IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CP.

BETWEEN : THE ATTORNEY-GENERAL

INFORMANT

A N D : ALFRED HUNT

DEFENDANT

Counsel : M. Edwards and K. Latu for Informant
R. Drake for Defendant

Hearing : 13 & 17 August 1993

Decision : 30 August 1993

DECISION OF SAPOLU, CJ

This decision is an interim decision. The reasons for that will appear in the course of this decision.

As this is an interim decision, I do not need to refer to the evidence in detail. It will be sufficient to refer only to those parts of the evidence which are relevant to the purpose of this decision.

The Attorney-General, as the informant in these proceedings, is seeking judgment of condemnation under section 255 of the Customs Act 1977 in respect of certain goods consigned to the defendant from American Samoa and were shipped over on the ship Kyowa Violet which arrived in the port of Apia on 19 January 1993. Subsequent on arrival in Apia, the goods were seized under sections 245 and 250 of the Customs Act by the Customs Department as forfeited to the Government. The present proceedings for condemnation has followed on from that seizure and forfeiture of the goods consigned to the defendant.

It appears from the statement of defence filed by the defendant pursuant to section 255 (5) of the Customs Act, as well as from the evidence adduced for the defendant and the submissions by counsel for the defendant, that the defendant's challenge is directed at the exercise by the Comptroller of Customs of his discretion under section 245 (b) of the Customs Act. It also appears that the informant was alert to this challenge as part of the evidence for the informant as well as part of the submissions by counsel for the informant were directed to this very issue raised by the defendant. It would be helpful to set out section 245(b) which provides :

> "In addtion to all other goods elsewhere declared by the Customs
> "Act to be forfeited, the following goods shall be forfeited to
> "the Government :
> "All dutiable or restricted goods on any ship or aircraft after
> "arrival in any port from any country outside Western Samoa, not
> "being goods specified or referred to in the inward report, and
> "not being baggage belonging to the crew or passengers, and not
> "being accounted for to the satisfaction of the Comptroller."

The discretion of the Comptroller of Customs which is being questioned by the defendant may be seen as contained in the last few words of section 245(b), namely, "and not being accounted for to the satisfaction of the Comptroller". The relevant part of the evidence shows that a container of goods was sent from American Samoa to the defendant on the ship Kyowa Violet which arrived in Apia on 19 January 1993. The documentation relating to that container aroused suspicion in the Comptroller of Customs. In particular, the manifest shows that the container contains "fish meal" but when it was opened and inspected by the Customs officers, the container was found to contain "Instant Ramen Noodles". The defendant, according to his evidence, was not aware of the discrepancy between the manifest and the actual contents of the container. He sought to explain the discrepancy by

obtaining a letter from the shipping agent in American Samoa which says that the entry of "fish meal" in the manifest was an inadvertent typographical error by an employee of that shipping agent who prepared the manifest. That letter together with a "corrected manifest" from the shipping agent in American Samoa were presented to the Comptroller of Customs. Notwithstanding the explanation and documentation presented by the defendant, the goods in the container were seized, forfeited and now sought to be condemned. I have referred only to this part of the devidence for the purpose of this decision. As already pointed out, I do not need to go into the evidence in detail at this stage as this decision is an interim decision.

Now counsel for the defendant has argued that with the explanation given by the defendant to the Comptroller of Customs in relation to the discrepancy between the original manifest and the actual contents of the container in question, the defendant did account to the satisfaction of the Comptroller of Customs for that discrepancy. Therefore, the goods should not have been seized as forfeited to the Government. As a consequence, these proceedings for condemnation should not have been brought. Counsel for the defendant also argues that the decision by the Comptroller to seize the goods after he was presented with the defendant's explanation was an unreasonable exercise of his discretion under section 245(b). She refers to the well known principles on the question of reasonableness set out in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1K 223 in support of her argument.

Counsel for the informant has argued that the Comptroller acted reasonably in accordance with the Wednesbury principles. He then goes on to argue that, in any event, the defendant did not raise the question of reasonableness in his pleadings and therefore the defendant is now barred from raising that question. He further says that the proper procedure for

the defendant to follow if he had contemplated raising the issue of reasonableness in relation to the exercise of the Comptroller of Customs discretion under section 245(b) was to apply for judicial review of that discretion, but the defendant has not done so. I must say that these arguments by counsel for the informant touch upon an important point in administrative law which is of practical importance. It is also after due consideration of these arguments by counsel for the informant that I have decided this decision has to be an interim decision.

Now the important point which has been indirectly raised by the informant's arguments is the distinction between what has been sometimes described as collateral challenge on one hand and judicial review on the other. It has been pointed out by Professor Taggart at pages 85 and 86 of Judicial Review of Administrative Action in the 1980's : Problems and Prospects that historically collateral challenge to the validity of an administrative action was based on the absolute theory of invalidity and that the invalidity of an administrative decision could be raised collaterally as a defence to a criminal prosecution or civil action. However, the development of judicial review over the last two centuries has lessened the scope and importance of collateral challenge. Professor Taggart then refers to the judgment of Cooke J in the New Zealand Court of Appeal in Reid v Rawley [1977] 2 NZLR 472 and goes on to say :

> "There are two points worthy of note. The first is the limited "role for collateral challenge envisaged by Cooke J. In general, "I would agree that there are good reasons for allowing collateral "challenge only in a limited class of cases; i.e. where the "invalidity is patent on the face of the decision or is otherwise "clear and easily proven. In these cases it is sensible that the "hapless citizen should be spared the time and money involved

"in initiating direct judicial review proceedings in the High "Court and be permitted to set back conflict that if the "authority is foolish enough to enforce the decision in the "District Court a conclusive defence is available. The emphasis "on patent or clear invalidity is justified by both the nature "of collateral challenge and the fact that it is the High Court, "in the exercise of its inherent supervisory jurisdiction which "generally deals with administrative law issues District Court "Judges need little or no expertise in administrative law to "recognise patently invalid decisions. By the nature of "collateral challenge there is no discretion in the District "Court (such as the remedial discretion enjoyed by the High "Court on direct judicial review) but this is less likely "to be a problem in relation to patent or clear cases of "invalidity as the discretionary remedies (on direct review) "would almost invariably issue as of course".

What Cooke J had said in Reid v Rawley, is this :

"I think also that while the initial decision stands it should not "be ignored in collateral proceedings before other courts or "tribunals of limited jurisdiction - unless, no doubt, it is "patently altogether outside the ambit of the domestic jurisdiction. "Still less should the appeal decision be ignored in such "circumstances. If, for instance, the Trotling Conference had "brought an action in a Magistrates' Court to recover the costs "awarded against the appellant by the appeal judges, and the "appellant had raised a reasonably arguable claim of invalidity, "the Magistrate would have had a discretion to adjourn the "action to give the appellant an opportunity of applying for "relief in the Supreme Court. It is the function of that court,

"as the court of general jurisdiction in New Zealand, to review "the decisions and proceedings of tribunals of limited jurisdiction "on the available grounds. Unless and until the Supreme Court "jurisdiction is exercised, in whatever form of proceeding may be "found convenient, I think that a decision prima facie within the "domestic or administrative jurisdiction should be treated as valid."

Now the High Court and District Court as referred to by Professor Taggart were formerly the Supreme Court and Magistrates' Court of New Zealand mentioned in the passage from Cooke J.

It is clear to me that the scope for collateral challenge of an administrative decision based on the ground of invalidity is very limited. In a criminal prosecution or civil action this must be limited to cases where the invalidity is patent on the face of the decision and where it is very clear that the discretionary remedies available under judicial review would almost invariably issue as of course if judicial review proceedings were taken instead of a collateral challenge. In the passages just quoted from Cooke J and Professor Taggart, they refer to a collateral challenge in proceedings before a Magistrates' Court where the Magistrate has a discretion to adjourn the action if there is a reasonably arguable claim of invalidity so that the claim could be determined in judicial review proceedings before the Supreme Court. I am of the view that the same should also apply to proceedings before the Supreme Court where those proceedings are not by way of judicial review but a collateral challenge has been made to an administrative decision based on the exercise of a discretion, and there is a reasonably arguable claim and the invalidity alleged is not patent on the face of a decision. The Supreme Court has a discretion to adjourn the case provided it is not functus officio in order for the claim to be properly determined in judicial review proceedings.

One good reason for this is that in a collateral challenge, the Court is almost bound to go on the facts proved in relation to an administrative decision without any discretion to exercise whether the relief sought should be granted or refused. In judicial review, the remedies are of course discretionary and the Court, in the exercise of its discretion, may still refuse the remedy sought. It will therefore be a denial of the opportunity to raise the "discretionary argument" to the party who is opposing the relief sought, if there is a reasonably arguable claim of invalidity and the case is not adjourned so that the claim is determined in appropriate judicial review proceedings.

In this case, the defendant has not sought judicial review of the exercise by the Comptroller of Customs of his discretion under section 245 (b) of the Customs Act. What the defendant has done by challenging the exercise of that discretion, and any decision that follow from it, on the ground of unreasonableness in the Wednesbury sense, is tantamount to lauching a collateral challenge. But there are reasonably arguable claims for and against the alleged invalidity of what the Comptroller of Customs did. And there is also no invalidity which is patent on the face of any decision made by the Comptroller of Customs, in terms of the passages already quoted from Cooke J and Professor Taggart. So the collateral challenge by the defendant in this case is not appropriate.

It is true that section 255(5) of the Customs Act allows the defendant to file a statement of defence with an accompanying affidavit verifying his interest in the goods if he opposes condemnation proceedings. But I do not think that section 255(5) precludes the necessity for judicial review proceedings in an appropriate case like this one.

It is not necessary to deal with the other legal submissions made by counsel for the informant and the defendant now, as this is only an interim decision.

I have therefore come to the view that I should exercise my discretion in favour of adjourning this case so that the defendant could file an appropriate application for judicial review. This case is adjourned to 20 September 1993 for the defendant to file that application. Leave is reserved to the informant to apply for costs.

T F M Sapolu

CHIEF JUSTICE