

## CUSTOMS FRAUD

### Definition of Customs Fraud

The meaning of fraud or to defraud has been discussed in many cases. In R v Sinclair 1968 3 ALL ER 241 James J said,

“To cheat and defraud is to act with dishonesty to the prejudice of another”.

In Scott vs Commissioner of Police 1974 3 ALL ER 1032 at page 1038 Viscount Dilhorne said,

“To defraud ordinarily means in my opinion to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled”.

The dictionary of English Law defines customs as:

“duties charged upon commodities on their importation into.....any country”

Customs fraud may therefore be simply defined any acts of dishonesty which deprive the government of revenue (duties) to which it would, but for the dishonesty, be entitled.

### Customs Fraud and the Customs Act

The Customs Act is a revenue collecting statute designed to regulate and prevent importation of goods and to ensure collection of duties which are payable. Parliament so intended and our courts have so interpreted the statute. For example in R v George Barber, Fox J.A in interpreting section 210 of the Act said

“The section is an important part of the machinery established by Government to effect two of its fundamental functions namely collection of revenue and control of the economy”.

As a result the Customs Act and the provisions thereunder which are designed to prevent customs fraud are different from other statutes such as the Larceny Act and the Forgery Act which deal with

ordinary fraud. It is different in the following respects:-

- (i) A number of offences under the Act impose strict liability and require no criminal intent on the part of the offender.
- (ii) A number of evidential rules are changed and these will be dealt with in Part II of this paper.
- (iii) Certified copies of documents required by the Customs Laws are admissible in evidence.
- (iv) Severe penalties are imposed such as treble the value of goods in respect of which a Judge has no discretion.

This paper will focus on the main offences under the Customs Act which deals with Customs fraud and the provisions which impose strict liability.

**SECTION 209 OF THE CUSTOMS ACT** creates several offences relating to False declarations or falsification of documents- and these offences do not require proof of any evasion or intention to evade customs duties or customs prohibitions and restrictions. However if the false declaration or document results in evasion of duties, restrictions or prohibitions additional charges may be laid for offences under Section 210 or 211 which attract much more severe penalties.

The offences under this section are as follows:-

- (i) making and subscribing or causing to be made and subscribed false declarations;
- (ii) making or signing or causing to be made or signed any false declaration, certificate or other instrument required to be verified by signature only;
- (iii) making or signing untrue declarations made for the consideration of the Commissioner on any application presented;
- (iv) refusing to answer questions where required by the Customs Laws to answer such questions;

- (v) untruthfully answering questions put by an officer acting in the execution of his duty;
- (vi) counterfeiting, falsifying or wilfully using when counterfeited or falsified the following:-
  - (a) any document required by the Customs Laws or by or under the directions of the Commissioner.
  - (b) any instrument used in the transaction of any business or matter relating to Customs;
- (vii) altering any document or instrument after the same has been officially issued;
- (viii) counterfeiting the seal, signature initial or other mark of or used by any officer for the following purposes:-
  - (a) verification of any document;
  - (b) security for goods;
  - (c) any other purpose in the conduct of business relating to the customs or under the control or management of the Commissioner;
- (ix) counterfeiting or imitating the seal, signature initials or other mark of or made use of by any other person whatsoever whether with or without the consent of such person;

For each of the above offences the offender is liable to a penalty of \$1,000.00

The offences (I) to (iii) in particular may be a trap for the innocent or unwary as strict liability is imposed. In the case of Patel vs Commissioner of Customs and Comptroller of Customs vs Western Electric Co. Ltd, the Privy Council in interpreting similar legislation held that the offence of making a false declaration was complete on proof of the inaccuracy without proof of mens rea or guilty mind. In that case Patel had made a false declaration in relation to the origin of certain goods.

An error in completing a particular form or using the wrong form may result in criminal liability. For

example form C70 A is to be completed by an importer who is not an agent broker or distributor or concessionaire for the seller nor associated in business with him. However form C70B is the appropriate form for importers who are so related to the seller. Quite often importers innocently or negligently use the wrong form and this may result in criminal liability.

### SECTION 210 OF THE CUSTOMS ACT.

This section creates several offences which may be divided into five categories and these are as follows:-

Every person who shall:-

- (i) import or bring or be concerned in importing or bringing into the island any prohibited goods or any goods the importation of which is restricted, contrary to such restriction or prohibition, whether the same be unloaded or not or ;
- (ii) unload or assist or be otherwise concerned in unloading any goods which are prohibited or any goods which are restricted and imported contrary to such restriction; or
- (iii) knowingly harbour, keep or conceal or knowingly permit or suffer or cause or procure to be harboured, kept or concealed any prohibited, restricted or uncustomed goods; or
- (iv) knowingly ;
  - (a) acquire possession of or;
  - (b) be in any way knowingly concerned in carrying, removing, depositing, concealing or ;
  - (c) in any manner dealing with any goods;

with intent to defraud her majesty of any duties thereon or to evade any prohibition or restriction of or applicable to such goods or ;

- (v) be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs or of the laws and restrictions of the customs relating to

the importation, unloading, warehousing, delivery, removal loading and exportation of goods.

shall for each such offence incur a penalty of \$5,000.00 or treble the value of the goods at the election of the said Commissioner and all goods in respect of which any such offence shall be committed shall be forfeited.

The following points shall be noted in relation to Section 210:-

(1) The offences listed as (i) and (ii) above are offences of strict liability. In the case of R v George Barbar 12 JLR 1127 the Jamaican Court of Appeal in interpreting that Section of the Act (which was then section 205 of the Customs Law Cap 89) held that the Legislature by using the word "knowingly" in the offences listed as (iii) (iv) and (v) above and omitting it in the offences listed as (i) and (ii) dealing with importation, exporting and unloading intended to impose strict liability in respect of offences (i) and (ii) and in respect of offences (iii) (iv) and (v) required proof of guilty knowledge. Further, referring to offences (i) and (ii) under Section 210 Fox J.A. said at page 1140 paragraph 13,

"To import, to bring into the island to unload prohibited or restricted goods are declared to be punishable offences. The verbs are not qualified by any such limiting term as "unlawfully" or "maliciously" to show that the legislature intended to import into the offences the element of awareness or foresight in a defendant that his action was wrong and would expose him to the sanction of the criminal law. The words of prohibition in clauses one and two are absolute".

In R v Richard Simmonds and George Luesingh R.M. C. A 34/94 the Jamaican Court of Appeal applied the case of R v Barbar and Gordon J.A. said at page 5, in relation to section 210.

"In clauses 1 and 2 above no word importing mens rea is used. In clauses 3,4 and

5 the words knowingly, intent to defraud.... or to evade any prohibition or restriction are included thus indicating the varied mens rea required to be proved by the prosecution".

(2) The practical effect of offences (i) and (ii) of Section 210 being offences of strict liability is as follows:-

(a) In a prosecution for the offence of importing or bringing into the island or being concerned of importing or bringing into the island or being concerned in importing or bringing into the island prohibited or restricted goods contrary to such prohibition or restriction, the Crown need only prove that the goods were imported or brought into the island contrary to restrictions (such as the requirement for a licence) or prohibitions which are applicable to such goods. Therefore, as in many instances where a broker is employed, the importer may be liable although he simply relied upon the brokers knowledge of prohibitions and restrictions. The importer may also find himself liable where the broker negligently completed documents which the importer relying on the broker's skill, simply signed.

(b) Where a licence is obtained which imposes certain conditions the importer may be liable if the conditions are not met. For example in R v George Barbar cited above the Appellant Barbar obtained a licence to import antique furniture but a condition of the licence was that the antiques should be genuine. Examination by an expert revealed that the furniture imported were not genuine antiques and Barbar was prosecuted and convicted.

(3) Offenders under Section 210 are liable to a penalty of \$5,000.00 or 3 times the value of the goods for each offences at the election of the Commissioner. In addition the goods which are the subject of the charge shall be forfeited. It should

be noted that once the Judge finds the offender guilty and enters a verdict of guilty he has no discretion in relation to sentence since it is the Commissioner who elects the penalty and in practice usually elects the penalty of treble the value of the goods for each offence.

**NOTE** In order to avoid such harsh penalties and forfeiture the offender may invoke the Commissioner's power to mitigate under Section 219 which is discussed below.

- (4) In relation to the offence listed as (iii) relating to harbouring uncustomed goods the use of the words knowingly means that it must be shown that the offender knew that the goods he is harbouring or keeping or concealing or causing to be are prohibited, restricted or uncustomed goods i.e. mens rea is required. In R v Simmonds and Luesingh cited above the Court of Appeal held that such knowledge was established on the part of the appellants who were in possession of a Honda motor Car imported without a licence, and that it was unnecessary for the Crown to prove an intention to defraud Her Majesty of duties thereon or an intention to evade any restriction applicable to such goods.

The requirement of guilty knowledge for this offence is welcome for those persons who often purchase imported goods locally even in well established stores but do not know whether customs duties have been paid or whether the goods have been lawfully imported. However if such "innocent" persons are found with uncustomed, restricted or prohibited goods, the goods may be detained and forfeited.

- (5) In practice the most common examples of the offence listed as (v) relating to the fraudulent evasion of duties and restrictions are as follows:-

- (a) Under invoicing

Here the importer has prepared or procured invoices showing lower

values or prices than that actually paid for the goods overseas. The second invoice may have been obtained from the supplier or the importer may in some instances print or cause to be printed invoices purporting to come from the supplier. Since the amount of duty payable varies with the value of the goods the importer is able to avoid paying the duty on the true value of the goods stated on the genuine invoices by presenting to Customs the invoices with the lower values. If the offender is prosecuted there are practical difficulties for the crown in having the genuine invoices admitted into evidence since it is highly unlikely that the supplier who is the maker of the document will come to give evidence particularly where he had prepared the invoices showing lower values.

(b) Misrepresentation of the year of manufacture of vehicles

Where vehicles are imported the rate of duty is generally lower for older vehicles of the same model. In many cases the VIN number or other features have been changed on the vehicle thereby leading the Customs Officers to believe the vehicle is an older model.

As a consequence a lower amount of duty is imposed. The importer or persons who purchase from the importer may be unaware that the VIN number or other marks were changed but since the proper duties have not been paid the goods are uncustomed goods and liable to detention and forfeiture unless the importer or purchaser pays the difference in the amount of duty.

**SECTION 211 OF THE CUSTOMS ACT** creates offences relating to concealed goods. The two



offences are:-

- (i) Importing or exporting or causing to be imported or exported goods which are concealed in any way or packed in any package or parcel in a manner calculated to deceive the officers of customs.
- (ii) Importing or exporting or causing to be imported or exported any package containing goods not corresponding with the entry thereof.

It should be noted that although the first offence incorporates words requiring mens rea namely, an intention to deceive the officers of customs, the second offence contains no such words and therefore it is an offence of strict liability. See cases of R v Barbar and R v Simmonds and Luesingh above, where it was held that the omission of words incorporating mens rea means that the Legislature intended to impose strict liability. An importer whose supplier overseas has shipped more goods to him than ordered and purchased may incur criminal liability when the container is inspected by customs officials and found to contain more goods than on the entry which is usually prepared using the invoice and other documents. In this situation the package namely the container, contains goods not corresponding with the entry since the container has more goods than declared on the entry form. The offenders under this section are liable to a penalty of \$2,000.00 or treble the value of the goods. However, when an importer incurs such liability because his supplier overseas had over shipped the goods then it is submitted that the importer may bring a civil action against the supplier for negligence or breach of contract and recover the penalty and any other losses incurred as a result of the over shipment.

In relation to the first offence the Legislature intended to deal with those persons who conceal or pack goods with the intention that the goods are not detected by the Customs Officials. No doubt the intention in many cases is to evade duty, restrictions or prohibitions but the Crown is only required to establish an intention to deceive the customs officials. For example if a person arriving

in the island from overseas has hidden an electrical appliance in an extra lining in his suitcase he may be liable.

### **SECTION 32 OF THIS CUSTOMS ACT**

This section is designed to deal with persons who import goods and obtain a reduction in duty or pay no duty at all on the basis that the goods will be used for a particular purpose but instead they use the goods for a contrary purpose. For example if the importer declared that the goods would be used as raw materials and obtained a duty concession but subsequently sold the goods as finished products then he would be liable under this section. This section (section 32 (1) provides as follows:

"If any goods which are ordinary liable to duty at a given rate are allowed by law to be, and are in fact, entered at a lower rate of duty, or free of duty, on any special conditions, or for use for some special purpose, or because they are the property of or intended for use by some particular person or functionary, and if such conditions are not observed, or the goods are at anytime within three years of the date of importation thereof use for any other than the specified purpose, or, being goods entered as aforesaid because they are the property of or intended for use by some particular person or functionary, are sold or transferred to any other person, such goods, unless the full duties thereon shall have been paid, shall be forfeited, and the importer and any person who shall be knowingly concerned in the use of such goods contrary to such conditions, or for some purpose other than that specified, or in any way contrary to this section shall each incur a penalty of two hundred dollars, or treble the value of such goods, at the election of the Collector-General.

### **MITIGATION OF PENALTY**

The decision as to whether to pursue the process of mitigation or to face prosecution for offences under the Act is a critical one because there is a vast difference in the penalties for which the

offender may be liable. An Attorney-at-Law has to assess his client's prospects of success in defending any case brought against him in advising whether to have the Commissioner mitigate.

Section 219 of the Customs Act empowers the Commissioner of Customs to:-

- (a) mitigate or remit any penalty
- (b) Restore anything seized under the Customs Laws

However this section provides that this power may be exercised at any time prior to the commencement of proceedings in any Court against any person for an offence against the Customs Laws or for the condemnation of any seizure. Although the section clearly empowers the commissioner to exercise the power prior to commencement of court proceedings in practice this power is sometimes exercised even after the commencement of court proceedings i.e. after an information is laid in court since it is in the interest of the Government to collect revenue rather than risk loosing the revenue after lengthy court proceedings.

#### The Procedure and Practice of mitigation

- (I) The offender is first required to sign a "consent form" in which he;
  - (a) admits committing a specified breach or specified breaches of the Customs Act and;
  - (b) consents to the Commissioner mitigating the penalty to which he is liable and for restoring articles seized under the act.

Note: The form may be used to prove an admission of guilt or liability for any subsequent proceedings where the Customs Authorities are suing or prosecuting for a penalty recoverable summarily. Although the form may also be used in criminal proceedings instituted after the offender has failed to pay the penalty, the writer has no knowledge of any case where this has been done.

- (ii) After the consent form is signed the Commissioner exercises the power and the offender is notified of the penalty imposed and whether the goods will be returned.
- (iii) If the penalty is not paid in full then an agreement for the payment along with a payment schedule is prepared. In a situation where the breach involves evasion of duty the offender is required to pay at least the arrears of duty immediately and the balance is payable over a period of time. For this balance the offender is required to provide security such as a bank guarantee, a mortgage or a bill of sale. Payments are usually made by a managers cheque payable to the Collector of Customs and not the Commissioner of Customs.
- (iv) After the foregoing arrangements are made relating to payment any goods liable to forfeiture may be released to the offender by the Commissioner.

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