THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0101

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR DAMAGES [PART 56 ECSC CIVIL PROCEDURE RULES]

BETWEEN:

BALLY AND BALLY INVESTMENT LTD **CLAIMANT**

AND

COMPTROLLER OF CUSTOMS AND EXCISE

THE ATTORNEY GENERAL **DEFENDANTS**

Appearances:
Mrs. Ronnia Durham-Balcombe for the Claimant/Applicant
Mrs. Cerepha Harper-Joseph and Mr. Kezron Walters for the Defendants

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2019: June 25
July 25

JUDGMENT

Byer, J.:

[1] By Amended Fixed Dated Claim Form filed on 13 March 2019, the claimant/applicant having been given leave to bring judicial review on 11 October 2018 sought the following reliefs:

i. A declaration that the First named defendant acted *ultra vires* its powers under the Customs (Control and Management) Act CAP. 422 of the Revised Laws of St. Vincent and the Grenadines 2009 (hereinafter referred to as the Act) in arriving at the values it placed on the two vehicles consigned to the claimant/applicant.

ii. A declaration that the First named defendant acted unreasonably in more than doubling the values of the two vehicles consigned to the claimant/applicant in circumstances where their research showed that such vehicles could be obtained and accepted for even less than what the claimant/applicant paid on its invoices.
iii. A declaration that the First named defendant acted *ultra vires* and/or unreasonably in the first instance in not permitting the claimant/applicant to clear the other goods on the back of the vehicle without also clearing either or both vehicles.
iv. A declaration that the First named defendant's reasoning in letter dated 5 November 2018 for not permitting the claimant/applicant to amend the ASYCUDA to clear the other goods in circumstances where the ASYCUDA system allows for amendments to be made is unreasonable.
v. An order of Certiorari quashing the decision of the First named defendant which more than doubled the values of the said vehicles.
vi. An order of mandamus requiring the First named defendant to make its determination of the values of the said vehicles using either the transaction value method there being no justifiable reason for not accepting the claimant/applicant's invoice or in the alternative the Transaction Value of Similar Goods in accordance with the Second Schedule of the said Act.
vii. Special damages in the amount of $17,150.00 to date and continuing.
viii. Exemplary and/or other damages to be assessed by the court.
ix. Interest at the statutory rate of six (6) percent per annum on any sum found due on an award of damages to the claimant/applicant.
x. Costs
xi. Such further or other reliefs as the Honourable Court deems fit.

[2] The trial of this matter took the divergent course that is usually adopted in the hearings of applications for judicial review in that evidence and cross examination of those individuals who had sworn affidavits in the proceedings was undertaken. This appeared to the court to be necessary in the instant case as the motive for the decision of the First named defendant had been brought into question and the factual contentions of the parties as to what transpired were fundamentally different. However, despite this difference, this court has been able to distill the salient events that took place between the claimant/applicant and the defendants that led to the claim as filed.

Background

[3] On 30 April 2018 documents (Invoice No. Dinv 00036; Bill of Lading no. 18016dvrt030; ASYCUDA World Way of Bill 2018/483, and two sets of Bills of Sight, three copies each) were lodged with the Valuation Unit of the Customs and Excise Department by Mr. Brian Nanton of Cox and Richards Customs and Shipping on behalf of the claimant/applicant.

[4] The motor vehicles and goods were consigned to the claimant/applicant herein. The two page invoice contained declarations that it was a true and correct original document and there were no other invoices relating to the value of the items included.

[5] The documents for the motor vehicles, two Toyota Hilux vehicles (years 2007 at least initially thought to be at this stage and 2013) and the other goods imported by the Applicant were examined. On examination of the invoice by Customs, it was noted that the invoice stated that both vehicles were categorized as "non-runners", and notices had been affixed to the vehicles by the vendor stating "Do not attempt to start"[1].

[6] Having seen the same, it appears that the First named defendant by its officers, purported to doubt the validity of the invoice supplied by the claimant/applicant, and in particular, the prices that were stated therein.

[7] In response to this the First named defendant purportedly made investigations including the perusal of websites of other automobile traders and determined that the vehicles were under-invoiced and amended the claimant/applicant's invoice by more than doubling the values of the vehicles. Further, the defendant, by Bill of Sight, assessed and valued the other goods which accompanied the vehicles, and ascribed values to those goods, which in large measure correlated with the values as stated on the invoice, but also ascribed values to goods which were clearly marked with a zero value.

[8] The claimant/applicant was provided with a letter dated 22 May 2018 from the First named defendant giving its reasons for more than doubling the vehicle values, which is at the crux of the claimant/applicant's application for judicial review. The claimant/applicant disagreed not only with the revised values of the vehicles but also how the First named defendant arrived at their values.

[9] By letter dated 25 May 2018 the claimant/applicant requested the defendant to permit it to clear the other goods, which for convenience were shipped on the back of one of the vehicles and which the First named defendant had already assessed and valued by Bill of Sight. By letter dated 1 June 2018, the First named defendant responded in writing to the claimant/applicant's request to clear the other goods, stating that since there was only one invoice and one Bill of Lading they concluded that *"… to allow the clearance of the vehicle parts only is not in keeping with the procedures of the Customs. There are however, two options you can choose from.*

> *1. You can deposit the duties based on the revised assessment of the Valuation Unit.*
>
> *2. The vehicle that contains the parts must be cleared along with those parts and the duties to be paid are based on the revised values of the valuation unit."*

[1] Tab 3 Exhibit CM4 of Trial Bundle

[10] As an alternative, the claimant/applicant, on the advice of its broker, then further proposed to the First named defendant, a procedure which entailed amending the ASYCUDA, but the First named defendant, by letter dated 5 November 2018[2], refused the claimant/applicant's application indicating that the procedure identified was incorrect and that partial clearing is only allowable in the circumstances prescribed by Section 22 (3) of the said Act.

[11] Having determined the factual matrix that gave rise to the claim as filed, this court has also determined that the issues for its determination can be encapsulated as the following:

i. Whether the First named defendant acted *ultra vires* its powers under the Act in arriving at the values as placed on the two vehicles consigned to the claimant/applicant;
   a) In particular whether the use of the diagnostic scan and the results therefrom to arrive at the values placed on the vehicles were *ultra vires* the Act.

ii. Whether the First named defendant acted unreasonably in more than doubling the value of the two vehicles;
   a) In particular as to whether the First named defendant was entitled to rely on the research and investigations conducted with regard to other vehicles.

iii. Whether customs unreasonably refused to permit the claimant/applicant to pay for and clear the goods on the back of one of the trucks unless either one or both vehicles were also cleared; and

iv. Whether the First named defendant's reasoning in the letter dated 5 November 2018 in which it was made clear that the claimant/applicant was not permitted to amend the ASYCUDA to clear the other goods in circumstances where the ASYCUDA system in fact allowed for amendments was in all the circumstances, unreasonable.

[12] Before this court embarks on an assessment of the issues it is always useful to bear in mind the nature of the assessment that is to be undertaken by the court in proceedings of this nature.

[13] Judicial review proceedings are the process by which an aggrieved party seeks to ask the court to inquire into the functions and/or decisions of public authorities, to ensure that the "***functions of public authorities are carried out in accordance with the law and also that these bodies are held accountable for any abuse of power or unlawful or ultra vires acts ….. In a constitutional democracy, one of the roles of judicial review is the vindication of the rights of an individual against abuse of power carried out by public officials."***[3]

[2] Tab 4, Exhibit LJ8 of Trial Bundle

[3] **Digicel (Jamaica) Limited v The Office of the Utilities Regulation** HCV2012/03318 (Jamaica) unrep

[14] The filing of judicial review proceedings therefore does not engage the court to stand in the stead of the decision maker or even as a tribunal in the appellate jurisdiction. The court simply operates to examine the premise upon which the decision maker has based their decision and to ultimately determine whether that tribunal could have come to the decision that they did. In other words, whether the decision made could have been reached by any reasonable tribunal in *all* the circumstances.

Judicial review is therefore "*not an appeal from a decision but a* ***review*** *of the manner in which the decision was made"* (my emphasis) per Lord Bingham in Chief Constable of the North Wales Police v Evans[4].

[15] However in doing that review it is very clear that it is not the job of this court or any court to determine the right or wrong of the decision itself or even to examine the basis upon which the decision was made but simply to ensure the process followed was lawful, reasonable and fair.

Issue #1 - Whether the First named defendant acted *ultra vires* its powers under the Act in arriving at the values as placed on the two vehicles consigned to the claimant/applicant:

a) In particular whether the use of the diagnostic scan and the results therefrom to arrive at the values placed on the vehicles were *ultra vires* the Act

Issue #2 - Whether the First named defendant acted unreasonably in more than doubling the value of the two vehicles:

a) In particular as to whether the First named defendant was entitled to rely on the research and investigations conducted with regard to other vehicles

[16] Since these issues both deal with the complaint with regard to the values that were ascribed to the vehicles consigned to the claimant/applicant, for convenience I will deal with them together, examining of course the individual complaints in due course.

[17] When one looks to a complaint of the action of a public body or tribunal acting *ultra vires*, it is important to note what exactly is the definition of *ultra vires*. This has been defined as any action taken "beyond the scope or in excess of a legal power or authority"[5] as conferred on the entity by way of statute or otherwise. Thus, either an act complained of is authorized by statute or it is *ultra vires* that statute. In order to make such a determination it is necessary for the legislation which gives the power to be examined. In the instant case it is the Act.

[4] [1982] 3 ALL ER 141 at 155
[5] Merriam – Webster Dictionary

[18] Within the preamble of the Act, it is clearly stated that its intention was to "make better provisions and consolidate the law relating to Customs" and gave the Comptroller of Customs the responsibility "…for the administration of [the Act]" together with the duty *"…of collecting and accounting for and otherwise managing the revenue of customs"*[6].

[19] There is therefore no doubt that the First named defendant was the person who holds the ultimate responsibility for governance of the Act. It is also therefore very clear that any decision that he has made in that capacity personally or through his officers, must be amenable to review by this court.

[20] So the Act sets the background and the parameters in which the department and the First named defendant can act to assess sums that would be due to the State on the importation of goods into St. Vincent and the Grenadines.

[21] The submission of the claimant/applicant therefore in this regard was that although they do not and cannot dispute that the First named defendant has the power to make the required assessment of duties, that in the instant case the act of the First named defendant in performing an invasive scan of the vehicles by an individual who was not approved by the claimant/applicant went outside the scope of the powers conferred on the First named defendant to "examine and take account of any goods" pursuant to Section 86 of the Act. This act was therefore ultra vires.

[22] Thus having done so, and using that assessment among other factors to find that the goods were undervalued and thereby doubling the values of the vehicles was both illegal and unreasonable on the part of the First named defendant.

[23] The submission of the claimant/applicant was that the word "examine" as contained within the provisions of the Act, in its plain and ordinary meaning, must have meant no more than the ability to look at the item closely, even to investigate it but only by means of observation, analysis or inspection[7]. Therefore, having proceeded to undertake the scan which amounted to an invasive act was clearly outside the parameters, of what in the mind of the claimant/applicant, was envisioned by the very words of the Act. This they submitted was buttressed by the fact that where intrusive or invasive acts were to be undertaken, the Act made specific mention of those powers and also set the parameters of them clearly. Thus if Parliament intended for the First named defendant to have that power to test the vehicles, that would have been specifically given to him as was done in an act of similar ilk in the Federation of St. Christopher and Nevis where in their Customs Act provision is made for physical or chemical testing of goods and the drilling or dismantling of goods[8].

[6] Section 4 (1) and (2) of the Act
[7] Paragraph A (J) of the submissions of the Claimant/Applicant filed 17/6/19
[8] Paragraph A (N) of the submissions of the Claimant/Applicant filed 17/6/19

[24] The claimant/applicant therefore submitted that the First named defendant not having been given this power expressly, could not do so on their own initiative and as such the diagnostic scan was outside the parameters of the provisions of the Act and therefore the taking of such action must amount to the same being ultra vires. Any reliance on this scan together with the use of research and investigations of similar vehicles to formulate the values then ascribed to their consignment of the claimant/applicant resulted in the First named defendant taking into consideration irrelevant information which by necessity meant that the decision to raise the values was unreasonable.

[25] The claimant/applicant submitted that the First named defendant was empowered by the Act to conduct a valuation in the manner as provided for by the Second Schedule to the Act only. These provisions of this Schedule, for the claimant/applicant, gave a comprehensive and binding structure within which the First named defendant and his officers could act. Having chosen to seek other guidance that was outside the parameters of these provisions, the claimant/applicant submitted that the decision was therefore unreasonable and irrational and should be set aside.

[26] The defendants on the other hand disputed the contentions of the claimant/applicant.

[27] The defendants submitted that upon the evidence led, and by the law which governed their actions, it was clear that the First named defendant and by extension his officers to whom he had delegated certain functions were entitled to take a closer look at the declaration and the goods of the claimant/applicant.

[28] The defendant submitted that the First named defendant and his officers were entitled under Section 86 of the Act, to "examine goods". They submitted that this section was purposely drafted in such broad terms to enable the officers of the Customs to take all necessary action in undertaking the mandated examination for the purpose of assessment[9].

[29] The defendants further submitted that it was therefore not the place or the province of the court to fetter the discretion of the First named defendant and place restrictions where none existed by law. Therefore the First named defendant had not acted *ultra vires* the Act in interpreting "examine" to allow for the diagnostic test to be undertaken as a means to "satisfy"[10] themselves of the accuracy of the declaration.

[30] This legitimate concern or suspicion had arisen, the defendants submitted, because of the failure of the invoices presented to conform to expectations from this particular vendor. Those concerns having been presented, the defendants defended their actions and submitted that the officers of the First named defendant were empowered to satisfy themselves as to the veracity and accuracy of the same. Thus the officers were entitled to have the scan performed, they were entitled to ask

[9] Paragraph 35 of the Closing submissions of the Defendant filed 5/7/19
[10] Section 3 (7) of the Second Schedule of the Act

for further information to substantiate the invoice and they were entitled to undertake their own investigations and research and formulate a value that they then ascribed to the consignment of the claimant/applicant.

[31] The defendants therefore submit that they acted neither *ultra vires* the Act nor unreasonable in making the decisions that they did and as such the decision was not one that was open to being quashed by this court.

Court's Analysis and Considerations

[32] In looking at this issue, it was clear to this court that the determination of this issue lay with the evidence that was elicited at trial and the functions that were ascribed to the First named defendant and his officers by the provisions of the Act. In looking at these issues, the questions for the court must be 1) Did the First named defendant act *ultra vires* the Act in conducting the diagnostic test to fulfill the mandate of examination required under Section 86 and 2) having conducted the test, having gotten the results and having raised issues with the veracity of the invoices produced, was the First named defendant entitled to come to the decision that it had on the uplifting of the values of the goods of the claimant/applicant?

[33] In looking at what was required of the First named defendant in coming to the decision to undertake the diagnostic scan, the First named defendant has relied on Section 86 of the Act which would be helpful to state here for ease of reference. Section 86 is entitled **Examination of goods, etc:**

"(1) Without prejudice to any other power conferred by any customs enactment, an officer may ***examine and take account of any goods****—*

(a) which have been imported; or

(b) in a warehouse or a customs warehouse; or

(c) loaded into or unloaded from any vessel or aircraft at any place in the State; or

(d) entered for exportation or for use as stores; or

(e) brought to any place in the State for exportation of for use as stores;

(f) in respect of which any claim for drawback, allowance, rebate, remission or repayment of duty has been made,

and may for that purpose require any container to be opened or unpacked.

(2) An examination of goods by an officer under subsection (1) shall be made at such reasonable time and place as the officer may direct.

(3) The cost of transporting goods to a place directed under subsection (2), and their unloading, opening, unpacking, weighing, repacking, bulking, sorting, lotting, marking, numbering, loading, carrying or landing and any such treatment to the containers in which the goods are kept, for the purposes of and incidental to their examination or use as stores, or warehousing and any facilities or assistance required for examination shall be provided by or at the expense of the owner of the goods.

(4) Any—

(a) imported goods which an officer has the power under this Act to examine; or

(b) goods, other than imported goods, which an officer has directed to be brought to a place for the purposes of examination,

removed from customs charge before they have been examined without the prior authority of the proper officer shall be liable to forfeiture." (My emphasis added)

[34] In looking at this section it is clear that the applicable provision is as contained in Section 86 (1) (a) and 86 (2).

[35] Thus the operative words are ***"examine and take account of any goods".*** It is therefore apparent to this court that this question in issue does indeed turn on the rules of statutory interpretation. In that regard I am heartened by the words of Byron CJ as he then was as he adopted the words of Sir Vincent Flossaic from the case of **Charles Savarin v John William**[11] in the later case of **The Attorney General v Barbuda Council**[12] in which he succinctly stated that is necessary to "… ***start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which the word or phrase should bear, That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every other word or phrase used in the statute, all implications there from and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."***

[36] Thus statutory interpretation in almost all cases must give pay to the words in their "…***grammatical and ordinary sense [read] harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".***[13]

[11] [1995]51 WIR 75 at 79
[12] Civ App NO 7/2001 at para 10
[13] **Driedger's The Construction of Statutes** Butterworths 1983 page 87

[37] In **R v Secretary of State for the Environment, Transportation and Regions ex parte Spath Holme** Lord Nicholls observed at page 396[14]:

> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used."*

Also in the case of **Douglas v The Police**[15] our then Chief Justice, Sir Vincent Floissac stated:

> *"The function of the court in relation to a statute is to interpret the statute by ascending the legislative intention in regard thereto. That legislative intention is an inference drawn from the primary meanings of the words and phrases used in the statute with such modifications of those meanings as may be necessary to make them consistent with the statutory context."*

[38] It is therefore pellucid to this court that *"parliament is expected to say what it means and mean what it says"*[16].

[39] When the court is therefore looking at the scheme of this Act the entire act must be considered that is the Act itself, any relevant facts to the subject matter of the Act and even in some cases the commentary that may have accompanied the legislative debate on the same.

[40] In doing so what this court must ultimately look at therefore is what **Bennion on Statutory Interpretation**[17] has called the "informed interpretation rule". This really means nothing more than the court adopting a two stage process in looking at the enactment in its literal meaning and then accepting a final view on the legal meaning that is formed from looking and considering the literal or grammatical meaning. Thus the court should consider that "a legislator when settling the wording of legislation intended it to be given a fully informed rather than a purely literal interpretation…"[18]

[41] In the case at bar, neither side specifically assisted the court with regard to context of the enactment of the Act but the claimant/applicant in their closing submissions did provide this court with a plethora of information that this court accepts puts the context of this Act into perspective. It

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[14] Quoted by Carrington JA (Acting) in **Telecommunications Regulatory Commission v Cable and Wireless BVI Ltd** BVIHCVAP2016/0013 at paragraph 22

[15] Op Cit at paragraph 23

[16] Op Cit paragraph 24

[17] 9th Ed Lexis Nexis

[18] **Telecommunications Regulatory Commission** case at paragraph 25

would appear that over time it was recognized by those countries that form part of World Trade Organisation that there was a requirement for transparency and universality in the law that governs Customs[19].

[42] One such authority relied on by the claimant/applicant was the text **Glossary of International Customs Terms**[20] published by the World Customs Organisation which this court accepts deals with global rules of trade between nations and to which this State is a member since 1 January 1995[21]. In that text, the definition of examination of goods where it appears in Customs legislation was stated as encapsulating the "*physical inspection of goods by customs to satisfy themselves that the nature, origin, condition, quantity and value of the goods are in accordance with the particulars furnished in the goods declaration".*

[43] When this court considers this definition, it is satisfied that this captures and permits what the First named defendant did with regard to the commissioned scan.

[44] In the evidence of Mr. Christopher Mason, (the valuation supervisor who headed this investigation) he stated:

> *"19. Mrs. Balcombe and I had a discussion during which I informed her of our decision to have the vehicles examined by scanning them in their presence so that we all can be satisfied with the condition of the vehicles as claimed.*
>
> *21. An officer is empowered by Section 86 (1) and (2) among others, of the Customs Control Management Act to examine goods imported. This provision states:*
>
> > *"(1) Without prejudice to any other power conferred by any customs enactment, an officer may examine and take account of any goods—*
> >
> > *(a) which have been imported; or*
> >
> > *(b) …*
> >
> > *(2) An examination of goods by an officer under subsection (1) shall be made at such reasonable time and place as the officer may direct."*
>
> *22. On the 15th May 2018, I called Mr. Brian Nanton requesting his presence during the examination. He informed me that his client told him that he is not permitted to represent him in that matter.*

[19] A Handbook on the WTO Customs Valuation Agreement (2010), World Trade Organisation: Legal, Economic and Political Analysis Volume 1, The WTO Analytical Index, Guide to WTO Law and Practice, and World Trade Organization Trade Policy Review Report Of The OECS-WTO Members

[20] Tab 6 to the Submissions of the Claimant/Applicant filed on 5/7/19

[21] www.wto.org

23. Later on the 15th the 2013 Toyota Hilux Invincible was scanned by Mr. Curtis Lewis of Lewis Auto World. The scan revealed that the claim made by the claimants that the vehicle was defective was not factual. The scan showed that there were no errors and that the vehicle was in perfect shape. Based on this reading we proceeded to start the vehicle. It started without any difficulty."

Mr. Mason also reiterated during cross examination that the First named defendant and his officers saw this examination of the goods, namely the vehicles, as an integral part of verifying the declaration as submitted on behalf of the claimant/applicant.

[45] Thus in agreeing with counsel for the defendant and being bound by the findings of the erudite learning contained in the case of **Global Education Providers Inc v The Honourable Petter Saint Jean and the Attorney General of Dominica**[22] I have no intention to limit the powers that have been set broadly by the legislature regarding the extent of the examination that can be undertaken by Customs.

[46] When one considers that the very definition that is relied on by the claimant/applicant states that the inspection conducted by Customs must satisfy themselves of *inter alia* the nature, condition and value of the goods that have been declared, this court is itself satisfied that the diagnostic scan was one that could have been undertaken by the First named defendant. I am fortified in this view when one considers that the condition of these vehicles played a pivotal role in the values that the claimant/applicant indicated had been paid and that the bargain struck was due to this very fact. The non-working aspect of these goods was used to substantiate their declared values[23], thus having relied on the same, it is in the view of this court that the examination of the vehicles could not only be, limited to simple sight inspection. The claimant/applicant failed to produce any documentation to show that there were in fact documented mechanical defects with the vehicles and despite the contention to the contrary by the claimant/applicant's counsel in cross examination

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[22] DOMHCVAP2001/0009

[23] Affidavit of the Claimant/Applicant filed 26/10/2018 states: *"6. With their usual efficiency, K & M contacted me in February 2018 informing me that they sourced a 2013 Toyota Hilux Invincible in good condition but with a damaged engine for about Seven Thousand plus Great Britain Pounds. They also told me of the other option they sourced which was a 2007 Toyota Hilux Vigo for about Four Thousand plus Great British Pounds which had a damaged transmission. The exact prices were not yet settled as further costs as expected would be incurred, for example to source the required parts, clean up, storage and so on. 7. I was not interested in either vehicle at first as the last thing I wanted to deal with was a vehicle I had to spend time to fix up. However, after much thought and speaking with my wife and father, I decided to purchase the said 2013 Toyota Hilux with the engine problem for the claimant as my father's garage has over the years worked on and rebuilt engines for trucks, cars and jeeps. I asked K & M to provide some of the parts for the pickup that were needed and they supplied filters, belts, Brakes pads, Engine oil and under sealer. The claimant was charged Seven Thousand Nine Hundred Pounds for the vehicle and service parts package. I was satisfied that the claimant got a good deal."*
In cross examination where the claimant/applicant's witness stated that the declaration to customs also mentioned that the vehicles were non-runners.

of the valuation supervisor Mr. Mason, that they had in fact produced such supporting documentation, it was clear to this court that no document had in fact been so produced.

[47] I therefore do not find that the actions of the First named defendant in commissioning the diagnostic scan can be said to be *ultra vires* the Act whose purpose and intent is to ensure that the state recoups all its due revenue.

[48] That being said, the next question that must be addressed is whether the First named defendant was entitled to question the veracity and the accuracy of the invoices produced by the claimant/applicant in support of their declaration and by so doing rely not only on the results of the scan undertaken but separate and purportedly undertaken independent research and investigations.

[49] Upon the First named defendant taking receipt of the invoices presented on behalf of the claimant/applicant they noted that there were immediate issues with the same.

[50] In the evidence of Christopher Mason, the Valuation Supervisor of the Customs Department, he clearly stated that:

> *"7. On the Invoice it was noted that the address of the company does not appear on the top of page 1 of the Invoice. When compared with other invoices received from other importers with regard to this company, the address box has always contained the address of the company. This led to the conclusion that the documents presented were questionable."*

[51] This officer went on in evidence[24] to state that as a result of these queries more documentation was requested from the claimant/applicant pursuant to Regulation 3 (7). Regulation 3 (7) states in its entirety:

> *"(7) Where a declaration regarding the value of goods has been presented under this Act and the Comptroller has reason to doubt the truth or accuracy of any of the particulars stated in the declaration or in any document produced in support of the declaration or the genuineness of any such document, the Comptroller may request the importer to produce further information, including documents or other evidence, to satisfy him that the declared value represents the total amount actually paid or payable for the imported goods, adjusted as provided in subparagraph (1); and if, after considering the further information furnished to him pursuant to any such request, the Comptroller still doubts the truth or accuracy of the value of the imported goods as declared, or the genuineness of any document produced in support of the declaration, or where the further information requested is not produced by the imported, it shall be deemed that the transaction value of the imported goods cannot be determined under the provisions of this paragraph."*

[24] Paragraph 8 of the Affidavit of Christopher Mason filed 26/11/18

[52] So the further information was requested and the officer told this court:

> *"10. I requested documents from Mr. Balcombe to verify the information relating to the vehicular problems and was told that there were no such documents. I told him that the values are very low when compared with vehicles of the same make and model and that more than likely the values will have to be uplifted once the necessary evidence is not presented."*[25]

[53] On cross examination this officer maintained that the department had had major issues with the invoices as presented. He admitted that he had seen the wire transfers from the claimant/applicant's bank to the vendor but stated that the sums were not the exact amounts on the invoices but were in fact over and did not accept, with no further proof that the sum in excess, amounted to bank fees that were to be deducted on the receiving side of the transaction. He also went to say in cross examination that having failed to be satisfied that the invoices were in fact a true representation of the transactional value of the goods that they then used the method to value based on values that were ascribed to similar goods.

[54] It is with this decision that the claimant/applicant takes issue. In the extensive cross examination of the officer Mr. Mason, it was clear to this court that the position that had been taken by the First named defendant was that the claimant/applicant was attempting to perpetrate a fraud on the state. It is this mindset that this court accepts drove all the actions of the First named defendant and his officers in how they handled this transaction with the claimant/applicant. In fact, in cross examination this officer made no qualms to say that the department had had issues in the past where invoices which had been presented to the department and which looked genuine on the surface turned out later after investigations to be in fact bogus.

[55] In this court's mind that appreciation or approach in and of itself presents the converse of the truism that a person is innocent until proven guilty. No one in this court's mind must be obliged to prove their innocence or the truth of their word. This cannot be, in this court's mind, the correct way in which matters of this nature are considered.

[56] Thus what the First named defendant in fact did must be scrutinized carefully.

[57] On the evidence of Mr. Mason, he stated that having accepted that the transactional value could not be relied on and in fact going so far to state, unusually in this court's mind, that each bargain or agreement is not necessarily unique to its parties, he personally conducted research on the values that had been ascribed to "similar" vehicles upon which having found that the values stated by the claimant/applicant were on the low side of that research, that a decision was made to uplift the values.

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[25] Affidavit of Christopher Mason filed 26/11/2018

[58] What was therefore clear to this court that despite there having been differences in the vehicles that Mr. Mason's research had found, from the vehicles of the claimant/applicant, the First named defendant used those differences for more than a guide, they used them as the means to correct what they considered under invoicing.

[59] The claimant/applicant identified several areas in which the First named defendant erred in making their decision, these were *inter alia*:

a) looking at the form of the invoice and the failure of the invoice to contain certain information that the First named defendant said was missing in keeping with invoices for other parties with the same vendor, although it was admitted in cross examination that the department could not insist that a vendor's invoice had to be a prepared in a particular way[26];

b) that there were zero values ascribed to certain items and that despite being told that there were not specifically paid for that the department stated that it was unable to accept zero values[27];

c) that one vehicle erroneously declared as a 2007 model, when it was a 2005 vehicle as discovered by the defendants, was however valued as a 2007 model because the First named defendant did not accept that the indication of the year of model (the seatbelt) was a fool proof way of making such a determination;

d) that the defendant had done research of vehicles that did not take into consideration the branding of vehicles for certain regions, had not considered that certain "attachments" could have been standard on certain models, that the ascetic look of the vehicle was considered- dirty/clean; dents/rust and

e) finally that the defendants had failed to take into consideration that the research was not limited to actual vehicles that had been imported into the state as mandated by Regulation 4 and 5 of the Act.

[60] In the case of **Saga Trading Limited v The Comptroller of Customs and Excise[28]** the High Court of Trinidad and Tobago and in particular Archie J as he then was considered similar considerations of what the Customs is permitted to do when confronted with a suspect invoice pursuant to provisions in legislation in large measure identical to the one in this jurisdiction.

[26] Cross examination of Christopher Mason
[27] Cross examination of Leanna James Deputy Comptroller of Customs
[28] H.C.A No CV 1347 of 1993

[61] Archie J made the following observation:

> *"It does not follow that the Customs must accept without question any invoices presented to them. The invoices are prima facie evidence of the price paid but the customs must be entitled to conduct* ***reasonable*** *enquiries into the accuracy of the documents presented. To hold otherwise would be to leave the Revenue at the mercy of those who would evade duties by 'under invoicing'.*
>
> *What then must the customs do when confronted with an invoice which it suspects to be false?*
>
> *First of all there must be* ***some*** *evidence or information upon which that suspicion might* ***reasonably be grounded.***
>
> *Secondly, the evidence/information must bear relation to the criteria set out in paragraph 3. By laying down a specific method of approach, the framers of the legislation must have rejected the notion that the customs could pursue any number of speculative lines of inquiry. Intuition and 'gut feeling' based on accumulated experience are an important part of customs work,* ***but any inquiry arising therefrom must have as its objective the proper application of the statute.***
>
> *For example, if the customs suspect that the price on the invoice is not the price paid then they are entitled to inquire into and to demand from the importer documentary evidence of its financing and payment arrangements. Once the actual price is established or accepted then the customs may also consider the other factors set out in paragraph 3 of the 6th Schedule. If the purported transaction value cannot be verified, or is disproved then one proceeds in sequence to the next succeeding paragraphs of the sixth schedule."* (My emphasis added)

[62] Of course accepting that this court is not bound by these findings, it is still persuaded to the entirely sensible approach proposed by the Learned Judge in situations as the one at bar. In this court's mind this should have been the path taken by the First named defendant in how he addressed the concerns raised by the claimant/applicant and what should have informed the final determination on the same.

[63] However, what seemed to have occurred in the case at bar, is that the First named defendant and his officers failed to appreciate that there was a stepped approach in which certain matters could and could not be taken into consideration.

[64] The failure of Customs to a) accept proof of the payments by the claimant/applicant on the invoices presented by way of the wire transfers, b) to produce to the claimant/applicant and to the court the nature of the research undertaken with unnamed importers that they said they relied on, c) adhere

to the requirements of the Regulations and in particular this court has no evidence before it that the First named defendant even attempted to invoke subparagraph 8 of Regulation 3 which states: "*(8) Before the Comptroller concludes that the transaction value of the imported goods cannot be determined under the provision of this paragraph, the Comptroller shall if requested by the importer, communicate to him in writing the grounds for such conclusion and the opportunity to make representations in regard to the matter and such representations shall be taken into consideration by the Comptroller"* but rather wrote to the claimant/applicant after having determined that they were going to uplift the values on another basis than the transactional value[29], d) to adhere to the process provided for by Regulation 5[30], all point in this court's mind to the inescapable conclusion that the First named defendant took into consideration irrelevant matters and failed to take into consideration relevant matters.

[65] When a court considers the issue of the impact of actions of the decision maker in such a situation, the issue of the materiality of the irrelevant matter to the final decision must be considered.

In R v Secretary of State for Work and Pensions, Lord Neuberger MR stated:

> *"Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held to be invalid unless the factor played no significant part in the decision-making exercise. ... Even where the irrelevant factor played a significant or substantial part in the decision-maker's thinking, the decision may, exceptionally, still be upheld, provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion".*

He went on to state further at paragraph 81 that it was "… [a] *high hurdle that has to be crossed by the decision-maker before he can persuade the court that his decision would have been the same if he had ignored a factor which he illegitimately had taken into account".*

[66] Thus in **R v Broadcasting Complaints Commission ex p Owen, May LJ stated***:*

> *"Where the reasons given by a statutory body for taking ... a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review."*[31]

[67] In looking at the evidence I am satisfied that the defendant having made it clear what information they took into account, in this court's mind I consider the same to have been largely irrelevant, and

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[29] Letter of 22/5/18 from the First Named Defendant attached to the Affidavit of Leanna James filed on 26/11/18 as "LJ 3"

[30] Regulation 5 states in its entirety: 5. (1) The customs value of imported goods determined under this paragraph shall be the transaction value of similar goods sold for export to and exported at or about the same time as the goods being valued. (2) The provisions of paragraph 4(2), (3), (4) and (5) shall apply, mutatis mutandis, to this paragraph.

[31] **Telecommunications Regulatory Commission** case op cit at paragraphs 63 and 64

additionally having failed to accord to weight to those matters which were in fact relevant, this court is not of the opinion that the decision to uplift the values to the extent that the same was done would have occurred. In this court's mind the defendant has not shown that the decision would have "inevitably been the same"[32] and as such I am satisfied that having taken into consideration those things which they did and those things which they did not, that the decision to uplift the values cannot stand and I quash the same.

[68] I therefore grant the declaration of the claimant/applicant that the First named defendant acted unreasonably in more than doubling the values of the two vehicles consigned to the claimant/applicant they having taken into consideration irrelevant matters and failed to take into consideration relevant matters. I therefore direct that the First named defendant is to make its determination of the values of the said vehicles using the transaction value method based on the invoice as presented along with the supporting documentation required by the First named defendant in support of such invoices including the information on the zero values observed on the said invoice.

Issues #3
Whether customs unreasonably refused to permit the claimant/applicant to pay for and clear the goods on the back of one of the trucks unless either one or both vehicles were also cleared

Issue #4
Whether the First named defendants reasoning in the letter dated the 5th of November 2018 (November Letter) in which it was made clear that the claimant/applicant was not permitted to amend the ASYCUDA to clear the other goods in circumstances where the ASYCUDA system in fact allowed for amendments was in all the circumstances unreasonable

[69] The submissions on behalf of the claimant/applicant on these issues are quite simple.

[70] Counsel for the claimant/applicant submitted that there being a procedure for the separate clearing of the parts on the back of the truck, it was clear that the First named defendant was aware of the appropriate procedure and as such having failed to facilitate the same, they were being capricious and unreasonable. They say so especially in light of the letter dated 5 November 2018 addressed to the claimant/applicant in which the First named defendant seemingly admitted to existence of a procedure to amend the ASYCUDA system which governs the declarations made to Customs but yet still refused to allow such amendment.

[71] The defendants on the other hand submitted that in order for partial clearing to be facilitated it could not be done to goods that existed as one consignment on one Bill of Lading. There was no

[32] **Smith v North Derbyshire** [2006] 1 WLR 3315 at para 10 per May LJ

provision within the law, they submitted that allowed for the splitting of one consignment. The section that the claimant/applicant sought to rely on[33] for an Entry on a Bill of Sight related to the circumstances where there was an error, this error having been brought to the attention of customs that Customs would permit clearing the goods based on the assessment done by looking at the same and thereafter the appropriate corrections could be done to allow for the clearing at the correct value. That procedure they submitted did not apply to where there was one consignee and one Bill of Lading.

[72] Additionally, the defendants submitted that by the November letter the position of the First named defendant had been made clear and that it was up to the claimant/applicant to take the necessary steps to have the amendments made to the Bill of Lading and having so directed the claimant/applicant to the requisite procedure it was up to them to do what they needed to do, failing to do so cannot result in the blame being laid at the feet of the First named defendant as they had done all that the statute allowed them to do in the particular circumstances of the case.

Court's Considerations and Analysis

[73] In order for the court to consider the entitlement to the relief prayed for by the claimant/applicant attached to these issues, it is necessary to put the circumstances in context.

[74] On the back of one of the vehicles imported by the claimant/applicant, parts for various other machines owned by the claimant/applicant as well as for the trucks themselves, were packaged and placed for ease of shipping.

[75] From the documents that were produced, these parts were all part and parcel of the consignment to the claimant/applicant as one package together with the trucks. When the First named defendant uplifted the values of the vehicles making the duties charged financially prohibitive to the claimant/applicant they sought to clear the separate package of parts to enable the repairs of those machines awaiting the said parts.

[76] The First named defendant refused to do so and this court at the hearing of application for leave having been presented with what appeared to be an alternate method of clearing the goods by way of Section 24 and utilizing the Entry by Bill of Sight method this court ordered that the claimant/applicant was to make another application pursuant to that identified method to the First named defendant. Upon this second application having been made, the First named defendant refused to allow the said clearance which gave rise to the letter of 8 November 2018 (the November Letter). As this letter is of some importance I reproduce it here in its entirety:

"Mr. Cameron Balcombe

[33] Section 24 of the Act

Bally & Bally Investment Limited
Kingstown

Dear Sir,

RE: CLAIM NUMBER 101 OF 2018 BALLY AND BALLY INVESTMENT LTD. V. COMPTROLLER OF CUSTOMS AND EXCISE AND THE ATTORNEY GENERAL IN THE MATTER OF THE INTERIM RELIEF APPLICATION

Reference is made to your letter dated October 12, 2018 on the above-captioned subject.

Please be advised that the procedure outlined in your letter of request applies to goods arriving on a vessel for which any report made is incorrect and, the master or commander or other person who made it has a period of seventy-two hours or such longer period as the Comptroller may in any case permit, to make an amendment. Please see Section 22 (3) of Chapter 422 of the Revised Laws of St. Vincent and the Grenadines Customs 2009.

The matter at hand is not one where in a reporting error was made upon importation of the goods in question. The situation is one where the invoiced values declared to the customs for clearance of the goods imported appears to have discrepancies. Hence, the customs cannot arbitrarily amend the Bill of Laden issued by the shippers to split the goods that you deemed that the Customs has no issue with and allow for clearance.

The fact here is that the very vehicle parts that you are asking that the Customs deliver on a separate Bill of Laden by amending the Bill of laden issued by the shippers had zero values declared in some cases. Therefore, even the accuracy of the values of the vehicle parts is uncertain.

The previous offer made by Customs in the letter dated June 1, 2018 was given to you so that even thought the duties were deposited, it would not have been brought to revenue until after a six month period. This period would have been sufficient for the Customs to conduct a thorough investigation into the values declared by you to determine its correctness. Once the correctness of your declarations was ascertained then the Customs would have issued a refund or request any additional payments based on the outcome of its investigations.

As such, your request to amend the Bill of Laden presented by you and allow for the clearance of the vehicle parts only among your consignment cannot be granted in this case as it is not in keeping with Section 22 (3) of the Customs Act CAP 422, 14/1999.

Please be advised further that if you wish to secure the parts from the elements, then the custodians of the cargo which is the SVG Port Authority can be contacted and asked to relocate the parts in the Port Transit Shed.

Please do not hesitate to contact eh Department should you require further clarification.

Sincerely
Comptroller of Customs and Excise"

[77] It is clear from this letter that the First named defendant makes the assertion that the procedure under Section 24 was inapplicable and since the claimant/applicant had failed to make the application under Section 22 (3)[34] of the Act, the First named defendant was not in a position to grant any permission to clear the goods separately.

[78] Having received this letter, the claimant/applicant was given leave to amend the Fixed Date Claim Form to claim that the explanation given in the November letter was unreasonable when there was in fact a way in which amendments could be made.

[79] In looking at these issues under review, both to the initial action of the First named defendant to refuse to clear the goods separately and then by the November letter in which the procedure that could have been adopted was stated clearly by the First named defendant, this court does not agree that the First named defendant acted at all unreasonably in the position they took.

[80] With regard to the initial refusal, this court accepts that the procedure that had been outlined by Mr. Nanton and upon which the claimant/applicant initially relied on would and could apply in instances where there is either what was referred to in evidence as in "short landing" or "over landing"[35]. This meant that the cargo as manifested was either less than on the manifest or more than was on the manifest. Mr. Nanton the claimant/applicant's witness, agreed on cross examination that in the circumstances of the case at bar, neither of events occurred. Mr. Nanton also agreed that once there was one consignment that there was no provision that he was aware of that allowed for separation of goods to allow for partial clearance.

[81] It was however indeed unfortunate that this position was not made clear to the court or the claimant/applicant at the time that this method was suggested. This court is of the firm belief that if this had been known, the claimant/applicant would not have pursued the application in the manner that they did and would have in fact made alternative representations to allow for partial clearance. That being said, the decision of the First named defendant in those circumstances cannot be held to be unreasonable. This avenue just was not open to the First named defendant to effect in favour of the claimant/applicant.

[82] I therefore dismiss the prayer sought for a declaration against the decision of the First named defendant at the first instance.

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[34] Section 22 (3) *"where any report made under this section is incorrect, the master or commander or other person who made it shall within seventy hours or such longer period as the Comptroller may on any case permit be allowed to amend it".*

[35] Evidence of Kelroy Brian Nanton on cross examination

[83] At the trial of this matter it became immediately clear to the court that the First named defendant in the November letter despite knowing what was required of the claimant/applicant to invoke the requisite provisions of the Act, that they felt no obligation to direct them to the same.

[84] In the November letter the First named defendant clearly reiterated that they were not permitted under the referred Section 24 to allow for partial clearance and instead referred the claimant/applicant, in this court's mind rather obtusely, to the correct section upon which the claimant/applicant could rely.

[85] This was the Section 22 (3) of the Act which makes it clear, that any request for the amendment of the **report** regarding goods must come from the "master, commander or other person who made it" within seventy two hours or "***such longer period as the comptroller may in any case permit".*** It was clear to this court that the amendment of this report could have in fact facilitated the requested partial or rather separate clearance.

[86] Thus it was at trial that the Deputy Comptroller of Customs Ms. James, had no difficulty in telling this court on in response to questions from the bench that any request for amendment could not come from the claimant/applicant and that it was the agent who had to make such a request within 72 hours of the shipment arriving. So when the claimant/applicant by letter dated 12 October 2018 appeared to understand the procedure that was required and the same was not done, the First named defendant, as was stated in the evidence of Ms. James, was entitled to take the position that they could not assist the claimant/applicant and grant the request for partial clearance.

[87] This court is therefore slow to see how this could have been an unreasonable approach by the First named defendant. This court finds that indeed it may have been useful for the First named defendant to indicate the appropriate procedure that would have been required to be followed by the claimant/applicant but there certainly was no obligation on them to do so and this is particularly so when apparently the claimant/applicant by their own correspondence identified the appropriate procedure.

[88] Indeed the November letter indicated that there was a procedure available that would allow for an amendment to be effected to ASYCUDA but the claimant/applicant having failed to trigger that process, the First named defendant in the determination of this court was entitled to take the decision contained in the said letter.

[89] I therefore find that the claimant/applicant is not entitled to the reliefs claimed with regard to the November letter, and I refuse the declaration sought that the reasoning contained therein is unreasonable.

Damages

[90] The final prayers sought by the claimant/applicant is with regard to damages.

[91] For a claimant/applicant to obtain relief by way of damages, the CPR by Part 56.8 (2) permits an award of damages if there are two conditions met as set out in Part 56.8 (2) (c).

Part 56.8 (2) states in its entirety as follows:

"56.8

(2) In particular the court may, on a claim for judicial review or for relief under the Constitution award –

a. damages;

b. restitution; or

c. an order for return of property to the claimant; if the –

i. claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

ii. facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

iii. court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

[92] Thus it is clear in this court's mind that not only must the claim form speak to that claim but that the affidavit evidence must substantiate the claim for damages as well.

[93] When we look at the claim form that formed the basis of this claim, the claimant/applicant made no claim that spoke to the relief of damages being referable to any act for which damages would be referable. The only mention of any act on the part of the First named defendant was by way of submissions in which the claimant/applicant raised for the first time the provisions of the tort of misfeasance. Thus this court is satisfied that 56.8 (2) (c) (i) was not satisfied. So this court was entitled to examine whether 56.8 (2) (c) (ii) was satisfied as it was stated in the alternative. That is that the affidavit evidence supported any such claim.

[94] Thus when one looks at the affidavits that were filed in support of the claim, the only evidence that was led was as encapsulated in paragraph 27 of the affidavit of Cameron Balcombe filed on 26 October 2018. Mr. Balcombe had this to say:

"27. The alternative procedure to clear the other goods is summarized in the hereto exhibited letter of the brokerage firm Cox and Richards. Therefore, I am advised by

Counsel aforesaid and verily believe the same to be true that their decision not to respond and/or refuse the claimant's application is acting in bad faith and is so unreasonable that no reasonable authority would come to it for in the balance the Customs would be able to collect some revenue, which is their primary function, and the claimant would be able to mitigate some of its losses…."

[95] In this court's mind this statement of evidence cannot meet the requirement under the Rule and the pre-requisites as contained in Part 56.8 (2) to claim damages has not been met. Having not even gotten past these two alternatives, this court will not even address its mind to (iii) as it cannot even arise to be considered in the present circumstances.

[96] I therefore find that the claimant/applicant would not be entitled to damages as claimed for "bad faith" or the tort of misfeasance.

[97] Before I however depart from this point, this court notes with interest the reliance of the claimant/applicant to the decision of my brother Ventose J in the case of **Wesk Limited v Saint Christopher Air and Sea Ports Authority**[36]. Their reliance however failed to appreciate that the basis of that case was whether or not there was despite having been no right to claim damages under the CPR, a right of an aggrieved party to be awarded damages at common law in judicial review proceedings independent of any claim in contract or tort existed at common law[37]. After a review of the law my brother came to the considered decision that the common law could develop to encapsulate such an order but the parties before him having failed to give him fulsome submissions on this point, he refrained from making such a determination. The claimant/applicant certainly has made no such submission and as such this court stands by the determination that having failed to fall within the parameters of Part 56.8 (2) that the claimant/applicant is not entitled to damages.

[98] Additionally, in so far as the claimant/applicant has sought the relief for aggravated/exemplary damages, the court accepts that aggravated damages may be awarded to compensate a claimant/applicant whose injury and dare I say loss, has been aggravated by the conduct of the defendants. "*It is compensation which takes into account the motives and conduct of the defendant... [68]…these damages would not only compensate the claimant but provide a measure of punishment [and]…are awarded where there is conduct that requires an exceptional remedy".*[38]

[99] Thus in this court's mind I am in agreement with my brother Cottle J that damages of this nature cannot be awarded where conduct complained of, is inadvertent[39].

[36] SKBHCV2017/0241
[37] Op cit paragraph 25
[38] Lexi Maximae v The Chief of Police and others DOMHCV2009/0054 at paragraph 67 and 68 per Stephenson J
[39] Michael Christopher v PC 240 John Flavien and anr SLUHCV2004/0052 at paragraph 12

[100] In the case at bar the claimant/applicant has not satisfied this court that the behaviour of the First named defendant amounted to anything close to being highhanded or oppressive to warrant such an award.

[101] I am satisfied in my own mind, that the First named defendant's actions at the most amounted to over zealousness to ensure that the state adequately and appropriately benefitted from the import of the goods by the claimant/applicant and thus the basis for the finding earlier in this judgment, that there has been a consideration of irrelevant matters. There was however nothing in my mind that warrants those said actions being classified of a nature requiring aggravated/exemplary damages.

[102] This prayer is therefore also dismissed.

Costs

[103] In the determination of this court, the claimant/applicant is entitled to their costs even though they were only partially successful on their claim.

[104] By Part 56.13 once a court determines that a party is entitled to costs[40], this Rule makes it clear that "*if the judge makes any order as to costs the judge must assess them*"[41]. This Rule has now been considered by our Court of Appeal in the case of **Friar Tuck Ltd and Anr v International Tax Authority**[42] in which the judgment of Michel JA made it clear that the costs that a court awards on the hearing of a judicial review application must be assessed by the judge who heard the matter pursuant to Part 65.12 (2)[43].

[105] This case as cited also made it clear that the judge must have the necessary material upon which to make any such assessment.

[106] In the case at bar neither side have made any such submissions as to the quantum of costs and this court determines that it has no material to assess such costs.

[107] Therefore the order of the court is that the claimant/applicant is to file a bill of costs with supporting submissions within 21 days of today's date if the parties fail to agree on the said costs.

[108] If the Bill of Costs is filed the defendants will therefore have an opportunity to respond within 14 days thereafter and the hearing of the assessment of costs will take place on the first available

[40] Part 56.13(4)
[41] Part 56.13(5)
[42] BVIHCVAP2017/0003
[43] Op Cit at paragraph 19 and 20

chamber day before this court in September 2019 unless the parties notify the Registrar that the same is not required.

The order of the court is therefore as follows:

1. The declaration that the First named defendant acted *ultra vires* the Act in arriving at the values placed on the two vehicles consigned to the claimant/applicant by the use of the diagnostic exam is refused.

2. The declaration that the First named defendant acted unreasonably in doubling the values of the two vehicles consigned to the claimant/applicant is granted.

3. The declaration that the First named defendant acted ultra vires/unreasonably in the first instance by not allowing the claimant/applicant to partially clear the goods that were situated on the back of one of the vehicles is refused.

4. The declaration that the First named defendant refusing to allow partial clearance by letter dated 5 November 2018 was unreasonable is refused.

5. The order of certiorari quashing the decision of the First named defendant which doubled the values of the said vehicles is granted.

6. The order of mandamus requiring the First named defendant to determine the values of the said vehicles using the transaction value as set out in paragraph 68 hereof is granted.

7. The prayer for special damages is dismissed.

8. The prayer for exemplary damages is dismissed.

9. Costs to the claimant/applicant to be assessed if not agreed within 21 days of today's date pursuant to paragraphs 107 and 108 hereof.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar