

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-04448

IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000

AND

**IN THE MATTER OF THE DECISION AND/OR FINDINGS AND/OR RECOMMENDATIONS OF THE
COMMISSION OF ENQUIRY INTO THE ENTIRE PROCESS WHICH LED TO THE CONSTRUCTION OF
THE LAS ALTURAS HOUSING TOWERS AT LADY YOUNG GARDENS MORVANT**

BETWEEN

JOHN CALDER HART

Claimant

AND

**THE COMMISSION OF ENQUIRY INTO THE ENTIRE PROCESS WHICH LED TO
THE CONSTRUCTION OF THE LAS ALTURAS HOUSING TOWERS
AT LADY YOUNG GARDENS MORVANT**

First Defendant

JUSTICE MUSTAPHA IBRAHIM

Second Defendant

DR. MYRON WING-SANG CHIN

Third Defendant

ANTHONY FARRELL

Fourth Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Interested Party

Before The Honorable Mr. Justice David C Harris

Appearances:

Dr. Lloyd Barnett and Mr. Anthony Bullock instructed by Ms. Tecla Duncan-Caines

for the Claimant

Mr. Richard Clayton Q.C. leads Mr. Gerald Ramdeen instructed by Mr. Alvin Shiva Pariagsingh

for the Third and Fourth Defendants

Mr. Fyard Hosein S.C. leads Mr. Rishi Dass instructed by Ms. Amrita Ramsook

for the Interested Party

JUDGMENT

INTRODUCTION¹

1. On his application of 12th December 2016, the Claimant was granted leave on 22nd March 2017 to file his Fixed Date Claim for Judicial Review of the *decision and/or findings and/or recommendations of the Commission of Enquiry into the entire process which led to the construction of the Las Alturas Housing Towers at Lady Young Gardens, Morvant (“the project”)*. The first Defendant at the time of the trial was very unfortunately, deceased.
2. The Claimant was the Chairman of the Board of the Urban Development Corporation of Trinidad and Tobago (“**UDeCOTT**”) from January 2002 until September 2006.
3. UDeCOTT is a State Company, and acquired the lands for the project in 2002 at a cost of \$3.5M. The company was engaged to provide project management and project development services for the said project. In 2004 the Board of UDeCOTT approved and awarded the contract to construct the towers to China Jiangsu International Corporation (**CJIC**) for the sum of \$67,620,000.00. On designs prepared by Planning Associates Limited (“**PAL**”), the contract for the project was for the construction of nine 4-storey apartment buildings² with a total 297 apartments on a *design/bid/build* basis. The project was scheduled to begin in 2004 and completed by February 2007.
4. In January 2005, concerns as to the suitability of the site arose; there was significant slope movement and a large crack followed in March 2005. CJIC was ordered by PAL to immediately cease construction of those blocks located in the unstable area.
5. Construction continued on blocks A and B and in July 2006, the project was handed over to the Housing Development Corporation (“**HDC**”). In January 2008 HDC contracted with CJIC to construct 134 units at a cost of \$74,876,000.00. CJIC recommended the replacement of units to the southern side of the site with blocks H, I and J. Construction of buildings H and I began in

¹ Summarised from the Claimants claim, affidavit in support, the Defendants’ affidavits in opposition, the written submissions of the parties – Claimant, Defendants and Interested Party, and the Report of the Commission of Enquiry at Chapter 1

² Buildings A, B, E, F, G, H, J, L and M

December 2008 but the instability continued. In 2009 these said buildings suffered structural distress - cracking, settlement and earth movement. Both buildings were eventually rendered uninhabitable despite variations and remedial works. By 2011 partial demolition of H and I became necessary and in March 2019, the HDC ordered their complete demolition.

6. On 2nd December 2014 His Excellency, the President, at the request of the Government, appointed a Commission of Enquiry ("**Commission**" or "**CoE**") pursuant to the Commission of Enquiry Act Chap. 19:01, to enquire into the entire process which led to the construction of the Las Alturas Towers at Lady Young Gardens, Morvant.
7. The Commission held public sittings ("**the enquiry**") wherein some 25 witnesses testified. The Claimant was invited to participate in the CoE as he was the Chairman of UDeCOTT up to and until the project was handed over to the HDC, and the commission expressed that they were of the view that he *would be of great assistance to the Commission*.³
8. Several pieces of correspondence were exchanged between the Claimant's Attorney and the Commission, centred around the Claimant's request for certain documents pertinent, in his view, to any useful testimony he can give before the Commission.⁴ The documents were not in the possession of the Commission and as a consequence, were not obtained by the Claimant and the Claimant declined to provide a witness statement.
9. The CoE took place from time to time over some 18 months and ended without testimony from the Claimant and its report was laid in the Parliament on 6th September 2016. The report recommended civil action (and not criminal proceeding as its remit also provided for), against the Claimant.⁵

³ Commission letter dated 24th April 2015

⁴ See paras. 8-12 of Claimant's affidavit in support

⁵ See FDC at paras. 1(a) to (e) for the decision/findings/recommendations of the CoE Report for review

10. The **Claimant's claim** for Judicial Review of the decision, findings and/or recommendations on the pleadings and on the submissions, is on the grounds contained in the Judicial Review Act Chap. 7:08 at s. 5(3)(c) to (e)⁶; (g)⁷; and (j) to (o)⁸; and also that the said decision, findings and/or recommendations **(i)** are illegal, unreasonable, disproportionate, **(ii)** arrived at in a procedurally improper manner and/or **(iii)** are or amount to an unreasonable, irregular, or improper exercise of a discretion and/or **(iv)** are an abuse of power and unfair and/or **(v)** are in breach of the principles of natural justice and/or section 20 of the Judicial Review Act⁹ and/or of the Applicant's legitimate expectation¹⁰, **(vi)** are *ultra vires*, invalid, null, void, and of no effect; **(vii)** are in breach of sections 4(b) and 5(2)(e) of the Constitution of the Republic of Trinidad and Tobago Chap 1:01¹¹ **(viii)** there was no full and sufficient inquiry by the Las Alturas Commission as required by the Act since no reasonable efforts were made to procure relevant and important documents.

11. The **Defendants' position** is that the Commission made all reasonable attempts to source the requested information from UDeCOTT, and had made it very clear that it was not in possession of some of the material requested by the Claimant. Further, it was not the function of the Commission to provide the said material, which would have been within the possession custody and control of UDeCOTT. The Defendant placed all the documents that had been disclosed to it and it had in its possession including witness statements of the prospective witnesses in a "drop box" online and invited the Claimant to access them. The hearings were public and for the most part in real-time televised hearings.

⁶ Consecutively: failure to satisfy or observe conditions or procedures required by law; breach of the principles of natural justice; unreasonable, irregular or improper exercise of discretion

⁷ Fraud, bad faith, improper purpose or irrelevant consideration

⁸ Consecutively: error of law, whether or not apparent on the face of the record; absence of evidence on which a finding or assumption of fact could reasonably be based; breach of or omission to perform a duty; deprivation of a legitimate expectation; a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.

⁹ "An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner."

¹⁰ The Commission laid down and published its procedural rules which were attached to its Report as Appendix II. In Part 5, section 43. The Claimant alleges the rules – which were tantamount to providing for a *Salmon letter* - were not complied with.

¹¹ Summary of ss. 4(b) and 5(2)(e) - the right of the individual to the protection of the law, and the right not to be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of their rights and obligations.

12. One recommendation made by the Commission in relation to the Claimant was that he be held accountable and liable for the losses sustained in the execution of the project. This recommendation, contend the Defendants, was based on the evidence before the Commission, which in its view highlighted the depth and extent of the Claimant's role in relation to site selection for the said project.
13. The Defendants also submit as the first line of defence, that the Claimant raised *new* grounds for review in his submissions which were not advanced in the Application for Judicial Review, including **(i)** Unfairness – failure to provide the Claimant with a Salmon letter; **(ii)** Breach of a legitimate expectation that the Commission would provide the Claimant with a Salmon letter; **(iii)** Illegality – failure to comply with statutory obligation: ss. 5 and 11 of the Commission of Enquiry Act Chap. 19:01¹²; **(iv)** Error of law – finding that the Claimant was fully in charge of the project; and **(v)** Irrationality in relation to certain of the Commission's findings of fact and potential civil liability.
14. The Defendants contend that the Claimant failed to seek leave to amend the grounds and to argue the new grounds advanced in his submissions and generally pleaded very little facts to support the new grounds of his challenge. The Claimant's actions, the Defendants contend, amount to an abuse of process. Further, they submit that in any event, the time had long passed for the Claimant to apply to raise any *new* grounds of challenge.
15. The Defendants also submit that Salmon letters referred to by the Claimant are only provided to witnesses to any inquiry. This duty never arose with respect to the Claimant as he was not a witness at the enquiry¹³.
16. The **Attorney General ("AGTT") as Interested Party** made written submissions to the court. The AGTT contends that the obligation of the Commission is to be fair; the said obligation required them to notify the Claimant on matters before the Commission with the potential to adversely

¹² **S. 5** Each commissioner appointed under this Act shall make and subscribe an oath that he will faithfully, fully, impartially and to the best of his ability discharge the trust and perform the duties devolving upon him as a commissioner, which oath may be taken before the President, and shall be deposited by the commissioner with the Secretary to the Cabinet and Head of the Public Service. **S 11** Commissioners acting under this Act shall have the powers of the High Court to summon witnesses, to call for the production of books, plans, and documents, and to examine witnesses and parties concerned on oath;...

¹³ See para 14 of the Reply Submissions on behalf of the Third and Fourth Defendants.

affect the Claimant. Further, no defence of an unfair procedure could be based upon the failure of a party to provide a witness statement or otherwise participate in proceedings.

17. The AGTT further made the one concession, that it does not appear to the said AGTT that leave was granted to the Claimant to pursue the discrete claim of legitimate expectation that he did.

ISSUES FOR DETERMINATION

18. (i) Whether the Claimant in his submissions has submitted *new* grounds for review, that were not advanced in his substantive Fixed Date Claim for Judicial Review;
- (ii) Whether the Claimant has, as a result of submitting new grounds, abused the court's process;
- (iii) Whether the *new* grounds for review are properly before the court;
- (iv) Whether the Claimant is otherwise entitled to the relief claimed.

CORE RELEVANT LAW AND AUTHORITIES

19. The function and purpose of a Judge in Judicial review is captured in the learning in ***Fordham, Judicial Review Handbook***, 6th Edition at paragraph 2.1.3 referencing Lord Clyde in the case of ***Reid v Secretary of State for Scotland*** (1999) 2 AC 512 at 541F and 542A where he stated:

“Judicial Review involves a challenge to the legal validity of the decision. It does not allow the Court of review to examine the evidence with a view to forming its own view of the substantial merits of the case. It may be that the tribunal whose decision is being challenged had no lawful authority to do so. It may have misused or abused its authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency as for example, through the absence of evidence or of sufficient evidence to support it...”

[Emphasis added]

20. Further, in relation to the Defendants' submissions on the Abuse of Process and the Claimant's delay in raising certain issues and then, only in its submissions, cited is the authority of **Judicial Review Handbook, Fordham, 6th edition** at para 26.2:

"A claimant has a duty to act promptly, not a right to wait for up to three months. Some contexts are recognized as calling for special, sometimes the utmost, promptness. The clock starts when the grounds first arise and does not stop until the claim is lodged...Care is always needed in letting time lapse."¹⁴

21. The procedural rules of the Commission, annexed to its Report as Appendix II, states at Part 5:

43 – *"The Commission shall not make a finding of misconduct on the part of any person unless that person or, if the person is deceased, his estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the Enquiry to be heard in person or by Counsel."*[Emphasis added]

44 – *"Any notices of alleged misconduct shall be delivered on a confidential basis to the person to whom the allegations of misconduct refer."*

22. The procedural rules of the Commission do reflect the contents of the Judicial Review Act at s.20 (*supra*), and to a lesser extent, broadly reflect the findings of the Canadian Supreme Court and Canadian Statute in the far reaching statute-relevant case of Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) [1997] 3 S.C.R. 440 at 471 (para. 56) and **Application of Oswald Wilson and Ors.** (the EBC Case)¹⁵:

"...a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding be made... What the law requires is the risk of the finding be made known to the party affected. This is not the risk of any finding but the particular finding." [Emphasis mine]

¹⁴ See also; O'Reilly v Mackman [1983] 2 AC 237, 280, 281 per Lord Diplock; R v Dairy Produce Quota Tribunal for England e p Caswell [1990] 2 A.C. 738 at 749); R (Burkett) v Hammersmith and Fulham LBC [2002] 1 W.L.R. 1593 per Lord Steyn at [44]; A v Essex County Council [2011] 1 A.C. 280 per Baroness Hale at 116.

¹⁵ HCA No. 2081 of 2002 Mendonça J at pp 33-35; see also Re Erebus Royal Commission: Air New Zealand Limited v Mahon (No. 2) [1981] 1 NZLR 618 at 627

23. Further, on the Commission's duty to reopen hearings where there are adverse findings in the Report, the Claimant cites the Canadian authority *Landreville v The Queen*¹⁶ and **Fairmount Investments Ltd v Secretary of State for the Environment**¹⁷.

24. The Defendants, in denying that the Claimant was treated unfairly, cite various authorities in support of their position: *Russell v Duke of Norfolk*¹⁸, and **Hopkins Developments Ltd v Secretary of State for Communities and Local Government**¹⁹, where Jackson LJ stated in part:

“Provided that certain factors are borne in mind, it does not generally matter whether what is at issue is characterised as “natural justice” or “procedural fairness”. The first of those factors is that it is a commonplace that in the context of administrative decision-making the ascertainment of what procedures are required is acutely sensitive to context and the particular factual situation. Fairness is thus a flexible concept, as well as, of course, being subject to any particular requirements in primary and secondary legislation...”

25. Further still, all parties and now this Court, cite different parts of the judgment, for varying reasons, in the case of *Erebus Royal Commission; Air New Zealand Ltd. v. Mahon* (No. 2) [1981] 1 NZLR 618 the New Zealand Court of Appeal. For this Court's part, I find a very instructive exposition on the concept of fairness and natural justice at pp 651 (ln.25) thereof, per Woodhouse P:

“The concept of natural justice does not rest upon carefully defined rules or standards that must always be applied in the same fixed way. Nor is it possible to find answers to issues which really depend on fairness and commonsense by legalistic or theoretical approaches. What is needed is a broad and balanced assessment of what happened and been done in the general environment of the case under consideration.”

¹⁶ (1977) 75 DLR (3d) 380 “Section 13 of the Inquiries Act requires that a person against whom a charge of misconduct is alleged be given reasonable notice of, and an opportunity to reply to, such allegation. The Commissioner found that the plaintiff had been guilty of gross contempt before three other tribunals. This matter was not within the terms of reference of the Commission and the plaintiff was not given an opportunity to meet the specific charges. The Commissioner thus failed to comply with the mandatory requirements of section 13. The Commission should have been reconvened, and notice of the “charge” of misconduct given; the plaintiff should then have been allowed to call witnesses and answer the charges.”

¹⁷ [1976] 1 WLR 1255. See however, the Defendants' counter argument to this, which is accepted and now adopted by the Court in this judgment. The Defendants' counter argument is found in paras 18 - 21, 23, of the Defendant's Reply Submissions filed in this matter.

¹⁸ [1949] 1 All ER 109 at 1188 per Tucker LJ

¹⁹ [2014] PTSR 1145

26. The Defendants also challenge the Claimant's reliance on the Royal Commission on Tribunals of Enquiry Report Cmnd 3121, 1966 (the Salmon Report) and the six 'cardinal principles' to be observed. The Claimant relied on the first 2 principles, which cover how/why persons become involved in an enquiry and informing persons of any allegations made against them before they are called as witnesses.²⁰ The Defendants counter and rely on context of the principles:

*"As soon as possible after he has given his statement, and certainly well in advance, usually not less than seven days before he gives evidence, he should be supplied with a document setting out the allegations against him and the substance of the evidence in support of those allegations."*²¹[Emphasis added]

27. Further, the Defendants submit that the Claimant's reliance on the Air New Zealand Ltd v Mahon case (supra) is misplaced as that matter concerned natural justice in the context of persons who had given evidence at the enquiry.

28. In support of their issue of abuse of process (issues raised for the first time in the submissions), the Defendants put forward several authorities, including Fishermen and Friends of the Sea v Environmental Management Authority²², Johnatty v AG of Trinidad²³, Seepersad v Ayers Caesar²⁴, **and Police Service Commission v Mohammed**²⁵, where at para. 36 the Court stated:

"We were therefore of the view that in the absence of a grant of leave to amend the application, the trial judge was wrong to allow the respondent to raise in his submissions the question of the legality of the appellant's decision to dismiss him. It was not a live issue before him."

29. The AGTT as the claimed Interested Party provided various authorities on fairness in enquiries and investigations. These include cases cited by the Claimant and stated above and other

²⁰ See para. 3.3 of the Claimant's submissions

²¹ Salmon Report at para. 50; Defendants' submissions at para. 27

²² [2018] UKPC 24 at para. 32

²³ [2008] UKPC 55 Lord Hope at para. 18

²⁴ Civ App No. P 252 of 2015 Jamadar JA at paras. 37-38

²⁵ Civ App No. 203 of 2011 at paras. 33-40

authorities such as *Re Pergamon Press*²⁶, *Maxwell v Department of Trade and Industry*²⁷ and in *Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry*²⁸ where Lord Diplock stated at p. 368:

*“I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigation – which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may adversely affect him.”*²⁹ [Emphasis added]

30. However, as Senior Counsel for the Defendants pointed out, in the said case *Maxwell v Department for Trade and Industry* [1974] QB 523, Maxwell argued that the law required him to be informed of any criticism to appear in the final report, prior to it being published. As Senior Counsel notes, the Court of Appeal rejected this argument, holding (in line with the existing law on Salmon letters) that fairness required only that a person be given an opportunity to respond to the substance of what other witnesses were to say during the Inquiry – i.e. they are to be given the opportunity to consider giving evidence and otherwise taking part in the Inquiry, so as to respond to the evidence of other witnesses. [Emphasis added]. Per Lawton LJ:

“...they [the commissioners] are no more bound to tell a witness likely to be criticised in their report what they have in mind to say about him than has a judge sitting alone who has to decide which of two conflicting witnesses is telling the truth.”

THE EVIDENCE

31. The core evidence in this matter is by way of the Affidavits of the Claimant and the Third Defendant and Fourth Defendant. The Defendants or the Third and Fourth Defendants named

²⁶ [1971] Ch 388

²⁷ [1974] QB 523

²⁸ [1975] AC 295

²⁹ See also *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560; *Permanent Secretary v Ramjohn* [2011] UKPC 20

and/or referred to in the matter are collectively referred to interchangeably as the Defendants in this judgment.

32. At the onset I believe the case is put into its proper context best, by setting out the relevant terms of reference of the Commission of Enquiry along with the specific findings of the enquiry to which the Claimant primarily takes objection. A fundamental limb of the Claimant's complaint (among significant others more fully set out below), is that the terms of reference of the Commission could not by itself have put him on notice of the findings that the Commission was likely to have made or in the end, in fact made.

33. The relevant Terms of Reference of the Commission were stated as follows:

[I]. To enquire into:

i. the entire process which led to the construction of the Las Alturas Towers at Lady Young Gardens Morvant, and all other acts, matters or decisions done or undertaken incidental thereto up to and including the construction thereof;

ii. the advice, reports and minutes which were made available to the Housing Development Corporation (hereinafter referred to as "HDC") and Urban Development Corporation of Trinidad and Tobago (hereinafter referred to as "UDeCOTT") and/or the relevant Director and/or Board of HDC and Ministry of Planning, Housing and the Environment concerning the suitability or unsuitability of the site for the construction of the said Las Alturas towers (hereinafter referred to as "the Project");

iii. the consideration, if any, given by the Board of HDC and UDeCOTT and/or the relevant Director and/or representatives of HDC and UDeCOTT and/or the Ministry of Housing later known as the Ministry of Planning, Housing and the Environment of the said advice and report and the action, if any taken, by the Board of HDC and UDeCOTT or the relevant Director and/or representative of HDC and UDeCOTT and/or the Ministry of Housing later known as the Ministry of Planning, Housing and the Environment in respect of the said advice and report;

iv. whether the Board of HDC and UDeCOTT and/or the relevant Director, or Directors and/or representatives of HDC and UDeCOTT and/or the Ministry of Housing later known as the Ministry of Planning, Housing and the Environment commissioned proper advices and reports into the

suitability of the site at Lady Young Morvant for the construction of the Project;

v. the reasons for and effect of the site selection for the project, including the advices and reports which were made available to or requested by the Board of the HDC and/ or UDeCOTT and/or the Ministry of Housing later known as the Ministry of Planning, Housing and the Environment concerning the suitability or unsuitability of the site for the Project; whether the Board of HDC and/or UDeCOTT and/or the Ministry of Housing later known as the Ministry of Planning, Housing and the Environment commissioned proper advices and reports into the suitability of the site for the Project;

vi. the procedures, practices and procurement processes employed by the Board and Management of UDeCOTT and HDC in the award of the contract to undertake the Project;

vii. the circumstances concerning the procurement process and the award of all contract from the inception of the Project;

viii. whether the Board of HDC and UDeCOTT and/or a Director or Directors of HDC and UDeCOTT fulfilled or complied with the responsibilities and duties imposed on them by law and by good corporate governance and practice, by commissioning the construction of the Las Alturas towers on the site at Lady Young Morvant;

ix. the identity of the officials, if any, who have so failed in their duties; and

[II]. To make such findings, observations and recommendations arising out of its deliberations, as may be deemed appropriate, in relation to:

(i) whether there are any grounds for criminal and civil proceedings against any persons or entity;

(ii) whether criminal proceedings should be recommended to the Director of Public Prosecutions for his consideration; and

(iii) whether civil proceedings should be recommended to the Attorney General for his consideration.

[III] *“the causes, events, matters, circumstances and considerations which led to the decision to demolish buildings H and I of the Las Alturas towers located at Lady Young Gardens, Morvant, including the demolition thereof.”*³⁰

34. In its Report the Commission made decisions which included adverse findings and criticisms of the Claimant and others. In addition the Commission made, amongst others, the following conclusions and recommendations³¹:

Page 137, Paragraph 7.5

Mr. Calder Hart was the Managing Director of UDeCOTT at the time when the decision was taken to purchase the land and construct the buildings thereon known as Las Alturas Towers. From the evidence adduced, it appears that he was the mind and management of UDeCOTT. He had an attorney in the matter before us. Several excuses were given by his attorney to account for his non-appearance. Eventually, his attorney informed the Commission that Mr. Calder Hart was prepared to testify but by video link up from Florida USA. The Commission agreed to that proposal but his attorney indicated that he required copies of certain documents before he can prepare his statement and be ready to testify. The majority of the documents requested were from UDeCOTT but not all of them were submitted to the Commission in UDeCOTT’s statement. We made requests to UDeCOTT for the documents requested but were unsuccessful in obtaining them. We were therefore unable to comply with all the requests of his attorney and accordingly he refused to testify.

Page 121 Paragraph 6.16

Mr. Calder Hart was the Chairman of the Board and was therefore fully in charge of the Project. There is no evidence of any information being conveyed by him to the Directors or any enquiry being made by them as to the condition of the land. There can be no doubt that the Directors at that time failed to implement proper procedures for the acquisition of property. This failure later manifested itself in delays and cost overruns. Without such due diligence no reasonably prudent person should have run the risk of investing public funds for the purchase of the Lady Young Gardens site, particularly for the construction of low cost housing. The Commission is of the

³⁰ By warrant of appointment dated March 27, 2015, the Terms of Reference were altered by His Excellency, the President, to include this additional term of reference.

³¹ Taken from the Fixed Date Claim Form.

opinion that the Directors of UDeCOTT failed to exercise the duty of care and diligence called for by Section 99(1) of the Companies Act.

Page 147 Paragraph 7.28-7.29

Mr. Calder Hart of UDeCOTT

7.28

A person whose conduct gave rise to many questions is Mr. Calder Hart, the Managing Director of UDeCOTT at the crucial time. It was he who was instrumental in acquiring the land for the Las Alturas Project but in so doing he failed to do that which a prudent purchaser would do when land is being acquired. The net result of this failure resulted in the land being generally unsuitable for the purpose for which it was acquired, that is, for low cost housing. Because of his failure to inspect the land before purchase, UDeCOTT became bound by constructive notice of the many matters that made the land generally unsuitable for the intended project. Some of these matters are –

- The presence of squatters on the land;*
- The use to which the land was put before its acquisition by UDeCOTT;*
- The slope of the land that made it unsuitable for the construction of Blocks “H” and “I” which were placed over a large longitudinal crack;*
- The failure to obtain a Geotechnical Report as to land suitability before execution of the deed of purchase; and*
- Slope instability of the land.*

7.29

A low cost housing project requires the absence of all of the above negative characteristics. The manner in which PAL was initially employed leaves many questions opened for answers. He eventually declined to cooperate with the Commission by refusing to give evidence with the consequence that the Commission was without answers to the many questions created by his actions and no one now at UDeCOTT could render any assistance to the Commission on these matters. The action and role played by the then Managing Director left UDeCOTT and HDC exposed to large losses as they proceeded to utilize the land for the purpose for which it was acquired at unnecessary expense to the public purse.

35. **Paragraph 172 Paragraph 7.76**

Mr. Calder Hart was clearly the mind and the management of UDeCOTT with respect to this project. He failed to do that which a prudent buyer would have done in the purchase of the land. He was required to do an inspection of the land before purchase and if he had done that he would have seen all the facts that operate against its suitability for the project. He therefore should be held accountable and liable for the losses sustained in the execution of the project.

HDC proceeded to build in areas that were clearly unsuitable for development. In this regard, Buildings “H” and “I” were constructed on a site that was unfit for building and that negligence on their part resulted in the buildings being unfit for human habitation with the consequence that they have to be destroyed. They, too, should be held accountable for the losses sustained by their negligence.

Paragraph 178

Civil Liability

The Commission makes the following recommendations –

1. UDeCOTT in purchasing the land for development of low cost housing units created a situation where it is clear that the land was generally unsuitable for that purpose. They, therefore, should be held accountable and liable for the losses sustained thereby.

2. Mr. Calder Hart was clearly the mind and the management of UDeCOTT with respect to this project. He failed to do that which a prudent buyer would have done in the purchase of the land. He was required to do an inspection of the land before purchase and if he had done that he would have seen all the facts that operate against its suitability for the project. He therefore should be held accountable and liable for the losses sustained in the execution of the project.

ANALYSIS AND FINDINGS

36. This Court is aware of instances of the Court of Appeal’s deprecation of the incidents of wholesale or even substantial verbatim adoption of the submissions of a party, in a Judgment of the Lower Court. I make the observation however, that in several instances in this case, to do otherwise is tantamount to an attempt at *reinventing the wheel*. At the onset this Court can say that it is

persuaded by the submissions of the Defendants on each issue raised by the Claimant and the Interested Party and dealt with in the submissions of the Third and Fourth Defendants under the following headings: **(i)** ‘Abuse of process’; **(ii)** ‘Procedural irregularity/breach of natural justice’; **(iii)** ‘Legitimate Expectation’; **(iv)** ‘Maxwellization’ **(v)** *Illegality – failure to comply with statutory obligation*; **(vi)** ‘Error of Law’; and **(vii)** *Irrationality challenge*’.

Abuse of process

37. The Defendants contend that, as a preliminary issue, both the Claimant’s leave application and now the substantive Fixed Date Claim for Judicial Review set out certain grounds upon which the Claimant intended to rely, only in the most general way. Virtually the full panoply of Judicial Review grounds was relied upon in the Grounds in paragraph 3 of the Leave Application,³² and paras 1-5 in the Fixed date claim, including some which are not obviously relevant to this claim (such as abuse of power and improper exercise of a discretion). The Claimant chose to plead very little facts to substantiate the grounds of challenge. Importantly, the Claimant failed to advance any positive case on the facts in support of his challenges.
38. The Defendants contend that the most that could be gleaned from the substantive application for Judicial Review, together with the evidence filed in support, was that the Claimant had some sort of generalised complaint about his lack of involvement in the enquiry process.
39. The nub of the Defendants’ objection is captured in their written submissions at paras 13 -16 and in substance is as follows: In September 2018, almost 2 years after the claim for Judicial Review was filed, the Claimant filed written submissions which seek to advance an entirely new and different case³³. By far the largest part of the submissions focuses on the lack of provision to the Claimant of a Salmon letter. Little of the material facts required in order to support this point were pleaded in the Leave Application, and skeletal facts so pleaded in what is in effect the substantive Fixed Date Claim for Judicial Review. The Claimant also seeks to raise for the first time, a point on ss. 43 and 44 of the procedural rules in Appendix II to the Report. No advance warning was given that the Claimant intended to rely on these rules, and no material facts were pleaded or evidenced in support. The Claimant asserts in his written submissions that “*The*

³² Note that the Leave Application has two paragraphs 3 and that the Defendants are referring to the second paragraph 3.

³³ See paras 6(2) - 6(5) of the Defendants’ written submissions filed in the matter.

*evidence that these procedural rules were not complied with is clear and unchallenged” (para 4.2). The Defendants contend that the Claimant’s contention is unsustainable. Further, that these particular rules have never been previously raised before and it is not for the Claimant to suggest that evidence has been filed on this issue, and still less so that it is ‘unchallenged’. All the Court has been provided with is the Claimant’s *stilted, incomplete chronology and part only of the correspondence passing between the parties, for a period of the enquiry.**

40. The Defendants submit that the approach adopted by the Claimant is, therefore, wrong in principle, is an abuse of the process and the Court should debar the Claimant from advancing any of the new challenges which appear in his Skeleton Argument. This Court agrees for the reasons advanced by the Defendants and set out below.
41. The Claimant indeed has now pointedly raised these several issues – save the Salmon letter point - frontally for the first time in its submissions. This is a finding of this Court. The tangential raising of any of them by citing the various sections of the Act for instance is insufficient to sustain the contention (implied it seems) that the relevant facts in support of the issues now raised have been ‘pleaded’. In relation to the Salmon letters, the Claimant did ‘plead’ that the commission stated by letter to him that they were aware of the *Royal Commission on the tribunals of Enquiry UK (the 1966 Salmon Report)*. The Claimant further pleaded as the Court understands the said pleadings, that the Commission undertook to issue a notice/ letter, if adverse findings were to be made against him and that in fact, no notice of adverse findings were communicated to him.
42. That several issues and facts thereto having been raised for the first time in the submissions, now being the finding of this Court, then the first reason for the Court’s determination of this issue is that the Claimant has indeed failed to seek leave to amend his grounds to argue the new grounds advanced in his written submissions. As the Privy Council recently stressed in *Fishermen and Friends of the Sea v Environmental Management Authority* [2018] UKPC 24, amongst other things, merely raising the issues and facts now is not tantamount to an application for leave to amend. This Court’s finding is that no application has been made to amend the grounds.
43. Secondly, any application to amend to add the new grounds in the skeleton is bound to fail since it is now too late to raise new grounds of challenge: more than 3 months have elapsed since the

grounds first arose.³⁴ Furthermore, the Claimant has failed to identify any good reason to extend time and leave would in any event have been refused on this ground.³⁵ Further still, the Claimant has indeed flagrantly breached the time requirements prescribed by s 11(1) of the Judicial Review Act and Rule 56.5 of the Civil Procedure Rules.

44. Thirdly, the Claimant has not obtained the leave of the Court to advance any of the new arguments now being advanced in his Skeleton Argument in accordance with s 5(4) of the Judicial Review Act; and for the Court to permit him to utilise Judicial Review proceedings by circumventing the leave requirement amounts to an abuse of process.³⁶

45. Lastly, in allowing the Claimant to advance such new submissions, the Court would be enabling the Claimant to take by surprise and ambush, the Commissioners/Defendants at trial by having put forward a new and/or inadequately pleaded case long after the timetable for the service of pleadings and evidence.

46. The Defendants have urged the Court to apply the approach taken by Kokaram J (as he then was) in the A-G of Trinidad v Evolving Technologies CV2007-00387 at paras 4.1 to 4.9, as follows:

“4.2 The principles of proper pleading has not been jettisoned by the general wording of rules 8.6(1) and (2) CPR. The duty to state material facts necessitates a careful attention to the details of the case that are material to establishing a claim.”

47. The learning by Kokaram J. (as he then was) in this case is apposite. Failure to adhere to the rules requiring the adequacy in detail of pleadings has resulted in great prejudice to these Defendants. The Court concludes that the Claimant has failed to set out the material facts in sufficient detail or at all, material in the first place to commence the action and then in any event to establishing the claim.

48. The full text of the Defendants’ extensive and erudite arguments on this issue upon which this Court is persuaded in favour of, are set out in paras 2 -23 of their written submissions. This Court

³⁴ Fishermen and Friends of the Sea v Environmental Management Authority [2018] UKPC 24 paras 21-29.

³⁵ R (Page) v Darlington BC [2018] EWHC 1818 (Admin) paras 3-34.

³⁶ O'Reilly v Mackman [1983] 2 A.C. 237.

prohibits the Claimant from advancing any of the new challenges which appear in his Skeleton Argument as contended by the Defendants and determined by this Court and set out above.

49. But what about the substance of the issues now raised in the submissions by the Claimant? Were they to have been properly advanced and considered by this Court would the Claimant have had a case? The short answer to that question is no, and fundamentally so, for the reasons set out in the Defendants' written submission and at the risk of oversimplification, set out in substance below.

Procedural irregularity/breach of natural justice

50. The Claimant's essential complaint under this caption appears, from the substantive Application for Judicial Review, to be that he was not given a fair opportunity to take part in the proceedings. However, as contended by the Defendants, the Claimant's written submissions focus substantially on a point about *Salmon letters*, a point although not now raised for the first time, was only tangentially and skeletally raised in the pleadings and evidence of the Claimant filed in this matter.

51. Salmon letters are only provided to witnesses to an enquiry, and further, only at the point shortly before they are due to give their oral evidence. The Claimant never agreed to be a witness, and never attended the enquiry. The duty of the Commissioners as alleged, to issue such a letter, on the facts of the present case never arose.

52. In any event, upon reading the detailed, descriptive and pointed terms of reference of the Commission, the correspondence relied upon by the Claimant, together with the affidavit evidence from the Fourth Defendant, Anthony Farrell, and the fact that the enquiry spanned some 18 months of six publicly televised hearings, it is a fair conclusion that the Claimant felt no compulsion and consequent intention to go and give evidence. This is the Court's view also. This was in fact the concluded view of the Commission. This Court accepts the submission of Queen's Counsel for the Defendants that this was a conclusion which the Commission "*...was plainly entitled to reach and one it was reasonably entitled to conclude- a decision, which is unimpeachable on Wednesbury reasonable grounds.*"³⁷

³⁷ See also *R (Khatun) v Newham LBC* [2005] QC 37 per Laws LJ at paragraph 35.

53. The principles applicable to enquiries following the Salmon Report are set out in the Defendants' primary written submissions at paras 24 - 50 thereof. This Court adopts the said submissions as part of its reasoning on this issue. Briefly set out, it is as follows: (1) the core requirement is to act fairly, which depends on the particular factual context of each case; (2) Salmon letters warning of potential adverse findings are issued to witnesses not to any person who might be mentioned in the report, (3) the Applicant unreasonably failed to take part as a witness; (4) the Applicant's suggestion that a further, later, duty arose to provide him with a warning about adverse findings in the report is unsustainable because (i) he had already, in effect, refused to give evidence and otherwise take part in the proceedings, and (ii) if such a letter had been provided, the Applicant's response would require, in order to be considered, the Commissioners to extend the Inquiry and, possibly, re-open the evidence stage. This would have been impracticable, and unfair to others who had chosen to take part, not to mention the general public who were awaiting the results of an important public Inquiry.

Maxwellisation

54. This concept was introduced by the Attorney General in its submissions. I note however, that it was not by that name, raised (if at all) by the Claimant. It was argued only in the submissions by the AGTT³⁸. It presented somewhat as a hybrid species if you will, of the requirement of natural justice and of the more detailed requirements for the issue of a *Salmon letter*.

55. The AGTT's contention is perhaps, in the Court's interest in brevity, best encapsulated and set out in AGTT's written submissions on the point as follows:

*"The principle in Pergamon and Maxwell was later approved by the House of Lords in F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 where Lord Diplock stated at p.368D-E: "... I would accept that it is the duty of the commissioners to observe the **rules of natural justice** in the course of their investigation – which means no more than that they must **act fairly** by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may adversely affect him."*[Emphasis added]

³⁸ The first notice of this issue was raised orally by Senior Counsel for the AGTT toward the end of the trial.

56. The AGTT's contention on *Maxwellization* is fully met in the written Reply submissions of the Defendants at paras 14 -24 thereof. The requirement of fairness requires only that the Claimant in the instant case be given the opportunity to be heard. That he was afforded such opportunity is a fact as found by this Court. The reasons he proffered for his non-participation in the circumstances in this case do not provide sufficient grounds for the contention that he was not afforded the opportunity to be heard in the matter.
57. Further still, it appears that the case of *Maxwell*, in any event, does not afford the protections claimed by the Claimant under that caption of Maxwellization, to a person merely mentioned in a report(such as the claimant) as opposed to an actual witness in the matter. The instances of the reliance of certain principles enunciated in *Maxwell* are for the most part founded on the applicable UK rules which are not duplicated in Trinidad and Tobago, nor, it appears, applicable or perhaps even necessary, having regard to the terms of reference and all the other protections in the common and statute law in Trinidad and Tobago³⁹.

Legitimate Expectation⁴⁰

58. The Commission laid down and published its procedural rules which were attached to its Report as Appendix II. In Part 5, section 43 states:

*“(b) Part 5 Notices Regarding Alleged Misconduct **Section 43** – “The Commission shall not make a finding of misconduct on the part of any person unless that person or, if the person is deceased, his estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the Enquiry to be heard in person or by Counsel.” **Section 44** – “Any notices of alleged misconduct shall be delivered on a confidential basis to the person to whom the allegations of misconduct refer.”*

59. The Claimant contends that the evidence that these Defendants' self-imposed procedural rules were not complied with is clear and unchallenged. In furtherance of the Claimant's statement that the Commission did not serve a Salmon notice on him, the Claimant says further, that: *Mr.*

³⁹ Public Inquiry Rules 2006. Rule 13(1), (2) and (3); See para 21 of the Defendants' written Reply submissions for the relevant text of the said Rule.

⁴⁰ The arguments set out here are a substantial reproduction of the relevant parts of the written submissions filed in this matter.

Farrell merely states: "that, having regard to the Claimant's failure and/or refusal to participate in the Commission of Enquiry, the Commission was advised and took the view that there was no need to have any further Communication with the Claimant before issuing its report."

60. The Defendants' opposing contention commences with their understanding of the Claimant's claim and argument (which they deny); that the Claimant enjoyed a legitimate expectation that the Commission would apply to him the self-imposed rules set out in Appendix II to the Report. The Defendants contend that even assuming this is be right, the short answer is that the treatment accorded the Claimant did not in any way fall foul of those rules.
61. The Defendants contend therefore, that the purpose of section 43 in particular, is to provide persons against whom adverse findings might be made an opportunity to take part and be heard. For all the reasons set out in this case, the Claimant was given this opportunity to take part. He failed and /or refused to take part. It is, contends Queen's Counsel for the Defendants, an important assumption underlying sections 43 and 44 that the person concerned is or would be a willing participant in the enquiry. Thus, section 43 refers to the right to be heard "*...during the Enquiry*" – i.e. that the individual in question has attended and given evidence and made submissions during the pendency of the enquiry.
62. This reasoning appears sound to the Court. If it were otherwise, near everyone involved in the project including perhaps the engineers, surveyors, consultants, geologists, site supervisors etc. who were not witnesses in the matter would have a right to such notification. Just taking the first term of reference alone, it throws out a wide net: "*...the entire process which led to the construction of the Las Alturas towers at Lady Young Gardens Morvant, and all other acts, matters or decisions done or undertaken incidental thereto up to and including the construction thereof.*"
63. On another note, the Court is persuaded by the additional contentions of the Defendants on the issue as set out in paras 54 -58 of the Defendants' written submissions. What is this contention?
64. The Defendants' contention is that it was plain and obvious from the enquiry's terms of reference that findings adverse to UDeCOTT and its Board members including the Claimant might well be made, and on what basis they might be so. The Claimant was advised, back in May 2015, that the

enquiry would be looking into the specific question of whether the Board and/or individual directors of UDeCOTT had commissioned “...proper advices and reports into the suitability of the site at Lady Young Morvant”⁴¹; and whether the Board / members thereof had “...complied with the responsibilities and duties imposed on them by law and by good corporate governance and practice, by commissioning the construction of the Las Alturas towers on the site at Lady Young Morvant”.⁴² The Commission would observe in this context that the Claimant, as an experienced director, and certainly as Chairman of the Board, would have (or ought to have had) a detailed understanding of his legal and other corporate obligations at the material time. The terms of reference were abundantly clear, that the chairman of the Board had a case to answer and an interest to defend if he so desired. The evidence is that at the time of the enquiry, the Claimant no longer resided in Trinidad.

65. In the end, the principal finding of the Commission, as against UDeCOTT, and the Claimant as Chairman of the Board, was that they had failed to properly inspect the site⁴³. Counsel for the Defendants drew to the Court’s attention that this was a finding in respect of the very point made in *para I.iv* of the terms of reference and the Claimant was, therefore, manifestly on notice of the allegation in question.

66. Although the enquiry undertook a detailed and careful process in carrying out a hearing over many months, the Commission found that the central problem with the towers was clear: the ground on which the towers were built was unsuitable. The key question in respect of the Claimant and UDeCOTT, was whether they ought to have realised this before committing themselves to the site. The Commission noted in the Report that the land suffered from a number of problems which made it “...generally unsuitable for the intended project”⁴⁴. These problems included “*Slope instability*” and a further problem relating to the slope of the land, making it unsuitable for Blocks H and I “...which were placed over a large longitudinal crack”. UDeCOTT, in particular, had failed to secure a geotechnical report prior to purchasing the land.

⁴¹ See para I.iv of the terms of reference.

⁴² Ibid para I.viii.

⁴³ See Mr. Farrell’s affidavit, para 21.

⁴⁴ See para 7.28 of the Report.

67. The Commission's essential conclusion was indeed that these matters were there to be seen and that any prudent purchaser would have caused an inspection to be done of the land which would have revealed the same. The Claimant has cited authority suggesting the specific allegation/finding need have been brought to the Claimant's notice and not just the 'generalized' allegations. The application of this principle, will turn on the peculiar facts of each case, surely. It was clear from the terms of reference and the filed affidavits that this was going to be a central issue. The Claimant was on notice of it, and further, had been given every opportunity and a continuing opportunity at that, as the evidence unfolded over the many months of testimony, to harken to the evidence and come to the enquiry and give his explanation as to what went on and why. He chose not to do so albeit for the reasons he has provided.

68. For these reasons the Defendants submit that sections 43 and 44 were complied with. The obligation to provide the Claimant with advance notice of a potential adverse decision did not arise, as it was clear that he was not intent on taking part in the enquiry. The Defendants contended alternatively, that the terms of reference in any event made the position clear and properly put the Claimant on notice. He cannot have been in any serious doubt as to what the enquiry might very well conclude and in any event he was well aware that at the very least his role, function and performance was under examination. Yet, still, in light of this (and having had access to all of the evidence in the Commission Dropbox and online – including the periodic transcripts of what everyone else was saying), the Claimant chose to give no evidence and filed no submissions at the Commission hearing. The creeping adversity as it were, in relation to the Claimant as the 25 witnesses testified publicly one after the other over the many months was such, in the view of this Court, ought to have excited the Claimant's commitment to participate if he so desired, notwithstanding the absence of certain documents. Indeed the Claimant has not made-out even the narrower allegation, that the Commission did improperly place reliance on any material to which he did not have access.

69. This Court is persuaded by the whole of the Defendants' arguments on the issue of the *Salmon letter/Notice* and concludes that the expectation to be provided with the Notice is not a justiciable *legitimate expectation*⁴⁵.

⁴⁵ See also the Court's affirmative findings below on the Defendants' alternative contention on this issue.

70. Not only was there an evidential basis for the Commission's conclusions that the Claimant had no wish to give evidence at the enquiry within the terms of reference, (whether you would necessarily come to the same conclusion or not) but no evidential basis for arriving at an alternative view has been shown to this Court as having been brought to the attention of the Commission at the relevant time, or now brought to the attention of this Court. A mere bald statement as to the Claimant's legitimate expectations is insufficient.

71. The Defendants contended in the alternative, that even if the Court were to find that the Claimant's legitimate expectations were disappointed, the Court still ought not to grant the relief being sought. The Court was invited by the Defendants in this alternative circumstance, to decline relief on the principal basis that advance notice to the Claimant of the adverse finding that the Commission had proposed to make, would have made no difference to the outcome. This is so on two bases. Essentially, that the Claimant himself gave no evidence (and has not pointed to any – prospective or existing evidence on the record) and would be hard pressed to identify any evidence in support of his contention that a different outcome would have ensued and further, that in any event any reasonable objective consideration of the facts before the Commission and the facts stated as actually being relied upon by the Commission, point to the Commission's findings as being plainly right. This Court agrees with the Defendants' submission on this alternative issue and draws the conclusion adverse to the Claimant.

Illegality – failure to comply with statutory obligation

72. The nub of this ground of contention lies in the interpretation of the terms of reference and the Commission's conduct of the enquiry⁴⁶. The Claimant sets out its contention as follows:

“The Commission's Terms of Reference required the Commissioners to enquire into “the entire process which led to the construction of the Las Alturas project...and the adverse reports and minutes which were made available to various official agencies concerning the site. The Commission of Inquiry Act states that ‘Each commissioner appointed under this Act shall make and subscribe an oath that he will faithfully, fully, impartially and to

⁴⁶ See the Claimant's written submissions

*the best of his ability discharge the trust and perform the duties devolving upon him as a commissioner....”*⁴⁷

73. In order to equip the Commissioners with the means of carrying out a full enquiry they are given the powers of the High Court *“to summon witnesses, to call for the production of books, plans, and documents, and to examine witnesses and parties concerned on oath; and no commissioner shall be liable to any action or suit for any matter or thing done by him as such commissioner.”*⁴⁸
74. The Claimant contends that the Commission failed to utilize these powers so as to fulfil their duty of conducting the inquiry faithfully and fully as despite the obvious importance of the documentary records and the need to be fair to the Complainant by affording him access to those records, no summons was issued to any UDeCOTT officer or employee or any other person to produce the relevant documents.
75. As a result of the alleged conduct of the Commission, the Claimant submits that the conclusions of the Commission are fatally flawed and are the result of a deficient investigation. This Court took much time to consider this issue.
76. At the onset, it cannot be in dispute that the Commissioners are duty bound to faithfully, fully, impartially and to the best of their ability discharge the trust and perform the duties devolving upon them as commissioners. Did they do so? This Court holds that they did discharge their duty as prescribed by the terms of reference and indeed the law generally.
77. The Defendants’ response to the Claimant’s assertions on this issue was to the point⁴⁹. The Defendants contended that the Commission was not bound to allow, less still to facilitate, the Claimant’s participation in the enquiry on whatever terms he sought unilaterally to impose. The Commission, the Defendants accept, were required to provide the Claimant with a reasonable opportunity to take part in the enquiry. The Commission did so; but the Claimant did not, albeit for the reason he has proffered, utilize the opportunity afforded to him to participate.

⁴⁷ Section 5 of the Commission of Enquiry Act

⁴⁸ Section 11 of the Act

⁴⁹ See para 60-62 of the Defendants’ filed written submissions.

78. The Defendants submit that the complaint that (i) the Commission was somehow bound to exercise its discretionary statutory powers so as to provide the Claimant with documents and other assistance and (ii) the Commission failed to comply with its statutory obligations in relation to section 5 (“*to discharge the duties devolving upon him as a commissioner*”) and under section 11 (to exercise the powers of the High Court “*to summons witnesses*”), is misconceived. The Defendants submit further, that the Claimant has advanced no factual basis and/or adduced no evidence to indicate that the Commissioners breached these obligations. Indeed the Claimant has not done so in this Court’s view. In any event apart from the information that the Claimant may have decided to place in his witness statement, the Commissioners must have concluded that the useful information would have also, if not entirely, flowed from the responses to questions put to him in the box. This issue is not established by the Claimant.

Error of Law

79. The Claimant contends that it was on the basis of several fundamental erroneous conclusions of fact and law, the Commission made certain significant and objectionable findings. The ‘erroneous’ conclusions alleged range from determining that the Claimant as Chairman of the Board was therefore fully in charge of the project (“*...the mind and management of UDeCOTT*”); that he was appointed as a Managing Director when in fact he was not; that there was not any evidence that the Board delegated any of its powers to the Claimant; or any law to the contrary, that as a general principle the management of a company is vested in the Board of Directors collectively. The Claimant submits in the end, that it was of great importance that the Commission should have effectively sought access to the minutes of UDeCOTT before coming to a conclusion as to individual responsibility. He alleges, presumably, that the Commission did not do so.

80. The case for the Defendants on this issue is argued substantially on the evidence of Mr. Farrell. Mr. Farrell explains the Commissioners’ reasoning for its conclusions on the Claimant’s role as the Chairman of UDeCOTT, at length in his affidavit at paras 21-22. Mr Farrell is an Engineer and was a Commissioner in the enquiry.

81. The essence of his evidence on the role of the Claimant as the Chairman of the Board was that he was of the view that the evidence showed that the Claimant was the ‘alter ego’ of UDeCOTT and operated as the de facto Executive Chairman and CEO, and who was in fact responsible for all

major decisions relating to the site selection for the project. Further, Mr. Farrell testified that the evidence highlighted the depth and extent of his role in relation to the site selection of the project.

82. This Court is unable to agree with the Claimant's contention on this issue. It was a fact finding exercise which the Commission was well able to carry out and indeed did so. There is no evidence from the Claimant or otherwise discernible, that points to any evidence before the Commission which suggests the Commission could have possibly come to another reasonable conclusion than that which it did. There was ample material before the Commission. Its findings on these issues were reasonable ones which the Commission was entitled to make. To be clear, it is not this court that has made the finding, but that of the tribunal/commission that heard the evidence and possessed the expertise to make such findings.

Irrationality challenge

83. The Claimant contends that the Commission's condemnation of the acquisition of the Las Alturas site is not based on sound grounds or adequate reasons, since this could only be assessed after taking into account matters such as the housing needs in the area, the availability of alternative sites, whether any of the subsequent problems resulted from design faults which did not take into account the nature of the terrain. The Commission having failed to procure the historical documents and records acted irrationally in formulating decisive conclusions without the assistance of relevant evidential materials. If it is being suggested that the selection of an inadequate site is justified by issues such as housing needs in the area for instance, then this court is nonplussed by such an assertion.
84. The Claimant further contends, that in order to make a proper and rational determination of whether a director or the directors were guilty of negligence, a tribunal has to examine the character of the business, the number of directors, their qualifications, the supporting staff provided, the provisions of the Articles, the normal practices and the knowledge and experience of each. The Commission, he alleges, made no attempt to carry out this thorough enquiry.

85. The Defendants refute the allegation of irrationality⁵⁰. The Defendants submit that the Commission is a specialist tribunal. It held 6 hearings over 18 months, interviewed 25 witnesses, and reviewed thousands of documents. These are not disputed facts. The Defendants further submit that the Commission reached its conclusions on a considered basis, which were set out in *its detailed and closely reasoned Report*. This Court accepts the Defendants' contention that in deciding how to answer the terms of reference, it was for the Commission to decide what evidence it needed to hear and from whom. It was also, in the absence of express direction in the terms of reference, for the Commission, subject only to rationality, to decide what matters were relevant considerations and what weight to accord those considerations. The same applies in respect of the inquiries that the Commission considered to make with respect to the identification and collection of evidence.

86. I think it apposite, to refer to the case cited in argument on a very salient principle in this case: It was said in the English Court of Appeal and I hold it as good law in Trinidad and applicable to the instant Judicial Review before me; in *R (Khatun) v Newham LBC* [2005] QC 37 per Laws LJ at paragraph 35:

"In my judgment in the CREEDNZ Inc case (via the decision in Re Findlay) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to Wednesbury review..."

87. It must be in the circumstances of this case, that the Commission was entitled to seek the evidence it did, and to rely on the evidence given by the witnesses who chose to file witness statements and attend for questioning. This court accepts the view that the Claimant's complaints of irrationality do not satisfy the *Wednesbury* threshold.

DISPOSITION

88. This Court precludes the Claimant from advancing any of the new challenges which appear in his Skeleton Argument as contended by the Defendants and set out above.

⁵⁰See para 64 -66 of the written submissions of the Defendants.

89. Further, even upon consideration of those several issues raised in the submissions for the first time (and referred to in para 88) not least of which is the Salmon letter issue, the Court holds that the issues on their substance, are not sustainable and therefore dismissed.

90. The said decisions of the Commission are not in breach of sections 4(b) and 5(2)(e) of the Constitution of the Republic of Trinidad and Tobago, i.e. the right of the individual to the protection of the law, and the right not to be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of their rights and obligations.

91. For the reasons set out above, the Court will dismiss in its entirety this claim for Judicial Review and order the Claimant to pay the costs certified fit for Queen's and Junior Counsel to be assessed by the Registrar in default of agreement.

92. For the reasons provided above, **IT IS HEREBY ORDERED THAT:**

- I. Judgment for the Defendants;
- II. The Claimant's case is dismissed in its entirety;
- III. The Claimant shall pay the Defendants' Costs certified fit for Queen's Counsel and Junior Counsel to be assessed by the Registrar in default of agreement.

DAVID C. HARRIS
HIGH COURT JUDGE
SEPTEMBER 25TH 2020