



Easter Term

[2018] UKPC 10

Privy Council Appeal No 0085 of 2016

JUDGMENT

Guyah (Appellant) v Commissioner of Customs and another (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lady Hale

Lord Reed

Lord Carnwath

Lord Hughes

Lord Lloyd-Jones

JUDGMENT GIVEN ON

14 May 2018

Heard on 23 January 2018

Appellant

Paul A Beswick

Terri-Ann Guyah

Angel Beswick-Reid

Christopher Dunkley

(Instructed by Ballantye Beswick &
Company)

Respondents

Marlene Malahoo Forte QC

(Attorney General)

Althea Jarrett

(Director of State Proceedings)

(Instructed by Charles Russell Speechlys
LLP)

LORD REED:

1.

This appeal is concerned with actions taken by the customs authorities in Jamaica, and their effect under the applicable legislation. It is convenient to begin with the facts of the case, before considering the relevant provisions, the proceedings below, and the issues which arise.

The facts

2.

As the respondents, the Commissioner of Customs (“the Commissioner”) and the Attorney General of Jamaica, failed to submit any evidence timeously before the Supreme Court, and were refused permission to do so out of time, the only evidence before the court is that contained in a number of affidavits submitted on behalf of the appellant, Mr Guyah, of which his own affidavit dated 14 June 2013 is the most important. The following account of the facts is based primarily on that affidavit and on the agreed statement of facts and issues.

3.

Mr Guyah was employed at all material times in the Jamaica Customs Department, as the Director of Customs in the Contraband Enforcement Department. His duties, as described in his affidavit, included the enforcement of the customs laws of Jamaica and the oversight of the daily operations of the contraband enforcement team. He also acted as the prosecutor in proceedings brought against those responsible for breaches of the customs laws. He chaired the Breach Tribunal, which deals with issues involving penalties, seizures and forfeitures under the Customs Act. He also exercised important functions under the Proceeds of Crime Act. He represented the Government and people of Jamaica internationally on issues of border protection and national security. As the judge, Pusey J, succinctly observed, he is a very important Crown servant. He is also a person who, as he states in his affidavit, is “quite aware of the customs laws and procedure governing the clearance of goods and the identification of offences under the Customs Acts”.

4.

In or about November 2009 a Suzuki Swift motor vehicle (“the Suzuki”) entered Jamaica in a container on board the vessel Zim Shanghai. It was unloaded and placed in a bonded facility operated by a firm of wharfingers, Kingston Logistics Center Ltd (“Kingston Logistics”). The importer of the vehicle took no steps to clear it through the customs department.

5.

In 2010, customs officers acting on the instructions of Mr Guyah seized the Suzuki and 13 other vehicles in a similar situation. He states in his affidavit that he “seized these fourteen vehicles for breaches under the Customs Act”. He further states that “the Commissioner had issued forfeiture notices under his own hand, as prescribed by the Customs Act, for these fourteen vehicles”. The vehicles remained in the facility operated by Kingston Logistics.

6.

On 11 November 2010, the Commissioner issued a memorandum concerning the procedure for the disposal of goods under requests made by the wharfinger under section 91 of the Customs Act. So far as material, it stated:

“This procedure shall guide how the entry of goods should be treated by Customs where the wharfinger makes an application under section 91 of the Customs Act and this request has been duly approved by the Commissioner.

...

In the case of motor vehicles, the wharfinger is to obtain the services of a customs broker to prepare a Bill of Sight and submit it to the valuation branch for processing. After receiving the assessed CIF value, the Bill of Sight and all other supporting documents, if any, are to be taken to the Queens Warehouse where the duties will be assessed. Queens is then to collect the duties and make the relevant entry into the Queens Auction System (QAS) in order to generate the relevant paperwork to effect registration of the vehicle by the wharfinger. The Certificate generated from QAS and the

release documentation is to be prepared by Queens and given to the wharfinger, wherein the vehicle would be released to them.”

7.

On 11 January 2011, Kingston Logistics wrote to the Commissioner in relation to the 14 vehicles. The letter stated:

“The Kingston Logistics Centre acting as wharfingers/agents for the following consignments, hereby make a request under section 91 of the Customs Act for permission to enter these goods being abandoned motor vehicles which have reported and remain unclaimed in excess of One Hundred and Eighty (180) days.

All the importers have been duly notified of these shipments and have not effected any clearance for them nor have they entered into any arrangements with us indicating any intention to clearing them. We ask your due consideration in allowing us permission to enter these goods as belonging to us Kingston Logistics Centre, as we believe that we have met all the requirements specified in the Customs Act for this provision.”

8.

The Commissioner referred the request to Mr Guyah for his advice and recommendation, mainly, as Mr Guyah states in his affidavit, “because these vehicles were the subject of forfeiture proceedings under the Customs Act for breaches under section 210”. After discussions with Mr Guyah, the Commissioner responded to Kingston Logistics by letter dated 7 March 2011, stating:

“With regard to the fact that the importers have been given notice of these goods being stored at your warehouse and have taken no steps to clear same, in accordance with section 91, approval is hereby granted for Kingston Logistics Center to enter these vehicles and take custody of them when all customs requirements as to duties and taxes have been adhered to.

Given the difficulty with the lack of proper documentation to adequately prepare an import entry C87 [the import entry form], the clearance process would have to be treated as an auctioned vehicle.

The customs broker is to prepare a bill of sight and submit it to the Customs Valuation Branch and then take the completed document to any Queen’s Warehouse to complete the clearance process.”

In his affidavit, Mr Guyah describes this as the Commissioner restoring the seizures and revoking the forfeiture of the vehicles, in the exercise of his powers under section 219 of the Customs Act. Mr Guyah also states in his affidavit that, since section 91 was not conveniently applicable for these vehicles, the Commissioner invoked his powers to issue procedures for their entry under section 259 of the Customs Act.

9.

On 15 March 2011, CEC Customs Brokers & Freight Forwarding Ltd, acting on behalf of Kingston Logistics, submitted a Bill of Sight for the Suzuki to the Customs Valuation Branch. The parts of the Bill relating to the value of the goods were left blank. On 17 March 2011 a CIF value of US\$6,800 was provisionally accepted by the senior valuation certification officer.

10.

On 4 April 2011, the duties and taxes payable on the importation of the Suzuki were paid to the Jamaica Customs Department, using Mr Guyah’s credit card. A receipt for the payment was issued to Kingston Logistics.

11.

On 26 April 2011, the supervisor of the Jamaica Customs Queen's Warehouse issued a certificate for the Suzuki, certifying that the vehicle had been sold to Kingston Logistics at public auction. No such auction had in fact taken place.

12.

By letter dated 27 April 2011, Kingston Logistics notified the Jamaican tax authorities that they had purchased the Suzuki from the Customs Department and had sold it to a Ms Audrey Carter. As evidence of the purchase, they produced the Customs Department's certificate that the vehicle had been sold to them at public auction. So far as the sale to Audrey Carter is concerned, according to Mr Guyah's affidavit she was acting on his behalf, and he was the true owner of the Suzuki. On about 2 June 2011 Audrey Carter had the vehicle registered in her name and licensed to be operated on the island's roads.

13.

On 15 February 2012, Mr Guyah's sister, Kerri-Ann Guyah, was questioned about the Suzuki by customs officers from the Contraband Enforcement Department. According to her affidavit, she then gave a statement in which she said that she had borrowed it from Audrey Carter since about July or August 2011. She told the officers that it was currently in the custody of her sister, Terri-Ann Guyah. Accompanied by the officers, Kerri-Ann Guyah then retrieved the keys to the vehicle from her sister and drove it to premises of the Customs Department. She was then served with a notice of detention, addressed to Audrey Carter care of Kerri-Ann Guyah, referring to the vehicle and stating:

"I have to inform you that the undernoted goods have this day been detained on the following grounds: Investigation."

Statements were obtained from Audrey Carter, from which it could be inferred that she and Mr Guyah had been involved in the acquisition of a number of vehicles from Kingston Logistics in a similar manner to the Suzuki. During later questioning, she said that the Suzuki was never hers, and that it belonged to Mr Guyah.

14.

On 9 March 2012, Mr Guyah was arrested and charged with breaches of the Customs Act, the Corruption Prevention Act and the Larceny Act. The charges concerned all 14 vehicles. On 6 February 2015, those proceedings were dismissed for want of prosecution.

15.

On 12 August 2013, Mr Guyah commenced the present proceedings. The history of the proceedings is described below.

16.

During October 2015 Mr Guyah brought proceedings seeking a declaration and injunction to prevent the commencement of disciplinary proceedings against him, together with damages. An interim injunction was granted on 2 October 2015.

The relevant legislation

17.

Part III of the Customs Act contains the provisions regulating the unloading of goods from ships, their entry for warehousing, their removal from warehousing and their being duly "entered", defined by section 2 as meaning "the acceptance and signature by the proper officer of an entry, specification, or

shipping bill, and declaration signed by the importer or exporter on the prescribed form in the prescribed manner, together with the payment to the proper officer by the importer or exporter of all rents and charges due to the government in respect of the goods, and, in the case of dutiable goods (except on the entry for warehousing of imported goods), the payment by the importer or exporter to the proper officer of the full duties due thereon". The principal provisions regulating unloading, entry, removal and delivery are sections 76 and 77. Under section 78, any goods unloaded, removed or dealt with contrary to sections 76 and 77 "shall be forfeited".

18.

The situation where goods are not entered following unloading is addressed by a number of provisions. Under section 84, if the importer makes a declaration under section 80 (to the effect that he is unable to furnish full particulars of the goods) but fails to make entry, the Commissioner is to cause the goods to be deposited in a Queen's warehouse, defined by section 2 as "any warehouse or place whatsoever for the time being occupied or used by the Commissioner for the deposit of goods for the security thereof, or of the duty due thereon". They are then to be dealt with as provided in section 88. Under section 87, goods which have not been entered and produced for customs clearance within 14 days of unloading are also to be deposited in a Queens' warehouse. Under section 88, goods deposited in a Queen's warehouse can be sold by public auction after a period of three months, subject to public notice being given of the auction. The proceeds of the sale are then to be applied in discharge of the duties and any other charges, with any balance being payable to the owner, if he applies within two years, or otherwise into the Consolidated Fund. These provisions have to be read together with section 97, under which goods which are required to be deposited in a Queen's warehouse may be deemed to have been so deposited, at the Commissioner's discretion. They may in that event be kept in a private bonded warehouse, in accordance with section 98.

19.

Section 91, to which reference was made in paras 6 to 8 above, provides, so far as material:

"Where the owner of any goods imported in any ship ... fails to make entry thereof, or having made entry, fails to land the same or to take delivery thereof by the times severally hereinafter mentioned, the shipowner or Master or the agent of either, may make entry of the said goods at the times, in the manner, and subject to the conditions following, that is to say -

(a) if a time for the delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the time so expressed; and

(b) if no time for delivery of the goods is expressed in the charter party, bill of lading or agreement, then at any time after the expiration of 72 hours, exclusive of a Sunday or public holiday, after the report of the ship:

Provided that if at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to do so, and his entry shall, in such case, be preferred to any entry which may have been made by the shipowner or Master, or the agent or either." (sic: presumably "of either" is intended).

20.

Part VIII of the Customs Act is concerned with the prevention of smuggling. In relation to the powers of customs officers, section 203 provides, so far as material:

"(1) If any officer has reasonable cause to suspect that -

(a) any uncustomed or prohibited goods ...

are harboured, kept or concealed in any house or other place in the Island, the officer may apply to a Resident Magistrate or Justice of the Peace for a special warrant in relation to such goods ...

(2) Where, in relation to an application under subsection (1), the Resident Magistrate or Justice of the Peace is satisfied that the issue of a special warrant is justified, he may grant the special warrant authorizing the officer to -

(a) enter and search the house or other place referred to in his application, by day or by night;

(b) open the lock of a door, box, safe or other receptacle which the officer has reasonable grounds to believe is relevant to the search, using such force as may be necessary; and

(c) seize and carry away any uncustomed, restricted or prohibited goods ... as may be found therein.”

“Uncustomed goods” are defined by section 2 as including “goods liable to duty on which the full duties due have not been paid, and any goods, whether liable to duty or not, which are imported or exported or in any way dealt with contrary to the customs laws”. “Prohibited goods” and “restricted goods” mean respectively “any goods the importation or exportation of which is prohibited or restricted by law”. It is accepted that motor vehicles fall within the category of “restricted goods”.

21.

Section 204 confers a power to stop and examine any carriage upon reasonable suspicion (“carriage” being defined by section 2 as including every description of conveyance for the transport by land of human beings or property), in order to ascertain whether any uncustomed or prohibited goods are contained therein. Section 205 empowers any officer on duty, and having the authority of the Commissioner, to enter any part of the Island other than a dwelling-house or other building.

22.

Part IX of the Customs Act contains general provisions. They include section 210, to which reference was made in para 8 above. It provides, so far as material:

“(1) Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty ... and all goods in respect of which any such offence shall be committed shall be forfeited.”

23.

The principal provision conferring a statutory power upon customs officers in relation to the seizure of goods is section 214. So far as material, it provides:

“... all aircraft, ships, carriages and goods together with all animals and things liable to forfeiture, and all persons liable to be detained for any offence under the customs laws or under any law whereby officers are authorized to make seizures or detentions, shall or may be seized or detained in any place either upon land or water, by any person duly employed for the prevention of smuggling, or by any person having authority from the Commissioner to seize or detain the same, and all aircraft, ships, carriages, and goods together with all animals and things so seized, shall forthwith be delivered into the care of the Commissioner ...”

24.

Section 215(1) lays down the procedure following seizure. So far as material, it provides:

“Whenever any seizure shall be 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 law by which officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the Master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known ... and all seizures made under the customs laws or under any 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 Minister may direct, unless the person from whom such seizure shall have been made or the Master or owner thereof, or some person authorized by him shall within one calendar month from the day of seizure give notice in writing to the Commissioner that he claims the same, whereupon proceedings shall be taken for the forfeiture and condemnation thereof ...”

25.

Section 216 is also important:

“All seizures whatsoever which shall have been made and condemned under the customs laws, or any other law by which seizures are authorized to be made by officers, shall be disposed of in such manner as the Minister may direct.”

26.

Section 218 confers a general power on the Governor-General to direct restoration of a seizure whether condemnation shall have taken place or not. Section 219, to which reference was made in para 8 above, confers a more limited power on the Commissioner. So far as material, it provides:

“Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) ... the Commissioner may ... restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure.”

27.

Part XII of the Customs Act contains miscellaneous provisions. They include section 259, to which reference was made in para 8 above. It provides, so far as material:

“The Commissioner may permit the entry, unloading, removal and loading of goods ... in such form and manner as he may direct to meet the exigencies of any case to which the customs laws may not be conveniently applicable.”

The proceedings below

28.

On 12 August 2013, Mr Guyah commenced the present proceedings, seeking declarations that the Suzuki was not legally classifiable as uncustomed goods and was therefore not liable to seizure under section 210 of the Customs Act (scil, on 15 February 2012), that it was unlawfully seized on 15 February 2012, and that the officers who seized it had no authority to effect such seizure and abused their powers under the Customs Act. He also sought an order requiring the Commissioner to transfer the registration of the vehicle to him or his nominee, damages for conversion and loss of use of the vehicle, and aggravated, exemplary and punitive damages. The latter aspects of the claim were later abandoned.

29.

In support of the first declaration sought, Mr Guyah argued that “the vehicle the subject of the present claim was initially seized and forfeited by the Commissioner himself, and based on the powers vested in him under section 219 of the Customs Act, he restored the seizure and vested this vehicle to the wharfinger, Kingston Logistics”. He also relied on section 259, under which, he argued, “the Commissioner has been given a wide power to enter goods in any manner he sees fit”. Section 215 was argued not to be in point, as the vehicles had not been condemned.

30.

In support of the second declaration, Mr Guyah argued that a lawful detention of goods could only be carried out under section 214, which applied only to goods liable to forfeiture. Goods could not, therefore, be detained for the purpose of investigations. In that regard, reliance was placed on the decision of the Court of Appeal in *R (Eastenders Cash & Carry plc) v Revenue and Customs Comrs* [2012] EWCA Civ 15; [2012] 1 WLR 2067. It does not appear to have been noticed that this decision had been reversed by the Supreme Court: [2014] UKSC 34; [2015] AC 1101. The seizure of goods, it was argued, could only be effected under a warrant granted under section 203. The Suzuki was not liable to forfeiture, and the officers who seized it had not obtained a warrant.

31.

In a judgment issued on 27 February 2015, Pusey J rejected the respondents’ argument that Mr Guyah lacked standing to bring these proceedings. In his opinion, the fact that Mr Guyah had been charged with criminal offences relating to the vehicle gave him standing to apply for the declarations sought. He further held that the Suzuki was not legally classifiable as uncustomed goods and was not liable to seizure under section 210 of the Customs Act, and that its seizure had been wrong in law to the extent that it was a seizure of uncustomed goods. He made declarations to that effect.

32.

In reaching that conclusion, the judge rejected the respondents’ argument that the procedure under which the Suzuki and the other vehicles were entered was ultra vires of the Commissioner, with the consequence that the vehicles were uncustomed. In that regard, the respondents argued that since the vehicles had been seized by customs officers acting on Mr Guyah’s instructions, and had been forfeited under section 210, and since no claim to them had been made by or on behalf of the master or owner, it followed that they were deemed to be condemned under section 215, and should have been disposed of as directed by the Minister, in accordance with sections 215 and 216. There was no evidence that the Minister had directed that they should be disposed of to Kingston Logistics. Section 219 did not, they argued, enable the Commissioner to revoke the forfeiture. Furthermore, the restoration of seized goods had to be to the person from whom the goods were seized, or the master of the ship or the owner of the goods, or to some person authorised by them. Nor was section 91 applicable, since Kingston Logistics was not the shipowner or master, or the agent of either.

33.

The judge, however, considered that the respondents, one of whom was the Commissioner, could not impugn the legality of the Commissioner's own actions. He had no doubt in any event that the powers exercised by the Commissioner were within his legal remit. Furthermore, the Suzuki could not in his view be said to be uncustomed goods, on the basis that the phrase meant that the goods evaded customs or that the customs duties had not yet been paid. The Suzuki was not in that situation. It followed that, whether classified as seizure or detention, taking possession of the vehicle had been wrong in law if it was based on the vehicle being uncustomed goods. However, the judge declined to declare the detention of the vehicle an abuse of power. In that regard, he found that the officers were investigating an impropriety that had occurred, that they had received conflicting statements, and that it might have been reasonable for the vehicle to be detained while the matter was investigated. He also observed that, although the seizure was not proper under the Customs Act, it might have been allowable under the common law or under other legislation.

34.

The judge made no order as to costs. In that regard, he explained that Mr Guyah had abandoned a large part of the claim as originally brought, and had failed to serve on Audrey Carter, who was named as a defendant. He also referred in that regard to Mr Guyah's conduct, stating that "he attempted to profit from information that came to him by way of his job". The judge made similar comments about Mr Guyah earlier in his judgment, stating for example that "he did not act in the best traditions of the Civil Service", and that "rather than being a servant of the people he attempted to obtain financial gain from knowledge that came to him because of his position". He stated, however, that "whether [Mr Guyah] acted contrary to law or the rules of his employer is for other tribunals".

35.

Mr Guyah appealed, arguing that the judge had been wrong in (1) making statements which were not supported by the evidence and were damaging to his character, reputation and integrity, (2) ruling that the detention of the vehicle might have been reasonable for the purposes of investigation, (3) ruling that the seizure of the vehicle might have been allowable under common law or some other legislation in relation to the charges laid against Mr Guyah in the criminal court, and (4) ruling that there should be no order as to costs. The respondents cross-appealed, arguing that (1) the judge was wrong in finding that Mr Guyah had standing to bring the claim despite the fact that he was not the registered owner of the vehicle, and (2) the judge erred in finding that the Commissioner acted within his legal remit in releasing the vehicle to Kingston Logistics.

36.

On 26 February 2016 the Court of Appeal (Brooks and Sinclair-Haynes JJA, and P Williams JA (Ag)) dismissed Mr Guyah's appeal, allowed the respondents' cross-appeal in part, set aside the judgment and orders of Pusey J, and made a declaration that the Suzuki constituted uncustomed goods on 15 February 2012 and was subject to seizure by customs officials: [2015] JMCA Civ 17.

37.

On the question of standing, the court accepted that Mr Guyah had standing to seek a declaration concerning the customs status of the Suzuki, since he had been charged with criminal offences which depended on that status.

38.

On the question of whether the Suzuki was uncustomed goods on 15 February 2012, the court noted that the statutory definition of "uncustomed goods" included "any goods, whether liable to duty or

not, which are imported or exported or in any way dealt with contrary to the customs laws”: see para 20 above. The judge had therefore erred in restricting the application of the expression to goods on which the relevant duties had not been paid.

39.

In considering whether the statutory definition was satisfied, the court noted that section 215(1) of the Customs Act directs that “all seizures made under the customs laws ... shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Minister may direct, unless the person from whom such seizure shall have been made or the master or owner thereof, or some person authorized by him shall within one calendar month from the day of seizure give notice in writing to the Commissioner that he claims the same”: see para 24 above. The condemnation of goods which had been seized was therefore automatic, in the absence of a claim made in accordance with section 215(1). It was only if such a claim was made that court proceedings for condemnation were necessary: *ibid.* Where goods had been condemned or deemed to be condemned, they could only be disposed of as the Minister directed, in accordance with sections 215(1) and 216, subject to the exceptional power given to the Governor-General by section 218: see paras 24 to 26 above. The power given to the Commissioner by section 219 to “restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court ... for the condemnation of any seizure” was also made “subject to the approval of the Minister”: see para 26 above. It followed, in the view of the court, that the Commissioner could not lawfully dispose of anything seized except in accordance with the Minister’s direction or with the Minister’s approval.

40.

It followed from this analysis that Mr Guyah was correct in stating, in his affidavit, that section 91 could not be used to release a vehicle which had been forfeited. On the other hand, he was incorrect, in the court’s view, in stating that the Commissioner had restored the seizures and revoked the forfeiture of the 14 vehicles in question in the exercise of his powers under section 219. It was to section 91 that he had expressly referred when granting Kingston Logistics’ application: see para 8 above. Mr Guyah was also incorrect when stating in his affidavit that the Commissioner allowed the vehicles to be entered by invoking his powers under section 259, set out at para 27 above. In the court’s view, that section could only apply before goods had been forfeited: to give it a wider scope would be inconsistent with the scheme of the legislation, which placed all forfeited goods under the domain of the Minister.

41.

The court next considered whether the position was altered by the Commissioner’s letter dated 7 March 2011, set out in para 8 above. The court acknowledged the possibility that it might be presumed that the Commissioner had been acting in accordance with directions given by the Minister, on the basis expressed in the maxim *omnia praesumuntur rite esse acta*. However, it rejected that possibility on the ground that it only applied where there was no indication of irregularity. In the present case, in the view of the court, there were several indications of irregularity (paras 59-60):

“Firstly, not only do the Commissioner’s communications not refer to any authorisation by the Minister, they do not suggest that the Commissioner is cognisant of the fact that he is dealing with condemned goods. Secondly, the reference to section 91 suggests that the Commissioner’s directions are independent of any authorisation by the Minister. The section seems to speak to a time, shortly after the item has been imported and before it has been seized or forfeited ... Thirdly, the section speaks to the entry being made by ‘the shipowner or Master or the agent of either’. The direction that an application by a wharfinger would be acceptable for the purposes of section 91, without a

reference to proof of agency, is irregular. There is nothing to indicate that a wharfinger is automatically the agent of either a shipowner or the master of a vessel. Fourthly, the requirement that the sale to the wharfinger be on the basis as if it had been sold by public auction, although that did not occur, also indicates irregularity.”

Furthermore, although section 88 (discussed in para 18 above) envisaged a sale by public auction, it was not concerned with seized goods.

42.

In the court’s view, the respondents could not be estopped from asserting that the Commissioner’s action in purporting to authorise the disposal to Kingston Logistics had been ultra vires: applying well-established principles of administrative law, statutory limits on powers could not be overridden by means of an estoppel. The court therefore concluded that the Suzuki constituted uncustomed goods because it had not been released according to the provisions of the Customs Act. It could only have been properly disposed of with the authority of the Minister. It was disposed of by the Commissioner without any evidence of such authorisation. It was therefore subject to forfeiture under section 210(1), and was liable to seizure from the person in whose possession it was found under section 214: see paras 22 and 23 above. Furthermore, in the view of the court Mr Guyah had no standing to seek an order that the vehicle had been unlawfully seized or that its seizure was an abuse of power, since he had not sought to establish that he had any proprietary interest in it.

43.

The Court of Appeal also rejected Mr Guyah’s complaint about the judge’s comments on his conduct. It awarded the respondents the costs of the appeal and two-thirds of the costs of the cross-appeal, and made no order as to costs in the court below. Leave was subsequently granted by the Court of Appeal for an appeal to Her Majesty in Council.

The present appeal

44.

The parties have identified the following issues as arising:

1. Did the Court of Appeal err in finding that the Suzuki Swift motor car was uncustomed goods?
2. Did the Court of Appeal err in finding that the Suzuki Swift motor car was subject to seizure by Customs officials?
3. Did the Court of Appeal err in finding that it may have been reasonable for the Supreme Court to have made conclusions concerning the conduct, character and integrity of the appellant?

The parties had also identified as an issue the question whether the Court of Appeal erred in its interpretation of sections 91, 210, 214, 215, 219 and 259 of the Customs Act. As they recognised, however, that issue does not raise any distinct question from issues (1) and (2), and need not be considered separately.

1. Was the Suzuki uncustomed goods?

45.

In relation to this issue, Mr Guyah’s argument has taken a new tack. He argues that there is nothing in the evidence to show that the seizure of the vehicles in 2010 was performed in compliance with the legislation. An offence had been committed under section 210, since the importation of motor vehicles was unlawful without a licence, and no licence had been produced for the importation of the vehicles

in question. However, he states, the circumstances of the seizure were such that section 215(1) required a notice of seizure to be served on the wharfinger. The reason for that, he states, is that the seizure was not made in the wharfinger's presence. Furthermore, he states, there is no evidence that such a notice was served. The legal consequence of the failure to serve such a notice, he argues, is that the goods were not seized within the meaning of the Customs Act. Furthermore, he argues, the forfeiture of the goods by the Commissioner was premature. On that basis, he argues, an application could properly be made for the entry of the goods under section 91. It was, he states, the failure to serve a notice of seizure on the wharfinger which caused the Commissioner to grant the application, to use the powers available to him under section 219, and to restore the vehicles to Kingston Logistics. The seizure and forfeiture were, he states, "withdrawn as they were both irregular".

46.

The principal flaw in this argument, apart from the fact that it was not raised in the courts below, is that the only evidence in this case is comprised in the affidavits submitted on behalf of Mr Guyah, which were before the judge at the trial. Mr Guyah's affidavit, sworn on oath, states that "the Commissioner had issued forfeiture notices under his own hand, as prescribed by the Customs Act, for these 14 vehicles", and that "I had also seized these 14 vehicles for breaches under the Customs Act". There is no suggestion in the affidavit that either the seizure or the forfeiture was irregular or invalid. On the contrary, according to the affidavit, the position at the time when the application was made under section 91 was that "these vehicles were the subject of forfeiture proceedings under the Customs Act for breaches under section 210". The natural reading of the affidavit is that "seized" means "lawfully seized", and "forfeiture" means "lawful forfeiture". Unsurprisingly, the courts below dealt with the case on that basis. Given the contents of his affidavit, Mr Guyah cannot now be heard to argue that he had not in fact seized the vehicles but had merely purported to do so, or that the forfeiture notices signed by the Commissioner did not signify that the vehicles had actually been forfeited, but were merely worthless pieces of paper.

47.

Mr Guyah further argues that, even if the vehicles were seized, the Commissioner was nevertheless empowered to reverse any seizure under section 219, and then to permit their entry, by virtue of section 259. There was no need for any Ministerial direction or approval, since the vehicles were never the subject of court proceedings and were never condemned. It was proper for the vehicles to be restored to the wharfinger, who, it is argued, would have been their owner.

48.

We reject this argument for much the same reasons as the Court of Appeal. By virtue of section 215(1), goods which have been seized are automatically condemned after one month, unless claimed by or on behalf of the master or owner within that time. In the present case, no such claim was made, and the vehicles were therefore condemned, without any need for court proceedings. The result was that they could only be disposed of as the Minister directed, in accordance with sections 215(1) and 216, subject to the exceptional power given to the Governor-General by section 218. The power conferred on the Commissioner by section 219, even assuming it to be relevant following automatic condemnation (a question on which we have heard no argument), would in any event require Ministerial approval. Furthermore, both the application by Kingston Logistics, and the Commissioner's decision to grant it, were expressly based on section 91: a provision which cannot apply to goods which have been seized.

49.

Mr Guyah further argues that it should be presumed that the Commissioner was acting in accordance with a Ministerial direction, or with Ministerial approval, when he authorised the disposal of the vehicles to Kingston Logistics. We again reject this argument for the same reasons as the Court of Appeal. The Commissioner based his action on section 91: he did not purport to act under any of the provisions authorising disposal in accordance with a Ministerial direction or with Ministerial approval, such as sections 215, 216 or 219. There were in addition sufficient indications of irregularity, as the Court of Appeal explained, to exclude the application of the presumption of regularity. Those included, most notably, the conferral of a gratuitous benefit at public expense, in respect of the value of the seized vehicles, by artificially deeming them to have been sold to Kingston Logistics at public auction, when no such sale had taken place.

50.

Mr Guyah further argues that, even if the Commissioner acted unlawfully, nevertheless he is estopped from denying the lawfulness of his own action, having regard to authorities such as *Robertson v Minister of Pensions* [1949] 1 KB 227. This contention must also be rejected. The Commissioner made no representation to Mr Guyah as to the scope of his powers, and Mr Guyah was not misled by the Commissioner. On the contrary, the Commissioner acted on Mr Guyah's advice in his dealings with Kingston Logistics. Furthermore, although Mr Guyah asserts that he purchased the Suzuki in reliance on the Commissioner's decision, there is no finding to that effect. In these circumstances, there is no analogy with the case of *Robertson*, or with more recent authorities concerning legitimate expectations.

51.

Mr Guyah further argues that it is impossible for the Customs Department to seize goods after they have cleared customs, in the absence of concealment, misrepresentation or fraud, on the authority of *Customs and Excise Comrs v Tan* [1977] AC 650. This argument was not advanced below, and was not fully developed. In the circumstances, it is sufficient to say that the case of *Tan* was concerned with a different situation, and a different question, from the one with which the present case is concerned. Lord Wilberforce was careful at pp 667-668 to distinguish the question whether goods could be forfeited after importation because it was discovered that duty had mistakenly been under-assessed (which was the situation in the case then before the House of Lords), from the question whether they could be forfeited because there had been "improper importation of one kind or another".

52.

We accordingly conclude that the Suzuki was uncustomed goods, within the meaning given to that expression by section 2 of the Customs Act (see para 20 above).

2. Was the Suzuki subject to seizure?

53.

Mr Guyah argues that goods which are in the care, custody or control of a private person can only be seized in pursuance of a warrant granted under section 203. Even on the hypothesis that Mr Guyah is entitled to argue this point, in order to impugn the seizure of the Suzuki, we are unable to accept his submission. Section 203 (set out at para 20 above) is concerned specifically with powers to enter and search "any house or other place", and to seize and carry away any uncustomed, restricted or prohibited goods found there. It has to be construed in the context of other provisions conferring powers to enter and search without a warrant: for example, section 204 (summarised in para 21 above) confers a power to examine vehicles, and section 205 (also summarised in para 21) confers a power to enter "any part of the Island other than a dwelling-house or other building". In the context of

these provisions, the word “place”, in section 203, cannot be construed literally, and must be intended to apply primarily to buildings other than dwelling-houses. On the facts of the present case, it appears that the vehicle was detained after it had been driven to the premises of the Customs Department. Even if what occurred at an earlier stage, when Kerri-Ann Guyah retrieved the Suzuki from her sister, were to be regarded as amounting to detention, it did not involve officers entering or searching any house or building. In short, section 203 has no application to the present case.

54.

We need only add that the arguments before this court, as before the courts below, proceeded on the assumption that goods could be detained only if they were liable to forfeiture (for example, as uncustomed goods), in accordance with section 214. In that regard, reference was made to the Court of Appeal’s decision in the Eastenders case. As we have mentioned, that decision was reversed by the Supreme Court, which held that customs legislation in the United Kingdom impliedly empowers officers to detain goods temporarily pending investigations which might lead to their subsequent seizure. In the absence of argument on the point, we express no view on whether a similar power exists under the law of Jamaica.

3. Were the Supreme Court’s comments on Mr Guyah’s conduct objectionable?

55.

Mr Guyah argues that, since it was open to anyone to buy the vehicles from Kingston Logistics on payment of the amount assessed in customs duty, there was no question of his using his knowledge of this opportunity for his financial advantage. There was therefore no basis in fact for the judge’s adverse comments on his behaviour. Whether he had or had not adhered to the standards of conduct expected of a civil servant was in any event irrelevant to the issues which the Supreme Court had to decide. It was a court of law, not of moral standards.

56.

We are mindful of the fact that Mr Guyah remains the subject of disciplinary proceedings. As far as possible, this court should avoid making any comments which might prejudice those proceedings. In these circumstances, we shall be circumspect in our discussion of this matter. We also bear in mind that this court’s jurisdiction is to advise on the outcome of an appeal, and not on the appropriateness of incidental comments which may have been made in the course of proceedings in the courts below.

57.

In the circumstances, it is sufficient to say that the judge was entitled to take the view that Mr Guyah’s conduct, in relation to the events resulting in the proceedings before him, was relevant to the exercise of his discretion when deciding how responsibility for the costs of those proceedings should be allocated. Like the Court of Appeal, we are unable to say that the view which he formed of Mr Guyah’s conduct was not one which was reasonably open to him. On the evidence before him, he could reasonably consider that Mr Guyah had used his official position for his personal advantage.

Conclusions

58.

For all these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed, and that, subject to any submissions received within 14 days of the promulgation of this advice, the respondents’ costs of the appeal should be paid by the appellant.