. *Upon receipt of these Customs Entries the Valuations Officer to whom these declarations/forms are assigned then compares the declared values on the invoices presented by the importer with the export values of identical or similar suppliers who sell identical or similar goods to Trinidad and Tobago at or about the same period at or above the same quantities or level of trade in accordance with the **Sixth Schedule, Customs Act, Chapter 78:01** of the **Laws of Trinidad and Tobago.***

8. *These identical or similar values provided by suppliers at or about the same period are known as the 'Tested Customs Values' (or 'TCV').*

9. *Prices or Values are also researched through the internet and other relevant documentary sources so that a proper comparison can be made between the price paid or payable and the prices declared.*

10. *The values that are presented by an importer are checked against the TCV and if found to be within the TCV range the value declared for the goods would be accepted.*

[1] Affidavit of Brenda Wills filed on 5th November 2008.

11. *Whenever an assessment reveals that the declared values are significantly below the normal trading values or the TCV, possibly in an attempt to avoid paying the requisite Customs and Excise duties, the Valuations Officer has the* ***authority*** *to query the value presented.*

[Emphasis mine].

12. *Values which are found to be significantly lower or inconsistent with the TCV or normal trading value are duly queried with a notation affixed on the Customs Query sheet [C83 form] stating "values inconsistent with trade level. Provide documentary evidence to support consideration given in price".*

13. *An importer, who has had his Custom Entries queried as being inconsistent with the TCV, is thus given an opportunity to reply to the query by providing documentary evidence in support of the values declared on his Custom Entries.*

14. *Documentary evidence must detail any considerations given in the price, the considerations of sale of the goods and any indeterminable considerations included in the price.*

15. *Where documentary evidence is provided it will be assessed to evaluate whether it provides a valid explanation for the values declared. If it does the values would be accepted.*

16. *In the event that the documentary evidence is not accepted by the importer, he can make representations to the supervisor, and if not satisfied then to the Collector and up the chain of command finally to the Comptroller of Customs to review the decision, not directly to the Comptroller of Customs as done in the instant case by the Applicant to secure the conditional release of his goods pending the determination of this matter.*

17. *The importer also has recourse to the Tax Appeal Board.*

[9] In relation to these five (5) containers, Ms Wills deposed that on or about 23/24 June 2008, BML through its Customs Brokers presented the C82 Form for processing. The forms were processed between 23/24 June by the Brokerage firms and "were all attended to by Customs Invoice Examiner at San Fernando on 24th June 2008".

[10] **MR LARRY SIEFERT's EVIDENCE**

Mr Siefert, the officer charged by Customs Invoice Examiner to deal with these five (5) entries, deposed as follows:

> 14. *I found the values on the invoices for Bamboo Marketing Limited (the Claimant herein) to be inconsistent with the trade levels and affixed the query stating* ***"values inconsistent with trade levels. Provide documentary evidence to support consideration given in price"*** *in my own hand writing to the C83 form and signed the form.*
>
> 15. *Whilst checking the values the deposit that was payable was estimated and written by me on the invoices attached and initial.*

[11] **MS BRENDA WILLS**

Ms Wills continued that BML replied by acknowledging the stated undervalue of the goods and their inconsistency with "normal trade values" but advanced that the reason:

> 28. *... for the significantly reduced value is that his company is a beneficiary to lower pricing due to the longstanding relationship he enjoys with the supplier;...*
>
> 29. *...A plethora of documentary evidence that suggests that his suppliers are recyclers, that they have a good relationship with the suppliers or the volume of purchases entitles them to preferential pricing.*

[12] In answer to BML's position of the representation made with respect to other consignments and the special considerations accruing from its longstanding relationship with its suppliers Ms Wills deposes:

> *30. The Applicant in his affidavit refers to various representations that have been made in respect to these goods and/or other goods, which would have been duly considered, suggests that they are the beneficiary of special considerations solely enjoyed by them by virtue of their longstanding relationship with the supplier and that the Customs Valuations Branch must take this special relationship into account in assessing the value of his goods.*
>
> *31. The Applicant's representations and rationale, even if true, is not a valid reason to depart from the values established under the TCV. Nor does it not exempt a person from paying the relevant Customs duties payable on the goods which value is determined by the TCV.*

[13] In Ms Wills's view BML's position was as follows:

> *32. In any event the Applicant appears no more in a favourable position than any other importer of engines or car parts from Japan. By virtue of my job and experience I am aware of several companies that import similar volumes of engines and car parts from the applicant's supplier in Japan but who do not submit such grossly undervalued goods but rather pay the normal trade value as per the TCV.*
>
> *33. More importantly however is the fact that the Applicant* ***failed to declare this special consideration*** *on his* ***C75*** *declaration.*
>
> *34. Any person who imports items for which he obtained a discount on favourable consideration must expressly state that fact, and declare that in* ***Part 8b*** *of the* ***C75 Form*** *("declaration regarding goods of a value exceeding $1000.00 (TT) liable to AD VALOREM duty") which states:*

"(b) is the sale or price subject to some CONDITION or CONSIDERATION for which a value cannot be determined with respect to the goods being valued?"

35. *The applicant in answer to* ***Part 8 of the C75 form*** *expressly stated (by placing "XXX" in the 'no' box) that the price of the goods were not subject to any CONDITION or CONSIDERATION.*

36. *Further, the Applicant in signing and lodging the* ***C75 form*** *declaration accepted responsibility for the accuracy and completeness of the particulars given on the form and on any continuation sheet lodged with it and the authenticity of any document produced in support.*

37. *The Applicant's manager, a person duly authorized by the Applicant, declared on the C75 Form, as annexed to the Applicant's affidavit and marked "A.R.2", that the prices were not subject to any Condition or Consideration and expressly stated that "I, the undersigned declare that all particulars given in this document are true and complete".*

38. *Customs Division gives due regard to the declarations signed by the Applicant and therefore treated the goods as 'normal' goods to which no special Consideration applies but rather where the normal trade values should be applied. Therefore the applicant cannot now state that the goods are in fact subject to 'Condition or Considerations' by virtue of longstanding relationship with his supplier and/or he is the beneficiary of discounts and that the TCV should not in fact apply.*

(Emphasis mine.)

[14] **BML's Response**

Mr Rajcoomar disputed in detail most of the procedure adverted to by Ms Wills. I shall not reproduce the entire response but suffice it to say that BML disclaimed knowledge of "a standard procedure that each entry must go before a Valuations Officer for

Assessment". He does say that he knows that the entries are "placed[2] before the Valuation Division from time to time for their input". BML strenuously objected to the use of the methodology known as tested Customs Values (TCV) and poured scorn on the use of Internet as a guide in arriving at any decision concerning assessment of values stated. Mr Rajcoomar asserted that BML "provided Ms Wills with all supporting documents which she summarily rejected".

[15] Mr Rajcoomar reiterated his assertion that the TCV value placed by the Customs was improper. In response to Ms Wills' statement that an importer is given an opportunity to reply to a query by providing documentary evidence in support of the values declared, Mr Rajcoomar reiterated that his Attorney responded by letter indicating that *"the documents were presented to your valuations department with the understanding that they were to be used and applied mutatis mutandi and considered in all future consignments imported by my client"*. He added nothing further. Mr Rajcoomar stated that at no time was the Company informed that it was open to them to make representations to the various persons outlined in Ms Wills's affidavit. Mr Rajcoomar repeated his contention that Ms Wills refused his proffered documents. There was nothing new added in response. Mr Rajcoomar did not address the issue of the declaration on the C75 Form raised by Ms Wills where the deponent noted that BML *"failed to declare this special consideration"*.

[16] BML filed a list of questions for Ms Wills to answer. To my mind the most salient are as follows:

Questions under Paragraph 34

Q. 19) At paragraph 34 you indicate that the Claimant should have indicated on the C75 form that there were special considerations. Does this non declaration preclude Customs from having considerations of special considerations?

[2] See paragraph 4 of Affidavit of Anand Rajcoomar filed 1/12/08.

A. ***If they are not declared then the Customs Officer would have no knowledge that they are being claimed, and therefore would give no consideration to them that is the nature of a declaration.***

Q. *Would you agree that the Claimant presented documentary evidence showing special considerations and these were disregarded?*

A. ***No.***

[17] **WRITTEN SUBMISSIONS**

BML

Counsel, Mr Ramkissoon outlined the main issue as *"whether the decision to issue Notifications of Query and referral and to impose further or additional duties by way of deposits of monies in respect of the said consignments is irrational, procedurally improper, null and void since the Claimant had provided adequate and sufficient information".*

[18] **a. IRRATIONALITY**

Mr Ramkissoon went through the provisions of the Sixth Schedule[3] to buttress his position that Mrs Wills did not conduct the valuation exercise in conformity with the Sixth Schedule as she was mandated to do, but took into account irrelevant considerations. Ms Wills, Counsel further contends *"failed to use the starting point of paragraph 3 of the Sixth Schedule".* Counsel relied on the **SAGA TRADING case** in which he quoted extensively from the judgment of Archie J (as he then was) on the calculation of *ad valorem* Customs duties[4]. Further reliance was placed on the ex parte **MACHINES AND ALLIED TRADERS LIMITED CASE**[5] in that a decision-maker

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[3] See **CUSTOMS ACT** Chap. 78:01 .

[4] **SAGA TRADING LIMITED v COMPTROLLER OF CUSTOMS AND EXCISE** HCA No. 1347 of 1993

[5] **R v COMMISSIONER OF CUSTOMS AND EXCISE, THE MINISTER OF FINANCE AND THE RESIDENT MAGISTRATE FOR THE PARISH OF ST. ANDREW *ex parte* MACHINES AND ALLIED TRADERS LTD. and RICHARD KHOURI (1993) 30 JLR 34** (JM).

ought not to take irrelevant matters into account. Mr Ramkissoon opined that Ms Wills by her evidence at paragraph 9 clearly took into account irrelevant considerations and found further support in the **D.S. MAHARAJ CASE**[6] in which C.J. de la Bastide re-emphasised the point how the courts view decisions when it is found that irrelevant considerations are taken into account by decision makers in arriving at their decisions.

[19] Mr Ramkissoon then posited that Ms Wills's irrational handling of these consignments was evident when she chose "to ignore the plethora of evidence" which BML furnished "in order to establish and verify the true valuation of the said consignments". He suggested that Ms Wills's action "*must be viewed in the context of events which transpired with an earlier consignment as detailed in paragraphs 21 – 31*" of BML's affidavit, Mr Ramkissoon submitted as follows:

> *6.16 ...It is not only paradoxical but irrational in the extreme that the Defendant having addressed his mind to the same relevant considerations for the valuation of an almost identical consignment would come to a conclusion which is diametrically opposed to his earlier decision within a period of time spanning two months. It is and arbitrary approach to a statutory function in not in keeping with a scientific exercise of discretion as articulated by Coke LJ in Rooke's case.*
>
> ...
>
> *6.18 Even more absurd is that despite the Claimant providing further documentary evidence as requested by the Defendant the Defendant proceeded to withhold the said consignment from the Claimant not being satisfied with the documentary evidence provided* ***and not specifically requesting any further document...***
>
> [Emphasis mine]

[6] **D.S. MAHARAJ v COMPTROLLER OF CUSTOMS AND EXCISE Civil Appeal No. 6 of 1995**

6.19 The inexplicable course of conduct by the Defendant of continuing to withhold the Claimant's consignment of goods, it is submitted is procedurally improper and illegal as it does not conform with the procedures as specified in the Customs Act.

[20] b. **PROCEDURAL IMPRIOPRIETY**

Counsel also felt that BML "*suffered procedural impropriety at the hands of the Defendant when he was denied the opportunity to be heard on the issues surrounding the assessing of the duties on the consignment.*" He based this on learning contained in the **COOPER v WANDSWORTH BOARD OF WORKS**[7], which gives a correct statement of the law that where a statute does not expressly provide for a right to be heard there is by law a necessary implication of such a right.

[21] **CUSTOMS'S SUBMISSIONS**

a. **IRRATIONALITY**

Mr Douglas started his account by taking me to the **CUSTOMS ACT** in particular Section 23 and the **SIXTH SCHEDULE** which provides for the operationalisation of the duties and powers contained in the primary section in the Act. Much of the submission on this issue reiterated Ms Wills's evidence. Mr Douglas contended as follows:

> *As long as the Custom's Valuations Branch is reasonably and objectively satisfied that the declared value of the goods submitted by the importer is in conformity with normal trade values of 'Tested Custom Values' the goods will be duly processed and released upon the payment of the requisite Customs duties.*

[22] Further Mr Douglas contended that "*... In the matter of **PANCHO'S LIMITED v COMPTROLLER OF CUSTOMS** (H.C.A. NO. 4102 OF 1992) customs values were assessed by the use of information reported in bulletins from the United States on similar goods.*" Pursuant to Section 23, the Customs is empowered to query values submitted

[7] (1893) 14 CB (NS)

once they are questions raised about the declared value of *"... of the imported goods based on values significantly lower and/or inconsistent with the Tested Customs Values or normal trade values of the said goods"*.

[23] Mr Douglas continued by asserting that

> *any importer who/which presents values for goods that are less than the Tested Customs Values must provide documentary evidence in support of the presented values for the Customs to accept them. Failure to provide the documentary evidence which may state the reasons for the values presented by the importer or if the importer provides reasons that are "not compelling" then the Customs will value the goods in accordance with the provisions of paragraphs 4 – 7 of the Sixth Schedule.*

[24] Mr Douglas opined that BML's contention that it is entitled to have the value of the goods ascertained on the basis of the price actually paid (paragraph 3 of the Sixth Schedule), instead of the normal trading value for the reason advanced that it is '*a beneficiary to significant pricing benefits because the goods are of little value in the country of origin'* or that '*it enjoys preferential treatment because of longstanding business relationship'*, is an insufficient basis for the Customs to accept the values proferred or an adequate reason to dislodge the methodology contained in paragraphs 4-7 of the Sixth Schedule.

[25] In light of this analysis of the law and its application to the facts, Mr Douglas asserted that the Comptroller of Customs correctly applied Section 23 and paragraphs 4 to 7 of the Sixth Schedule in relation to the five (5) consignments, the subject matter of this action.

[26] **b. IRRATIONALITY**

As far as the Notification of Query is concerned this was communicated to BML by way of the entry on the C83 Form which gave BML an opportunity to make representations. Mr Douglas relied on **SAGA** to support his view that the Comptroller of Customs is entitled to conduct enquiries into the accuracy of documents presented to him and to call

for further information[8]. The power to ask questions on the invoices was not at large but was circumscribed by the very dicta in **SAGA** Case where Archie J. said that *'there must be evidence or information upon which (the suspicion of incorrect transactions) might be reasonably be grounded. (addition mine).* Archie J. gave credence to the framers of the Legislation who he said laid down a specific method of approach to prevent speculation but allowed for enquiry through intuition in the context of an objective and proper application of the Statute.

[27] Mr Douglas submitted that the evidence provided by Ms Wills in her affidavit gave sufficient grounds for suspicion that the declared values were lower than the normal trading values and that the Defendant made a proper application of the law when it sought to establish that under that BML was not entitled to have the consignment valued under the "price paid" provision contained in paragraph 3 of the Sixth Schedule, since the price quoted in the invoices was significantly lower than the normal trade values, and unacceptable to the Customs. Counsel commented that the Customs was entitled to and was justified in applying paragraphs 4 to 7 of the Sixth Schedule and supported his decision by the dicta in **SAGA**.

[28] Mr Douglas then dealt with the Claimant's representation and concluded that the Customs allowed BML to make representations on the query, heard and considered those representations through its Attorney and also provided BML with the option of paying the deposit to have the goods cleared. In the premises, the Customs acted reasonably and not irrationally. Mr Douglas was of the opinion that BML fully understood the situation and had a chance to explain its situation at a further meeting held at the Customs Office.

[29] Mr Douglas was fortified in his conclusion by dicta of Warner J (as she then was) who, in the **KOOL TEMP CASE** [9] from the evidence came to the conclusion that the Customs 's*howed a willingness'* to entertain that applicant and having done so, one must distinguish between a complaint that 'goods *have been withheld'* and '*that the relevant authority has held the goods, but her informed (the applicant) that he could have the*

[8] See p. 11 of The Customs's submissions.

[9] **KOOL TEMP TRADING CO. v THE COMPTROLLER OF CUSTOMS AND EXCISE AND THE ATTORNEY GENERAL H.C.A. NO. 3875 OF 1991**.

goods provided he pay a deposit to cover duties and liabilities pending investigation'. That is the Comptroller's discretion.

[30] BML did not provide the Court with any evidence that the two (2) sets of consignments that is the ten (10) dealt with previously and the five (5) the subject matter of this action were equally circumstanced. BML did not provide any evidence to say that the factors that were considered in the valuation of the five (5) consignments were irrelevant. The decision by the Customs cannot be said to be procedurally incorrect.

[31] Mr Douglas concluded that paragraph 3(1) of the Sixth Schedule, the price actually paid is the correct starting point to determine the Customs value of imported goods. In circumstances where there is a suspicion as to the price actually paid or declared which suspicion is based on empirical evidence of similar transactions which forms the basis for normal trade values, the Customs is entitled by Law to satisfy themselves of the truth or accuracy of the declarations. Once this is done the test in **SAGA** is satisfied. In this case the Customs was entitled to apply the normal trade value basis in conformity with paragraph 4(1) (a) of the Schedule. The Customs duly informed BML by issuing a Notification of Query that the proffered values were suspect and BML made representations in reply. The valuation exercise was thus consistent with the provision of the Customs Act and took into account relevant considerations. Counsel opined that the application for Judicial Review should be dismissed with costs. The Customs did not take into account irrelevant information.

[32] **ORAL SUBMISSIONS**

BML

There was no deviation from the written submissions. Mr Ramkissoon reiterated that BML was not made aware of any statements made to the Customs and Excise which factored in its decision. He admitted that the Customs and Excise gave the option to pay the deposits but BML declined to do so.

[33] **DUTY OF THE CUSTOMS**

In closing his submissions Mr Ramkissoon sought to add another layer to well established learning on Judicial Review. According to Mr Ramkissoon *"... the duty of a decision-maker in this case the Customs is wide"*. Mr Ramkissoon argued *"the duty lies upon the Customs' Officer to itemize or particularise to an importer of merchandise the documents necessary in order for the Customs to arrive at its decision"*. In other words *"it is the decision-maker's duty to say what documents are necessary"*. These words were uttered in the context that the Customs according to Mr Ramkissoon had firmly made a decision to query the invoices. In light of that they ought to have communicated to BML the documents which they needed to provide for Customs consideration. Having failed to so itemise the documents required to arrive at the decision on the taxes leviable, the decision to query the values is irrational, procedurally unfair, null, void and of no effect.

[34] **THE CUSTOMS**

In the main Mr Douglas relied on his Written Submissions which can be summarised as follows:

- There is no evidence that BML had been singled out or treated differently;
- The consignments, the subject matter of this action were **NOT** part of the former consignments. It would not be fair to say that they were part of a larger consignment of 15;
- Mr Siegert put the query on the five (5) consignments, the subject matter of this review;
- The query asked for further evidence to verify declared values;
- No explanation was proffered by BML as to why the specific information requested by the Customs was **NOT** supplied;
- The twofold test laid down by Archie J. in **SAGA** was satisfied;

- The Notification of Query was **NOT** a final determination but a request for the Customs to BML for assistance in the determining the duties payable if any;
- There was no duty on the Customs to itemise the documents required. The request for information on the C83 Form asking for the documents was sufficient.

[35] **ANALYSIS AND CONCLUSION**

DID THE FIVE CONSIGNMENTS THE SUBJECT MATTER OF THESE PROCEEDINGS FORM PART OF A LARGER WHOLE? AND IF SO COULD THEY BE TREATED SIMILARLY?

It follows that if the answer to the first limb of the question is no, then there is no need to address the second limb. The question of fact that arises is: were the five (5) containers a subject matter of this action part of the fifteen (15) containers as alleged by BML are therefore part of the same consignment? BML said that the five (5) containers were part of the fifteen (15) and therefore they all comprised the same consignment. The Customs says they were not and relied on the fact that these five (5) containers were dealt with by Mr Larry Siefert and Ms Wills.

[36] What does "same consignment" mean? The first step is to look to the ordinary English meaning unless there is evidence that it is a term of art. There is no submission made or evidence led to establish that "*consignment*" is a term of art. There is no specific industry meaning. It would therefore seem that "same consignment" means that goods loaded onto a specific vessel the same day from the port of departure from the same consignor to the same consignee. The description will therefore be on the same bill of lading. Is that the evidence here? No. The goods came into Trinidad and Tobago **over a period of time albeit** from the same source to the same recipient. That cannot qualify as the "same consignment". By extension, BML can harbour no expectation legitimate or otherwise that each landing will be treated in the same fashion "as the other" especially if:

(a) Certain steps were not taken or information was missing so that the Customs Officer was not satisfied; or

(b) That any assurance was given by the competent authority that all the consignments would be subjected to the same treatment or;

(c) That that assurance was in keeping with the law; that is, that there is evidence that the basis of a legitimate expectation existed.

[37] It is true that legitimate expectation was not a basis of this action and that is appreciated by the Court. The question is whether Mr Seifert in requesting further information on the values declared by BML on the forms presented to him by BML acted irrationally or took a step that was procedurally improper.

[38] **LAW**

JUDICIAL REVIEW GENERALLY

Judicial Review looks to procedure by which decision-maker arrived at his decision and not the decision in and of itself. If the procedure used is *ultra vires*, irrational, or illegal or is procedurally improper or tainted by bias and displays lack of natural justice or the process is tainted by delay – inexcusable delay then the decision could be impugned by the court. Judicial Review is **NOT** an appeal process. It is **NOT** available to the litigant who is dissatisfied by the result of a procedurally sound, fair, rational reasonable and legal process. It is certainly **NOT** available if the decision maker is not tainted with bias and has in fact afforded the applicant every opportunity to put his position forward.

[39] **IRRATIONALITY**

This was dealt with extensively in the **SMELTER Case** and I do not propose to traverse the ground any further. Suffice it to say that the decision making process would fail for irrationality if an applicant succeeds in proving that a result was so outrageous in its defiance of logic and accepted moral standards that no reasonable authority could have

arrived at it[10] . As I see it irrationality can be viewed from the standpoint that a decision making authority has taken into account factors which they ought not to have considered or have failed to take account of factors that they should have taken into account.

[40] **DID CUSTOMS TAKE A DECISION THAT WAS BASED ON IRRELEVANT MATTERS AND/OR DID CUSTOMS FAIL TO TAKE INTO ACCOUNT ALL FACTORS THAT THEY OUGHT NOT TO HAVE CONSIDERED?**

I have already determined that the five (5) consignments, the subject matter of this action, are separate and apart from any consignment which may have been dealt with by the parties. In light of that finding the Customs was entitled to follow the proceedings mandated in the Sixth Schedule for levying duties on imported goods. BML has asserted that the Customs had addressed similar issues in earlier consignments. Where is the evidence of this before this court? Must I take it that since the Customs (1) did not accept BML's explanation contained in their Attorney's response to the queries (that is the instructions on how to treat with the subject consignment in light of information in relation to former consignment whilst annexing those documents); (2) deigned to treat these five (5) consignments separately and apply the law and practice in the usual course; and (3) decided the issues queries based on the information or lack thereof before it, that the issue of the query on the C83 Form is an action that is "outrageous in defiance of logic or acceptable moral standards"? I think not.

[41] My view is that there was no such evidence led by BML, and even if there was, that evidence may not have satisfied the tests laid down in **SAGA** and **KOOL TEMP**. In fact the Customs through the affidavit of Ms Wills was at pains to show the practical application of Section 23 and the provisions of the Sixth Schedule. I am reminded of Archie's J. dicta in **SAGA** when the learned judge (as he then was) clearly stated that the Customs need not accept without question any invoices presented to them. The Learned Judge reiterated and emphasised that the invoices are "*prima facie evidence of the price paid but the Customs must be entitled to conduct reasonable enquiries into the accuracy*

[10] See CCSU per Lord Diplock as cited by Dean Armorer J. in **The SMELTER Case PURE AND RAG v EMA, ALUTRINT AND THE ATTORNEY GENERAL OF TRINIDAD ANBD TOBAGO CV 2007 – 02263** paras. 16 – 19.

of the documents presented... To hold otherwise would be to leave a Revenue at the mercy of those who evade duties by 'under invoicing'". I wish to associate myself with this position and apply it with full force to this case. The fact that an officer charged with the responsibility as Mr Siefert was, asked for further other information does NOT invalidate the process. Even if the consignee and/or consignments were similarly circumstanced (and no evidence of this has been provided) would that create an expectation that the result of the customs examination would be the same? The answer is clearly no. To me there seems to be some confusion between process and result. BML's claim therefore fails on this ground.

[42] The second part of the **SAGA** test is that there must be some evidence or information upon which a suspicion might be reasonably grounded. It is clear from the evidence presented that the declared values on these consignments aroused Customs's suspicion since it was found that those values were below the normal trading values. BML brought no evidence to show why this suspicion was unreasonable or simply false. To say that the values were the same as other consignments for which there were explanations and that those explanations were accepted is not enough. In light of the declaration on the C75 Form, the Customs was entitled to harbour those suspicions and raised enquiries if it was in furtherance of the proper application of the law. BML has brought no evidence to contradict this stance. I find that BML has not convinced me that the second part of the **SAGA** test was not satisfied by the Customs. The claim therefore fails on this ground as well.

[43] **PROCEDURAL IMPRIOPRIETY/UNFAIRNESS**

BML'S POSITION

Mr Ramkissoon in his Written Submissions found comfort on this issue in de la Bastide C.J.'s dicta in the **D.S MAHARAJ** case. In his oral submissions, Counsel opined that a decision maker acting pursuant to a taxing statute has a greater duty to comply with natural justice requirements. It was not proper for the Valuations Division to unilaterally arrive at a decision to impose additional duties without the input of the person to be charged. Counsel relied on the **SYMMETRY** case. Counsel indicated that there was no

communication with the Customs and Excise Department and stated that he was not aware of any statement made to the Department to assist them in coming to their decision. Counsel reiterated that to affix the Notification of Query without further informing BML of what it was required to do infringed the rule demanding procedural propriety. Counsel asserted that not coming to a decision on the Notification of Query is unfair in itself. Counsel questioned Ms Wills's views of the internet as part of the methodology of assessing whether the declared duties were satisfactory. Counsel contended that BML was not asking Mr Seifert to disclose intimate details of his knowledge. What he ought to have done was to go a step beyond what he did. He must have given BML an opportunity to respond to it. According to Mr Ramkissoon "*Mr Seifert sits and makes a decision under a taxing statute without saying the basis. This is where the procedural flaws are highlighted. This is supposed to be a mutual intercourse of the parties, Comptroller and the Importer. He has therefore committed procedural impropriety in the CCSU sense."* Mr Ramkissoon continued to question what lay behind Mr Seifert notification and concluded that his client was subject to procedural impropriety, but admitted that there was no final decision made with respect to the duties.

[44] **CUSTOMS'S POSITION**

Mr Douglas disagreed entirely. He said that the Notification of Query on the C83 Form does not constitute a decision on the declared values. It is directed to the Claimant in this case BML asking him to provide documentary evidence in support of the values. Counsel stated that when Mr Ramkissoon indicated that BML was not told to do that is far from what happened. The endorsement on the C83 Form was clear. It was endorsed with the duties payable should BML be minded to have the goods released at that point in time. It was not a final determination of duties payable. In response to that Notification, BML indicated that it was not prepared to pay the duties to have the goods released. The practice is that once the duties were paid the goods are released pending the determination of actual values. This Mr Douglas states was in line with **SAGA**. It is unfortunate, Counsel stated that BML was asserting that the Notification of Query did not tell it what to do or give it an opportunity to respond. The Notification in fact was "*pleading for assistance"*, by giving BML an invitation to provide information to assist

the Customs to treat with its papers. Mr Douglas stressed that that was not a final decision and that has put a dent in BML's case.

[45] **LAW AND ANALYSIS**

Fordham[11] opens his chapter on this topic with the statements "*A body must adopt a fair procedure giving those affected a fair and informed say*" and "*The common law imposes minimum standards of procedural fairness or due process, formerly known as natural justice".* According to Lord Roskill in the **CCSU** case[12], that duty may now be couched in terms of the duty of a decision making authority to act fairly. Aspects of procedural impropriety may include unfair behaviour towards persons affected by the decision; a failure to follow a procedure laid down in the legislation or failing to properly 'marshal' the evidence on which the decision should be based.

[46] In this case, the **CUSTOMS ACT** has laid down the procedure to be followed when the Customs are unhappy with or suspicious of declared values. This is the law; but does it stop there? Is the court forbidden to look further when assessing whether a decision made in pursuance of the power is brought for review? The answer is obviously no in that the decision may be reviewed as a matter of law and of evidence. Fordham's treatment of procedural fairness as supplementing an express procedure therefore accords with much sense and is readily applicable to this case[13]. The learned author states that "***Standards of basic procedural fairness can fill the gaps left by a statutory scheme".***[14]

[47] In this case, as opposed to the **DS MAHARAJ** case, and in light of the information contained on the C75 Form, the endorsement on the C83 Form was clear. Three things struck me. The first was that Mr Siefert asked for documentary evidence to support the values declared of the engines. This was to me a clear indication that BML was given an opportunity to make representations with respect to the five (5) consignments which were not expressed to have special considerations attached to them. The second was that there was and continues to be no evidence supplied by BML to indicate whether to date the

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[11] See **JUDICIAL REVIEW HANDBOOK 5th ed**. *Michael Fordham Q.C.* p. 567

[12] See **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE** [1985] AC 374, 414 G-H.

[13] **See FORDHAM** *infa.* Para. 60.3.2 *et seq*

[14] Mr Fordham Q.C. culls this principle from LLOYD v Mc MAHON [1987] AC 65

request for documents relating to the five consignments has been supplied. The third was that no decision was arrived at with respect to the values.

[48] **REJECTION OF BML's DOCUMENTS**

Ms. Wills's approach to assessment by use of internet sources attracted scorn from BML. As far as I understand from Ms Wills's evidence, the use of these sources is as a guide in order to arrive at an objective basis upon which to perform duties. The alternative, the use of client documents alone to my mind would be far from the use of objectives and standards. Ms Wills's methodology is to be preferred. I can see no basis to mount a challenge in the vein of procedural impropriety or irregularity

[49] In relation to this duty that Mr Ramkissoon places on the Customs to "*itemise or particularise the documents necessary*" for the importer to provide to aid the process raises more questions. Is the Customs Department an institution of instruction? Is that one of the functions? I have not been directed to nor have I seen such a duty expressed in the Customs Act and Mr Ramkissoon has failed to provide me with any authority which speaks to this duty. I would have thought that if BML had problems in interpreting the Customs requirements especially with respect to importation it would have sought an audience with the Comptroller to elicit the information that was sought. The position is made even starker in the context of BML providing similar information in relation to earlier consignments. To say that the same information **is** adequate, especially in light of not declaring the considerations on the C75 Form is not enough for the court to agree with BML that the decision to issue the query on the C83 Form is fraught with procedural irregularity or unfairness.

[50] Further, I find it passing strange that BML would not be au courant with this procedure given its designated line of business. To claim ignorance of standard procedure that every entry must go before the Valuations Division for assessment is surprising. I do not accept this stance taken by BML. The procedure followed or designated as standard procedure conforms to common sense and proper administration in the execution of public duties that is collection of revenue on behalf of the State. There can be no successful challenge on this issue on the ground of irregularity or procedural impropriety.

[51] **DELAY**

I shall not spend too much time on this issue as the documents speak for themselves and Mr Ramkissoon did not vigorously pursue this. Suffice it to say that it is undisputed that the invoices were presented to the Customs and dealt with on the same day. Queries were raised but were and have not been answered by BML to the satisfaction of the Customs? Does that constitute a delay for which an action for Judicial Review can stand? In any event there was correspondence between the parties concerning the issue and I find that there has been no evidence of delay on the part of the Customs in dealing with this matter.

[52] **DAMAGES**

Since there is no evidence of delay or tardiness in the Customs in dealing with this matter the issue of damages does not arise for consideration.

CONCLUSIONS

1. **That the five consignments, the subject matter of this action were correctly the focus of an independent assessment of the Customs and could not have been amalgamated with any other consignments for the purpose of assessing duties payable.**

2. **In light of that finding the Customs correctly applied Section 23 of the Act and the methodology contained in the provisions of the Sixth Schedule, paragraphs 4 to 7 in dealing with this matter.**

3. **There is no evidence before the Court that in so doing the Customs acted irrationally, by taking into account material that it should not have taken into account or by not taking into account material that it ought to have taken into account.**

4. **The use of internet values is not fatal if those values are to be used as guides. I accept the evidence of Ms Wills in this regard. BML has brought no evidence to support the contention that using the internet to research values**

was so outrageous that no reasonable decision maker would have pursued this as an option.

5. **In any event, BML was given an opportunity to provide further documentary evidence to assist the process which it failed to do.**

6. **The ground that the decision can be judicially reviewed for irrationality therefore fails.**

7. **Procedural fairness encompasses a right to be heard by any person to be affected by a decision, especially a decision which is the expression of a statutory right or power. Even though the CUSTOMS ACT does not provide an importer with an express right to be heard when taxes or duties are being levied, it is now accepted that such a right supplements an express statutory procedure.**

8. **There is no evidence that BML was deprived of that right. In fact, the uncontradicted and clear evidence was that such an opportunity to be heard was held out on the Form C83 and notified to and exercised by BML as evidenced by return correspondence from Attorneys-at-law.**

9. **There is no duty on Customs expressed by way of statute or implied at common law to inform an importer of the documents necessary to clear goods. There is certainly no duty on the Customs express or implied to itemize relevant documents for an importer.**

10. **There is therefore no evidence of procedural impropriety or unfairness.**

11. **The evidence led does not support the case that the delay in BML's clearing or the Customs's release of the goods was due to any action attributable to the Customs.**

12. **The issue of damages does not arise for consideration.**

13. **The decision of the Customs to issue the Notification of Query on the C83 Form cannot be challenged on the grounds of irrationality, procedural impropriety or unfairness or delay and therefore stands.**

ORDER

1. **The Fixed date Claim Form filed on the 9th September 2008 be and is hereby dismissed.**
2. **The Claimant to pay the Defendant's costs to be assessed if not agreed.**
3. **The Defendant to file and serve Statement of Cost on or before 30th April 2012.**
4. **The Claimant to respond on or before the 15th June 2012**
5. **Assessment to take place on 12th July 2012 at 10:30 a.m. in POS # 17.**

Dated this 16th day of March 2012.

/s/ Charmaine Pemberton

High Court Judge.

The Court wishes to express its gratitude to Counsel and Litigants for their patience and understanding during this particularly difficult period.