BJANNAR PTY LIMITED and ROBERTS -v- THE COMPTROLLER OF CUSTOMS & EXCISE

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 279 of 1992
Hearing: 22 September 1992
Ruling: 29 September 1992

J. Sullivan and D. Campbell for the Plaintiffs
P. Afeau for the Defendant

PALMER J: This is an application under originating summons by Bjannar Pty Limited (First Plaintiff) and Brendan John Roberts (Second Plaintiff) in essence for a declaration that the detention and seizure by the Defendant (The Comptroller of Customs & Excise) on or about the 18th day of August 1992 of a Piper Aztec Aircraft PA 23-250 (bearing Registration Marks VH-MBQ and Serial No. 27-7754015) the property of the Plaintiffs is unlawful and ultra vires the Defendant and that the Plaintiffs are entitled to its possession and for a consequential order of delivery of the aircraft to the Plaintiffs or their agent authorised in writing.

Messrs John Sullivan and David Campbell appeared for the Plaintiffs and Mr Primo Afeau of the Attorney General's Chambers appeared for the Defendant.

The brief facts are as follows. On the 21st of August 1992, the aircraft was detained at Afutara airstrip on Malaita after it had been discovered to have been used in an attempt to take away birds that have been prohibited from removal from Solomon Islands. The Pilot of the plane together with another expatriate and other local people have been charged inrespect of the offences associated with this incident.

It is not disputed that the aircraft is owned by the Plaintiffs. They have filed affidavits to show this.

A seizure notice was subsequently issued by Mr David L. Dakei, the Chief Collector, (Enforcement), and dated the 21st of August 1992. A copy of the notice is annexed to Mr Dakei's affidavit and marked "B". The section relied on for the seizure is section 221 of the Customs and Excise Act (Cap. 58) and the reason given is and I quote -

"Attempt to smuggle wild life from the Solomons"

The word "smuggle" is not defined in the Act. ***Osborn's Concise Law Dictionary,*** *Sixth Edition by John Burke page 308,* defines the word "smuggling" as -

"The offence of importing or exporting prohibited goods, or of importing or exporting goods and fraudulently evading the duties imposed on them."

The ***Australian Little Oxford Dictionary,*** Edited by George Turner at page 528 defines the word "smuggle" as -

"import or export (goods) illegally especially without paying customs duties, convey secretly in or out etc"

I have sought to get some definitions of the word smuggle or smuggling as it would be relevent in analysing the powers relied on by the Comptroller of Customs and Excise under section 221 and the applicability of the so-called smuggling provisions in Part X of the Customs and Excise Act.

It is sufficient to note that the general meaning of the word smuggling as defined in the Dictionaries quoted is to include the offences associated with the seizure and detention of the aircraft, and in that respect covers the offences in section 141 as well. that the Defendant relies on for the seizure powers in section 221.

The third schedule to the Customs and Excise Act prohibits the export of any wild or domesticated birds. The birds found in the plane

*"In any judgment, the phrase "**subject to** is a simple provision which merely subjects the provisions of one subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is a collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision."*

Learned Counsel for the Plaintiffs on the other hand has sought to submit that the words "subject to" covers and governs section 221 and working on that basis sought to show that the Comptroller has no power to seize and detain the aircraft.

He would be correct if the construction taken of the key phrase "**subject to**" is meant to restrict section 221 to the requirements of sections 195 and 196 in its entirety.

However, the case authorities quoted do not agree with this construction, and this Court would really be fumbling around for a justifiable explanation if such an interpretation is accepted and adopted.

I am satisfied the correct interpretation of the words "**subject to**" in section 221 of the Customs and Excise Act is as established in the English Authorities quoted, and that is, where there is a conflict between sections 221 and sections 195 and 196, then section 195 and 196 must prevail. Where there is no conflict, then section 221 is applicable as a general forfeiture provision of the Crown exercisable in person by the Comptroller.

This interpretation would make legal sense of the statute when one considers that sections 195 and 196 relate to offences committed under section 194. These sections come under Part X of the Act headed "**Prevention of Smuggling**". In other words sections 195 and 196 relate specifically to offences committed under section 194.

Section 194 in my view is a specific enactment which deals with a particular set of factual situations surrounding the discovery of an aircraft or ship.

The factual situation that must be proven in relation to such an aircraft are as listed in paragraphs (a) to (d) of section 194.

As long as an aircraft is found or discovered to have committed one of those offences then section 196 would apply.

It is not necessary to prove that such an aircraft has been made use of in the commission of offences against the customs laws.

The requirements of section 194 are different to the requirement of section 221 in which an aircraft has been made use of.

An aircraft made use of may be found or discovered to have committed the offences under section 194. An aircraft discovered under section 194 may not have been made use of on the other hand.

For instance, a Boeing 737 jet plane on its normal scheduled flight through Honiara may be discovered or found to have on board goods intended for exportation contrary to customs laws or it may have been found to have a secret or disguised place adapted for concealing goods.

It would not have been the intention of Parliament that such a plane should be forfeited. Section 196 therefore would apply. Such a plane in my view would not have been made use of. An offence has been committed by the plane as listed in section 194. But that is as far as its provisions would go insofar as section 196 would apply.

It does not extend to cover the aircraft which has been made use of. The boeing 737 plane was not flown into Honiara for the commission of the illegal offences. It was merely on its normal scheduled flight when it was discovered to have had goods for example for exportation contrary to the Customs Laws.

On the other hand an aircraft that has been made use of in the commission of an offence under section 141 or section 136 (1)(b) for instance would be liable to be forfeited under section 221. There is in

[illegible] the requirements of section 194.

The case of *Attorney General -v- Hunter [1948] Vol. 1 All E.R. p. 1076* did consider the phrase "made use of" and simply analysed it as a question of fact. It found that there was planning involved and the craft used was clearly used in pursuit of the illegal purposes.

The facts of this case reveal quite clearly that this aircraft was to be used solely for the illegal purposes planned by the offenders. It is immaterial that the lawful and rightful owners of the plane were unaware and completely innocent of the illegal activities.

There is provision in my view under sub-sections 222(2) and 222(3) and section 224 where the claims of the separate lawful owner can be made to the Minister for his consideration with the view to exercising his discretionary powers.

There are clearly other offences under the customs laws that the offenders may be charged under and which would entitle the Comptroller to exercise his powers under section 221 to seize the aircraft that was used.

It is possible that section 194 may have been breached, but in a situation where there are other offences also involved, and where the wording of section 221 is general in its application, and where there is no conflict involved with sections 194 and 196, then the forfeiture provisions relied on under section 221 are in order.

It would be different if section 194 was the only section relied on. In that circumstance, section 196 would apply.

The undisputed facts of this case show that the provisions of section 221 are applicable.

It must be borne in mind that section 221 comes under a separate heading from section 194. It comes under Part XI of the Act headed "Penalties and General Provisions".

A general provision is intended to have general application save where there is conflict. If none is available, then the general provision is applicable.

It cannot be said that section 196 and 196 are always in conflict with section 221.

Megarry J. at p. 601 says referring to the phrase subject to:

"The phrase provides no warranty of universal collision"

The provisions of section 221 can accommodate the offences committed in section 194, but not vice versa. I do not find that the provisions of section 221 and section 196 are in conflict.

It is my ruling that where section 194 only is being relied on then the powers of the Comptroller are confined to those spelt out in section 196.

Where other sections are being relied on together with section 221, then no conflict can arise, even if the provisions under section 194 may have been breached. The Comptroller is entitled to rely on section 221 to seize the aircraft and in the factual circumstances surrounding this particular aircraft, the seizure and detention is both lawful and intra vires.

The declarations and order prayed for therefore are denied.

Costs in this application to be paid by the Plaintiffs.

(A. R. Palmer)
JUDGE