

## ATTORNEY-GENERAL

v.

## INTERNATIONAL WOODS LIMITED

[COURT OF APPEAL, 1965 (Mills-Owens P., Marsack J.A., Gould J.A.), 12th May, 16th June]

## Civil Jurisdiction

Revenue—customs—forked lift—cargo handling equipment—discretion to admit as such—to what extent discretion subject to challenge in the Supreme Court — Customs Duties Ordinance (Cap. 167) s.3, First Schedule Items 98, 111B, 187— Customs Ordinance (Cap. 166) ss. 67, 68, 71, 157—Customs Consolidation Act 1876 (39 & 40 Vict., c.36) (Imperial) s.30—Customs and Excise Act 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c.44) (Imperial).

Administrative law—Comptroller of Customs—administrative discretion—whether subject to challenge in courts.

Action—customs duty—action for refund—nature of proceeding—Customs Ordinance (Cap. 166) ss.67,68,71,157.

The Comptroller of Customs assessed a Forked Lift Truck imported by the respondent company with 50% ad valorem duty as "Vehicles and parts not otherwise enumerated" under Item 107 of the First Schedule to the Customs Duties Ordinance. The duty was paid under protest and the respondent company claimed that the forked lift should have been assessed at 25% ad valorem under Item 111B — "Cargo handling equipment — (E.g. Forked Lifts . . .) when admitted as such by the Comptroller of Customs". In the Supreme Court it was held that a wide meaning should be attached to the word "cargo" in the phrase "cargo handling equipment" and the respondent company succeeded in its claim for a refund of excess duty paid.

*Held:* 1. The action in the Supreme Court was one based on quasi-contract and the court was not in the position of an appellate court to which a specific right of appeal against the exercise of a discretion had been conferred.

2. Section 157 of the Customs Ordinance assumes that in such an action the court will have power to determine "the proper duty" but that means the proper duty leviable by the Comptroller in accordance with law, including the exercise by him of any administrative discretion.

3. In the absence of a specific right of appeal the court will not interfere with the manner of exercise of an administrative discretion unless it has been exercised unreasonably, having regard to the context in which the discretion was conferred.

4. The word cargo was susceptible to a number of meanings and the manner of exercise of his discretion in relation thereto by the Comptroller of Customs was not unreasonable or wrong in law.

Per Mills-Owens P. In a case such as the present "unreasonableness" is to be viewed as connoting a decision so extreme that it could not have been made within the limits, express or implied, of the discretion conferred; in other words as no exercise of the discretion.

A Cases referred to : *Croyden Corporation v. Thomas* [1947] 1 K.B. 386; [1947] 1 All E.R. 239; *Stepney Borough Council v. Joffe* [1949] 1 K.B. 599; [1949] 1 All E.R. 256; *Brocklebank, Ltd. v. The King* [1925] 1 K.B. 52; 132 L.T. 166; *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680; *Roberts v. Hopwood* [1925] A.C. 578; 133 L.T. 289; *Municipal Council of Sydney v. Campbell* [1925] A.C. 338; 133 L.T. 63; *Feeney v. Pollexfen & Co.* [1931] I.R. 589; *Sueton D. Grant & Co. v. Coverdale Todd & Co.* (1884) 9 A.C. 470; 51 L.T. 472; *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886) 12 A.C. 128; 56 L.T. 173.

B Appeal from Judgment of the Supreme Court. The facts sufficiently appear from the judgment of Gould J.A. (infra).

G. N. Mishra for the appellant.

R. A. Kearsley for the respondent company.

The following judgments were read, the judgment of Gould J.A. being read first by direction of the President : [16th June, 1965]—

D GOULD J.A. : This is an appeal by the Attorney-General against a judgment of the Supreme Court of Fiji given on the 10th December, 1964, in an action in which the respondent claimed a refund of customs duty allegedly overpaid in respect of the importation of a Hyster Forked Lift Truck. The learned Judge held that, in circumstances which will appear, a sum of £649.15.0 paid by the respondent to the Comptroller of Customs under protest, was in excess of the duty legally chargeable and gave judgment against the Attorney-General for that sum and costs.

E The Customs Duties Ordinance (Cap. 167, Laws of Fiji 1955) enacts that the duties in the First Schedule to the Ordinance shall be collected and paid : the Schedule provides for Preferential Tariff and General Tariff and these proceedings are concerned only with the latter. Item 107 of the Schedule reads :—

"Vehicles and parts not otherwise enumerated . . . . ad val. . . . 50 per cent."

G Item 111B, which was introduced into the Schedule by a Resolution of the Legislative Council dated the 8th December, 1955, under section 3 of the Customs Duties Ordinance (Annual Legislation 1955 (Revised) p. 390) reads :—

"111B. Cargo handling equipment — (e.g. Forked Lifts, Mobile Cranes, Trailers, Conveyors and Stackers and component and fashioned parts thereof) when admitted as such by the Comptroller of Customs —

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Preferential Tariff . . . . .	Free
General Tariff . . . . .	25 per cent."

The action in the Supreme Court was argued on agreed facts which are as follows :—

"1. The Plaintiff is a Company duly incorporated in Fiji and at all material times —

- (a) was engaged in exporting logs from the Colony;
- (b) had at Lautoka a private log depot on a part of the proclaimed wharf area outside the fenced Customs area;
- (c) brought logs from its several sources to the said depot and stored them there for transference to the Customs area for shipment abroad.

2. On the 19th day of October, 1962, the said Company imported a hyster lift truck from the United States of America.

3. The said lift truck was equipped with a forked lift and was used mainly for unloading incoming logs at the said depot and loading them again onto lorries for transference to the Customs area.

4. The said lift truck was not used for loading logs directly onto ships.

5. The use of the said lift truck greatly facilitated the transfer of logs from the said depot to the Customs area and assisted their shipment generally.

6. The said lift truck was also used on the said Company's business at places other than the said log depot.

7. The Comptroller of Customs decided that the said lift truck was not cargo handling equipment for the purpose of Tariff Item 111A of the Customs Duties Ordinance (Schedule 1) and declined to classify it as such.

8. The said lift truck was consequently classified under Tariff Item 107 of the Customs Duties Ordinance (Schedule 1)."

The reference in paragraph 7 to Item 111A is an error — Item 111B was intended and the pleadings were amended to that effect at the hearing in the Supreme Court. The Statement of Facts was augmented at the hearing by concessions which the learned Judge noted as follows :—

"Court to Mishra :

May I ask if the Defence concedes that the Hyster Lift Truck concerned in this case is in fact 'a Forked Lift' within the meaning of that term in Item 111B of the Customs Duties Tariff?

Mishra :

Yes my Lord — that is conceded — it is a 'Forked Lift'.

"Kearsley (contd.)

5. The plaintiff deposited their logs prior to shipment inside the Customs area for a short time after they imported this Hyster

Forked Lift on 19th October, 1962, but shortly after that they established their own depot just outside the fence around the Lautoka Port Customs area.

A Mishra :

I agree to that and that the statement of facts should be amended accordingly.

Kearsley :

B At all material times the Plaintiff deposited their logs within the proclaimed port area at first within and then just outside the fenced Customs controlled area.

Mishra :

I concede that."

C The following passage also appears in the learned Judge's notes of the argument addressed by counsel for the Attorney-General :—

"3. The wharf area is a very large area of which only a small part was used by Govt. The Plaintiff was permitted to use a part of the unused area to store their logs.

D 4. This Hyster Lift did not operate inside the actual loading area of the Customs and wharf area at any time. It was used for loading logs on to lorries which then ran alongside the ships on to which they were loaded by means of the ships derrick and slings.

Kearsley :

I concede that."

E Possibly that concession applies only to paragraph 4 but paragraph 3 was not challenged.

F The general issue between the parties is plain from paragraphs 7 and 8 of the Statement of Agreed Facts and it is unnecessary to set out the pleadings in full. The Statement of Claim by the respondent asserted that duty was correctly payable under Item 111B: the defence denied that and added that the Comptroller had discretionary powers under Item 111B which were properly and reasonably exercised. In his judgment the learned Judge first considered the meaning of the word "cargo" in the expression "cargo handling equipment" in Item 111B, and for that purpose he examined with care the meaning which attached to the word in various other contexts. He pointed out that, if a strictly limited meaning were attached to the word (e.g. goods on board a ship or at the ship's side) the forked lift, which was given in the Item as an example, would be virtually excluded, as it was not used on board or for actually putting goods on board a ship. He took the view that a reasonably wide meaning should be adopted and said :—

H "I hold that in the context in which it is used the term 'cargo handling equipment' includes equipment the predominant use of which is or is intended to be the handling of goods which fall within the following scope —

- (1) goods which are intended to be the freight or lading of ships and having been identified as such are in the process of being conveyed to the place where they are to be put on board;
- (2) goods which are on board as the freight or lading of ships; and
- (3) goods which having been on board as the freight or lading of ships are being off-loaded or are in the process of being conveyed from the place where they have been off-loaded to places of storage within the Customs area of a wharf or elsewhere in vicinity of the place where they have been off-loaded,

subject of course in all cases, as is stated in Item 111B, to the overriding discretion of the Comptroller of Customs whether he admits them as such."

The learned Judge next considered the argument relating to discretion and two passages from his judgment indicate his finding on that question. They read :—

"The Courts are certainly reluctant to interfere with the exercise of such a discretion unless it can be shown that it was not exercised at all or that it was exercised on wrong principles. Counsel for the Crown has conceded that the reason why the Comptroller of Customs exercised his discretion against admitting this Forked Lift as cargo handling equipment under Item 111B was for the same reason that the Plaintiff Company's claim in this case has been opposed, i.e. because he considered that the logs being handled by it were not 'cargo' and that a strictly limited meaning should be given to the word 'cargo' in the term 'cargo handling equipment'. In my view such a construction is wrong in law. On the correct legal construction of the word 'cargo' in Tariff Item No. 111B, as I have determined it, the Comptroller must clearly have exercised his discretion by assessing this 'Forked Lift' for duty under Item 111B and not under Item 107."

.....

"This Forked Lift was therefore entirely within the meaning of the term 'Cargo Handling Equipment' in Item 111B. It should, in my view, have been admitted as such and, in my view, would have been admitted as such had the word 'cargo' in the term 'cargo handling equipment' been given its correct meaning in the context in which it was used."

I will approach first the issue relating to the discretion of the Comptroller of Customs. The wording of Item 111B is such as to confer upon him without limitation or restriction power to decide whether equipment is to be "admitted" as cargo handling equipment or not. If limitation is to be found it is not in the words used in the item. It is perhaps unusual to find such a discretion in a Customs Tariff; another example appears in Item 98 (contained in the same Legislative Council Resolution) relating to machinery and plant



“imported solely for industrial purposes and admitted as such by the Comptroller of Customs”. It is of interest to observe that, while Item 111B is new, Item 98 replaces an earlier item under the same number in relation to machinery and plant “imported and declared to be imported solely” for certain purposes. The new wording vests in the Comptroller a substantially augmented authority and lessens the possibility of abuse.

Two points relating to the interpretation of Item 111B were common ground between counsel appearing before this Court. First, that the discretion extended to the examples given in the item, including as they do, forked lifts, and was not limited to deciding what other equipment might properly fall within the scope of the item. The second is that the word “when” is not intended to indicate a point of time but has the significance of “if”. Counsel for the respondent also conceded that the decision to be taken by the Comptroller whether or not to admit an article under Item 111B is an administrative or executive decision. I will therefore only observe in passing, that even if it were quasi-judicial, there is no evidence or suggestion that the Comptroller acted in any way against the principles of natural justice or ultra vires.

When an official or a body has been entrusted by the legislature with authority to take administrative decisions it is only in exceptional cases that a Court can interfere so as to put itself in the position of that official or body and arrive at its own decision. It can do so where a specific and unlimited right of appeal against the decision has been given. That appears from two passages (both from judgments of Goddard C.J., as he then was) which I shall quote from *Croydon Corporation v. Thomas* [1947] 1 K.B. 386 and *Stepney Borough Council v. Joffe* [1949] 1 All E.R. 256. The first is at p.388 of the report of *Croydon Corporation v. Thomas* :—

“The words which we have to construe are to be found in sub-s. 1 of s.75 of the Public Health Act, 1936, and are as follows: ‘Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction.’ If you take the first part of sub-s. 1 alone, it appears to put the widest possible discretion, into the hands of the local authority. It appears to enable them, by administrative action, to require either the owner or the occupier to provide this dustbin. Accordingly, if the section remained without the addition of the words I have just read, it would seem reasonably clear that that was an administrative discretion given to an elected body, such as the corporation, with which no one could interfere. It is not a discretion, on the face of it, which requires to be exercised judicially; it is an administrative discretion. But when you find that any person aggrieved by a requirement of the local authority may appeal to a court of summary jurisdiction, it is obvious that Parliament intends the discretion which has been exercised by the local authority to be subject to an appeal, and the final determination, in the event of an appeal, is left to the justices and not to the local authority.”

The other passage is at p. 258 of the report of *Stepney Borough Council v. Joffe* :—

"It is argued that on an appeal against a refusal on the ground of misconduct or for any other sufficient reason rendering the applicant unsuitable to hold such a licence, the magistrate is not entitled to substitute his opinion for that of the borough council, but all he can decide is whether there was evidence on which the council could come to that conclusion. I find myself unable to accept that argument. If it be right, the right of appeal which is given, at any rate against a refusal on any ground mentioned in s.21(3)(a), would be purely illusory. It would, I suppose, as Humphreys, J., pointed out during the argument, really be an appeal on the question of law whether there was any evidence on which the borough council could form an opinion. If their decision is to be a mere matter of opinion and their opinion is to be conclusive, I do not know what evidence the council would be obliged to have. They could simply say: 'In our opinion, this man or this woman is unsuitable for holding a licence', and give any reason they liked. I do not know how a court could say on appeal whether that was a sufficient reason. If the reason is to be one which is sufficient in their opinion, it is difficult to see how any court of appeal could set aside their decision.

On the other hand, there is given here an unrestricted right of appeal, and, if there is an unrestricted right of appeal, it is for the court of appeal, in this case the metropolitan magistrate, to substitute its opinion for the opinion of the borough council. That does not mean to say that the court of appeal ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly to reverse their opinion."

I have quoted these passages at some length as they indicate not only the position where a full right of appeal has been given but also, *per contra*, the difficulty which is felt in interfering with an administrative decision where there is no such right of appeal.

In the present case no specific right of appeal to any court against the Comptroller's discretion is given by the legislation and, unless one is in some way to be inferred, the Supreme Court would have to find very strong grounds for overriding his decision. It is therefore necessary to ascertain the nature of the litigation in the Supreme Court from the judgment in which this appeal has been brought. The respondent in effect claimed that his goods had been assessed on a wrong basis and that he was entitled to the return of the excess. Authority to bring such an action is not given expressly by the Customs Ordinance (Cap. 166) but is implicit in section 157 thereof, which reads :—

"157. No action or suit for the refund of any duties alleged to have been wrongly levied under any law relating to customs shall be commenced in the Supreme Court before the person bringing the same has first appealed to and obtained the ruling or decision of the Commissioners as provided under section 67 hereof, and then only within two months from the date of such

A ruling or decision, and if in case of such action or suit it is determined that the duty so paid was not the proper duty but that a less duty was payable, the difference between the payment and the duty found to be due or the whole payment as the case may require shall be returned to such importer and shall be accepted by such importer in satisfaction of all claims in respect of the importation of such goods and the duty payable thereon and of all or any damages and expenses incident thereto except costs of suit as next hereinafter provided."

B The section assumes that in such an action the Court will have power to determine "the proper duty".

It will be observed that the action contemplated in section 157 can only be brought after certain steps have been taken, and in his judgment the learned Judge said that it was conceded that the respondent had taken those preliminary steps. It may be of assistance, nevertheless, to look at section 67 to which section 157 refers.

C It reads :—

"67. Should the owner of any goods be dissatisfied with the assessment of the collector or other proper officer in respect of the customs dues payable on such goods or consider the interpretation of the tariff or the classification of any goods by the collector or other proper officer to be contrary to law, then, after payment of any duty demanded by the collector and within one month after the decision by the collector or other proper officer as aforesaid, he may appeal to the Board of Commissioners whose appointment is hereinafter provided for by presenting to the collector for transmission to such Commissioners a protest in writing against the claim of the collector or other proper officer setting forth in full the reasons for his disagreement with the assessment of the collector or other proper officer as aforesaid, and the Commissioners, after due inquiry, shall determine the amount of duty leviable on such goods and shall forthwith communicate their decision to the collector, and the duty so determined by such Commissioners as leviable shall be the proper duty payable on such goods, whereupon any amount overpaid by the owner shall be refunded to him by the collector of customs and any amount of duty determined by the Commissioners as leviable and short paid by the owner shall be paid by him to the collector or other proper officer."

It would seem that, in spite of the provision that the duty determined shall be "the proper duty" section 157 must have an overriding effect, as the obtaining of a decision of the Commissioners is a condition precedent to the action contemplated in that section. That proposition is supported also by section 71 which enacts that a limited class of rulings or decisions of the Commissioners, i.e. every one "which is an interpretation of the nomenclature of the customs tariff", shall be Gazetted and be final and binding. I should observe that the decision of the Commissioners in the present case has not been put before either Court but we were informed by counsel for the Attorney-General that it was conceded it was not of a nature which would render it final by virtue of section 71. I would myself have



thought that in a revenue matter everything should be before the Court, but the procedure adopted has the concurrence of the Attorney-General and I accept it.

I am not concerned to make any finding as to the position of the Commissioners acting under section 67 in relation to the discretion conferred upon the Comptroller by Item 111B and other sections. Section 68, which provides for a reference to the Commissioners in cases where a collector is unable to assess the amount of duty payable, apparently contemplates that they would in that case act administratively and presumably exercise any discretion vested in the Comptroller. It is not impossible that section 67, which, although it speaks of an appeal, orders the Commissioners to make due inquiry, contemplates an approach *ab initio*. If so, the result, as far as the discretion is concerned, would be the same as if an unlimited right of appeal to the Commissioners had been given against it. Again it might be said that the right of appeal created by section 67 in favour of an owner "dissatisfied with the assessment . . . in respect of the custom dues payable . . ." is unlimited in its terms and includes the power to re-exercise a discretion.

As I have indicated, I express no concluded view on section 67 but it is necessary to ascertain the position under section 157 which is a very different type of section. It creates no right of appeal but contemplates that an aggrieved importer may bring an action for the refund of duty wrongly levied. The importer would have presumably to bring himself within one of the accepted forms of action, and reference to the case of *Brocklebank, Ltd. v. The King* [1925] 1 K.B. 52 indicates that it would be a suit in assumpsit, on an implied contract to return the money. In England a similar type of action appears to have been contemplated by section 30 of the Customs Consolidation Act, 1876, until the coming into force of the Customs and Excise Act 1952, which specifically authorised (in a limited class of cases) an application to the Court for a declaration as to the amount of duty properly payable.

Is there anything in section 157 which could be construed as conferring, in relation to the exercise by the Comptroller of an administrative discretion, powers similar to those which would be enjoyed by a Court to which a specific appeal against that discretion lay? I think not. It would, in my opinion, be fallacious to argue that because the section contemplates that the Court shall ascertain "the proper duty", that enables the Court to stand in the place of the Comptroller in relation to discretions entrusted to him by the legislature. The Supreme Court did not sit in an appellate capacity and did not draw its authority to sit from section 157. It exercised its ordinary judicial function in entertaining a suit based on quasi-contract. In order to ascertain whether the Comptroller was indebted on a quasi-contract to the importer the Supreme Court had certainly to decide what was the proper duty, but the proper duty leviable by the Comptroller in accordance with law, including the exercise by him of any administrative discretion. It must be kept in mind that the Supreme Court was acting in first instance and not exercising appellate jurisdiction and had no powers beyond those which were inherent in it in an ordinary action.

The case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, which contains much that is helpful on the subject of administrative decisions, was like the present appeal, an appeal from an action in the Supreme Court: the plaintiff in the action sought a declaration that a condition imposed by an administrative tribunal was unreasonable, which, in essence, is what is argued in the present case in relation to the Comptroller's exercise of his discretion. I take the following passage from the Judgment of Lord Greene M.R. at p. 228 :—

"The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of what executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the fact of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal."

The Master of the Rolls went on to say that the exercise of the discretion must be a real exercise of the discretion and (p. 228) :—

"If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

Then, having referred to bad faith and dishonesty as standing by themselves, he dealt with unreasonableness, at p. 229 :—

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he

has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."

It would appear from the second of those extracts that the context of a statute may be a relevant factor when considering whether a discretion has been exercised reasonably, a proposition which receives support from other cases such as *Roberts v. Hopwood* [1925] A.C. 578 and *Municipal Council of Sydney v. Campbell* [1925] A.C. 338. From the third extract from the judgment of Lord Greene M.R. I would point only to the requirement that the person entrusted with the discretion must "so to speak, direct himself properly in law", as it appears to have been on that principle that the learned Judge in the present case based himself when he held that a limited construction of the word "cargo" was wrong in law. There is no suggestion otherwise that the Comptroller failed to consider matters which he ought to have considered or considered matters which he ought not to have considered and no suggestion of any form of bad faith.

In the judgment under appeal the learned Judge gave detailed consideration to the meaning of the word cargo. He referred to the dictionary definition, to one case (*Feeney v. Pollexfen & Co.* [1931] I.R. 589) relating to stowage of cargo near the wharf after unloading, to three insurance cases, and to *Sueton D. Grant & Co. v. Coverdale Todd & Co.* (1884) 9 A.C. 470 as showing the way in which the word cargo was used in relation to charter parties. He referred also to *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886) 12 A.C. 128 and extracted the following passages from the judgment of the Privy Council (See p.134 and p.136) :—

"... the word 'cargo' is a word susceptible of different meanings and must be interpreted with reference to the context ..."

"In each of the cases the insurance was on a 'cargo', a word which as already pointed out, is susceptible of different meanings in different contracts and which must be interpreted with reference to the context"

I think that this case serves to emphasise the very point which the learned Judge's examination of the authorities showed — that the word cargo may have a wide or a narrow meaning and that it has not been made the subject of legal definition save in a particular context or for the purpose of a particular case. With respect I think the learned Judge did not give sufficient effect to this result of his consideration of the authorities. In relation to a charter party the word cargo may, it would seem, be used in a sense so wide as to include intended cargo, but it does not, I think, follow either in logic or law that the Comptroller, the official entrusted by the legislature with the discretion, is constrained to adopt a concept equally wide in the context of the Customs Ordinance. If there was any such intention on the part of the legislature it would not have needed to give any discretion and I think that the acceptance by the learned Judge of the submissions of the respondent leaves no room for a discretion in the Comptroller — the predominant use of an article is a matter of fact (though it must presumably be put before the Comptroller at

the time of admission as an intended use) and the meaning of "cargo" is treated in the argument strictly as a matter of law.

A I think that the true position is this. The word cargo being susceptible to a number of meanings the legislature has enacted that, in the phrase "cargo handling equipment" in the context of the Ordinance, the Comptroller shall have exclusive power to decide that meaning as one of the factors he considers in relation to his discretion. Therefore the meaning which the Comptroller selects, provided that it is not outrageous or contrary to anything which could be inferred from the context, could not be a mistake in law.

B So far as I am aware there is nothing in the context which can be pointed to as indicating that the way in which the Comptroller did in fact decide was contrary to or outside the purposes of the Ordinance. Counsel for the Attorney-General said that the purpose of the item was to facilitate and expedite the turn around of ships. This is not part of the admitted facts and I am doubtful how far this Court should consider it, but if the Comptroller did take such a view I do not think a Court could say that because of it his opinion as to the meaning to be attached to the word cargo was unreasonable in any sense. In my view it has not been shown (and it would be for the respondent to establish it) that the Comptroller, in exercising his discretion, considered anything or excluded from his consideration anything, which the context of the Ordinance expressly or impliedly required to be excluded or considered.

D If that is so a Court could only interfere if the discretion had been exercised in a way which was unreasonable in the sense that it amounted almost to absurdity. To quote again from Lord Greene's judgment in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* (supra) at p. 234 :—

E "Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

F The agreed facts indicate that the forked lift in the present case was mainly used in a log depot operated by the respondent for accumulation of logs prior to their being transferred to the actual dockside for loading. It appears that it would be used to unload the logs on arrival and to load them onto lorries to be taken to the wharf when the ship was available. The wharf area was very large and only a small part was used by Government — the respondent was permitted to use a part of the vacant area for its depot. The forked lift was operated at times in other premises of the respondent, but mainly in the depot; never in the actual loading area of the Customs and the wharf area.

G The position, as I see it, is as if the respondent had had a warehouse for storage adjacent to the docks and the forked lift was used (predominantly) there. I do not think the fact that the depot was,

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by permission, on Government ground makes any difference. It was obviously not far from the loading area though lorries had still to be employed for the final stage of the journey: but is that factor of proximity such that it can be said that the Comptroller has been shown to have exercised his discretion in a completely unreasonable way? He would immediately be involved in questions of degree. Ought a depot ten miles away to receive similar treatment — or one hundred miles away? Is the vendor in the interior who sells goods to a merchant who proposes to export them to have the benefit of the concession? These would be real problems and would arise if the wide meaning in paragraph (1) of the learned Judge's definition were acted upon. Clearly the legislature entrusted the Comptroller with authority to draw the line in a province in which he was experienced. He would be alive to the possibility of the concession contained in Item 111 being abused (cf. his discretion in Item 187 relating to parcels of goods for the personal use of the importer) and be fully conversant with all aspects of cargo handling, loading, storage and movement generally. His decision was not in fact one which denied to forked lifts all function as cargo handling equipment as they might well be used in the loading area and around the wharves.

I must emphasise that it is not for a Court to substitute its own opinion in the matter and even if the Comptroller might be thought to have imposed a narrow limit in the present case that is a matter entirely for him unless his decision was palpably unreasonable. In the light of what I have already said I am satisfied that it was not, and in my respectful view the learned Judge in the Supreme Court erred in finding that the Comptroller was wrong in law. The learned Judge was not assisted by the manner of presentation of the case. The pleadings were not precise and the facts emerged piecemeal. The real basis of the exercise of the discretion has not been presented clearly but has been taken to centre around the meaning of the word "cargo" which hardly seems adequate to cover the whole matter and ignores the factor that it is in relation to the meaning to be attached to that word that the discretion was given.

For the reasons given above I would allow the appeal, set aside the judgment of the Supreme Court and substitute a judgment dismissing the action with taxed costs. The taxed costs of the appeal to be paid by the respondent.

MILLS-OWENS P.: I concur. Neither the pleadings, the agreed statement of facts, or the form of the proceedings, as it appears to me, were apt to direct the attention of the learned Judge to the aspect of the Comptroller's discretion whether or not to admit cargo handling equipment as such. Nothing was said concerning the Comptroller's discretion in the statement of claim. In the defence the discretion was referred to in terms of a discretion to decide whether or not the fork lift 'was' cargo handling equipment — not in terms of a discretion whether or not to admit it as such. The relevant portion of the agreed facts was in terms of the Comptroller declining to 'classify' the fork lift as cargo handling equipment — not in terms of declining to 'admit' it as such. If, as it subsequently transpired in the course of the trial, the Comptroller's exercise of his discretion was to be in issue, this should have been made clear to the Court at



the outset; one would have expected to see also a precise statement of the materials upon which the discretion was said to have been exercised, and of the Comptroller's reasons if they were reduced to writing or agreed by the parties. It is however clear that the exercise of the discretion became an issue at the trial and that it must be dealt with on this appeal.

As it appears to me, the respondent was completely unable to controvert the decision made by the Comptroller, which presumably had been supported by the Commissioners on appeal. There were some fundamental difficulties in the way of the respondent. The discretion was conceded to be an administrative or executive discretion, but the question whether it was one to be exercised in the context of the policy adopted by the Customs Department from time to time was left unexplored. Secondly, if it were to be the case that the Comptroller is answerable only to the Crown for the manner in which he exercises his discretion, the respondent would lack the necessary *locus standi* to attack his decision. Thirdly, even if the discretion were shown to have been wrongly exercised, I doubt whether, in proceedings such as these, it would assist the respondent. He might be able to show that the purported decision was unreasonable, but would it follow that the Court could then substitute its own decision?

The Respondent's case, was in effect, that the Comptroller's decision was unreasonable and therefore wrong in law. I agree that a discretion ostensibly untrammelled may be controlled by the context; that it may be subject to an implied limitation or restriction. The respondent did not attempt to formulate any such limitation or restriction in the present case. Item 111B appears to contemplate an application by the importer based on intended user for cargo handling. Obviously there may be apparatus capable of being used for handling not only cargo but other merchandise. Item 111B makes no reference to the degree of intended or contemplated user. These are the very reasons why the Comptroller is invested with a discretion, if not also for the purpose of carrying out policy. On the basis assumed in the proceedings, namely that the fork lift was intended to be used in handling logs at the depot, it cannot be said that the decision was unreasonable. To accept the argument for the respondent would be to introduce some undefined objective test, denying all element of discretion in the Comptroller.

In the present context, as it appears to me, reference to a test of 'unreasonableness' is apt to be misleading. 'Reasonableness' is more appropriate to the sphere in which the exercise of statutory powers, which may interfere with private rights, comes into question. In a case such as the present 'unreasonableness' is to be viewed as connoting a decision so extreme that it could not have been made within the limits, express or implied, of the discretion conferred; in other words as no exercise of the discretion.

To summarise, as the matter presents itself to me, but in the light of a limited argument; the expression "cargo handling equipment" is not, and was not intended to be, a definitive expression; there are obviously sound reasons for a discretion being conferred on the Comptroller; the qualifying words "when admitted as such by the Comptroller ..." confer a discretion which may rest partly on policy; if

the Comptroller is answerable only to the Crown, his decision is unassailable; the application to the Comptroller is intended to be made prior to importation; if his decision, or that of the Commissioners on appeal, is to be subjected to challenge it must be on the basis of the materials before him or them and in the light of his or their reasons; the Court cannot substitute its own decision.

MARSACK J. : I have had the advantage of reading the judgments of the learned President and of Gould, J.A. and I am in complete accord with those judgments as to the construction to be placed on the words "when admitted as such by the Comptroller of Customs", and agree, for the reasons given, that this Court should not interfere with the ruling of the Comptroller in declining to admit this forked lift under section 111B. At the same time I should not be taken as accepting the argument of Counsel for the appellant that, for the purposes of this part of the Ordinance, goods intended for export become "cargo" only when received by the shipowner, or by stevedores on the shipowner's behalf. In my view that interpretation would be unduly restrictive. To define at exactly what point in time, or in place, goods acquire the character of cargo, reference must necessarily be made, as is pointed out in the authorities cited, to the context of the statute or document in which the word is used. In the present case there is some force, in my opinion, in the argument that the logs were cargo, within the meaning of the Ordinance, at least from the time they were taken from the Company's depot in the wharf area for conveyance to ship's side. But the adoption of that construction would not determine the matter. To become eligible for the lower rate of duty under section 111B any goods imported must comply with each of two conditions: (i) they must be cargo-handling equipment, and (ii) they must be admitted as such by the Comptroller of Customs. A machine or vehicle which could properly be described as cargo-handling equipment would still not qualify under section 111B unless and until it was admitted as such by the Comptroller of Customs. The Courts are reluctant to interfere with the exercise of an administrative discretion in the absence of compelling reasons, and I agree that in the circumstances of the present case the Comptroller's ruling should not be disturbed. Accordingly, in my opinion, the appeal must be allowed.

*Appeal allowed.*