SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2009/031

BETWEEN:

ATTORNEY GENERAL

Appellant

and

KENNY D. ANTHONY

Respondent

Before:

The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson K. Baptiste	Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Reginald T. A. Armour, SC for the appellant
Mr. Anthony Astaphan, SC, Mr. Peter I. Foster,
Ms. Renee St. Rose and Mr. Leslie Mondesir for the respondent

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2010: March 22 and 23;
June 14.

Civil Appeal – Judicial Review – Wednesbury unreasonableness – irrationality – bad faith – credibility of witnesses – non-disclosure by public officer – adverse inferences –

Tuxedo Villas is a hotel in Rodney Bay, locally owned and operated by Dr. Keith Mondesir who is also a Minister of Government and a member of the Cabinet of Ministers of Saint Lucia. Tuxedo Villas was granted duty free concessions in the past and on 19th June 2007, Dr. Mondesir wrote to the Minister of Tourism, Mr. Allen Chastanet, applying for further concessions with regard to the refurbishment of the Villas. The application letter stated that Tuxedo Villas comprise: "(1) six two bedroom villas; (2) four one bedroom villas; (3) one restaurant at Rodney Bay; and (4) a three bedroom villa at Bonne Terre Rodney Bay". The Deputy Permanent Secretary in the Ministry prepared a memorandum for the Cabinet to consider the application. Mr. Chastanet signed the memorandum based on the discussions he had had with Dr. Mondesir which he conceded did not include anything about a house at Bonne Terre. The Cabinet of Ministers met on 5th July 2007, and made a decision granting import duty exemptions and other concessions to Tuxedo

Villas. Acting under this decision Dr. Mondesir imported certain goods and electronic equipment. Some of these goods were off loaded at a house in Bonne Terre which is a residential area outside Rodney Bay. As a result the Comptroller of Customs launched an investigation into the matter. Dr. Mondesir met with the Comptroller and explained that the house at Bonne Terre was in fact part of Tuxedo Villas. He also met with Mr. Chastanet and showed him documents supporting his position. The Minister advised Dr. Mondesir to meet with the Comptroller and present his case. The Comptroller was not satisfied with Dr. Mondesir's explanation and asked him for proof that the Bonne Terre house was a part of Tuxedo Villas. This was not forthcoming and on 26th June 2008, the Comptroller wrote to Dr. Mondesir demanding proof of his claim by 4th July 2008, by way of a confirmatory letter from the Ministry of Tourism, failing which he would proceed with the appropriate action under the Customs Laws. Mr. Chastanet prepared a note for another Minister to bring up the issue with Cabinet at its next meeting because he was going to be out of state. The Cabinet meeting was held on 26th June 2008, and a decision was made noting that the house at Bonne Terre was part of Tuxedo Villas ("the Second Cabinet Decision"). When the Comptroller was informed of this he wrote to the appellant asking him for advice on the validity of the Second Cabinet Decision. The appellant investigated the matter by interviewing Dr. Mondesir and advised the Comptroller on 13th August 2008, that the Second Cabinet Decision was a proper one. The respondent applied for Judicial Review of the Second Cabinet Decision on the grounds that it was irrational in the Wednesbury sense and/or made in bad faith for an improper purpose. The trial judge quashed the Second Cabinet Decision as having been made without any reasonable basis. The appellant appealed the trial judge's decision and the respondent counter-appealed contending that the trial judge should have quashed the Second Cabinet Decision on the additional ground that is was made in bad faith.

Held: dismissing the appeal and allowing the counter-appeal and awarding costs to the respondent on the appeal and counter-appeal:

1. That the Second Cabinet Decision was irrational in the Wednesbury sense in that it was so unreasonable that no reasonable Cabinet should have made it.

   Civil Services Unions v Minister of Civil Service [1985] AC 374 and Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223 applied.

2. That the finding that the Minister of Tourism is a credible and reliable witness is set aside and this Court is in as good a position as the trial judge to evaluate the Minister's evidence and draw its own inferences.

   Coghlan v Cumberland [1898] 1 Ch. 704, Watt (or Thomas) v Thomas [1947] AC 484 applied and Golfview Development Ltd v St. Kitts Development Corporation and Michael Simanic Civ. App. No. 17 of 2004 at para. 23 followed.

3. That the disclosure of documents by the appellant was unsatisfactory leading the court to draw adverse inferences regarding the reasons for the Second Cabinet Decision.

4. The Second Cabinet Decision is quashed on the additional ground that it was made in bad faith for the improper purposes of shielding Dr. Mondesir from further investigation and possible prosecution for breaches of the Customs Laws.

JUDGMENT

[1] WEBSTER, J.A. [AG.]: On 5th July 2007, the Cabinet of Saint Lucia issued Cabinet Conclusion No. 543 of 2007 granting relief from import duties and consumption taxes to Dr. Keith Mondesir, a Minister of the Cabinet, in respect of a Tourism Product known as Tuxedo Villas ("the First Cabinet Decision"). On 26th June 2008, Cabinet issued Cabinet Conclusion No. 574(c) of 2008 effectively amending the First Cabinet Decision by noting that Tuxedo Villas include one 3-bedroom 3 bathroom villa at Bonne Terre ("the Second Cabinet Decision"). On 3rd August 2009, the trial judge, the Hon. Brian Cottle, quashed the Second Cabinet Decision on the ground of Wednesbury unreasonableness. The Attorney General appealed against the decision and Leader of the Opposition filed a Counter Notice contending that the trial judge should have quashed the Second Decision on the additional ground that it was made in bad faith.

Background

[2] Dr. Keith Mondesir is the Minister of Health in the Government of Saint Lucia and the owner of Tuxedo Villas located at Rodney Bay, Saint Lucia. He is also the owner of a three bedroom three bathroom house at Bonne Terre which is a residential area some distance away from Rodney Bay. He claims that the house at Bonne Terre is a part of Tuxedo Villas.

[3] On 19th June 2007, Dr. Mondesir wrote the Minister of Tourism and Civil Aviation, Mr. Allen Chastanet, applying for duty free concessions in respect of the refurbishment of Tuxedo Villas comprising the following:

"- Six two bedroom villas
- Four one bedroom villas
- One Restaurant at Rodney Bay; and
- A three bedroom villa at Bonne Terre Rodney Bay"

("the Application Letter")

[4] Upon receipt of the Application Letter the Ministry of Tourism prepared a Memorandum to Cabinet outlining the terms of the application ("the Memorandum"). The relevant parts of the Memorandum are –

"Ministry of Tourism and Civil Aviation
Memorandum to Cabinet

Application by Tuxedo Villas for Duty Free Concessions under the Tourism Incentives Act, No. 7 of 1996 to facilitate refurbishment

1.0 Proposal

Cabinet is invited to consider, pursuant to the Tourism Incentives Act, No. 7 of 1996, the award of duty free concessions to Tuxedo Villas for the purpose of refurbishing and upgrading its tourism product.

2.0 Background

Tuxedo Villas is a six (6) 2 bedroom and four (4) 1 bedroom hotel that is locally owned and operated by Dr. Keith Mondesir. The property has been in operation for over ten (10) years and has an average Annual Occupancy Percentage of 50%.

2.1 Tuxedo Villas has been granted duty free concessions in the past, however, the concessions have expired and the applicant is now desirous of upgrading its product offering. The product comprises:

a conferencing facility.
self-contained units.
a store room.
a restaurant and bar facility.
laundry facilities.

5.0 Incentives Sought

The applicant has approached the Ministry of Tourism and Civil Aviation for duty free concessions and as such is requesting the following:

5.1 100% waiver of Import Duty and Consumption Tax on all furniture, fittings and equipment needed for the renovation of the property to include the restaurant and bar and conferencing facility.

6.0 Comment/Analysis

Tuxedo Villas has a waterfront location. Consequently, there is increased exposure from sea blast thus leading to quicker deterioration of its appliances and equipment. This warrants the constant need to refurbish and replace key equipment to ensure it meets the standards of accommodation of the food and beverage sectors at all times."

[5] The Memorandum was prepared by the Deputy Permanent Secretary in the Ministry of Tourism and signed by Mr. Chastanet in his capacity as the Minister of Tourism. Mr. Chastanet gave evidence at the trial. He said that he signed the Memorandum based on discussions he had had with Dr. Mondesir, and that at the time he had not seen the Application Letter. He admitted in cross examination that the Bonne Terre house was not a part of his discussions with Dr. Mondesir, and that it was not on his mind when he signed the Memorandum. Regardless of what Dr. Mondesir intended by including the reference to the house at Bonne Terre in the Application Letter, neither the Minister of Tourism nor the Deputy Permanent Secretary, who prepared the Memorandum, thought that the house was a part of Tuxedo Villas. In fact the evidence is overwhelming that Tuxedo Villas and the house at Bonne Terre are two separate properties, and the latter was not regarded as a part of the former. Apart from Dr. Mondesir himself, no other person who gave evidence at the trial thought that the Bonne Terre house was a part of Tuxedo Villas.

[6] The First Cabinet Decision was published as Statutory Instrument No. 11 of 2008 thereby making Tuxedo Villas an Approved Tourism Product within the meaning of the Tourism Incentives Act ("the Act").

[7] In May 2008, Dr. Mondesir imported various items duty free under the concession granted to him in respect of Tuxedo Villas. Officers of the Customs Department observed that a container with some of the items was being off-loaded and used at

the house in Bonne Terre. The Comptroller of Customs launched an investigation into the matter. As a result of the investigation Dr. Mondesir met Mr. Chastanet and showed him certain documents which he said proved that the house at Bonne Terre was a part of Tuxedo Villas. More will be said about these documents. Mr. Chastanet also made enquiries within the Ministry and found the Application Letter. He advised Dr. Mondesir to meet the Comptroller of Customs and present his case. Dr Mondesir met the Comptroller and other officers of the Customs Department on 16th and 17th June 2007. The Comptroller was not satisfied with Dr. Mondesir's explanation that the Bonne Terre house was a part of Tuxedo Villas and asked him to provide proof of his claim in the form of a letter from the Ministry of Tourism. When this request was not met the Comptroller wrote to Dr. Mondesir on 26th June 2008, demanding the confirmation letter from the Ministry by no later than 4th July 2008, failing which he would proceed with the appropriate action under the Customs laws.

[8] Upon receipt of the letter from the Comptroller Dr. Mondesir said that he contacted the Ministry and was told that the requested letter would be sent to the Comptroller of Customs. Mr. Chastanet prepared a "note" for another Minister, Guy Joseph, to bring up the issue with Cabinet because he (Mr. Chastanet) was not going to be in the State for the next Cabinet meeting. It is not clear from the evidence when this "note" was prepared, and it was not disclosed.

[9] The Cabinet meeting was held on 26th June 2008, the same day as the letter from the Comptroller of Customs to Dr. Mondesir. There is very little evidence of what actually happened in the Cabinet meeting. Dr. Mondesir said that he left the meeting when the matter was being discussed, and Mr. Chastanet said he was not at the meeting. The evidence of the Cabinet Secretary, Aurelia Victor, focused on procedures, documents and the departure of Dr. Mondesir. The inference that the appellant must have expected the Court to draw is that there was a presentation by Minister Joseph and Cabinet corrected its earlier decision by "noting" that Tuxedo Villas included the house at Bonne Terre.

[10] By this time the allegation that Dr. Mondesir had used the imported goods to renovate his house in Bonne Terre in breach of the exemption that he was given in respect of Tuxedo Villas had become a major talking point in the public media in Saint Lucia and had generated a ground swell of controversy.

[11] Upon being informed of Cabinet's decision the Comptroller of Customs wrote the appellant on 9th July 2008, outlining the history of the matter, and asked the appellant to advise whether the Second Cabinet Decision nullified Dr. Mondesir's contravention of the Act (by using the imported goods at the Bonne Terre house). The appellant replied on 30th July 2008, advising the Comptroller of Customs that he would carry out an inquiry into the matter. The only person that the appellant met in the inquiry was the person being investigated, Dr. Mondesir. On 13th August 2008, the appellant informed the Comptroller of Customs that he was "satisfied that Cabinet Conclusion No. 574(c) of 2008 was a proper one based on available documentary and other evidence." He gave no details of the documents or "the other evidence" that he had considered.

[12] On 16th October 2008, the respondent wrote to the appellant pointing out the unlawful use of the imported goods by Dr. Mondesir and the impropriety of the Second Cabinet Decision, and called upon the appellant to advise his Cabinet colleagues to repeal the Second Cabinet Decision and remove all impediments in the way of prosecuting Dr. Mondesir for breaches of the Tourism Incentives Act. The appellant did not reply to this letter.

Proceedings in the High Court

[13] On 8th January 2009, the respondent initiated these proceedings by filing an application for judicial review of the Second Cabinet Decision. On 13th February 2009, Cottle J. granted leave to proceed with the action.

[14] The Fixed Date Claim Form was filed on 20th February 2009 seeking an order quashing the Second Cabinet Decision on the grounds that –

(1) it is unreasonable, arbitrary, irrational and/or perverse; and/or

(2) it was made in bad faith.

The claim was supported by affidavits by the respondent as the Leader of the Opposition, Claudius Francis, the host of a radio talk show, and Phillip J. Pierre, a former Minister of Tourism. Both the Claim Form and the respondent's affidavit in support allege that the Second Cabinet Decision was unreasonable, irrational and arbitrary, and that it was made in bad faith in that it was intended to shield Dr. Mondesir from investigation and possible prosecution for violations of the Customs laws.

[15] Under CPR 10.2(2)(a) the appellant was required to file affidavits in answer to the claim, and those affidavits would be his defence. Instead, he filed a Defence on 24th April 2009, followed by opposing affidavits by Dr. Mondesir, Aurelia Victor and Oswald Augustin on 28th April 2009, and by Mr. Chastanet on 30th April 2009. Under CPR 10.2(3) the affidavits are considered a part of his defence. The cumulative effect of the Defence and the reply affidavits is that the appellant denied the allegations of unreasonableness and bad faith and pleaded a positive case that the Second Cabinet Decision was made to correct the error in the First Cabinet Decision, and to provide the Customs Department with written confirmation that the house at Bonne Terre was a part of Tuxedo Villas. This is sufficient to dispose of the submission by Counsel for the respondent, Mr. Anthony Astaphan, SC that by failing to plead a positive case in the Defence to the allegations of bad faith the appellant had conceded those allegations. No such concession was made.

[16] This case involves a decision of the Cabinet and it is not surprising that the bulk of the most crucial documents that would have assisted the trial judge in his deliberations were in the appellant's possession. That is the nature of judicial review proceedings and the courts have traditionally placed a duty on the public authority to co-operate and make full disclosure. In R v Lancaster County

Council ex parte Huddleston[1] Sir John Donaldson, MR described the disclosure obligation in this way:

> "First, she says that it is for the applicant to make out his case for judicial review and that it is not for the respondent authority to do it for him. This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

The appellant was obliged to make full and frank disclosure in this case.

[17] On 17th January 2009, the respondent's legal advisors wrote to Counsel for the appellant requesting specific disclosure of the following documents:

(1) Cabinet Minutes of the meeting on 5th July 2007

(2) Cabinet Minutes of the meeting on 26th June 2008

(3) The Memorandum

(4) Application by Tuxedo Villas under the Act for duty free concessions.

(5) The Customs Officer's investigative report referred to by the Comptroller of Customs in the letter to the Appellant on 9th July 2008.

(6) The "available documentary and other evidence" referred to by the Appellant in his letter to the Comptroller of Customs on 13th August 2008.

[18] The appellant's Counsel replied on 24th March 2009, enclosing copies of documents that purported to comply with all of the above requests except item (e). Item (e) was provided in due course. However, the document containing the minutes of the Cabinet meeting on 26th June 2008, that was provided was

[1] [1986] 2 All ER 941 at 945

incomplete, and remains so. It consists of two pages. The first lists the persons who were present at the meeting. They include Dr. Mondesir and Mr. Chastanet. The second page lists the persons who were absent, one person who was in attendance, and one announcement by the Minister of Education and Culture. The remainder of the document is missing. The Court was therefore denied the best evidence available of the persons who were present at the meeting when Tuxedo Villas was discussed, and the documents that were presented, both of which are crucial issues in this case.

[19] The trial took place over two days on 9th and 10th July 2009. The Judgment was delivered on 3rd August 2009. The trial judge quashed the Second Cabinet Decision as having been made without any reasonable basis. He did not make a finding whether the decision was made in bad faith.

[20] The appellant appealed against the order to quash the Second Cabinet Decision and the respondent filed a Counter Notice contending that the trial judge erred in not making a finding that the Second Cabinet Decision was made in bad faith, and in finding that Minister Chastanet was a reliable witness and not finding that Dr. Mondesir was not a reliable witness.

[21] The main issues in this appeal are:

(1) On the appeal – was the trial judge correct in quashing the Second Cabinet Decision on the ground of Wednesbury unreasonableness?

(2) On the Counter Notice – was the Second Cabinet Decision motivated by bad faith to protect Dr. Mondesir from further investigation by the Comptroller of Customs and possible prosecution for offences under the Customs Laws?

[22] In order to resolve the main issues it is necessary to resolve the following matters:

(1) The role of the Minister of Tourism under the Act.

(2) Was the Bonne Terre house included in the First Cabinet Decision?

(3) The procedure for making Cabinet Decisions in Saint Lucia.

(4) The finding that Minister Chastanet was a credible witness and the failure to find that Dr. Mondesir was not a credible witness.

(5) The documents that were before Cabinet on 26th June 2008 and generally what happened in the meeting regarding Tuxedo Villas.

(6) Was Dr. Mondesir present in the Cabinet meeting on 26th June 2008 when Tuxedo Villas was being discussed and the Second Cabinet Decision made?

(7) Non-disclosure by the appellant and his failure to attend for cross-examination.

I will deal with these matters before going on to the main issues.

Minister's Role under the Act

[23] Persons embarking on a tourism project can apply to the Minister under Section 3 of Part 2 of the Tourism Incentives Act for the approval of the project as an Approved Tourism Product. A project includes the building of a new hotel or restaurant or the renovation of an existing hotel or restaurant, and the furnishing and equipping of a building to be used as a hotel or restaurant. Subsection (3) provides –

> "After the approval of Cabinet, the Minister may by order made by statutory instrument declare any service or facility to be a tourism product."

The remainder of Part 2 of the Act sets out the Minister's wide powers in approving Tourism Products, but Section 3(3) makes it clear that he must first have Cabinet approval to declare a service or facility as a Tourism Product. In this case Cabinet approval was given in the form of the First Cabinet Decision and declared by the Minister by Statutory Instrument No. 11 of 2008 made on 31st December 2007.

[24] Section 4 deals with the information to be furnished by an applicant. The Section reads:

> "Upon receipt of an application under section 3 the Minister may require that evidence satisfactory to him or her be submitted with respect to any matter relevant to the application, including:
>
> (a) ownership of the project and of the completed project;
>
> (b) land to be used in the project's development
>
> (c) estimated expenditure on the project and the source of funds to be used;
>
> (d) a project feasibility study forecasting economic benefits to Saint Lucia;
>
> (e) an environmental impact assessment statement;
>
> (f) marketing plans relevant to the sale of the completed tourism product or services; or
>
> (g) any other information including comments from the public that may be required by the Minister at the time."

This list is an indication of the seriousness of an application for approval of a project as a Tourism Product, and the matters that the Minister should take into consideration when considering the application. It is not a matter for private discussion between the Minister and the applicant.

Was the Bonne Terre House included in the First Cabinet Decision

[25] The trial judge found that the Application Letter did not say that Tuxedo Villas includes a villa at Bonne Terre. This places a restrictive interpretation on Dr. Mondesir's letter. The reference to a "villa at Bonne Terre, Rodney Bay" may be inaccurate in geographical terms because Bonne Terre is not a part of Rodney Bay. But it is clear that Dr. Mondesir intended to include the villa in the application. It is equally clear that when the application was considered in the Ministry of Tourism the Deputy Permanent Secretary did not consider the Bonne Terre house as a part of the Tuxedo Villas and he did not include it in the Memorandum. Mr. Chastanet said that he discussed the application with Dr.

Mondesir before it was submitted to Cabinet, and in describing those discussions in cross examination Mr. Chastanet said –

> "They involve(d) Tuxedo Villas, I don't remember specifically the villa coming up, I don't remember that being a question."

"The villa" is a reference to the house at Bonne Terre. The following exchange between Mr. Chastanet and Mr. Astaphan, SC confirms that Mr. Chastanet did not think that Tuxedo Villas included the house at Bonne Terre –

> "Q … Now did you see this letter (the Application Letter) at the time you signed it?" ("the Memorandum")
>
> A. I did not see the letter at the time that I submitted the application into the Cabinet.
>
> Q. And you did not recall any specific discussion of Bonne Terre?
>
> A. No.
>
> Q. So at the time you signed this memorandum and submitted it to Cabinet, Bonne Terre would not have been on your mind?
>
> A. Not on my mind."

[26] Apart from Mr. Chastanet, the respondent and Mr. Pierre both testified that they have never considered the house at Bonne Terre as a part of Tuxedo Villas. The only person who gave evidence that the house was a part of Tuxedo Villas was Dr. Mondesir himself.

[27] The inevitable conclusion is that the house at Bonne Terre was not a part of Tuxedo Villas and was not included in the First Cabinet Decision.

Procedure for Cabinet Decision

[28] Counsel for the appellant, Mr. Reginald Armour, SC invited the Court to consider the procedure for Cabinet Meetings in England as set out in the work Ministers of the Crown by Rodney Brazier[2]. In deference to Mr. Armour I will refer to what I

[2] 1997 edition

think are the relevant portions of the text, but in the final analysis the decision of Cabinet procedure in Saint Lucia will be based on the evidence.

[29] The Court was referred to page 146 and the passage which states that Cabinet Ministers are free to raise a particular topic at Cabinet "Sometimes supported by an accompanying paper written by him, and sometimes not." And under the rubric "Cabinet Decisions" the following points are made:

(1) Ministers must give the Cabinet Secretary at least seven days notice of any business they intend to raise, including business to be raised orally.

(2) Memoranda are to be circulated in sufficient time to enable Ministers to read and digest them. Two working days and a weekend is suggested, and in urgent matters at least two working days without a weekend.

(3) The agenda is settled by the Prime Minister and in urgent cases when a matter arises after the agenda has been issued the Prime Minister may authorise the circulation of supplementary papers.

(4) Minutes are taken by the Secretary of the Cabinet which will include documents on which Cabinet was asked to make a decision, a summary of general arguments made in discussions, and full note of the decisions made.

[30] So much for the procedure in England which provides helpful guidance on the procedural issues that are relevant to this case. The procedure in St. Lucia can be gleaned from the evidence. Firstly, the respondent who is a former Prime Minister and Minister responsible for Finance, deposed in the Affidavit in Support of the Claim that prior to a Cabinet meeting a cabinet paper or memorandum is circulated to all Cabinet Ministers which usually sets out all the facts upon which a Cabinet decision is to be made.

[31] The Cabinet Clerk, Aurelia Victor, confirmed that Cabinet papers are circulated usually two days before the meeting. Further, that minutes of the meeting are taken and errors in the minutes can be corrected at the next meeting. Dr. Mondesir also confirmed that Cabinet papers are circulated prior to meetings, and that minutes are taken and confirmed at the following meeting.

[32] This brief summary of the evidence does not give a complete guide to Cabinet procedures in Saint Lucia, but it is sufficient for the relevant issues of prior circulation of papers, the taking of minutes, and the opportunity afforded to Ministers to correct the minutes.

Credibility of Witnesses

[33] The principles that guide an appellate court in assessing the findings by a trial judge as to the credibility of witnesses who gave evidence at the trial are well known and are summarised by Lindley, MR in Coghlan v Cumberland[3] as follows:

> "When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and, when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

[34] Lord Thankerton issued similar guidelines in Watt (or Thomas) v Thomas[4], and on the issue of when the appellate should intervene he said –

> "The Appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably appears so from the evidence, may be satisfied that he has not taken proper advantage of his

[3] [1898] 1 Ch. 704 at 705
[4] [1947] AC 484 at 488

> having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Finally, Rawlins JA (as he then was) said in Golfview Development Ltd v St. Kitts Development Corporation and Michael Simanac Civil Appeal No. 17 of 2004 at paragraph 23 –

> "An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Section 33(1)(b) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act empowers this Court to draw factual inferences. [24] Where therefore there is an appeal against the fact-finding of a court of first instance, the burden upon the appellant is a very heavy one. The appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes elegantly stated, exceeded the generous ambit within which reasonable agreement is possible."

[35] In respect of Mr. Chastanet the trial judge found that –

> "The Minister was frank and open. He impressed the Court as a reliable witness who gave his evidence in a credible and forthright manner. [19] In cross-examination the Minister of Tourism was candid."

Counsel for the respondent, Mr. Anthony Astaphan, SC invited this Court to reject the trial judge's finding that Mr. Chastanet was a credible witness on account of inconsistencies between his affidavit evidence and his cross-examination; that some of his answers were evasive and so outrageous as to be false; and because he said he was not at Cabinet meeting on 26th June 2008, when the Minutes recorded him as being present.

[36] The one area of inconsistency between Mr. Chastanet's affidavit and oral evidence relates to the timing of his meetings with Dr. Mondesir after the customs investigation was launched. His affidavit is very clear – he met Dr. Mondesir in May or early June and advised him to meet with the Comptroller of Customs. In cross examination he said that that meeting took place after Dr. Mondesir had

received a letter from Customs. The only letter that Dr. Mondesir received from Customs was the letter dated 26th June 2008. But the meeting with Dr. Mondesir took place in May or early June and so it could not have been after Dr. Mondesir received the letter from Customs. Taken by itself I do not consider this a material inconsistency.

[37] The answers which Mr. Astaphan describes as evasive or outrageous include Mr. Chastanet saying that he had not seen the Application Letter before he signed the Memorandum in July 2007, and that he did not consult the senior public officers in his Ministry before preparing the "Note" for Minister Joseph to take to Cabinet. These and similar matters were explained by Mr. Chastanet in his evidence. They do not paint a favourable picture of how Mr. Chastanet conducted his business as a minister, but his answers were obviously accepted by the judge and this Court would not interfere if he was otherwise a credible witness.

[38] The aspect of the judge's findings on credibility, or more accurately his lack of a finding, which causes concern is in relation to Mr. Chastanet's presence at the meeting on 26th June 2008. In dealing with the parallel situation of Dr. Mondesir's presence at the meeting the judge relied on the minutes of the meeting. He said –

> "I accept that the Cabinet Minutes must be taken to be correct. [26] I prefer the Official record to the recollection of the clerk of events which happened more than a year ago and certainly many cabinet meetings ago. This means that I find that Minister Mondesir was present at the meeting at which the questioned decision was made."

The judge's line of reasoning is impeccable. He preferred the official minutes to the evidence of the Cabinet Clerk, found that the minutes were correct, and based on his finding that Dr. Mondesir was at the meeting on the minutes. He cannot be faulted for this.

[39] Mr. Chastanet deposed in his affidavit that he was not at the meeting because he was scheduled to travel out of the state on that date. He said in cross examination that he was "one thousand percent" sure he was off island. Yet the minutes of the meeting show on page 1 that he was present at the meeting, and on page 2 that

three ministers are listed as being absent. Mr. Chastanet is not included in the list of absent ministers. The judge did not make a finding as to Mr. Chastanet's presence at the meeting. Had he done so, and followed the course that he had charted regarding Dr. Mondesir, the inevitable conclusion would have been that the minutes show Mr. Chastanet being present, and not absent. His evidence that he was not present at the meeting would have been rejected, as was the case with Dr. Mondesir. A rejection of Mr. Chastanet's evidence on this important point would have at least tarnished his image as a credible and reliable witness.

[40] The judge should have dealt with the issue of Mr. Chastanet's presence at the meeting. If he had done so the inevitable conclusion would have been that his evidence was not credible or reliable. I am also mindful of what Mr. Astaphan described as the outrageous aspects of Mr. Chastanet's evidence, and the lack of clarity in the sequence of the letter from the Comptroller of Customs to Dr. Mondesir on 26th June 2008, the "Note" to Cabinet that was not produced, and the timing of the meeting on 26th June 2008. So much appears to have happened on 26th June 2008.

[41] Taking all of these matters into consideration the finding by the judge that Mr. Chastanet is a credible and reliable witness is set aside, and this Court is in as good a position to evaluate Mr. Chastanet's evidence and draw its own inferences.

[42] Mr. Astaphan also complained about the failure of the trial judge to find that Dr. Mondesir was not a credible witness. However, Dr. Mondesir's contention that he left the Cabinet meeting on 26th June 2008 before Tuxedo Villas was discussed, and the judge's finding that he was present at the relevant time, is a clear indication that the judge did not think that Dr. Mondesir was a credible witness, at least on this very important issue.

Documents before Cabinet on 26 June 2008

[43] The evidence of the documents, if any, that that was before Cabinet on 26th June 2008 is unclear. The only person who gave evidence who admitted to being

present when the Tuxedo Villas was discussed is the Cabinet Clerk, Aurelia Victor. Under cross-examination she said that the 2007 Memorandum "and the other documents submitted" were reviewed by Cabinet. If there were other documents they could only have been the 2007 Application Letter and the bills and receipts that were disclosed by the appellant's Counsel on 24th March 2009. On that state of the evidence the trial judge cannot be faulted for basing his decision in part on the premise that Cabinet looked at the documents referred to in this paragraph in coming to its decision.

[44] The trial judge was also correct in finding that the said documents do not prove that the Bonne Terre house was a part of Tuxedo Villas. The following comments are made on these documents:

(1) The seven year old electricity bill appears to be addressed to "Helen Mondesir Bonne Terre, Tuxedo Villas, Reduit Beach, Castries". This does not mean that the house at Bonne Terre was operated as and formed part of Tuxedo Villas. It simply shows how the electricity company addressed the bill. What is far more important is that it discloses a billing at the domestic rate and this was conceded by Dr. Mondesir. If the Bonne Terre house was a part of Tuxedo Villas it would have been billed at the commercial rate which one would expect to be the higher rate. It appears that Dr. Mondesir was asking the Minister to treat the Bonne Terre house as a commercial property on the basis of an electricity bill at the rate for domestic properties, notwithstanding that were it indeed a commercial property a commercial billing rate would have been stated on the bill.

(2) The Tuxedo Villas receipt for $2,500 dated 22nd March 2000 was described by the trial judge as "cryptic", and rightly so. It is in respect of "Emmanuel Hotel" at Bonne Terre. There is no evidence as to what is Emmanuel Hotel. It may very well be that a Tuxedo Villas guest stayed at Emmanuel Hotel in Bonne Terre in 2000, but that does not prove that the house at Bonne Terre is a part of Tuxedo Villas.

(3) The utility receipt dated 12th July 2001 ex facie does not have any link to the house at Bonne Terre.

(4) The Application Letter does refer to the house at Bonne Terre but it was previously rejected by the Deputy Permanent Secretary and Mr. Chastanet when the Memorandum leading to the First Cabinet Decision was being prepared. The Comptroller of Customs must have come to the same conclusion.

[45] In the circumstances I support the trial judge's findings that the documents that he referred to and which are dealt with in the preceding paragraph were the documents that were before the Cabinet when the Second Cabinet Decision was made; and that they do not prove that the house at Bonne Terre is a part of Tuxedo Villas.

Dr. Mondesir's presence when the Second Cabinet Decision was made

[46] The trial judge found that Dr. Mondesir was present at the meeting when Tuxedo Villas was discussed. He preferred the official record of the meeting (the incomplete minutes) which show that he was present, to the evidence of the Cabinet Clerk who said Dr. Mondesir left the meeting before Tuxedo Villas was discussed. The complete minutes of the meeting could have resolved this issue conclusively, one way or the other, but the relevant portion of the minutes was not disclosed by the appellant.

[47] Claudius Francis is the host of a radio talk show programme in Saint Lucia. He deposed that sometime in September 2008, he watched and listened to a television programme broadcast to the public called "Talk" hosted by a Mr. Rick Wayne. Mr. Wayne's guest was Mr. Guy Joseph, the Minister who was given "the Note" by Mr. Chastanet to take the Tuxedo Villas issue to Cabinet on the 26 June 2008. Mr. Joseph told the host of "Talk" that Dr. Mondesir was present in the Cabinet meeting when his application for incentives for Tuxedo Villas was discussed.

[48] In the circumstances there was material before the trial judge on which he could have found, as he did, that Dr. Mondesir was present when Tuxedo Villas was discussed, and there is no reason to disturb this finding. The effect of this finding is that Dr. Mondesir participated in the decision 'to note" that the house at Bonne Terre was a part of Tuxedo Villas thereby putting himself in a situation of an obvious conflict of interest.

Non-disclosure by the Appellant

[49] I have already made the point that this is a case where the appellant was in possession of documents that were relevant and important, and commented on the incomplete minutes of 26th June 2008 meeting. It is difficult to understand how the appellant, who is an officer of the Court and the Government's chief legal officer, could have thought that incomplete minutes without explanation would have been sufficient compliance with his disclosure obligations.

[50] The "note" that Minister Chastanet prepared for Minister Guy Joseph to take the matter to Cabinet was not disclosed. Mr. Chastanet said in cross examination that he "prepared a note" for Minister Joseph because he was going to be out of State and in re-examination he said:

> "Yeah, I sent a letter . . . a memo to Honourable Guy Joseph indicating to him and asked him to make representation on this matter at Cabinet."

This note, which could have been of some assistance, was not produced. If the reason for its non-production is that it never existed, it means that the briefing of Minister Joseph would have been entirely oral, which of itself would be a cause for concern. If the note was made and not disclosed it is equally a cause for concern. In either case it leads to the drawing of an adverse inference.

Appellant's failure to attend for cross-examination

[51] The appellant swore and filed two affidavits in the application for leave to apply for judicial review. One of these affidavits contained averments that are relevant to these proceedings. In addition, the attendance of the appellant as a witness could

have shed light on a multiplicity of important controversial matters in this case including the persons who were present at the Cabinet on 26th June 2008 when Tuxedo Villas was discussed, the documents that were considered, and the details of his investigation of the allegations against Dr. Mondesir.

[52] The Directions Order that was made at the first hearing of the case on 3rd March 2009, stipulated that all affidavits are to stand as examination in chief and the deponents are to attend for cross-examination. Part 30.1 of the Civil Procedure Rules provides –

> "(3) Whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross-examined.
>
> (4) Such an application must be made not less than in the case of
>
> (a) a trial – 21 days; or
> (b) any other hearing – 7 days;
>
> before the date of the hearing at which it is intended to cross-examine the deponent.
>
> (5) If the deponent does not attend as required by the court order, the affidavit may not be used as evidence unless the court permits."

The Directions Order is caught by this rule and if a deponent who made an affidavit did not attend for cross-examination his affidavit could not be used without the court's permission. No explanation was given for the appellant's failure to attend for cross examination, and no application was made to rely on his affidavit. Therefore, his affidavits were not evidence before the trial judge. But even if the appellant's affidavit are not caught by the Part 30.1 and can be considered by the Court, his failure to attend for cross-examination without explanation means that little, if any, weight would have been given to his evidence.

[53] I turn now to the main issues in this appeal.

Wednesbury Unreasonableness/Irrationality

[54] The trial judge quashed the Second Cabinet Decision on the ground that it was unreasonable in the sense that no reasonable grounds were shown as to why Cabinet came to that decision.

[55] It is now settled that the Courts have jurisdiction to question a decision made by a public authority. The jurisdiction is purely supervisory in the sense that the Court's role is limited to ensuring that the decision was lawfully made. The Court cannot act as an appellate body to question the decision on the merits, even if it thinks that the wrong decision was made. The correct approach is summarised in the House of Lords decision of Brind and others v Secretary of State of the Home Department[5] as follows –

> "But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary."

[56] Decisions of the Cabinet are among the decisions of public authorities that are subject to judicial review: HMB Holdings Ltd v Cabinet of Antigua and Barbuda,[6] a decision of the Privy Council on appeal from this Court concerning the decision of the Cabinet of Antigua and Barbuda to acquire certain lands belonging to the appellant. Lord Hope opined at paragraphs 30 and 31 –

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[5] [1991] 1 All ER 720 at 731
[6] [2007] UKPC 37

"30. But this does not mean that the decision is immune from judicial review. The Attorney General conceded that the door was not closed entirely. He accepted that the decision could be challenged on the ground that it was manifestly without foundation. He was right to do so, but the principle extends further than that: *Vanterpool v Crown Attorney* (1961) 3 WIR 35, per Lewis J at pp 366- 367. As Lord Wilberforce explained in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 207D- F, however widely the field in which a decision-maker operates is defined by statute, there are always certain fundamental assumptions which necessarily underlie the remission, or delegation, of a power to decide such as the requirement that a decision must be made in good faith. An examination of its proper area is not precluded by a clause which confers finality of its decisions. Clauses of that kind can only relate to decisions which have been given within the field of operation that has been entrusted to the decision-maker. This means that all three grounds for judicial review which Lord Diplock identified in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, may be invoked – illegality, irrationality and procedural impropriety.

31. Their Lordships therefore reject the respondent's argument that judicial review of the Cabinet's decision is not available. It is open to HMB to challenge the decision on the ground that it was irrational. The test of irrationality will be satisfied if it can be shown that it was one which no sensible person who had applied his mind to the question to be decided could have arrived at."

[57] The test of irrationality or unreasonableness in applications for judicial review is set out in the often quoted judgment of Lord Green, MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation[7] –

> "In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarise once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. 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 matter 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. The power of the court to interfere in each

[7] [1948] 1 K.B. 223 at pages 233 – 234

case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them."

[58] The test was further developed by Lord Diplock in Council of the Civil Services Unions v Minister of the Civil Service[8] –

> ". . . Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" *(Associated Provincial Pictures Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

[8] [1985] AC 374 at pages 410 - 411

> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers all failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

[59] In summary the Second Cabinet Decision can be reviewed by the courts on the grounds of irrationality, illegality or procedural impropriety. A finding on any one or more grounds is sufficient for the Court to quash the Decision.

[60] Can it be said that the Second Cabinet Decision was tainted with irrationality in the sense contemplated by Lord Diplock in the Council of the Civil Services case above. I find that there is ample ground for making such a finding for the following reasons:

(1) The Bonne Terre house was not a part of the First Cabinet Decision and it was necessary for Cabinet to find that it was a part of Tourism Product known as Tuxedo Villas to arrive at the Second Cabinet Decision. I have already dealt with the evidence on this issue in detail.[9] On the totality of the evidence the trial judge was correct in finding that the house at Bonne Terre was not a part of Tuxedo Villas and that there was no reasonable basis for the Cabinet to find that it was a part of the Villas.

(2) The non-disclosure of documents by the appellant including the remainder of the minutes of the meeting on 26th June 2008[10] and Mr. Chastanet's "note" to Minister Joseph.

[9] See paragraphs 25-27 above
[10] See paragraphs 49-50 above

(3) The failure of the Tourism Minister to investigate the renewed application by Dr. Mondesir with anyone apart from Dr. Mondesir himself.

(4) The presence of Dr. Mondesir in the Cabinet meeting when the Second Cabinet Decision was made in the face of a blatant conflict of interest.

(5) The failure of the Cabinet to follow established Cabinet procedures regarding prior notice of matters to be discussed at Cabinet. There was no urgency or emergency in this case other than the need to deal with the growing public controversy regarding Dr. Mondesir's use of the imported goods. In any case this is not the type of urgency or emergency that would justify Cabinet deviating from its established procedures. The matter could easily have been put before Cabinet in the usual way.

(6) There was no consideration of any of the matters listed in Section 4 of the Tourism Incentives Act.[11]

[61] Taking all of these matters into consideration I find that the Second Cabinet Decision was irrational in the Wednesbury sense in that it was so unreasonable that no reasonable Cabinet should have made it. The Cabinet is the decision making body of the Executive of the Government of Saint Lucia with important fiduciary duties to the citizens of the country. It cannot make decisions that result in reducing the revenue that the Government is entitled to collect in an arbitrary and cavalier manner, especially where the decision benefits one of its own members. Dr. Mondesir's application should have followed the usual procedures for making Cabinet decisions and he should not have been allowed to sit in on the deliberations. On any view of the evidence the decision is so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the decision

that the Cabinet made on 26th June 2008. The decision was simply devoid of any rational basis. There is no reference in the Cabinet Minutes of 26th June 2008 that the minutes of 5th July 2007 contained an error, and that the Second Decision was in essence a correction of the First Decision. Given the fact that neither Minister Chastanet nor any officer within the Ministry considered that the house at Bonne Terre was a part of Tuxedo Villas, it is difficult to rationalise how a mere 'noting" of that fact without any proper consideration of this addition could suffice as a basis for arriving at the Second Cabinet Decision.

[62] I should add that the finding of irrationality would stand even if Mr. Chastanet is treated as a credible witness and his version of the reason for the Second Cabinet Decision is accepted.

[63] I therefore uphold the Order of the trial judge to quash the Second Cabinet Decision and that is sufficient to dispose of the appeal.

The Cross Appeal

[64] The three main points in the respondent's Counter Notice are:

(1) the judge erred in finding that Mr. Chastanet was a credible and candid witness, and in not finding that Dr. Mondesir was not a credible witness;

(2) the judge erred in not finding on the totality of the evidence that the Second Cabinet Decision was made in bad faith for an ulterior purpose namely to protect Dr. Mondesir from further investigation and possible prosecution by the Comptroller of Customs; and

(3) the judge erred in not drawing adverse inferences from the deliberate failure of the appellant to give evidence at the trial.

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[11] See paragraph 24 above

I have already dealt with the issues of credibility and the appellant's failure to give evidence. I will now deal with bad faith.

[65] Lord Diplock in Civil Service Unions case[12] listed the three main grounds that the courts will challenge administrative decisions, namely illegality, irrationality and procedural impropriety. Lord Greene, MR also referred in the Wednesbury case[13] to bad faith and dishonesty as a separate category. Such claims are usually brought as criminal actions for misbehaviour or misconduct in public office, or as the tort of misfeasance in public office. This claim was not brought under either of these two categories. Insofar as the claim is based on bad faith it is an application by the respondent to the Court to review the actions of the Cabinet in making the Second Cabinet Decision, and to set it aside because it was made for an improper purpose, namely, to shield Dr. Mondesir from further investigation by the Comptroller of Customs, and possible prosecution for offences under the Customs law.

[66] The appellant's response is that based on the new material provided by Dr. Mondesir, including the misfiled Letter of Application, the Second Cabinet Decision was necessary to correct the mistake made in the First Cabinet Decision, and to provide the documentation requested by the Comptroller of Customs that the house at Bonne Terre is a part of Tuxedo Villas.

[67] This brief outline satisfies me that the allegation of bad faith was clearly pleaded by the respondent and responded to by the appellant. The allegation of bad faith carries with it, as is expected, allegations of dishonesty and improper use of the powers granted by the legislation. It suggests that the entire Cabinet, or at least those members who were present at the meeting on 26th June 2008, were involved in a cover up to protect one of their members. It is a very serious allegation. In R v Port Talbot BC[14] Lord Nolan commented on the meaning of bad faith in this context as follows:

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[12] Supra paragraph 58
[13] [1948] 1KB 223 at 229
[14] [1988] 2 All ER 207

> "As Megaw LJ said in Cannock Chase DC v Kelly [1978] 1 All ER 152 at 156 [1978] 1 WLR 1 at 6, bad faith means dishonesty: 'It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant."

And in Smith v East Elloe Rural District Council and others[15] Lord Radcliffe described mala fides, another way of saying bad faith, as -

> ". . . a phrase often issued in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud and corruption"

[68] There is no gainsaying the gravity of the allegation of bad faith, and the evidential burden on the respondent is commensurate with the seriousness of the allegation. Dishonesty and bad faith can be proved by inference from established facts, but the inference is not to be drawn from evidence which is equally consistent with mere negligence. In dealing with the proper approach to an allegation of bad faith or dishonesty in proving the tort of misfeasance in public office, Lord Hobhouse of Woodborough said in Three Rivers District Council v Governor and Company of the Bank of England[16] -

> "The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading then a trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence."

[69] Counsel for the respondent reminded this Court that we are entitled to draw inferences from established facts and I am guided by Lord Hobhouse's dictum that bad faith or dishonesty should not be inferred from the facts if those facts are equally consistent with mere negligence, or more apropos to this case, an equal

[15] [1956] AC 736 at 770

inference that when Cabinet made the Second Decision it was correcting its own mistake and complying with the demand of the Comptroller of Customs. Following this approach I have had regard to the findings set out in paragraph 61 above when I dealt with the issue of irrationality, including the rejection of Mr. Chastanet's evidence that he was not at the meeting. Taking all of these matters into consideration I find that we have passed Lord Hobhouse's signpost of the inference of bad faith being equally consistent with the explanation of a proper purpose. The evidence points unyieldingly to a decision made for improper purposes and I have no difficulty in drawing the inference that the Cabinet made its decision on 26th June 2008 to shield Dr. Mondesir from further investigation and possible prosecution for breaches of the Customs Laws. If the decision was made for the proper, though irrational, purpose of correcting a previous decision and providing the Comptroller of Customs with proof that the house at Bonne Terre was a part of Tuxedo Villas, the usual Cabinet procedures would have been followed and the Court would have had the benefit of the full minutes of the meeting, the note by Mr. Chastanet, and the advantage of seeing the appellant give oral evidence.

[70] Counsel for the appellant reminded this Court that the allegation of bad faith was not put to any of the two Cabinet Members who gave evidence. This was conceded by Counsel for the respondent who argued that it was not necessary because of the deemed admission of bad faith on the pleadings. I have already ruled that there was no such admission and bad faith was a live issue throughout the trial and the appeal. It was desirable for the issue to be put to the witnesses, because it is a matter of what Lord Hoffman described in Village Cay Marina Limited v Acland as "a general rule of procedural fairness".[17] However, the court retains a discretion to come to its own conclusions on the evidence even if the allegation was not tested by cross examination. The issues in the case were joined on the pleadings (including the affidavits) and it is clear from the evidence of the two Ministers what their response would have been. They both testified that

[16] [2001] 2 All ER 513
[17] (1996) 52 WIR 238 at 270

the Second Cabinet Decision was made to correct an error in the First Cabinet Decision, and to provide the Customs Department with written confirmation that the house at Bonne Terre was a part of Tuxedo Villas. I am also mindful of the compelling evidence of bad faith. In the circumstances no prejudice was caused to the appellant by the failure to put the allegation of bad faith to the two ministers when they were being cross-examined.

[71] I find that the allegation of bad faith is proved and that this is an additional ground to quash the Second Cabinet Decision.

Conclusion

[72] For the reasons given I would dismiss the appeal and allow the cross appeal. I would confirm the trial judge's decision to quash the Second Cabinet Decision, and award costs to the respondent on the appeal and cross-appeal.

[73] I express my deep appreciation to Counsel on both sides for their excellent written and oral presentations.

Paul Webster, Q.C.
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson K. Baptiste
Justice of Appeal