IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 351/93

BETWEEN: ALFRED HUNT of Apia, Businessman

Applicant

A N D: THE ATTORNEY-GENERAL sued in respect of the Comptroller of Customs

Respondent

Counsel: R. Drake for applicant
M. Edwards for respondent

Hearing: 16 November 1993

Judgment: 4 October 1994

JUDGMENT OF SAPOLU, CJ

This case raises for the first time the availability of judicial review in relation to the forfeiture and seizure of goods under the relevant provisions of the Customs Act 1977. The present judicial review proceedings have arisen out of still incomplete condemnation proceedings under that Act by reason of the suggestion from counsel that some of the arguments raised for the applicant in the condemnation proceedings should be properly dealt with in separate judicial review proceedings. The novelty of the issues involved has contributed to the difficulties in dealing with this case.

Section 245 of the Customs Act 1977 in so far as it is relevant to these proceedings provides :

> "245 - Goods forfeited : In addition to all other goods "elsewhere declared by the Customs Act to be forfeited, "the following goods shall be forfeited to the Government :
>
> "(a) .....
>
> "(b) All dutiable or restricted goods found 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 passen- " gers, and not being accounted for to the satisfac- " tion of the Comptroller";

Sections 246 to 248 of the Act then provide for other things liable to forfeiture; and section 249 provides that forfeiture of goods relates back to the date of the act or event from which the forfeiture accrued.

Section 250 of the Act which deals with the seizure of forfeited goods then provides in so far as it is relevant as follows :

> "250 - Seizure of forfeited goods - (1) Any officer of "Customs or member of the Police may seize any forfeited "goods or any goods which he has reasonable and probable "cause for suspecting to be forefeited".

Section 251 then provides that any goods found within the territorial limits of Western Samoa may be seized as forfeited.

Section 252 deals with the rescue of forfeited goods, and section 253 provides for the giving of a notice of seizure.

Sections 254 to 277 then deal with the question of condemnation of goods seized as forfeited. It is not necessary to quote any of these provisions relating to condemnation as the application for judicial review is directed to the forfeiture and seizure provisions already quoted. However, I will refer briefly in the course of this judgment to the question of condemnation in so far as it relates to one of the points raised by counsel, namely, whether condemnation has already taken place in this case or not. Before proceeding further, it is to be noted that the application for judicial review does not specify which judicial remedy is being sought. However, in my view, that is not fatal to this applica- tion; it is for the Court, in the exercise of its discretion, to grant the appropriate judicial remedy, if any such remedy ought to be granted.

Now counsel for the applicant in her argument submitted that the last words of the forfeiture provision in section 245(b), namely the words, "and not being accounted for to the satisfaction of the Comptroller", confer a discretion on the Comptroller of Customs; and the Comptroller of Customs did not act reasonably or in accordance with the principles of natural justice in the exercise of that discretion, when he came to the conclusion that the

goods imported by the applicant were not accounted for to his satisfaction. The reason for this, according to counsel for the applicant, is that, there were relevant factors which the Comptroller of Customs did not take into account in the exercise of his discretion, but those factors were favourable to the applicant. The argument for the applicant also touched on the seizure provision in section 250(1) and counsel for the applicant submitted that the Customs officer who seized the applicant's goods did not act reasonably or in accordance with the principles of natural justice in doing so, because he had no reasonable and probable cause for suspecting the goods imported by the applicant to be forfeited. So essentially the two grounds on which the challenge in this case is founded are those of reasonableness and breach of natural justice. Counsel for the applicant's argument on the ground of reasonableness was based on the well known judgment of Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223. I will deal as a matter of law, with the two grounds on which the application for judicial review is founded shortly. Counsel for the respondent in his argument submitted that on both forfeiture and seizure, the Customs authorities did act reasonably; alternatively, the onus of proof is on the applicant to show that the Customs authorities acted unreasonably, and he has failed to discharge that onus. Counsel for the respondent also made the alternative submission that the forfeiture and seizure provisions of the Customs Act provide a 'code' and

therefore there is no room for implying the principles of natural justice and the requirement for a hearing under those provisions.

There is no doubt in my mind that the legal issues raised in the submissions and arguments by counsel are very important issues in the field of administrative law and I will deal with those issues now as a matter of law. I will come to the facts of this case after the legal issues have been clarified.

Dealing first with the question of reasonableness or unreasonableness as a ground for judicial review, it must be said that reasonableness in the Wednesbury sense has been applied by administrative lawyers to many different situations to mean many different things. As a result, there has been some confusion and inconsistency in the way the test for reasonableness has been phrased. However, the test for reasonableness which now finds dominance in New Zealand is that stated by Cooke P in Webster v Auckland Harbour Board [1987] 2 NZLR 129, 131 (CA) where His Honour says :

> "I accept that the Court was bound to act reasonably
> "and do not think that anything significant is gained
> "in this or other administrative law cases by adding
> "'in the Wednesbury sense'. An unreasonable decision
> "in the ordinary sense is one outside the limits of
> "reason. Or, in other words, one that no reasonable
> "body could reach.... Changes in emphasis may be
> "called for from time to time by changing trends or by
> "the facts and arguments in particular cases. But in
> "my opinion steady and unvarnished adherence to the

> "ordinary sense just mentioned is all that is needed
> "in principle. As with many other principles of law,
> "the real difficulties arise when particular sets of
> "facts have to be scrutinised. These difficulties have
> "to be grappled with by judgment and are not eased by
> "semantics".

What Cooke P says in Webster's case was foreshadowed in his address entitled "The Struggle for Simplicity in Administrative Law" which is published in Judicial Review of Administrative Action in the 1980s : Problems and Prospects edited by Professor Taggart. At page 14 of that publication Cooke P says :

> "Last, a submission on which I would lay some stress.
> "Just as I have gone to the length of suggesting that
> "fair means fair, so I ask you to entertain the serious
> "possibility that reasonable means reasonable. The
> "definition in the Concise Oxford Dictionary, reflecting
> "as it should ordinary educated usage, is 'within the
> "'limits of reason'. What is outside those limits is
> "unreasonable; what is inside them is reasonable".

I respectfully adopt the statement of principle by Cooke P in Webster's case as the test for what is a reasonable or unreasonable decision or exercise of discretion. This seems to be another significant change in the rapidly developing field of administrative law.

As to the point about the Customs authorities not taking into account relevant factors in the exercise of their discretion under the forfeiture and seizure provisions of the Act. I will deal with

that point under the umbrella of reasonableness when I come to the facts of this case, as counsel for the applicant has argued the question of not taking into account relevant factors under the umbrella of reasonableness. I accept that a relevant or irrelevant factor may overlap with the ground of reasonableness in the circumstances of some cases, but it must also be appreciated that conventionally, the failure to take into account a relevant factor or the taking into account of an irrelevant factor, is an independent ground for judicial review in its own right : see for instance the judgment of Mason J in Minister for Aboriginal Affairs v Peko Wollsend Ltd (1986) 162 CLR 24 and that of Cooke P in New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries [1988] 1 NZLR 544.

That brings me to the question of natural justice. It must be pointed out that at the present state of administrative law, the terms 'natural justice' and 'fairness' have been used inter-changeably by the Courts so that the two are now treated as synonymous. In the well known dictum by Lord Morris in the judgment of the Privy Council on an appeal from New Zealand in Furnell v Whangarei High Schools Board [1973] 2 NZLR 705, 708 it is stated :

> "It has often been pointed out that the conceptions
> "which are indicated when natural justice is invoked
> "or referred to are not comprised within and are not
> "to be confined within certain hard and fast and rigid

"rules (see the speeches in Wiseman v Bornerman [1971] "A.C. 297; [1969] 3 All E.R. 275). Natural justice is "but fairness writ large and juridically. It has "been described as 'fair play in action'. Nor is it a "leaven to be associated only with judicial or quasi- "judicial occasions. But as was printed out by Tucker LJ "in Russell v Duke of Norfolk [1949] 1 All E.R. 109, 118, "the requirements of natural justice must depend on the "circumstances of each particular case and the subject "matter under consideration".

In the High Court of Australia in Salemi v Mackellar (1977) 137 CLR 396 Gibbs J says :

"Some judgments suggest that the duty to act fairly arises "from a principle separate from, although analogous to, "the principles of natural justice (see de Smith : Judicial "Review of Administrative Action, 3rd ed., (1973) pp 208-209) "but I would prefer to regard the duty to act fairly as "simply flowing from the duty to observe the principles of "natural justice. 'Natural justice is but fairness writ large "'and juridically. It has been described as fair play in "'action' (Furnell v Whangarei High Schools Board)".

In Dagnayasi v Minister of Immigration [1980] 2 NZLR 130, 141 Cooke J says :

"Perhaps it is as well to repeat some points that by "1980 have become fairly elementary. The requirements "of natural justice vary with the power which is exer- "cised and the circumstances. In their broadest sense "they are not limited to occasions which might be "labelled judicial or quasi-judicial. Their applica- "bility and extent depend either on what is to be "inferred or presumed in interpreting the particular "Act (as is suggested by the speech of Lord Hailsham LC "in Pearlberg v Varty [1972] 2 All E.R. 6, 11) or on "judicial supplementation of the Act when this is neces- "sary to achieve justice without frustrating the appa- "rent purpose of the legislation (as Lord Reid put it in

"Wiseman v Bornerman [1971] A.C. 297, 308; [1969] 3 All "E.R. 275, 277). In order to stress that there are some "legally enforceable elementary standards not confined "to the exercise of powers like those of Courts but that "they do not necessarily call for a procedure at all close "to Court procedure, the English Courts have tended for "more than a decade to use the term 'fairness' instead of "or as an alternative to natural justice. The tendency is "usually said to have began with the judgments of Lord "Parker CJ and Salmon LJ in Re H K [1967] 2 Q.B. 617; "[1967] 1 All E.R. 226. It has been promoted by Lord "Denning MR in a number of cases, such as R v Secretary "of State for the Home Department, ex parte Mughal [1974] "Q.B. 313, 325; [1973] 3 All E.R. 796, 803. A vigo-"rous justification of it is to be found in the judgment "of Lawton LJ in Maxwell v Department of Trade and Industry "[1974] Q.B. 523, 539; [1974] 2 All E.R. 122, 131. As an "instance of identification of fairness and natural justice "at the highest level of authority in England it is enough "to add the whole of the speech of Lord Wilberforce in "Wiseman v Bornerman. And as an instance of preference in "the field of administrative decisions of 'fairness' to "'natural justice' as a matter of terminology, one may refer "to the speech of Lord Diplock in Bushell v Secretary of "State for the Environment [1980] 2 All E.R. 608, 612-613. "For New Zealand the most authoritative decision is that "of the Privy Council in Furnell v Whangarei High Schools "Board [1973] A.C. 660; [1973] 2 NZLR 705, with the well-"known statements in the majority judgment.....that natural "justice is but fairness writ large and juridically, fair "play in action. This Court has constantly followed that "approach.... And while there was a striking division of "opinion as to the result in the case next to be cited, the "High Court of Australia has been, I think, at one - or almost "so - in adapting the same basic approach in Salemi v "Minister of Immigration and Ethnic Affairs (No.2) (1977) "14 ALR 1 and R v Minister for Immigration and Ethnic "Affairs, ex parte Ratu (1977) 14 ALR 317".

While it is clear from the case law that natural justice is synonymous with fairness, and the two terms may be used interchangeably; it is also now clear from Furnell v Whangarei High Schools Board with the reference to what Tucker LJ said in Russell

v Duke of Norfolk that the requirements of natural justice or fairness depend on the circumstances of each case including the subject matter under consideration. These circumstances will also include the nature of the inquiry and the rules under which the decision-maker is acting : Kioa v Minister for Immigration and Ethnic Affairs (1985) 159 CLR 550, 585 per Mason J. In other words the duty to observe the principles of natural justice or to act fairly does not mean in every case that a formal hearing has to be given to a person whose interests have been affected by a decision or exercise of discretion by a public authority. The administration of Government will be impossible if that were to be the case. Everything depends on the circumstances of each case. In the circumstances of some cases a formal hearing may be required by the duty to act fairly; in other cases no formal hearing is necessary and the requirement to act fairly will be satisfied if the person affected by a decision or exercise of discretionary power is confronted with the case against him and he be given the opportunity to simply reply orally or in writing. As I have said the requirements of natural justice or fairness all depends on the circumstances of each case. So the question in this case is, if the Customs authorities were under a duty to act fairly under the forfeiture and seizure provisions of sections 245(b) and 250(1) of the Customs Act what were the requirements of that duty in the particular circumstances of this case. That is a question I will have to deal with later in this judgment. In the meantime I will

continue to deal with the legal issues raised by counsel.

The next issue is whether the forfeiture and seizure provisions of the Customs Act constitute a 'code'. In Brettingham-Moore v St Leonards Corporation (1969) CLR 509, 524 Barwick CJ in the High Court of Australia said :

> "The opportunity to put forward his views and the "supporting material in the form of a petition would "seem to me in this type of statutory scheme to "satisfy the common law requirements of natural "justice. But in any case s.15 is a clear indication "by the legislature of the nature of the opportunity "which it will afford the aggrieved persons to make "known their views and the material upon and by which "they seek to support them. The case is not one in "which the legislature is silent as to the right to be "heard, so that the common law can fill the void. The "legislature has addressed itself to the very question "and it is not for the Court to amend the statute by "engrafting upon it some provision which the Court might "think more consonant with a complete opportunity for an "aggrieved person to present his views and to support "them by evidentiary material".

In Whangarei High Schools Board v Furnell [1971] NZLR 791 which dealt with disciplinary proceedings under the Education Act 1964 (NZ) and subordinate regulations, Wild CJ with the concurrence of the other members of the New Zealand Court of Appeal said :

> "When it is borne in mind that the regulations were "brought into existence on the recommendation of "representatives of the teachers and of the School "Board I think it is clear from both their history "and their content that they provide a code of disciplinary procedure which is complete and exhaustive.

"That must be regarded as a strong indication that "the regulations leave no room for any rule of natural "justice to be implied".

It is to be noted that it is this case which went up from the New Zealand Court of Appeal to the Privy Council as Furnell v Whangarei High Schools Board. These cases, just mentioned, may be treated as authority for the 'code approach'. This approach means that where the legislature has set out in the relevant legislation elaborate and detailed procedures for dealing with the aspects of a particular matter, then the duty to observe the principles of natural justice or to act fairly is not to be implied. In both Brettingham-Moore and Furnell's case, the procedures set out in the relevant provisions to deal with the matter at hand were quite elaborate and detailed; in Furnell's case they were described as 'complete and exhaustive'. In my view the same cannot be said of the forfeiture and the seizure provisions of the Customs Act. They do not contain elaborate and detailed provisions as to the procedures for the exercise of any discretion or the making of any decision or dealing with any grievance. They therefore do not constitute a code which excludes the application of natural justice or fairness. I should also point out that the code approach was applied by Jeffries J in Bourke v State Services Commission [1978] 1 NZLR 633 but see what was said on that case, and the code approach, by Cooke J in Fraser v State Services Commission [1984] 1 NZLR 116 (C.A.).

I have also examined the decision of the Full Court of the Federal Court of Australia in Australian Federal Police v Craven (1989) 20 FCR 547 relied on by counsel for the respondent, and it does not support his argument that section 510 of the Customs Act as to seizure constitutes a code which excludes the application of natural justice or fairness. In fact the leading judgment in that case, which was delivered by Foster J, does recognise that the exercise of the power of seizure under the Customs Act 1901 (Cth) can be the subject of a judicial review application under the Administrative Decisions (Judicial Review) Act 1977 (Cth). It appears to me that the word 'code' as used in Craven's case was not intended to mean the 'code approach' as applied in other cases, but something different.

I must also say that in considering the 'code approach' I have not overlooked the fundamental rights provisions of the Constitution. But as the Constitution was not adverted to in this case, I say no more about it in this case. I will also from this point onwards in this judgment use the term 'fairness' without continuing to repeat its synonym, 'natural justice'.

That brings me back to the forfeiture provision in section 245(b) and the seizure provision in section 250(1) of the Customs Act, and whether the exercise of discretion under those provisions as alleged by counsel for the applicant can be subject to judicial

review. Dealing first with section 245(b), I am of the view that the words in that section "and not being accounted for to the satisfaction of the Comptroller" does involve the exercise of a discretion by the Comptroller of Customs. It is for him in the exercise of that discretion to decide whether the goods in question have been accounted for to his satisfaction. Such exercise of discretion determines for the purpose of section 245(b) whether the goods in question are forfeited or not. In Australia there seems to be a conflict of judicial opinions whether forfeiture under the Customs Act 1901 (Cth) can be the subject of judicial review proceedings. This appears from the cases cited by counsel for the respondent.

In Pearce v Burton (1986) 8 FCR 408, Fox and Spender JJ in the Federal Court were of the opinion that the question of forfeiture of goods under the Customs Act 1901 could not be the subject of judicial review proceedings under the Administrative Decision (Judicial Review) Act 1977. That opinion was accepted and endorsed by Jackson J in O'Neil v Wrotten (1986) 11 FCR 404. The same opinion seems to have been accepted in the judgment of O'Loughlin J in Whim Creek Consolidated v Colgan (1991) 31 FCR 469, 476-477 with which the other members of the Court in that case concurred. The contrary view that the question of forfeiture under the Customs Act 1901 can be the subject of judicial review proceedings was expressed by Pincus J in Turner v Owen (1990) 26 FCR

366. In Brunetto v Collector of Customs (1984) 4 FCR 92 the Court did not consider it necessary on the circumstances of that case to decide the point.

I have carefully considered all those Australian cases and in my view they are distinguishable from the present case. The reason is that under the forfeiture provisions of section 229 of the Customs Act 1901 (Cth) there is no discretion to be exercised by any person. So there is no exercise of discretion which can be the subject of judicial review proceedings. Forfeiture simply arises on the happening of certain events provided in section 229, without the necessity to exercise a discretion. See the judgment of O'Loughlin J in Whim Creek Consolidated v Colgan. The same may be said of the forfeiture provisions of paragraphs (a), (c)-(f) of section 245 of our own Customs Act which do not contain any discretionary element but simply events which, if they do occur, constitute a forfeiture. That is not so with section 245(b) which does confer a discretion to be exercised by the Comptroller of Customs. In my view the exercise of that discretion can be the subject of judicial review proceedings and the requirements of reasonableness and fairness apply.

Coming now to the seizure provision of section 250(1) which empowers any officer of Customs or member of the Police to seize any forfeited goods or any goods he has reasonable or probable

cause for suspecting to be forfeited, there is no question about the element of discretion involved in that provisions. The exercise of that discretion can be the subject of judicial review proceedings. All the cases cited from the Australian Federal Court in this judgment are authorities for that proposition. It must, however, be noted that if judicial review succeeds in respect of the exercise of discretion under section 245(b), then that will necessarily resolve the issue in relation to the exercise of discretion under section 250(1) as the goods will not then be forfeited goods.

There is another matter I should refer to as it has some hearing on the application for judicial review. Counsel for the applicant also submitted that the goods in this case have already been condemned. If that is correct, it raises the difficult question whether it is now too late or inappropriate for the applicant to seek judicial review of the forfeiture and seizure of the goods : on this point see the judgment of Foster J in Australian Federal Police v Craven (1989) 20 FCR 547. I accept what counsel for the respondent has submitted that no condemnation of the goods has taken place. I say that because in the circumstances of what happened in this case, there was substantial compliance with the provisions of section 254 within the one month prescribed time limit; and condemnation proceedings have yet to be concluded. I say nothing about the availability or otherwise of a

common law action in detinue or conversion against an unlawful seizure under the provisions of the Customs Act as the matter was not touched upon or raised before this Court.

I turn now to the evidence for determination of the essential questions in this case. These are, did the Comptroller of Customs act fairly under the forfeiture provision of section 245(b) and did he exercise his discretion reasonably under that provision; and secondly did the Customs authorities act fairly and reasonably under the seizure provision of section 250(1), and did they have reasonable and probable cause for suspecting the goods they seized as forfeited goods.

Now the applicant operates a business in Apia for general merchandise. He used to have business dealings with a Korean businessman in Pago Pago, American Samoa, who trades under the name of 'O & O Enterprises'. According to the applicant, O & O Enterprises contacted him in January 1993 and requested his assistance for the sale of siemin noodles. The applicant refused but O & O Enterprises still sent over to Apia a container of those siemin noodles. The applicant did not pack the container in American Samoa, or was present when the container was packed. This container of siemin noodles together with containers of empty Vailima beer bottles destined for the Western Samoa Breweries Ltd at Vaitele were shipped from the port of Pago Pago by Polynesia

Shipping Services on the ship Kyowa Violet which left Pago Pago on 18 January 1993 destined for the port of Apia. Polynesia Shipping Services is the shipping agent in American Samoa for the Kyowa Shipping Co which runs the ship Kyowa Villet.

The ship Kyowa Violet arrived in the port of Apia on 19 January and was subject to the usual clearance by the Customs authorities. According to the evidence by the Customs authorities, the practice with goods imported into Western Samoa on a ship is that before such ship arrives in the port of Apia, a manifest is sent to Customs by the local agent for the ship setting out the cargo on board the ship and the names of the respective importers. That manifest is called the cargo manifest. So before a ship arrives, Customs already has in its possession the cargo manifest for the cargo carried on board that ship; and when the ship arrives in port the Customs authorities would use the cargo manifest already sent to them by the ship's local agent to check the cargo. This is to ensure that customs duty is paid on all imported dutiable goods. In this case, Morris Hedstrom Ltd, the local agent for Kyowa Shipping Co., sent a cargo manifest to Customs before the arrival of the ship Kyowa Violet on 19 January setting out the cargo carried on board that ship and the names of the importers. When the Kyowa Violet arrived in Apia and its cargo was checked by the Customs authorities against the cargo manifest sent to them by Morris Hedstrom Ltd, it was discovered that the containers for the

Western Samoa Breweries Ltd and the applicant carried in the ships cargo were not accounted for in the cargo manifest. So the Customs authorities decided to retain those containers and not to release them. There is then some conflict in the evidence as to what happened next. According to the Customs senior examining officer who led the clearance of the ship Kyowa Violet, an employee of Morris Hedstrom Ltd, the ship's local agent, handed him a single leaf manifest during the clearance of the ship. That single leaf manifest showed the four containers consigned to Western Samoa Breweries Ltd but there was no manifest given to him for the applicant's single container. The evidence by Morris Hedstrom's employee was that he gave two manifests, one for Western Samoa Breweries four containers and one for the applicant's single container, to the Customs senior examining officer. A report on these unaccounted for containers was then submitted by the Customs officials who conducted the clearance to the Comptroller of Customs. The Comptroller of Customs then decided to order an investigation into these containers and a different Customs officer was instructed to carry out the investigation. As we are not concerned in this case with the containers consigned to the Western Samoa Breweries Ltd, I will now continue the narrative only in so far as it relates to the container consigned to the applicant.

On or about 22 January, the Customs officer assigned to the investigation went to see the shipping manager for Morris Hedstrom

Ltd about the unaccounted for container consigned to the applicant, and he was given by the shipping manager two manifests. The first manifest which is dated 20 January 1993 is a single leaf manifest (with a copy of the same attached to it) and it shows containers of goods consigned from Suva to Apia and then containers of goods consigned from Pago Pago to Apia. To pause here for the moment, it appears to me that the cargo manifest sent by Morris Hedstrom Ltd to Customs before the arrival in Apia of the ship Kyowa Violet on 19 January shows only containers of goods consigned from Ngoya, Hong Kong and Kobe for Apia; but no containers from Suva or Pago Pago for Apia. Now this first manifest also shows a container of fish meal consigned from Pago Pago for the applicant in Apia.

The second manifest which is dated 18 January 1993 and given by the shipping manager of Morris Hedstrom Ltd to the Customs investigating officer, was described by the shipping manager of Morris Hedstrom as the amended or corrected manifest, that is, it is an amendment or correction of the first manifest. This second manifest shows the shipper as O & O Enterprises in Pago Pago, American Samoa, and the consignee as the applicant in Apia, Western Samoa. The description of the goods given in this second manifest is general merchandise as opposed to the description given in the first manifest as fish meal. According to the Customs investigating officer, he did not believe that the second manifest was an amended or corrected version of the first manifest because

the normal practice is that copies of manifests should have attached to them copies of the relevant bill of lading but no copy of any bill of lading were attached to the copy of the manifest given to him. He also says he did not sight any bill of lading at all for the applicant's cargo. To pause here again, I think there is another difficulty with the copies of the two manifests given to the Customs investigating officer. The first manifest is dated 20 January 1993 and the second manifest which is said to be an amendment or correction of the first manifest is dated 18 January 1993. I cannot see how a manifest dated 18 January 1993 could have amended or corrected a manifest dated 20 January 1993. On 22 January the Customs investigation officer submitted a report on his investigation to the Comptroller of Customs.

As a result of that report the Comptroller of Customs, who has worked in the Customs Department for 31 years, decided to retain the goods. He also says that the three or four different documents relating to the applicant's container which were placed before him did not reconcile and that made him suspicious that something wrong was going on in relation to the applicant's container. His suspicion was increased when after his decision to retain the applicant's container, that container was returned to the Customs area by Customs officers on duty at the Customs check point where it was discovered on a Morris Hedstrom truck about to pass through the gate. According to the evidence by Morris Hedstrom Ltd on this

point, a member of their staff must have made an inadvertent typing error when preparing the customs delivery note for the Western Samoa Breweries four containers by including the number of the appli- cant's container in the customs delivery note for the four containers for Western Samoa Breweries and omitted the number for one of the Western Samoa Breweries containers. As a result the Morris Hedstrom truck that went down to uplift the four containers for Western Samoa Breweries picked up three of the Western Samoa Breweries four containers and the applicant's container leaving behind at the Customs area one of the Western Samoa Breweries container. The Customs officer at the check point discovered the applicant's container on the Morris Hedstrom truck as it was on its way out and returned it back to the Customs area.

It appears that the Comptroller of Customs was then approached by the applicant who said that there was a mistake in the manifest and that instead of fish meal it should have been siemin noodles; the mistake was not his but somebody else's. The Comptroller of Customs also received two letters from Morris Hedstrom about four or five weeks after the arrival of the ship Kyowa Violet saying that there was an inadvertent error in the cargo manifest; and that it should have been siemin noodles instead of fish meal. The Comptroller of Customs also received a letter from Polynesia Shipping Services in Pago Pago, the shipping agent for the Kyowa Shipping Co in American Samoa, saying that the error in the cargo

manifest was an inadvertent typing error by a member of its staff and that it should have been general merchandise and not fish meal. The Comptroller of Customs in his evidence said he did not believe these explanations.

He then sought legal advice from the Attorney-General's Office and advice from the Health Department regarding fitness of the siemin noodles for human consumption because of their expiry date noted on the labels. On the basis of the advice from the Attorney-General's Office and the Health Department, the Comptroller of Customs decided on 26 February 1993 to seize the applicant's container of goods and issued a seizure notice to the applicant. The goods were also tendered for sale. The Court was advised from the bar that the customs tariff for fish meal is 5% and for siemin noodles it is 20%.

The evidence by the applicant is that invoices for the siemin noodles shipped to Apia on the Kyowa Violet were faxed over to him on 24 or 25 January by O & O Enterprises in American Samoa. He then prepared the import entry for siemin noodles and sent it to the Central Bank for approval. This must be for the remittance of money overseas to pay for the goods. After approval was given by the Central Bank he took the import entry to the Customs Department to clear the goods and gave it to an officer of Customs who told him to see the Comptroller of Customs as there was something wrong

with the consignment. According to the applicant when he saw the Comptroller of Customs, he was told that his container had been confiscated as the goods declared in the manifest were different from the goods discovered in the container when checked by Customs. He was also told by the Comptroller of Customs that he wanted an investigation into the container and the paperwork involved. That was the first time, the applicant says, he was aware that something had gone wrong with the container. When the applicant saw the Comptroller of Customs again, he was told that the matter was with the Attorney-General's Office. The applicant says he also went to see the shipping manager of Morris Hedstrom Ltd as local agent for Kyowa Shipping Co and he was given a bill of lading. This was two or three days after the applicant had been to see the Minister of Customs. This bill of lading was produced in this case by the applicant and it is unsigned and shows the description of the goods as fish meal. He also says that he asked someone in Customs about the tariff rate for siemin and fish meal and he was told it was 20% and 35%. That person in Customs, whoever he is, was not called to give evidence. I accept what the Court was told from the bar that the correct tariff for fish meal is 5% and not 35%; and for siemin noodle the correct tariff is 20%.

The evidence by the shipping manager for Morris Hedstrom Ltd is that he submitted all the cargo manifest for the goods from other countries to the Customs Department three or four days before

the arrival of the Kyowa Violet except for the manifest for goods from Pago Pago as the Kyowa Violet berthed for a short while in Pago Pago; and so the cargo manifest for the goods from Pago Pago was not sent over but given to the captain of the ship to deliver to him or his assistant whichever of the two would be at the Apia wharf on arrival of the ship. He also says that he gave to the Customs investigating officer who came to him copies of the original cargo manifest for the Kyowa Violet which did not show the goods from Pago Pago as well as the copies of the manifests, including the corrected manifest, for the containers from Pago Pago. I have already mentioned the difficulty with the manifest alleged to have been brought by the captain of the Kyowa Violet from Pago Pago as it shows goods consigned from Suva to Apia but there is no such manifest for goods from Suva for Apia in the cargo manifest sent by Morris Hedstrom Ltd to the Customs Department before the arrival of the Kyowa Violet. The evidence is rather unsatisfactory and obscure on this point.

Then after the applicant's container was retained by Customs, the shipping manager of Morris Hedstrom Ltd says he contacted the manager of Polynesia Shipping Services in Pago Pago about what had happened and a fax was sent over from Polynesia Shipping Services on 25 January for correction of the manifest. On the basis of that fax, the shipping manager for Morris Hedstrom Ltd sent a letter to the Comptroller of Customs requesting that the error in the

manifest was an inadvertent error and that fish meal should be amended to read general merchandise. The Customs authorities did not accept that explanation in view of the other related circumstances and Morris Hedstrom Shipping manager says that he then contacted Polynesia Shipping Services again and the latter sent an undated faxed letter which was received by Morris Hedstrom on 23 March.

Now on 26 January, the applicant says he saw Morris Hedstrom's shipping manager who explained to him the problem with the container. The Morris Hedstrom shipping manager also gave to him an amended bill of lading which shows the description of the goods as general merchandise. This amended bill of lading is dated the same date, namely 18 January 1993, as the original bill of lading it purported to amend. It is also quite different in form from the original bill of lading. Furthermore while the original bill of lading is unsigned, the amended bill of lading is signed only by Polynesia Shipping Services as agent for Kyowa Shipping Co but not by O & O Enterprises as shipper of the goods. If the bill of lading represents a contract between O & O Enterprises as shipper and Kyowa Shipping Co as agent for the carrier of the container of goods, one would have expected O & O Enterprises to also sign or affix its seal to the bill of lading. That is not the case with the original or amended bill of lading.

The manager for Polynesia Shipping Services in his evidence says that the applicant is one of their regular customers. He also says that a girl in his office made the error of typing fish meal instead of general merchandise into the manifest. He says that this type of error happens all the time. He also says that Polynesia Shipping Services had just sent thirty seven containers of fish meal to Japan and that might have been the reason why she typed in fish meal instead of general merchandise for the applicant's container to Apia. When the mistake was discovered, he instructed his staff to correct the manifest and the bill of lading. The Customs authorities decided not to accept that explanation either. The Comptroller of Customs and a lawyer from the Attorney-General's Office also went over to American Samoa and made an inquiry with Polynesia Shipping Services in relation to the applicant's container and the alleged inadvertent typing error.

The first question is whether on the evidence the Comptroller of Customs acted with fairness. I think he did. When the applicant approached him about the container, he told the applicant the reason why the container had been retained by Customs. He did not refuse to see the applicant or hide the true reason from him. Fairness, as already explained, does not mean a formal hearing should be given in every case. Everything depends on the circumstances including the subject matter of the case at hand. Did the Comptroller also act reasonably in the exercise of his discretion

that the container was not being accounted for to his discretion? I also think he did. Given what happened and the very conflicting and confusing nature of the documentation given to him, he was quite justified in coming to the conclusion he reached. It might be said that he did not take into account a relevant factor which was the alleged inadvertent typing error by a girl at the office of Polynesia Shipping Services at Pago Pago; but I do not think that was what happened here. It appears to me that the Comptroller of Customs did take that factor into account but did not attach any weight to it because he disbelieved the explanation when other evidence before him were also considered. That is confirmed by the fact that the Comptroller of Customs did go over with a lawyer from the Attorney-General's Office to American Samoa and inquired of Polynesia Shipping Services in relation to the applicant's container and the alleged typing error in the manifest. So the Comptroller of Customs did not close his mind to the matter or simply brush it aside without giving it any consideration. He obviously took the matter into account quite seriously as shown by the fact that he did go over with a government lawyer to American Samoa and made inquiry about it. And I also do not think that in view of all the circumstances of this case the Comptroller of Customs acted unreasonably by not attaching any weight to the explanation given by Polynesia Shipping Services, and therefore deciding that the goods were not accounted for to his satisfaction. It is also to be remembered that we are here dealing with a special

kind of legislation which is a revenue piece of legislation. Customs legislations are not always easy to police and the exercise of discretion under such legislations quite often, if not always, involves some subjective element. The onus to show that the exercise of that discretion has been unreasonable lies on the applicant. I do not think that onus has been discharged in this case.

If, however, judicial review is not available for the exercise of the Comptroller of Customs discretion in relation to forfeiture under section 245(b) of the Act, then I will have to move on to consider the seizure of the goods under section 250(1). Here again fairness does not mean a formal hearing in every case. The requirements of fairness depend on the circumstances including the subject matter of the case. I think the Customs authorities acted fairly by listening to what was said for the applicant and by explaining to the applicant personally the reason the goods were retained and eventually seized by Customs. A seizure notice, as required under the Act, was even sent by the Comptroller of Customs to the applicant and the Customs authorities also considered all the explanations by the Morris Hedstrom Shipping including the explanation from Polynesia Shipping Services but decided to disbelieve those explanations. As to whether the Customs authorities had reasonable or probable cause for suspecting that the goods were forfeited, it is clear there were ample grounds for

such a suspicion. Firstly, the applicant's container was not shown in the cargo manifest sent by Morris Hedstrom to the Customs Department before arrival of the Kyowa Violet for the purpose of clearing the cargo of that ship; secondly, the manifest from Polynesia Shipping Services in American Samoa showed fish meal which carries a tariff rate of 5% while the container contained siemin noodles which carries a tariff rate of 20%; thirdly, no manifest for the applicant's container was given to the Customs authorities during the clearance of the ship Kyowa Violet; fourthly, a Morris Hedstrom truck carried the applicant's container to the Customs check-out point where it was discovered by Customs officers and Morris Hedstrom says it was an inadvertent typing error in the delivery note; fifthly, there was no bill of lading attached to the manifests shown by Morris Hedstrom to the Customs investigating officer when it is normal practice for a copy of the bill of lading to be attached to the copy of the manifest; sixthly, the manifest which is supposed to amend the original manifest is dated 18 January 1993 whereas the original manifest is dated 20 January 1993; seventhly, the two bills of lading, one supposed to be an amendment of the other, bear the same date and are quite different in form; eighthly, the first bill of lading is unsigned whereas the second bill of lading is dated 18 January 1993 and signed by Polynesia Shipping Services but not by the shipper; ninethly, the manifest submitted by Morris Hedstrom when this matter was under investigation shows not only goods from Pago Pago

for Apia but also goods from Suva for Apia but there is no mention of any goods from Suva for Apia in the cargo manifest sent by Morris Hedstrom to the Customs Department before the arrival of the Kyowa Violet. When all those matters are considered against the evidence for the applicant and the explanation given by Polynesia Shipping Services for the alleged typing error in the manifest, I am of the clear view that the Customs authorities had reasonable and probable cause for their suspicion that the goods in this case were forfeited goods, and that they acted reasonably in seizing the goods.

As for the evidence given by Polynesia Shipping Services that the kind of typing error which occurred in this case happens all the time, I am not impressed that such typing incompetence should continue to be allowed to happen all the time when it could lead to serious consequences. I also find no evidence from Morris Hedstrom Ltd, the Western Samoa shipping agent for Kyowa Shipping Co, that the kind of typing error alleged in this case happens all the time in the field of shipping agency. As for part of Polynesia Shipping Services evidence that it exports fish meal to Japan and had just sent a consignment of thirty seven containers of fish meal to Japan before the Kyowa Violet left Pago Pago for Apia, I am not satisfied that that was the cause of the alleged typing error in this case. Fish meal is not exported, or at least not often or regularly exported, from American Samoa to Western Samoa. The differences

between fish meal and siemin noodles, and between Japan and Western Samoa, are not insignificant. I am not impressed with the quality of this evidence but the onus is on the applicant. I do not think that the applicant has been discharged that onus.

In all the application for judicial review is dismissed.

Counsel to file memoranda as to costs within 10 days if they wish to do so.

T F M Sapolu
CHIEF JUSTICE