

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civ. App. No. 91 of 2004**

**BETWEEN**

**RAJNANAN RAMSARAN**  
**(Trading as Ramsaran's Dairy Products)**  
**APPELLANT**

**AND**

**THE COMPTROLLER OF CUSTOMS & EXCISE**  
**RESPONDENT**

**PANEL:**

W.N. Kangaloo, J.A.

S. John, J.A.

I. Archie, J.A.

**APPEARANCES:**

Mr. A. Ramlogan appeared on behalf of the Appellant.

Mr. D. Byam appeared on behalf of the Respondent.

**DATE DELIVERED:** 7<sup>th</sup> February 2006.

I have read the judgment of Kangaloo, J.A. and agree with it.

Stanley John  
Justice of Appeal

I, too, have read the judgment of Kangaloo J.A., and agree with it.

Ivor Archie  
Justice of Appeal

## Judgment

### Delivered by W.N. Kangaloo, J.A.

1. As Counsel for the Appellant, Mr. Ramlogan, put it when opening this appeal, the issue involved is short and simple but important. The issue is whether the appellant is entitled to damages in this judicial review application on the ground that damages would have been awarded in an action at common law, either for breach of statutory duty or negligence, based on the same factual scenario that gave rise to the judicial review application.

2. The context in which the issue arises is that the appellant is an importer of containers for the packaging of his fruit and milk products and is entitled to import these containers duty free, once the comptroller of customs (the comptroller) is satisfied that there are no locally manufactured containers available for the packaging of the appellant's products. The comptroller (through his customs officer) required proof of the unavailability of locally manufactured containers from the appellant in the form of a '*letter of unavailability*' from the Trinidad and Tobago Manufacturers Association (T&TMA). It turns out that the T&TMA was willing to provide the letter (and did provide the letter to the appellant in the past) but on payment by the appellant of a fee to it in the sum of \$230.00. The appellant successfully challenged this requirement in his judicial review application but the learned judge who granted the declarations sought, refused to order damages in addition. It is from this refusal of damages that the appellant has appealed.

3. The question arises whether the facts as set out can give rise to a cause of action in law for breach of statutory duty, which is the main plank of the appellant's appeal or alternatively in negligence, the long stop position of the appellant.

4. The breach of statutory duty contended for by Mr. Ramlogan is *'that the comptroller, instead of satisfying himself in the exercise of his own discretion as contemplated by S. 10(a) [of the second schedule to the Customs Act] imposed an illegal statutory precondition to the grant of the exemption.'*

Mr. Ramlogan seems to be contending that the duty of the Comptroller was to satisfy himself in the exercise of his own discretion, and he breached that duty when he required that the appellant obtain from the T&TMA a letter of unavailability before he, the comptroller, granted the exemption sought. The question remains how was the Comptroller to be satisfied of the unavailability of locally manufactured containers?

5. A look at the wording of S. 10(a) is perhaps helpful. It reads, under the general heading of Goods Exempt from payment of Customs Duty: *'Containers of all kinds (except those containers which the comptroller is satisfied are being manufactured in the country) which are imported for use exclusively as containers for the packing or packaging of any produce or manufacture of the country.'*

I say it is *'perhaps'* helpful because as can be seen, it is not the most happily worded section; however it has been taken by both sides, to mean that imported containers are exempt from customs duty, provided the Comptroller is satisfied there are no locally manufactured containers available.

6. What then is the statutory duty imposed on the comptroller of customs, if any? It appears to me that the duty is to declare exempt, imported containers, once he has been satisfied that there are no locally manufactured containers available. The exemption appears to be his primary duty but as a precondition to the performance of that duty he has another duty which is, to be satisfied there are no locally manufactured containers available.

7. It further appears to me that the Comptroller was in the process of performing that other duty of being satisfied as to the unavailability of locally manufactured containers, when he requested of the appellant the letter of unavailability referred to. However this request or imposition as Mr. Ramlogan puts it, was successfully challenged when the Court below made the following declarations:

(a) A declaration that the practice and/or policy of the Comptroller of Customs and Excise of demanding a letter of unavailability from the Trinidad and Tobago Manufacturers Association (T&TMA) as a mandatory requirement and/or precondition to the grant of exemption to the Applicant pursuant to the Second Schedule of the Customs Act as amended by the Finance Act 1993 is illegal and/or unlawful and/or improper;

(b) A declaration that the Comptroller of Customs and Excise has acted illegally and/or unreasonably by insisting that the Applicant obtain a letter of unavailability from the (T&TMA) each time he imports a shipment of containers as a precondition to the grant of the exemption.

8. Although there has been no appeal by the Comptroller from these declarations, I entertain some doubt about whether they ought to have been granted and my doubts are reinforced by Mr. Ramlogan's characteristically frank admission, that were it not for the fee the appellant had to pay for the letter of unavailability, the means employed by the Comptroller to be satisfied as to the unavailability of locally manufactured containers would not have been unlawful. I hardly see how the fact that the appellant had to pay for the letter could make something that was not unlawful, unlawful. Mr. Ramlogan's analogy to the fee being a tax imposed by the Comptroller is without basis, if only because there is

no evidence that the Comptroller was aware of the fee being charged. However all of this is by way of aside as there is no challenge to the declarations made.

9. As I said above, the Comptroller was in the process of performing the first duty imposed by the section, that of being satisfied that there were no locally manufactured containers available, when the process was interrupted by the judicial review application. I do not think it can be said that the Comptroller in attempting to perform the initial duty (i.e. of himself being satisfied) by a means which the Court declares illegal, unlawful or unreasonable, breached a statutory duty to the appellant. The only statutory duty owed to the appellant was to grant the exemption after the Comptroller had successfully completed the first duty which itself was not owed directly to the appellant. It seems to me that at best what the Court was saying was that the Comptroller by employing unreasonable, unlawful or illegal means of being satisfied about the unavailability of locally manufactured containers, erred. But this is only a first step towards performing the only duty owed to the appellant, the grant of the exemption once the condition of satisfaction is met. In other words, in my view, the duty of being satisfied about the unavailability of locally manufactured containers, was not a duty owed to the appellant so as to give rise to a private law action.

10. On the analysis of the statutory duty owed, it appears to me that the statutory duty owed to the appellant has not yet been breached, as there has not been as yet, any determination by the Comptroller of whether he has been satisfied about the unavailability of locally manufactured containers, that process having been interrupted. That being the case, there can be no damages for breach of statutory duty.

11. It is useful to observe that in **Cocks v Thanet District Council [1983] 2 AC 286** Lord Bridge had to undertake a similar analysis of the statutory duty of the Council to provide housing once satisfied that the appellant was not intentionally homeless. Lord Bridge determined that the duty to provide shelter

only arose after the Council was satisfied on the first issue which was a statutory duty given to it by the relevant Act. He said at page 292C *‘It is for the housing authority to decide whether they have reason to believe the matters which will give rise to the duty to inquire or to the temporary housing duty. It is for the housing authority, once the duty to inquire has arisen, to make the appropriate inquiries and to decide whether they are satisfied, or not satisfied as the case may be, of the matters which will give rise to the limited housing duty or the full housing duty. These are essentially public law functions. The power of decision being committed by the statute exclusively to the housing authority, their exercise of power can only be challenged before the courts on strictly limited grounds*

- (i) *that their decision was vitiated by bias or procedural unfairness;*
- (ii) *that they have reached a conclusion of fact which can be impugned on the principles set out in the speech of Lord Radcliffe in *Edwards v. Bairstow* [1956] A.C. 14; or*
- (iii) *that, in so far as they have exercised a discretion (as they may require to do in considering questions of reasonableness under section 17(1), (2) and (4)), the exercise can be impugned on the principles set out in the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223.*

*All this is trite law and the contrary has, so far as I know, never been argued in any case which has come before the courts under the Act of 1977.*

*On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it*

*will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.” (my emphasis)*

12. Although Lord Bridge in 1983, thought there was a private law duty to house after the public law duty has been satisfied, this view of the private law duty was later criticised by Lord Hoffman in the House of Lords in the case of **O’Rourke v Camden London Borough Council (1998) AC 188 at p. 196:**

*“Lord Bridge (with whom the other members of the House agreed) decided that no duty in private law could arise until the housing authority had made its inquiries and decided whether or not it was satisfied as to the various matters upon which the existence of the duty depended. Until the authority had declared itself so satisfied, its decision could be challenged only by judicial review. This was sufficient to dispose of the appeal. The House made a declaration that the plaintiff was not entitled to continue his proceedings “otherwise than by application for judicial review”*

*Lord Bridge went on, however, to say that a duty in private law would arise once the housing authority had made a decision in the applicant’s favour. He said [1983] 2 A.C. 286, 292-293:*

*“On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.”*

*My Lords, I must say with all respect that I cannot accept this reasoning. There is no examination of the legislative intent, the various considerations which I have discussed earlier as indicating whether or not a statute was intended to create a duty in private law sounding in damages. The fact that the housing authority is “charged with executive functions” is treated as sufficient to establish a private law duty. No doubt because the question did not have to be decided, Lord Bridge did not undertake a careful examination of the statutory intent such as he afterwards made in Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] 1 A.C. 58, 157-161. I feel sure that if he had, he would have expressed a different opinion.*

*The concept of a duty in private law which arises only when it has been acknowledged to exist is anomalous. It means that a housing authority which accepts that it has a duty to house the applicant but does so inadequately will be liable in damages but an authority which perversely refuses to accept that it has any such duty will not. This seems to me wrong.”*

13. The present position of the House of Lords since O’Rourke is that one must examine carefully the provisions of the relevant statute to glean a statutory intention to create private law duties and that where these alleged private law duties are conditional on the fulfilment of the exercise of public law discretion, the breach of the exercise of the public law discretion does not sound in private law. As such, the breach contended for by Mr. Ramlogan as set out in paragraph 4 above definitely does not give rise to a private law action for breach of statutory duty.

14. Assuming however that I am wrong in the analysis above and that the duty imposed on the Comptroller to be satisfied of the unavailability of locally



manufactured containers is one which is owed to the appellant and which was breached by the imposition of the letter of unavailability from the T&TMA, the question is whether damages are available for breach of this statutory duty.

15. An examination of the recent authorities demonstrates how this question is approached. The authority of **R. v Northern District Council, ex parte Palmer** (1995) 27 HLR 546, 579 says that it is not enough that there be a breach of statutory duty, it was held the claimant cannot recover damages save for breach of a private law duty. In **R. v Deputy Governor of Parkhurst Prison ex parte Hague** (1992) 1AC 58, 170H – 171A Lord Jauncey says “*it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.*” Applying this test of legislative intention, it will be seen that although section 10(a) of the Second Schedule to the Customs Act can be argued to confer a benefit on importers of containers, to determine whether Parliament intended to confer private law rights to them one has to look at the entire legislation. This legislation is the Customs Act, the primary purpose of which is to legislate how and in what circumstances the State is to recover revenue from the importation and exportation into and from Trinidad and Tobago. It can hardly be said that the general purpose of the legislation is to confer benefits on that class of individuals, to which the appellant belongs, viz. importers of containers. For myself I echo the words of Scott Barker J. in **T. v Surrey Country Council** (1994) 4 ALLER 577, 597 on the issue of an intention to create private law rights when he said ‘*I can find nothing in the Act to indicate such an intention.*’

In **X (Minors) v Bedfordshire C.C.** (1995) 2 AC 633 at 632 Lord Browne-Wilkinson says ‘*The cases where a private right of action for breach of statutory*

*duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative functions.’* All of what Lord Browne-Wilkinson has to say about the breach of statutory duty simpliciter at page 731 C to H of the judgment indicates that it is important to analyse the entire legislation to glean if Parliament intended to confer a private law cause of action. This will happen when the statutory duty was imposed for the protection of a limited class of persons and Parliament intended to confer on the members of that class a private right of action for breach of the duty.

16. I am afraid that there is to my mind nothing in the Customs Act which indicates this intention nor has any provision of the Act been cited, as none was in the Court below, as so doing except S. 10(a) of the Second Schedule. It therefore becomes clear to me that no private law action for damages for breach of statutory duty is available on the facts of this case.

17. Mr. Ramlogan threw in for good measure, the common law action of the tort of negligence as the alternative equivalent private law action necessary to succeed in the appellant’s claim for damages. Apart from the fact that as Mr. Byam pointed out, this is not a ground of appeal, I cannot possibly see how on the facts of this case as set out in the affidavit before the Court a case of negligence can be made out. In the first place nothing of the sort is alleged by the appellant and if it were then the question would arise whether the Comptroller’s decision to request the letter of unavailability could be challenged in judicial review proceedings, there being an alternative remedy of the common law action of negligence. The negligence argument simply does not get off the ground.

18. I would therefore dismiss this appeal on the ground that the statutory breach of duty contended for by Mr. Ramlogan does not sound in private law and further that the appellant’s conditional right to an exemption from duty could not

have been intended by Parliament to create private law rights. The appellant must pay to the respondent, the costs of the appeal

W.N. Kangaloo  
Justice of Appeal