**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No: CV2018-03206

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

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF THE DECISION OF THE COMPTROLLER OF CUSTOMS TO SEIZE AND/OR DETAIN GOODS OF THE CLAIMANT PURSUANT TO INTER ALIA SECTION 213(A) OF THE CUSTOMS ACT, CHAPTER 78:01**

Between

**GIRIRAJ RAMNANAN**

First Claimant

**TOTAL IMAGE INCORPORATED LIMITED**

Second Claimant

And

**THE COMPTROLLER OF CUSTOMS & EXCISE**

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Date of Delivery: September 17, 2019

Appearances:

Claimants: Mr. J. Singh, Mr. D. Rambally and Mr. K. Taklalsingh instructed by Ms. K. Singh

Defendant: Ms. J. Baptiste instructed by Ms. J. Chong Singh

## REASONS

1. On July 26, 2019 the court gave the following order;

   i. It is declared that the continuing failure and/or refusal of the defendant to institute forfeiture proceedings in relation to its seizure of one brown box of adult toys on August 29, 2017 (hereinafter referred to as "the said goods") in accordance with Section 220 (1) of the Customs Act Ch. 78:01 (hereinafter referred to as "the said decision") is unlawful.

   ii. It is declared that the said decision is made in breach of natural justice and/or the claimants' right to the protection of the law in that the said forfeiture proceedings would afford the claimants an opportunity to be heard in relation to the defendant's reasons and/or basis for the seizure of its goods.

   iii. It is declared that the said decision is ultra vires and in direct conflict with the policy of the Customs Act Ch. 78:01 in that the defendant failed to perform its express statutory duty as mandated by Section 220 (1) to have those forfeiture proceedings instituted within a reasonable time.

   iv. An order of Certiorari is granted, the said decision is removed into the High Court of Justice and is quashed.

   i. An order of Mandamus is granted, and the defendant shall immediately release and return the said goods to the claimants together with all items admitted by Kurt Theodore at paragraph 12 of his affidavit sworn to and filed on December 21, 2018 not to be obscene and/ or indecent within the shipment seized on November 15, 2017.

   ii. The claim in relation to the two boxes of goods seized on November 15, 2017 (save and except for those items therein that do not fall within the category of obscene or indecent by admission above) is dismissed.

   iii. Damages inclusive of exemplary and aggravated damages are to be assessed by a Master on a date to be fixed by the Court Office.

iv. The defendant shall pay to the claimants seventy-five percent (75%) of the costs of the claim to be assessed by an Assistant Registrar in default of agreement.

v. There be a stay of execution of forty-two (42) days.

2. The following are the reasons for this decision.

**THE EVIDENCE**

3. The claimants relied upon the following affidavits;

i. Affidavit of the first claimant sworn to and filed on September 7, 2018;

ii. Affidavit of Ms. Karina Singh sworn to and filed on September 17, 2018;

iii. Affidavit of Mr. Chaitram Bhola sworn to and filed on September 18, 2018; and

iv. Supplemental affidavit of the first claimant sworn to and filed on October 9, 2018.

4. The defendant relied upon the following affidavits;

i. Affidavit of Zaid Mohammed sworn to and filed on December 21, 2018;

ii. Affidavit of Kurt Theodore sworn to and filed on December 21, 2018;

iii. Affidavit of Mr. Harricharan Kassie sworn to and filed on December 21, 2018;

iv. Affidavit of Richard Smith sworn to and filed on December 24, 2018;

v. Affidavit of Shivonne Simon sworn to and filed on December 24, 2018; and

vi. Supplemental affidavit of Kurt Theodore sworn to and filed on July 24, 2019.

**BACKGROUND**

5. The relevant facts are as follows. In August of 2017 the first claimant ordered a box of what has been described as and admitted to be, adult sex toys from East Coast News Corporation ("the first shipment"). The first shipment which was shipped to Aeropost

Trinidad Company Limited was seized at Swissport Piarco by Customs and Excise Officer I, Nico Jaggernauth ("Jaggernauth") and Customs and Excise Officer I Shivonne Simon ("Simon"). On August 29, 2017 the first claimant was served with a notice of seizure by Jaggernauth.

6. By letter dated September 14, 2017 the first claimant's then Attorney-at-Law Mr. Chaitram Bhola ("Mr. Bhola") gave notice to the defendant of the first claimant's claim to the first shipment pursuant to Section 220(1) of the Customs Act Chapter 78:01 ("the Act"). By letter dated September 19, 2017 the defendant wrote to Mr. Bhola acknowledging receipt of letter dated September 14, 2017.

7. By letter dated October 11, 2017 the defendant wrote to Mr. Bhola inviting the first claimant to attend a meeting within thirty days of the delivery of the said letter to treat with the seizure of the first shipment.

8. In or around the month of November, 2017 the claimant ordered two more boxes of similar items from East Coast News Corporation ("the second shipment"). On November 15, 2017 the first claimant was notified by the defendant that the second shipment was seized. The claimant deposed by affidavit that on December 7, 2017 Mr. Bhola sent an email to Zaid Mohammed ("Mohammed") who was at the material time, the Supervisor (Operations) of the Preventive Branch of the Customs and Excise Division giving notice of his (the first claimant's) claim to the second ship pursuant to Section 220(1) of the Act.

9. Mr. Bhola deposed that by his affidavit that he sent the aforementioned email to Mohammed's email address at zaidmohammed699@gmail.com. According to Bhola, that was the only email he knew belonged to Mohammed which Mohammed gave to him personally. Mr. Bhola further deposed that Mohammed never disputed receipt or took issue with the manner in which the notice of claim was sent. Mohammed deposed by his affidavit that he never received such an email.

10. On February 1, 2018 a meeting at the Preventative Branch was held at Customs House with Kurt Theodore ("Theodore"), Customs and Excise Officer II; Chrisen Gobin, Customs and Excise Officer II; Samantha Bidaisie, Customs and Excise Officer I, Mr. Bhola and the first claimant concerning the seizure of the first and second shipments. According to the first claimant, Theodore informed him that he was being given the option to admit guilt of breaching Section 213(a) of the Act and that he could do so before the Comptroller or have the matter taken to Court. As the first claimant was of the belief that he did not violate any laws, he stated that he wished for the matter to be dealt with at Court.

11. Theodore deposed by his principal affidavit that at the aforementioned meeting, the first claimant and Mr. Bhola were informed that the shipments were seized as having contravened section 213(a) of the Act. That the first claimant was shown a representative sample of items found to be obscene and/or indecent from both shipments. Theodore further informed the first claimant and Mr. Bhola that not all of the items were obscene and/or indecent.

12. The claimant deposed that later in the month of April or May, 2018 a meeting was held with the Senior State Counsel of the defendant, Mr. Harricharan Kassie ("Mr. Kassie"). According to the claimant, at that meeting Mr. Kassie indicated to him that he saw no valid reason for the seizure, that he would discuss same with the Preventative Branch of Customs and contact him to inform him of a position. Mr. Kassie by his affidavit denied the aforementioned.

13. At the time of the claimants' application for judicial review, the defendant failed to initiate forfeiture proceedings. Richard Smith ("Smith"), Customs and Excise Officer III deposed by his affidavit that the detention of the shipments was lawful regardless of whether or not the defendant instituted forfeiture proceedings. That the delay to institute forfeiture proceedings did not make the detention unlawful in anyway. According to Smith, Sections 45(1)(l) and 213(a) of the Act were legal justifications for the continued detention of the shipments seized.

14. Theodore deposed by his supplemental affidavit filed some mere two days before the date of delivery of the judgment that on June 11, 2019 he laid three Informations at the Arima Magistrate's Court charging the first claimant with importing certain indecent articles contrary to the provisions of sections 213(a) and 45(1)(l) of the Act. On June 26, 2019, the three matters came up for hearing at the Arima Magistrate's Court before Her Worship Magistrate Cheron Raphael. The matter was adjourned to September 3, 2019.

15. Theodore by his supplemental affidavit further deposed that before criminal charges are instituted, the usual procedure is for the persons whose items were seized be shown the items that are deemed prohibited. According to Theodore, in this matter, the criminal charges were only brought on June 11, 2019 because the aforementioned procedure had not yet been complied with and the Division wanted to afford the claimants the opportunity to see which items were not prohibited and which could be made available to him upon payment of the relevant duties and taxes.

16. Moreover, Theodore testified that once legal proceedings are filed in the High Court, Customs Officers like himself would usually hold their hands in instituting any criminal charges until instructions are obtained by the Comptroller on the advice from the Legal Unit of the Division. As such, it was the evidence of Theodore that he was awaiting instructions from the Comptroller on how to proceed.

17. According to Theodore, on May 27, 2019 he contacted the claimant and informed him that some of the items which were previously seized by the defendant on August 29, 2017 and November 15, 2017 were not deemed to be prohibited under the Act and would therefore be made available to him upon the payment of the relevant duties and taxes. Theodore further informed the first claimant that he could attend Customs House to collect the lists of the items that were previously seized and the relevant invoices. It must be noted that up to the end of submissions in this case, no such evidence had been before this court.

**PRELIMINARY ISSUES**

18. The defendant raised the following two preliminary issues;

    i. That there was delay in the filing of the application for judicial review; and
    ii. That the claimants had available to them an alternative remedy at the time of the filing of the application.

**DELAY**

19. ***Section 11 of the Judicial Review Act Chap 7:01*** ("JRA") and ***Rule 56.5 of the CPR*** deal with delay in applying for judicial review.

20. ***Section 11 of the JRA*** provides as follows;

    *"11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*
    *(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration*
    *(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.*
    *(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."*

21. ***Rule 56.5 of the CPR*** provides as follows;

*"1) The judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.*

*2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.*

*3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to – (a) cause substantial hardship to or substantially prejudice the rights of any person; or (b) be detrimental to good administration."*

22. In the Court of Appeal case of ***Keith Rowley, the Prime Minister of Trinidad and Tobago and Another v Eden Charles***[1], Jones J.A. held that the position on delay in this jurisdiction and the co-relation between section 11 of the JRA and Rule 56.5 of the CPR has been definitively stated by the Privy Council in the case of ***Maharaj v National energy Corporation of Trinidad and Tobago***[2]. In ***Maharaj v NEC*** supra, Lord Lloyd-Jones had the following to say at paragraphs 37 & 38;

*"37……..Indeed when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that will likely to be caused by delay.*

*38. In the same way, questions of prejudice or detriment will often be highly relevant when determining, whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for the delay but the broader test of good reason for extending time. This will be likely to bring in many*

[1] Civil Appeal P271/2017 paragraph 46
[2] [2019] UKPC 5

*considerations beyond those relevant to an objectively good reason for delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration and the public interest…….where relevant, they are all matters to which the court is required to have regard."*

23. The defendant submitted that the claimants failed to act promptly in bringing this application. That the claimant also failed to act within the outer limit of three months. According to the defendant, the claimants were required by Section 11(1) of the JRA to act promptly.

24. The defendant further submitted that the court has a discretion to extend time and allow the claimants to maintain their application but that there was no evidence before the court of such an application for an extension of time. That there was also no explanation before the court as to the reason for the delay in filing the application. The defendant submitted that the court in the exercise of its discretion can refuse the grant of leave to pursue judicial review even in circumstance where the reason for the delay was explained. That the authorities show that the court may refuse permission or leave on the ground of hardship, prejudice and detriment to good administration.

25. As such, the defendant submitted that the court ought not to exercise its discretion to maintain the grant of leave in this matter. That the proceedings for judicial review was in fact detrimental to good administration since the deeming provisions whereby the goods would have been deemed as condemned under section 220(1) of the Act had already taken effect. The defendant further submitted that to allow the application would have been disruptive and detrimental to the good administration of Customs.

26. In opposition, the claimants submitted that the crux of these proceedings was a challenge to the defendant's continuing failure to institute forfeiture proceedings. That pursuant to Section 220 of the Act, the defendant was required in law to institute the forfeiture proceedings within a reasonable time. As such, the claimant submitted that it was an

unsustainable submission for the defendant to allege delay on their part in the circumstances where it has delayed in doing what the law prescribes should be done by it.

27. There were two seizures in this case. Notice of seizure of the first shipment was given to the first claimant by letter dated August 29, 2017 and notice of claim was given by the first claimant to the defendant in writing on September 14, 2017. Notice of seizure of the second shipment was given to the first claimant on November 15, 2017. As mentioned above, the first claimant alleged that on December 7, 2017 Mr. Bhola sent an email to Mohammed giving notice of his (the first claimant's) claim to the second ship.

28. The application for judicial review was made on September 7, 2018. As accurately pointed out by the claimants, the crux of these judicial review proceedings was that of a challenge to the defendant's continuing failure to institute forfeiture proceedings. According to the claimant, he would have given his intention to claim his shipments on September 14, 2017 and December 7, 2017 respectively. Pursuant to Section 220 of the Act, where the owner of the goods seized gives notice of his intention to the defendant that he claims the things seized, proceedings shall be taken for the forfeiture and condemnation thereof. Consequently, more than three months had elapsed since the first claimant gave his notices of intention to claim and the defendant's failed to initiate forfeiture proceedings.

29. No reasons were given by the claimants for the delay nor did the claimants seek an extension of time to make the application. The position that was taken by the claimants in their application was that the time limit for making the application for judicial review had not been exceeded as the matters complained of constituted a continuing breach. In accordance with ***Maharaj v NEC*** supra, a determination of whether to grant an extension of time to apply for judicial review is not limited to whether there is a good reason for the delay since a good reason for the delay is only one of the factors to be considered. The determination of whether to grant an extension of time to apply for judicial review involves consideration of the importance of the issues, the prospect of success, the

presence or absence of prejudice or detriment to good administration and the public interest. As such, the fact that the claimants did not provide any reason for the delay was not fatal to the grant of leave.

30. The court found that in this case, the question of whether there was good reason to extend the time for the application turned on the importance of the issues, the presence or absence of prejudice or detriment to good administration and the public interest. The court was of the view that no prejudice was likely to or did accrue to the defendant in treating with the present claim despite the effluxion of the prescribed period for bringing a judicial review claim. Further, the court found that the matter was of great public importance in relation to the exercise of the powers of seizure by the defendant and the process that ought to lawfully apply in that regard.

**Alternative remedy**

31. ***Section 9 of the JRA*** provides as follows;

*"The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances."*

32. ***Halsbury's Laws of England, Volume 61(A) (2018), paragraph 58*** provides as follows;

*"The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or internal complaints procedure or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted in exceptional circumstances such as where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'. This is particularly so where the decision in question is liable to be upset as a matter of law*

*because it is clearly made without jurisdiction or in consequence of an error of law. However, recent cases have emphasised that the courts must guard against granting judicial review merely because it is more effective and convenient since to do so risks undermining the will of Parliament. Usually the alternative remedy must be 'clearly unsatisfactory'; the mere fact that the alternative procedure cannot grant a quashing order or declaration does not mean that it is inappropriate and an appeal by way of rehearing is capable of remedying even serious defects in procedure…Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body…Where the point has not been raised at the permission stage or not until a late stage in proceedings then the court may, depending on the circumstances, determine the issue notwithstanding the availability of an alternative remedy…"*

33. The defendant submitted that section 223 of the Act provided an effective alternative remedy provided. That the alternative remedy provided under section 223 was more effective and immediate than the procedure by way of judicial review. ***Section 223 of the Act*** provides as follows;

*"When a seizure has been made, or a fine or penalty incurred or inflicted, or a person committed to prison for any offence against the Customs laws, the President may direct restoration of the seizure, whether condemnation has taken place or not, or waive or compound proceedings, or mitigate or remit the fine or penalty, or release the person from confinement, either before or after conviction, on any terms and conditions, as he shall see fit."*

34. The court did not accept the submission of the defendant that the power of Her Excellency, the President to restore goods pursuant to section 223 of the Act was an alternative remedy. The court found that such a power was one at the prerogative of the office holder of President akin to a general power of pardon for criminal offences as it were. It was not a matter of an application to be made procedurally and the court did not consider that the statute established such a procedure or conferred any such right onto the claimants.

**ISSUES**

35. The issues raised by the claimants were as follows;

    i. Whether the detention of the claimants' goods were unlawful, in that the defendant failed to initiate forfeiture proceedings in accordance with section 220(1) of the Act within a reasonable time; and
    ii. Whether the notice of claim served via email to Mohammed sufficed or constituted a notice of claim pursuant to section 220(1) of the Act.

**ISSUES 1** - *Whether the detention of the claimants' goods were unlawful, in that the defendant failed to initiate forfeiture proceedings in accordance with section 220(1) of the Act within a reasonable time*

36. ***Section 220(1) of the Act*** provides as follows;

    *"Whenever a seizure is made, unless in the possession of or in the presence of the offender, master or owner, as forfeited under the Customs laws, or under any written law by which Officers are empowered to make seizures, the seizing Officer shall give notice in writing of the seizure and of the grounds thereof to the master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering it to him*

*personally, or by letter addressed to him, and transmitted by post to, or delivered at, his usual place of abode or business, if known; and all seizures made under the Customs laws or under any written law by which Officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the President may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorised by him, within one calendar month from the day of seizure, gives notice in writing to the Comptroller that he claims the thing seized, whereupon proceedings shall be taken for the forfeiture and condemnation thereof; but if animals or perishable goods are seized, they may by direction of the Comptroller be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof."*

37. Consequently, the implicit procedure that section 220(1) of the Act contemplates is as follows;

    i. Notice of the seizure must be given in writing (personally or by letter addressed to the owner);
    ii. The owner then has one month from the day of the seizure of the goods to give notice in writing to the Comptroller that he claims the things seized. If he fails to do so then the goods are deemed to have been seized and can be sold or disposed of. The Act therefore places a legal burden on the owner to give notice to the Comptroller within that one calendar month of the date of seizure in writing.
    iii. Once the owner of the things seized gives notice of his claim, the goods cannot be sold or disposed and the onus then lies on the Comptroller to take proceedings for forfeiture and condemnation (except where it is animals or perishable goods in which case it can be sold and proceeds kept in the event the goods are ordered to be restored to the owner upon the outcome of forfeiture proceedings).

38. The court noted that no time has been set for the bringing of those forfeiture proceedings. In the Privy Council case of ***Rattansingh v the Attorney General of Trinidad and Tobago and another***[3]***,*** Lord Bingham had the following to say at paragraph 5;

*"…Unfortunately, the second Respondent did not, as the section required, take proceedings for the forfeiture and condemnation of the tyres. In the opinion of the Board, the taking of such proceedings within a reasonable time was a necessary condition of the second Respondent's right to continue to detain the goods. But no such proceedings were taken within a reasonable time, or at all."*

39. Having considered ***Rattansingh*** supra, the court found that forfeiture proceedings must be commenced within a reasonable period after the owner of the things seized gives notice of his claim. The question that follows is, what is a reasonable period. In ***Omar Singh Trading as "P.C. Richard and Sons Company v The Comptroller of Customs and Excise,***[4] Aboud J found that one month was sufficient time for the Comptroller to act. However, this court is of the view that what is reasonable must be considered within the context and circumstances of the individual case so that a reasonable period in one set of circumstances may be quite different to a reasonable period in another.

40. In this case, the defendant notified the first claimant that his first and second shipments had been seized on August 29, 2017 and November 15, 2017 respectively. According to the claimant, he served notices of claim on the defendant in relation to the first and second shipments on September 14, 2017 and December 7, 2017 respectively.

41. By his supplemental affidavit, Theodore testified that proceedings against the first claimant were initiated on June 11, 2019, almost two years thereafter. He further testified that before criminal charges are instituted, the usual procedure is for the persons whose items were seized be shown the items that are deemed prohibited. That in this matter,

[3] [2004] UKPC 15
[4] CV2013-02301

the criminal charges were only brought on June 11, 2019 because the aforementioned procedure had not yet been complied with yet and the Division wanted to afford the claimants the opportunity to see which items were not prohibited and for which could be made available to him upon payments of the relevant duties and taxes.

42. Moreover, Theodore testified that once legal proceedings are filed in the High Court, Customs Officers like himself would usually hold their hands in instituting any criminal charges until instructions are obtained by the Comptroller on the advice from the Legal Unit of the Division. As such, it was the evidence of Theodore that he was awaiting instructions from the Comptroller on how to proceed.

43. The court found that the reasons proffered by Theodore did not justify the defendant's failure to initiate forfeiture and condemnation proceedings for more than a year. That the defendant failed to initiate proceedings against the claimants within a reasonable period of time. It must be a rare and exceptional occasion in which a period of almost two years could be held to be reasonable and it certainly does in these circumstances for the reasons given. In the court's view nothing prevented the respondents from bringing proceedings within one to two months thereafter. The internal policy set out by Theodore to the extent that it exists is just that, a policy which on the face of it lends itself to unnecessary delay and unfairness. This is matter within the remit of the Respondent to remedy.

44. This courts ought not to however countenance such a policy where it leads to a clear injustice and goes against the principles of fairness and intention of the Act.

45. According to Section 220(2) of the Act, proceedings for forfeiture and condemnation is taken before a Magistrate who may order delivery of the goods to the claimant upon payment of security until determination of proceedings. It is therefore at the aforementioned stage that the issue of whether the items seized were lawfully seized, under the relevant provisions of the Act, in this case whether they are obscene or

indecent (pursuant to section 45(1)(l)) is determined by the Magistrate. If they are so found, they are forfeited and an order is made for destruction and/or disposal of the items (condemnation).

46. The court found that the process of forfeiture and condemnation before the court is a process that admits to the principles of natural justice in that the owner is then afforded the opportunity to be heard as to why his goods ought not to be forfeited by the state. The process permits the owner to make submissions and lead evidence that may touch the origin, nature and purpose of the goods all in an attempt to satisfy the Magistrate that the goods do not qualify as prohibited goods. But that is only one aspect of the opportunity provided to the owner by the process. In the course of the proceedings it is conceivable that many other sub issues may arise.

47. The statute thereby recognizes that the decision as to whether an item falls within the definition of a prohibited item falls ultimately to be decided by a judicial authority. It is axiomatic that the result is that an item does not become prohibited under the Act merely because the Customs and Excise Division deems it so. Were this to be the case, it would mean that the act of detaining items which are found to be prohibited by the Customs and Excise Division would be one which carries no judicial oversight. It is for this very reason that the Act makes provision for a process that is fair to the owner of the item. It was therefore clear to the court that the underpinning general policy and intention of the Act as far as it relates to the provisions for the institution of proceedings for forfeiture and condemnation was to ensure that the individual's right to property is not trampled upon by arbitrary detention and seizure without judicial oversight which admits to the property owner being afforded real opportunity to be heard.

48. In delivering the decision in ***Feroza Ramjohn v Patrick Manning,***[5] Their Lordships made it abundantly clear that what is fair in any given circumstance is entirely dependent of the facts of the particular case. This is what the court said at paragraph 39;

[5] [2011] UKPC 20

*"As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances – see, for example, R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560. Almost always, however, if a decision is to be taken against someone on the basis of an allegation such as that made here, fairness will demand that they be given an opportunity to meet it. A characteristically illuminating statement of the law appearing in Bingham LJ's judgment in R v Chief Constable of the Thames Valley Police Ex p Cotton [1990] IR LR 344 (para 60) deserves to be more widely known: "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this: Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance."*

49. There is no gainsaying the dicta set out above particularly in the circumstances of this case. To that end it bears repeating that the process of forfeiture and condemnation before a court is an important stage that encompasses elements of both natural justice and due process of which the claimant in this case had been deprived by the defendant's failure to initiate proceedings for forfeiture and condemnation within a reasonable time.

50. **Section 224** of the Act empowers the Comptroller to impose a fine where a person admits to the offence in the prescribed form. The court found that although the nature of the power is that of the exercise of a quasi-judicial function vested in the Comptroller it is not and cannot be equated to the fundamental process of being heard as to why the goods should not be forfeited. The power to impose the fine occurs post admission of guilt whereas the duty to institute forfeiture and condemnation proceedings is pre admission. It therefore followed that the evidence of the defendant's witness, Theodore at paragraph 12 of his affidavit was wholly misconceived. It was his evidence that he informed the first claimant and his lawyer that not all of the items were obscene and/or indecent and therefore they had a choice of the matter being determined before a

Magistrate or the Comptroller. His assertion was therefore internally inconsistent and an inaccurate representation of the law.

51. The powers of the Comptroller only become exercisable in that regard when there is an admission in the prescribed form. Up to that point and to these proceedings there had been no such admission. It is however the duty of the Comptroller to institute forfeiture and condemnation proceedings within a reasonable period once notice is given by the owner. In this case, the owner had already given notice in relation to the first shipment so that the choice provided by Theodore was not one with legal standing.

52. The court was also gravely concerned and was so concerned prior to the filing of the supplemental affidavit of Theodore that if the evidence of Theodore in his principal affidavit was accurate, it meant that there were items detained in the shipments (the court was not told which items or how many from which shipment) in respect of which the power to detain was being exercised unlawfully and arbitrarily without legal basis presented to the court.

53. Finally, the evidence being that the goods or some of them were allegedly seized because they were prohibited under section 45(1)(l) of the Act as being obscene, they were therefore Prohibited goods in the opinion of Comptroller. A person who imports, brings in or is concerned with the importation or bringing into Trinidad and Tobago of such prohibited goods commits an offence for which there are penalties both summarily and on indictment under section 213(a) of the Act. The issue of whether the goods are obscene and do in fact fall within the category of prohibited goods is a matter to be determined by the Magistrate when dealing with forfeiture proceedings and the court having so found, that issue was not a matter for this court.

**ISSUE 2** – *Whether the notice of claim served via email to Mohammed sufficed or constituted a notice of claim pursuant to section 220(1) of the Act*

54. As mentioned above, there were two seizures in this case. On August 29, 2017 the claimants' first shipment of adult sex toys were seized. Notice of seizure in writing was given in respect of the first shipment on August 29, 2017 and notice of claim was given by the first claimant to the Comptroller in writing on September 14, 2017.

55. Thereafter, the second shipment which was two boxes of similar items were seized on November 15, 2017 and Notice in writing was given by Customs on November 15, 2017. However, unlike the previous notice from the first claimant, there was no evidence of same in this case addressed and delivered to the Comptroller. However, in his affidavit, the first claimant deposed that on December 7, 2017 his then attorney-at-law sent an email to Mohammed to his personal email. According to the first claimant, the email served as his notice of intention to claim the second shipment.

56. At the material time, Mohammed was the Supervisor (Operations) of the Preventative Branch of the Customs division (the division that seized the goods). Mohammed was also the person with whom the first claimant dealt with at the material time amongst others. Mohammed deposed by affidavit that he has never received such an email either at his personal email address or at his work email address both of which he disclosed.

57. Section 4 of the Act is a deeming provision which deems that any act, matter or thing required by Customs laws to be done or performed by the Comptroller, if done or performed by any Officer appointed by the Comptroller for such purpose, shall be deemed to be done or performed by the Comptroller.

58. Consequently, in this case, it could not have been disputed that if the first claimant properly gave a notice of claim for the second shipment to Mohammed, same would have been effective and valid by virtue of the deeming provision. In that regard, it was incumbent on the first claimant, he having chosen not to address and deliver the notice directly to the Comptroller under section 220 (1), and having elected to email Mohammed

at his personal email, to prove and the legal burden fell upon him to so do, that notice was in fact received by Mohammed. The court found that the first claimant failed to prove that the notice was received by Mohammed as the evidence of Mohammed clearly showed that he did not receive the email in any form or at any of his email addresses and more importantly there was no evidence to the contrary.

59. The fact that the evidence of Mr. Bhola was that he was aware that the email address was the personal address of Mohammed and that it had been provided to him personally (he did not say when, where, what context and for what purpose) was insufficient to discharge the burden of proof on the first claimant in that regard. Neither was the fact that no issue was taken with the purported notice until these proceedings.

60. Consequently, the state of the evidence remained that of Mohammed denying receipt, and the first claimant having no proof of receipt. The deeming provision under section 4 operates to validate notice to the Comptroller although given to another person who qualifies to receive same under the section. However, as the claimant failed to prove that he gave notice to Mohammed, the deeming provision could not apply and the court so found.

61. As such, in relation to the second shipment, the court found that a claim was not made by the owner, the first claimant pursuant to section 220(1).

62. For these reasons, the court therefore disposed of this claim in the manner set out at paragraph 1 above.

Ricky Rahim

Judge