

**IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY**

Appeal Case No: AC 12/19 [CV 72 of 2018]

BETWEEN **MINISTER OF REVENUE AND CUSTOMS**
Appellant

AND **COST LOW COMPANY LIMITED**
Respondent

Coram: Whitten P
 Blanchard J
 Hansen J

Counsel: Mr S.F. Sisifa S.G. for the Appellant
 Mr W. Edwards for the Respondent

On the papers

Date of Judgment: 30 March 2020

JUDGMENT OF THE COURT

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Introduction

- [1] The appellant (the **Minister**), the defendant in the Supreme Court, appeals against orders for extended discovery made by Niu J on 11 December 2019. The Minister says the documents he has been ordered to discover are confidential and prohibited from disclosure under s 125 of the Customs and Excise Management Act 2007 (CAP 67) (the **Act**) and also under the general law.
- [2] The hearing of this appeal was to be facilitated by video link with Blanchard and Hansen JJ participating remotely from Auckland. Unfortunately, as a result of travel delays associated with the Covid-19 crisis, Mr Edwards, counsel for the respondent (**Cost Low**) was unable to reach Tonga in time for the hearing. Counsel for both parties subsequently advised their agreement to a hearing being dispensed with and for the matter to be dealt with on the papers pursuant to s15 of the Court of Appeal Act. We acknowledge with gratitude that the careful and comprehensive written submissions of counsel filed in advance have made this course possible.

Background

- [3] Cost Low is a supermarket operator retailing a wide range of household commercial goods. It alleges that such goods are being imported by others into Tonga as household goods, personal effects and the like; the Minister is failing to ascertain their proper value; in the result, he is failing to assess the duty properly payable. The importers or consignees are then selling the goods at markets at an unfair advantage over Cost Low and other importers who pay full duty.
- [4] In judicial review proceedings, Cost Low claims that the Minister has failed to discharge his statutory duty to assess the duty payable by importers of household commercial goods. It seeks a declaration that the Minister has failed to assess and collect the proper value of duty payable and an order for mandamus to require him to lawfully discharge his statutory duty.
- [5] The Minister denies that he is in breach of his statutory obligations.
- [6] By memorandum of 29 July 2019, counsel for Cost Low sought orders that the Minister discover “every document” relating to 12 freight manifests dated between 17 February 2017 and 5 July 2018. The freight manifests had been identified in an affidavit by Charlotte Tu’ile’ila, a shareholder and director of Cost Low. She is also

a shareholder and director of Polynesia Shipping Agency Limited (**PSA**), a shipping agent in Tonga. In that capacity she was able to access the freight manifests for ships for which PSA acts as agent. Each manifest includes particulars of consignments of household goods and personal effects shipped to Tonga on the named vessel.

- [7] On 30 September 2019, Justice Niu made orders that both parties file discovery by 28 October 2019, produce documents by 25 November 2019 and that the trial would take place on 12 and 13 December 2019.
- [8] The Minister's list of documents, filed on 5 December 2010, contained only three documents. Two were standard operating procedures and the other a checklist for documents of each importation.
- [9] On 9 December 2019, counsel for Cost Low applied for an order in terms of a draft attached that the Minister comply with the order made on 30 September and for the time for compliance with the order to be extended. The application was supported by an affidavit by the general manager of PSA. Counsel filed a supporting memorandum the following day.
- [10] The order was made on 11 December. It was made on the papers substantially in terms of the draft order. The Minister was given no opportunity to be heard. The application and supporting affidavit itself was not served on the Minister until 10 December.
- [11] The class of documents covered by the order was more extensive than originally sought. In addition to documents relating to the importations identified in the 12 freight manifests, it included documents in relation to all goods imported since July 2018 as described in D5 manifests.¹

Grounds of appeal

- [12] In his Notice of Appeal, the Minister complains of the denial of his right to be heard but the focus of the appeal is on the issue of confidentiality. The Minister says discovery of the documents in question is prohibited by s125 of the Act and on equitable principles, relying for that purpose on *Friendly Islands Satellite Communications Limited (trading as Tongasat) v Pohiva and Ors* [2015] TOCA 14; AC 14 of 2015.

¹ The term 'D5 manifests' is an abbreviation of the heading on the prescribed form which reads (D5) Bill of Lading Freight Manifest.

[13] Section 125 provides:

“125 Confidentiality

- (1) A Customs officer shall not communicate or allow to be communicated, any information obtained under the Customs laws, to any person not legally entitled to such information.
- (2) Any person who contravenes this section commits an offence and shall be liable upon conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 10 years, or both.
- (3) Nothing in this section shall prevent the disclosure of any document or information to –
 - (a) the Tax Tribunal or Supreme Court in relation to proceedings under this Act;
 - (b) any person in the service of Government where such disclosure is necessary for the performance of the person's official duties;
 - (c) the Auditor General or any person authorised by the Auditor General where such disclosure is necessary for the performance of official duties;
 - (d) the Governor of the National Reserve Bank of Tonga or any person authorised by the Governor where such disclosure is necessary for the performance of official duties;
 - (e) international customs agencies with which Customs has an agreement to the extent permitted under that agreement.”

For the purpose of subsection (1) Customs laws means the Customs Act 2007 (CAP 26.03), Excise Tax Act 2007 (CAP 26.07) and the Act: section 2 of the Act.

[14] It is not in question that subsection (1) operates to prohibit disclosure of the documents the subject of the discovery order. The issue is whether subsection (3), specifically subparagraph (a), applies to permit disclosure in this case. For Cost Low, Mr Edwards submits that it does as the documents relate to proceedings under the Act. The Minister contends that the documents do not fall within the exceptions made by s125(3). This part of the appeal, then, stands or falls on the question of whether the proceedings are under the Act. If they are, s125(1) does not apply to prevent disclosure. If they are not, s125(1) operates to bar discovery.

[15] Mr Edwards referred us to a number of authorities to support his argument. We find one to be of some assistance – *Rowell v Pratt* [1938] A.C. 101. It concerned a return made by a grower of potatoes to the United Kingdom Potato Marketing Board which, under the Agricultural Marketing Act 1931, was privileged from production in all legal proceedings except information coming within the proviso to s17(2), which provided that the section did not:

“... apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder...”

[16] The appellant had sued for the price of potatoes he had delivered to the respondent. For the purpose of his defence, the respondent sought production of the return made by the appellant. The trial judge ruled the return to be privileged from production. There was a successful appeal to the Court of Appeal. On appeal from that decision, the House of Lords held that the trial judge had been right to uphold the claim of privilege. The proceedings were not legal proceedings “under the Act” and did not come within the proviso. Lord Wright said at p106:

“The exception is limited by the superimposed limitation to legal proceedings under or in virtue of the Act. It is only within these narrow limits that the information may be disclosed. The present case seems to me to fall outside the precisely expressed limits of the proviso, and the proviso removes any doubt there might be whether the main prohibition applies to disclosure for the purposes of legal proceedings.”

[17] The question here is the same. Are the proceedings “under this Act”? Mr Edwards argues they are because they question the lawfulness of the Minister’s conduct and actions (proceedings) under the Customs legislation. He says s125(3), which was added by s24 of the Customs and Excise Management Amendment Act 2012, was intended to overcome any restriction on Customs relying upon information contained in documents in criminal proceedings brought against importers. Further, it would enable Customs to defend judicial review proceedings while, on the other hand, enabling an applicant in judicial review proceedings to effectually question the lawfulness of the Minister’s conduct. Mr Edwards urges us to adopt a “common sense, purposive” interpretation of “proceedings under the Act”.

[18] In the usual way, we see our task as requiring that we construe the words of s125(3)(a) in their plain, ordinary meaning having regard to the scheme and purpose of the Act as a whole. Beginning with s125 itself, we find a comprehensive prohibition on the communication of information obtained under the Customs laws other than to persons legally entitled to such information. The importance attaching to the prohibition is underlined by the severity of the penalties for contravention provided by subsection (2). In the circumstances it is not surprising that the departures from the prohibition permitted by subsection (3) are strictly delineated. All concern disclosure to public bodies or persons undertaking public duties for defined purposes. They show a clear intention to strictly confine any exception to the general prohibition.

- [19] A consideration of the Act as a whole shows that there are numerous provisions that require or could lead to proceedings in the Supreme Court or Tax Tribunal. Many of the prescribed offences carry sentences of \$100,000 or 10 years imprisonment – see for example sections 92-106. A challenge to the sale of seized goods must be by legal proceedings: s112(3). The right of final appeal in relation to disputed duty is to the Tax Tribunal: s115.
- [20] Proceedings in relation to such matters would clearly be proceedings under the Act and, in our view, it is to such proceedings that the exception in s125(3)(a) is directed. We do not accept that it encompasses proceedings such as the present which, although concerned with actions taken by customs officers pursuant to the Act, are not proceedings **under** the Act. The distinction is subtle but important as it was in *Rowell v Pratt*.
- [21] The ability to challenge the exercise of statutory powers by way of judicial review arises under the general law. The proceedings are brought independently of the Act. They are not authorised by the Act. They do not seek a remedy under the Act. It simply cannot be said that they are brought under the Act.
- [22] There is a further difficulty for Cost Low in seeking to bring the proceedings within s125(1). In its Amended Statement of Claim,² without identifying the particular provisions relied on, Cost Low alleges the Minister owes duties under both the Customs Act and the Act. But it would appear that the relevant statutory duties arise, not under the Act, but under the Customs Act. It is the Customs Act which confers the power on the Minister to impose Customs duty (section 3) and which requires importers to pay Customs duty (section 4). The value of imported goods for customs purposes is determined in accordance with the Customs Act not the Act: section 10 Customs Act. It is the alleged failure of the Minister to lawfully exercise powers under the Customs Act (delegated to customs officers under s4 of the Act) which is challenged in the proceedings. Proceedings under the Customs Act do not come within s125(3)(a). It follows that, even if the proceedings could be said to be proceedings under the statute imposing the duty, the documents will remain confidential.
- [23] For these reasons we are satisfied that the Minister cannot be required to provide discovery in the terms ordered. It is unnecessary to consider the alternative ground

² Para 15.

for claiming confidentiality raised on behalf of the Minister. The statute controls the issue.


[24] It is also unnecessary to say much about the process issue. It is sufficient to say the orders should not have been made without giving the Minister an opportunity be heard. Cost Low had contended in its application that s125 did not apply. It was of crucial importance that the Minister have the opportunity to answer this.

Result

[25] The appeal is allowed with costs to the appellant to be fixed, if necessary, by the Registrar.



Whitten P



Blanchard J



Hansen J