The Republic of Trinidad and Tobago

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-03205

Between

(1) DR WAYNE KUBLALSINGH
(2) RIAZ NIGEL KARI
(3) ELIZABETH RAMBHAROSE
(4) RAMKARAN BHAGWANSINGH
(5) MALCOLM MOHAN
(6) AMEENA MOHAMMED
(7) LEELAWATIE BOODHAI

Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr Justice James Christopher Aboud
Date: 26 October 2020
Appearances:

- Mr Ramesh Lawrence Maharaj SC and Mr Fyard Hosein SC leading Mr Rishi P A Dass and Ms Vijaya Maharaj instructed by Mr Anil V Maraj for the claimants.

- Mr Russell Martineau SC and Mrs Deborah Peake SC leading Mr Kelvin Ramkissoon, Mr Shastri A Roberts, and Ms Kelisha Bello instructed by Ms Kendra Mark and Ms Ryanka Ragbir of the Chief State Solicitor's Department for the Defendant.

JUDGMENT

[1] Briefly stated, the seven claimants sue for constitutional and tortious relief arising out breaches of legitimate expectations in the State's construction of the Debe to Mon Desir segment of the Solomon Hochoy Highway Extension Project in south Trinidad ('the highway') and the destruction of their protest camp in 2012. The highway is but one section of a much longer freeway that connects north Trinidad to the southern town of Point Fortin and passes near four major towns between Debe and Point Fortin. The claimants are seeking declarations that the decision to continue construction of the highway breached their constitutional rights as it

contravened certain assurances allegedly made by the Government that gave them legitimate expectations. They are also seeking reliefs pursuant to the demolition of their protest camp and the events that surrounded the demolition, including trespass, assault, and false imprisonment.

[2] When the Fixed Date Claim ('FDC') was filed in 2012 it sought a conservatory order (in effect, an injunction) to stop the State from continuing the construction of the highway. The conservatory order was not initially pursued as an interim remedy. Instead, many affidavits on the substantive matter were exchanged and directions for the filing of written submissions were given. The hearing of the substantive matter was already underway when the claimants decided to pursue their conservatory order as interim relief in 2013. I refused to grant the order by a judgment on 7 May 2014 after protracted hearings. The judgment was appealed. On 4 August 2014 the FDC was amended in the terms I will set out below. The appeal against my judgment was eventually refused and the substantive matter proceeded. There were contested interlocutory applications to strike out affidavit evidence, to admit expert evidence, and to cross-examine witnesses on which I gave decisions. The trial concluded in late 2018. Unfortunately, I suffered a spinal injury in June 2019 that eventually necessitated surgery and rehabilitation. The events above have led to unfortunate delay in the delivery of this judgment. In delivering this judgment I have divorced from my mind all my interlocutory findings in the conservatory order proceedings. I have applied a fresh mind to the facts and the law.

Background Facts

[3] The disputed and the undisputed background facts that gave rise to the amended FDC were set out in my 7 May 2014 Judgment on the interim injunction. I will therefore, where necessary, selectively refer to that section of the 2014 judgment that set out the background facts. I will also scrutinize

and refer to the evidence, both written and oral, adduced before me at the trial.

[4] The claimants are persons who say that they are adversely affected by the decision to construct the highway. The highway that was proposed to be built passes near to environmentally sensitive wetlands, and through lands where a community of people have historically lived, beginning in the mid-19th and 20th centuries when Indian Indentureship began and ended. At the time of filing the FDC on 3 August 2012, some of the claimants had been served with Acquisition Notices made pursuant to the order of the President. Some, whose homes are on the perimeter of this section, were not.

[5] The first claimant, Dr Wayne Kublalsingh, does not live anywhere near the path of the proposed extension, but is an environmental and national development activist who is the chief spokesman for the Highway Reroute Movement ('HRM') of which the other claimants are members or supporters. The second to sixth claimants testify that they are persons who will be adversely affected by the construction of the highway. The second claimant, Riaz Nigel Karim, lives on a large parcel with many family members. The land is owned by his father. His father was served with an Acquisition Notice. The third claimant, Elizabeth Rambharose, owns a property in Debe and was served with an Acquisition Notice. However, due to design changes her property will no longer be acquired. However, her property will still be in very close proximity to the highway. The fourth claimant, Ramkaran Bhagwansingh, was served with an Acquisition Notice. The fifth claimant, Malcom Mohan, is a retiree in his late 60s who has lived on his property for 29 years. Part of this property will be acquired by the State. He lives on the land with his son and is involved in farming on it. The sixth claimant, Ameena Mohammed, a widow now 77 years old, has lived for over 40 years on lands adjacent to the proposed highway. She lives alone. She says that she depends upon the support of her neighbourhood community in order to maintain her independent existence. Many of these neighbours were served with

Acquisition Notices at the time the proceedings were filed. This will cause a disruption to her way of life. She testifies that she is concerned about the hydrology of the highway as flooding is a perennial problem in the district. The seventh claimant, Leelawatie Boodhai, has been served with an Acquisition Notice.

[6] The current state of the lands on which Acquisition Notices were served is not known at the time of writing this judgment. The facts set out in this judgment are taken from affidavits filed in 2012 and 2013. In summary, the claimants say that the highway will affect the homes and livelihood of members of their community, and not only themselves personally. Their environmental or hydrological concerns about the destruction of wetlands, together with the disruption of their rural way of life, which they have enjoyed for generations, and its effects on physically compromised persons like Ameena Mohammed are at the forefront of their objections and their desire for the highway to be diverted along a different route. In essence, they say that the highway will destroy their way of life in social, environmental, and economic terms. They also say the disruption will be spiritual as a Christian church, a Mosque, and a Hindu Temple will be relocated.

[7] Between October 2010 and September 2011, residents in the Debe area of the proposed highway, under the leadership of Dr Kublalsingh, carried out a campaign of public education and awareness opposing the construction of the highway. They wrote letters to the editors of the daily newspapers and were interviewed on television. They held public meetings and disseminated several pamphlets. Newspaper headlines of the time, atop extensive interviews with Dr Kublalsingh, stated: “Most Debe Residents Say No to Highway Plan;” “Mon Desir to Debe: Highway to Disempowerment;” and “Mon Desir to Debe Highway: a Waste”.

[8] In September 2011, Dr Kublalsingh was instrumental in organizing an activist group known as the HRM to lobby against the highway. The main thrust of

their argument was that, instead of passing through four towns on the way to Point Fortin, the extension should instead be rerouted or diverted at the Debe interchange and cut across the island to the coastal road on the West. This goal is underlined in the word "reroute" in the name of their organization. This proposed diversion would have by-passed three of the four towns altogether for north/south traffic, and all four towns for south/north traffic. The main grounds of the complaint related to hydrology, the cost/benefit analysis of the enterprise in relation to the alternative route, the threat to the wetlands, and the disruption of their way of life.

[9] On 25 January 2011 Dr Kublalsingh became aware that Construtora OAS, SA ("OAS"), a Brazilian construction company, was awarded the contract to design and build the entire highway extension, including the disputed section. The Government had, by that time, already obtained a Certificate of Environmental Clearance ('CEC') from the Environmental Management Authority ('the EMA'). The contract sum was stated to be $5.2 billion, the largest single infrastructural investment to date in the nation's history. The preliminary design element would likely have begun, or ought to have been known to have begun, around that time, or, at any rate, soon after the formal contract was executed in July 2011. The public awareness and opposition campaign thereafter intensified. In May 2011 the major utility providers (electricity, water, telephone and cable television) began the process of removing or re-locating their installations along route of the proposed highway. In July 2011 the interchange at Debe (which was the first interchange along the disputed section of the highway from the north) was released to OAS for design work.

[10] Beginning at the end of 2011 and leading up to February 2012 the State began serving Acquisition Notices on landowners along the route of the disputed section. During this period the Government began negotiating prices for the acquisition of all private lands. The dates of the actual acquisitions were not given but the evidence suggests that the acquisition

process was ongoing from the time that the notices were served. As at October 2013, as the evidence discloses, the Government had paid out $62.8 million dollars to some 57 landowners.

[11] There are no proceedings before the court to contest the validity of the Acquisition Notices served on the claimants, or, indeed, on any of the other landowners. There is therefore no alleged defect in the procedure that led to their issuance. The grant by the EMA of the CFC, and the Town and Country Planning Permission was never judicially reviewed.

Interactions with the Government

[12] This case is about two distinct allegations of fact. Both allegations concern promises or assurances made by Ministers of Government or its officers that the policy decision to build the highway would be reviewed. In each of the two alleged factual situations the promises are said to have been made more than once. Some were allegedly made orally and directly to the claimants, or a few of them. Some were reported in newspapers as having been made by the State officials, and some are contained in written documents. In both cases, the facts asserted are said to create two legitimate expectations that a review of the decision would take place and that the recommendations would be followed.

The facts alleged to have created first legitimate expectation

[13] In February 2012, during the period when works on a section of the undisputed highway extension from Golconda to Debe were steadily progressing south, Acquisition Notices were being served, and pre-construction activities were being undertaken on parts of the highway, the HRM staged a demonstration in front of the private home of Mrs Kamla Persad-Bissessar, the Prime Minister. The demonstration was said to be an effort to deliver a letter and a report, both authored by the HRM in that month. The letter called for the "permanent discontinuance" of the highway and its rerouting along an alternate path. The report stated that the project

was destructive to the history, the geography, the economy and the ecological balance of the region. It drew reference to the prospect of flooding, the destruction of agricultural lands, the loss of a pristine rural culture, and the dis-connectivity of its people. It complained about the demolition of homes, businesses and places of worship, and the creation of "urban sprawl" emanating from the four towns with attendant crime. It also protested what it described as the flawed consultation that began in 2005, and the prohibitive financial costs of this major stretch with its many interchanges. The alternative was to divert the highway from Debe to the coastal road on the west and to repair and, where possible, expand the existing grid of secondary roads around the four towns. The letter was delivered to the Prime Minister.

[14] On 15 March 2012 another protest was staged outside the Prime Minister's office in St. Clair. Dr Kublalsingh said it was called in order to get a meeting with her. All these activities were widely reported in the media. The Prime Minister agreed to meet with the HRM and the claimants on the next day, 16 March 2012. The meeting took place at the temporary House of Parliament, The Waterfront, Port of Spain.

Representations at the first meeting

[15] Dr Kublalsingh testifies in his 3 August 2012 supporting affidavit that the Prime Minister, after hearing submissions from various members of the HRM on their objections to the highway, told them that the Government would review the issues and that the highway would be "put on hold". The claimants say that such a review was intended to be an independent technical review. The Government deponents admit that the Prime Minister undertook to carry out a review, but do not agree that the review was intended to be "an independent technical review". Dr Moonilal, a Government minister, and Ms Lisa Ghany, the Public Engagements Advisor to the Prime Minister in their affidavits of 15 February 2013, both testified that the Prime Minister said that there would be a review and that the works were to be put on hold pending the review.

[16] I cannot reasonably imagine that the review contemplated by the Prime Minister would not be understood to be technical. I also have difficulty accepting that such a review would be seen by the HRM as sensible without a consideration of their specific objections. According to Mr Maharaj SC, lead counsel for the claimants, these words created an expectation that the promised review would be meaningful, that the HRM objections would be assessed, and that the HRM would have an opportunity to be heard. Of course, insofar as the reviewing committee was concerned, I find it difficult to believe that if it were to be meaningful the reviewers would not exercise an independent judgment on the HRM objections. Mr Martineau submitted that while the Prime Minister said there would be a hold on construction, there was no undertaking to permanently halt the works. I accept that. But certainly, the language used suggests that such an undertaking was offered pending the conclusion of the review.

[17] Following this meeting Dr Kublalsingh and some 50 persons gathered at the offices of the EMA. Several of them including Dr Kublalsingh went into the building demanding to see its CEO. They refused the leave the lobby. Eventually, the CEO met them there. Dr Kublalsingh says that the CEO admitted that there were conditions attached to the already approved CEC that ought to be complied with. Dr Kublalsingh says that the EMA abdicated its responsibility in granting the CEC and they therefore staged a peaceful protest in the lobby until they were physically removed. All these events, like before, were heavily covered in the newspapers and on television.

Representations at the second meeting

[18] On 16 April 2012, after more public agitation and press coverage, the HRM was invited to attend a meeting with the then Minister of Works, Mr Jack Warner, to discuss their concerns. The meeting took place at the Ministry's offices on 18 April 2012. Attending the meeting were Mr Warner, Dr Moonilal, a Minister of Government, the Permanent Secretary of the Ministry of Works,

the Ministry of Works' Environment Officer and its Director of Drainage, the Chairman of National Infrastructure and Development Company ('NIDCO'), Dr Carson Charles, and one of NIDCO's engineers, together with two officials from the EMA, including its legal advisor, two members of Parliament and a representative of OAS. NIDCO was the State agency charged with the responsibility to build the highway. The composition of the meeting suggests to me that the Government was thinking along technical and legal lines in issuing its invitation and trying to bring together all parties concerned with the specific issues raised by the HRM.

[19] The HRM was represented by several of the claimants including Dr Kublalsingh and Dr Prame Narinesingh, a hydrologist from the University of the West Indies. The HRM raised their concerns about the hydrology, the social and economic impacts, and the proposed rerouting alternative. The Government attendees tried to get the HRM to agree at least to build the Siparia to Mon Desir section, which was a section further south of the highway, but Dr Kublalsingh said that the HRM would not agree to that.

[20] Eventually, according to the evidence, Mr Warner said that his Ministry would establish a nine-member committee, comprising seven Government-appointed officials, and two drawn from the HRM, namely, Dr Kublalsingh and one other person of Dr Kublalsingh's choice. Dr Kublalsingh testifies that Mr Warner said that "the purpose of the committee was to consider HRM's arguments and to come up with a solution to [the HRM] concerns and make a decision on the route of the Debe to Mon Desir segment within one month." Dr Kublalsingh objected to the composition of the proposed committee. He said that he did not have the technical skills to participate, and further, that the composition should be five members appointed by the Minister and five appointed by the HRM. Mr Warner insisted on the seven to two composition. Dr Kublalsingh and the HRM then abruptly left the meeting because, according to Dr Kublalsingh, "Mr Warner was going to form a committee that would not afford the HRM of meaningful participation by our technical

persons . . . it was better for the HRM to respond with its own technical personnel to any review which was promulgated."

[21] Mr Martineau SC, lead counsel for the defendant, says that this did not amount to a promise to set up a "technical review committee." Further, the State does not accept that the report would be delivered within one month. According to Mr Warner's affidavit there was no further discussion about setting up the committee after the HRM members left the meeting. However, in a newspaper interview following the meeting published in the Trinidad Guardian on 19 April 2012, Mr Warner is reported to have said: "This is the first of many meetings to come. I am not going to allow Mr Kublalsingh's histrionics to bother me. We have to meet with the people who live in the area and we have to consider their concerns." The newspaper writer also reported this: "Warner also said the proposed committee had the power to 'co-opt' personnel as necessary. Construction would continue on the initial route until the proposed new route could be thoroughly reviewed, he said." Mr Warner made no public retraction of the report made in the newspaper.

The setting up of the protest camp

[22] Shortly after this meeting, according to Dr Kublalsingh's 3 August 2012 affidavit, ". . . on 19 April 2012, bulldozers and tractors crossed the M2 Ring Road and began to grade lands directly on the path of the Debe to Mon Desir segment." On 21 April 2012, the next day, the HRM set up a protest camp about 100 meters south of the junction of the M2 Ring Road and the SS Erin Road. There is some dispute as to its exact location in relation to the proposed highway. On the basis of the evidence led by affidavit and elicited in cross-examination I put its western boundary at between around ten meters from the area proposed for the construction of the highway. There is some dispute as to whether or not the camp was situated on the path of the proposed highway. No plan was adduced into evidence by the defendant to demarcate the proposed highway and to, even informally, place a mark showing the location of the protest camp. The specific location of the camp

is an important fact to establish and the court was left with conflicting evidence as to whether or not the camp was built on lands reserved for the highway, on lands that formed the curtilage of the highway (commonly referred to as a road reserve in survey plans),or on lands beyond that point. Dr Carson Charles testified in his affidavit that the camp was impeding the construction works and blocking the way of the contractor. Mr Warner testified to the same effect.

[23] I think that it is the duty of the defendant in a public law matter to prove these facts as I am sure that accurate land surveys were undertaken and were in the Government's possession. I find it hard to believe that the protest camp was impeding the construction works and blocking the way of the contractor. If so, the contractors should have testified to it. On a balance of probabilities, I feel more secure in holding that the camp was built on lands adjacent to the construction work. I am fortified in this view because of the allegations that the camp was causing traffic congestion on the M2 Ring road. Traffic congestion suggests that the M2 Ring Road was open to vehicular traffic at that time.

[24] The true title to the land on which the camp was situated is not clear. The HRM says that it sought the approval of the occupier of the adjoining lands, the National Agricultural Marketing and Development Corporation ('NAMDEVCO'), a State Enterprise. NAMDEVCO operated an agricultural market at its site. It denied that it gave any approval to set up the protest camp. A deed was not produced but it is not unreasonable to believe that the camp was situated on NAMDEVCO's lands to which it either had a lease or a grant from the State.

[25] The protest camp comprised a main camp, which included an information booth, a meeting area, a cooking area, shelves for kitchen utensils, and a garbage disposal area. The main camp was covered by tarpaulin measuring 20 feet by 20 feet and part of its structure was made of galvanized zinc sheets.

There was a tank stand with a 400-gallon water tank that provided running water to the HRM members and its visitors. In addition, there were two gender-defined portable bathroom facilities. The HRM immediately engaged in a 21-day fast at the site. The public was invited to attend and to pray. There were praying areas for the Christian, Hindu, and Islamic faiths. There were two altars. There was also a Peepal Tree growing in a pot. This is a sacred plant according to Vedic faith, around which Hindus meditated or practiced "pradakshina" (or circumambulation while reciting prayers). In an adjoining area the HRM planted various short crops. Dr Kublalsingh testified that this was to demonstrate that fertile land was being lost.

[26] Members of the public visited the camp for information or to express solidarity with its goals. So too did leaders of various political organisations, community groups, and trade unionists. Some of these visits were reported in the newspapers. During these visits the HRM members shared their literature and explained their objections to the construction of the highway.

[27] I accept the defendant's evidence that cars passing nearby slowed down to look at what was going on, and that visitors parked their vehicles along the road. This led to a significant degree of traffic congestion. This traffic congestion appears to me to be the State's main official complaint. I doubt that the area occupied by the protest camp was immediately needed for the expansion of the highway. This is because, when it was finally demolished by the Army after just over two months of HRM operation or occupation (as I will come to later), it was replaced by an Army encampment. According to the evidence, this Army camp was put there to prevent the HRM from re-occupying the site.

[28] Designating the camp as a "protest camp" might be a misleading term. In my view it was not involved in anything even remotely approaching violent protest. It instead seems to me to have been involved in peaceful protest, prayer, and the dissemination of information. There is no evidence of HRM

members or visitors verbally or physically abusing anyone involved in construction or leaving the camp and standing in the path of road building equipment.

The third representation

[29] Grading and pre-construction works began in the vicinity of the Debe interchange on 19 April 2012. Around that time a notice was published in the newspapers inviting members of the public who lived in the district to attend a meeting to discuss the highway extension. The meeting took place on 5 May 2012 at the Debe High School. Attending the meeting on behalf of the Government were Junior Minister of Works, Stacey Roopnarine, Dr Charles of NIDCO, Minister Emmanuel George, the Local Government Minister and the Minister of Planning and the Economy.

[30] Following the meeting Minister Warner gave a statement to the press. This is a verbatim extract of what was reported in one of the newspapers:

> "Speaking on the Reroute Movement's protest over the Debe to Mon Desir segment, Works Minister Jack Warner said in asking that the Debe to Mon Desir segment not be built, the group was asking that Siparia, Penal and Debe be neglected and Government is not prepared to do that.
>
> 'The fact is we can't build a highway and avoid the people and I cannot see this Government building a highway and avoid the people and I could not see this Government building a highway for Point Fortin people alone. I could not see this Government building a highway for La Brea alone. I do not see why a highway should go to Point Fortin and bypass the people of Debe. Why should a highway go to Point Fortin and bypass the people of Siparia? Why should they be neglected? The plan is to leave Debe, Penal and Siparia as they were back in the 1950's.' Warner said that they now have to go the communities, the Chambers of Commerce, the Village Councils, the NGO's and the Clubs to convince them about

the importance of the Debe to Mon Desir segment toward the development of their communities."

[31] Dr Kublalsingh describes this community meeting in dismissive terms. He says that "our understanding and expectation of a review was that it should be carried out impartially and sincerely and that there would be legitimate consultation." He says that instead of being consultative, or to present a review of their concerns, the intention of the meeting was "merely to proselytize members of the public".

Representation by Steve Garibsingh

[32] On 7 May 2012 Mr Steve Garibsingh of NIDCO was quoted in one of the daily newspapers as saying that NIDCO had been requested by the Ministry of Works to put a hold on the Debe to Siparia segment for further additional studies "which are required to be able to respond to the inquiries and concerns of the citizens in the area".

Further representation by Mr Warner

[33] Notwithstanding the earlier comments attributed to Mr Warner as having been said on 5 May 2012, he was quoted in the newspapers on 8 May 2012 as saying that the works would be stopped on the disputed section for at least four months. The newspaper article, carried in the Trinidad Express of 8 May 2012, reports that "construction work on the Debe to Mon Desir segment… has been stopped to allow an investigation into complaints being made by protesting residents, Minister of Works Jack Warner has said." It goes on to report: "He said there will be no work on the construction site for at least four months… Warner said, 'all our engineers and technicians say it is the best site, but we are making another study again just to make assurance doubly sure there is no other route that we can take but the one we have chosen, when you collect all the information then you justify to the public and to the protesters that you have done your best and you cannot do more than your best."

[34] On 30 May 2012, a group of women from the HRM staged a much-publicized protest at the celebration of Indian Arrival Day at Parvati Girls Hindu College. They sat down and blocked the entrance to the school. The Prime Minister was carded to give a speech on this important day in the calendar of the East Indian-descended community. They had to be physically removed from the school entrance in order for the Prime Minister to enter the hall. This protest was widely covered in the press and on TV. On the next day, 1 June 2012, the Prime Minister made a statement to the media.

Further representation by the Prime Minister

[35] An article appearing in the Trinidad Express newspaper on 2 June 2012 asserted that on 1 June 2012 the Prime Minister told reporters that work will not proceed until technical advice was received.

Press release by Minister of Housing and the Environment

[36] The same newspaper article quotes from a press release allegedly issued by the Minister of Housing and the Environment, Mr Roodal Moonilal, on 1 June 2012. It begins by stating that the Prime Minister had pledged to discontinue the works on the disputed section since 16 March 2012 and that "it is to be noted that [since the meeting at the Ministry with Mr Warner on 18 April 2012] no work has commenced on that section of the highway for the past two months." It concludes by assuring that the Government is committed to dialogue with the HRM. Minister Moonilal never retracted the press release when it was issued. However, when he filed his affidavit in these proceedings, he said that the document was not issued by him. He points out that the document was not self-described as a "Press Release".

[37] It seems to me, after considering the evidence led at the trial, that a published notice bearing the name of a Minister that was issued to the newspapers in error or containing a misstatement ought to have been immediately rectified as a matter of public record. I get the sense that the

Government was in a state of political unease over the HRM's activities, especially after the female protestors staged such a daring sit-down protest, blocking the Prime Minister from entering the school compound on an auspicious day in the East-Indian calendar. It seems to me that the HRM was stirring up trouble among constituents in the Prime Minister's own constituency and adjoining constituencies, all of which formed part of her party's historical political stronghold. It appears to me that the newspapers were negatively interrogating the facts surrounding the decision to build the entire highway extension in terms of its cost and the disruptions it would cause to the affected residents. The HRM seem to me, by these newspaper reports, to be regarded as a dauntless David before an intractable Goliath. The HRM goal was obviously designed to sway public opinion. It seems to me that, at this stage and to some extent, it was succeeding.

The NIDCO report

[38] On 4 June 2012 Dr Kublalsingh received a letter of the same date signed by Mr Warner. It stated that a meeting was to be held at his offices, attended by staff of his Ministry and NIDCO "to discuss the technical issues relating to the Point Fortin Highway." Mr Warner recalled that at the meeting on 18 April 2012 "these issues were raised concerning the re-alignment of the route of the highway. Officials of NIDCO have done a report on this alignment and we therefore invite you and your team to give your suggestions and comments on this report." The meeting was scheduled for 8 June 2012. A copy of the NIDCO report was not attached to the letter.

[39] On 6 June 2012 Dr Kublalsingh sent an email to the Minister requesting a copy of the report. He also wrote a letter addressed to the Minister and the Prime Minister. It referenced the 16 April 2012 meeting with the Prime Minister at The Waterfront, the 18 April meeting with Minister Warner, and the Steve Garibsingh statement to the press. It stated the belief, based on his interpretation of the statements, that the disputed section had been "shelved pending re-consideration." It stated that the HRM looked forward to a

"comprehensive and fruitful consultation as a prelude to any re-consideration. The principle of good administration requires public authorities to be held to their promises and this would be undermined if the reviews already promised do not take place or take place without the input of our group".

The letter acknowledged that this re-consideration conflicts with the statements of Mr Warner that the route chosen is the best one. It warned of the dangers of pre-judgment and asked for a mature and judicious approach. Dr Kublalsingh went on to describe the proposed meeting with Minister Warner and NIDCO as "a review".

[40] The HRM letter also included this request:

"In pursuance of preparing for participation in the review we request the following:

a) The terms of reference for the review;
b) The methodology of the review;
c) The names and qualifications of the persons undertaking the review and with authority for making a final decision;
d) The time period for carrying out the review;
e) The parties who will be allowed to present material before the reviewers;
f) The form that their submissions will take; and
g) The form of the reviewer's report and/or decision."

[41] The letter also asked for delivery of any studies that were being undertaken, and referred to the NIDCO report, mentioned by Mr Warner in his letter of invitation, as one such study. The HRM requested a copy of it. There was no reply to this correspondence.

[42] On 8 June 2012, the HRM members attended the meeting at the Ministry's offices. Mr Warner was the chairman. The HRM representatives stated that the NIDCO report had not been seen. They were then invited or instructed to

outline their chief concerns. They made brief remarks about hydrology, the alternative route, and the economic costs/benefits of the highway. Persons from the Government side then made presentations. According to Dr Charles two members of the community affected by the disputed section spoke in favour of the wisdom of the project. Junior Minister Stacey Roopnarine, Dr Charles and Mr Garibsingh also spoke. Dr Kublalsingh says that the HRM members raised some questions and some of the Government members replied. Dr Charles says that all enquiries were comprehensively answered.

[43] Eventually, Mr Warner brought the meeting to a close by giving out copies of a NIDCO report titled "Preliminary Report on the Debe to Mon Desir Segment" and stating that the rerouting of the highway was not a possibility. Dr Kublalsingh says that save for the NIDCO report no technical information or studies were disclosed prior to or at the meeting. The preliminary report was the only one delivered and he says that it did not address the HRM issues "except in a broad and superficial manner". The NIDCO Preliminary Report had never been seen by the HRM except at the end of the meeting.

[44] Dr Charles now testifies in his affidavit that the NIDCO report was in fact prepared in response to Dr Kublalsingh's letter to the Prime Minister in February 2012 and was not a new document. It did not contain any new studies. He says it was compiled to determine whether the matters raised in the February 2012 letter were factual, and whether they had been addressed. NIDCO therefore went back to its previous studies and reports. It consulted its own technical people and they produced the Preliminary Report.

[45] On 9 June 2012 a newspaper article appeared under the headline "Jack: No Reroute of Highway." In it, Mr Warner stated that technical evidence and expert advice from both local and foreign sources were considered. Save for the NIDCO Preliminary Report, no other technical evidence or advice was, or has been disclosed to the HRM. The Minister said that the highway extension would proceed.

[46] The Preliminary Report is 10 pages long with a three-page appendix dealing with the impracticalities of the alternate route. There was no cost/benefit analysis, hydrological study or social impact assessment. Dr Charles' says in his affidavit that a copy of the NIDCO Preliminary Report was previously available for collection at NIDCO's office in Debe. HRM was however never able to get a copy, despite their official enquiries.

[47] Of course, there was no input by the HRM in formulating this report. It is obvious from its terms that this document was created pursuant to the HRM letter to the Prime Minister in February 2012, and not pursuant to the proposal to set up a committee by Mr Warner on 18 April 2012. It is possible that when the Prime Minister at the 16 April 2012 Waterfront meeting, referred to "a review by the Ministry of Works" she was referring to the work already undertaken by NIDCO following the HRM February 2012 letter, but she hasn't sworn an affidavit to say so. In any event, as I will examine below, an important question to ask is whether the preliminary report can amount to "a review" such as had been promised.

[48] The claimants complain that they have not been afforded an opportunity to respond to the preliminary report, nor have they been provided with a copy of a final report. The technical information which informed the conclusions drawn in the preliminary report had not been disclosed.

The demolition of the protest camp

[49] Following a well-publicized cabinet re-shuffle on 23 June 2012 Mr Warner was appointed as Minister of National Security and Mr Emmanuel George was appointed as Minister of Works. Four days later, on 27 June 2012 the camp was destroyed by soldiers. The claimants say that they were illegally acting under the orders of the newly appointed Minister of National Security, Mr Warner.

[50] The destruction commenced at dawn. It was conducted by officers of the Army like a raid, without warning. Police were in attendance. Video evidence was adduced that showed both Army and Police involved in the action. The claimants say that the Army arrived first and began their work. The video evidence of who arrived first is not conclusive as I do not know whether filming began at the start of the operation or just after it started. The defendant says that they arrived together. In my view, who arrived first is not material.

[51] The question of fact has arisen as to who directed the Army and the police to intervene in the way that they did. The claimants say that Mr Warner did so. Their deponents on this issue, who were generally unshaken in cross-examination, said they saw Mr Warner at the camp either issuing directions or generally supervising what was going on. Mr Warner was accompanied by Mr Colin Partap, a Minister in his ministry. Also in attendance was Brigadier Kenrick Maharaj, the Chief of Defence Staff of the Trinidad and Tobago Regiment, and Major Jason Hills, who had operational control on behalf of the Army. In his affidavit, Mr Warner denied giving "an instruction" or supervising the destruction. An order was made for Mr Warner's cross-examination on this part of the defendant's case, but he did not attend court on the day set aside for his cross-examination. A proper reason for his non-attendance was not given. A similar order was made for the attendance of Major Jason Hill, but he also did not show up for cross-examination. The announcement of their non-attendance was made on the day fixed for cross-examination. Part 29.9(2) requires a party to give 21-days' notice if a witness will not attend to adduce his or her witness statement. I see no reason why a witness statement and an affidavit should not be equated when an order for cross-examination has been made.

[52] Just after the demolition of the camp began, Dr Kublalsingh arrived. He was frantic. The video evidence proves that. He ran into the camp and sat in the path of a "backhoe" (a tractor with a shovel in front and a motorised arm at

the back). Someone was driving the backhoe at the time. Two Army officers removed him by wrestling him to the ground and then grabbing his arms. They forcibly escorted him away from the camp. Somehow, he escaped their grasp, ran along a large pipe beneath a bridge, and returned to the area where the backhoe was operating. The video evidence proves that the backhoe was operating at the time. At this point he was arrested by two policemen. They pulled his hands behind his back and handcuffed him. Dr Kublalsingh at first resisted by not allowing his arms to be pulled behind his back. He was escorted out with an officer holding him from behind. At one point he fell. He was raised upright by the policeman again from behind.

[53] It is clear that Dr Kublalsingh did not want to be removed and he was resisting as best as he could with his small and wiry frame. He frankly conceded in cross-examination that he was resisting his removal and the destruction of the protest camp. It is clear to me that by putting on the handcuffs the policemen were arresting Dr Kublalsingh. He was taken to a police vehicle and driven away. However, no charges were laid against him for disturbing the peace or otherwise. It seems to me that the policemen were intent on removing him from the protest camp. I believe the whole camp was demolished within an hour. The HRM members were allowed to remove some of their possessions, including the Peepal Tree but all the built structures were demolished. At the time of the Army's destruction there had been no announcement of the release of any technical review.

[54] On the next day, at a post-cabinet press conference, Mr Warner is reported in the newspapers to have said that the camp was demolished in order to "get on with [the construction of] the highway". At the same press conference, the Attorney General, Mr Anand Ramlogan SC, criticized the conduct of the HRM protest campaign.

[55] There was a major public outcry after the demolition of the protest camp. Minister Warner called his own press conference and is reported in the newspapers to have said the following words:

> "Suddenly it dawned on me that we should try and settle this issue about the highway to Point Fortin and I called the Minister of Works and Infrastructure, Senator Emanuel George, and I asked him if he is prepared to continue the highway at the same pace that it had been started and he said that he had no objection and in fact he would like my assistance in having the matter resolved. There and then I called the Chief of Defence Staff, Mr Maharaj and I told Mr Maharaj that I would like to get an Army contingent to go this morning at 5:30 to demolish the camp. The camps have been there illegally on Government's land for the past two months and the campers to who we have spoken to on several occasions and I said to him that we shall go this morning and demolish it. . .
>
> So, as it stands today the camp has been demolished. An Army camp will be on the spot and the Army camp shall move as fast and as often as contractors want to move. The Army camp shall also make sure that any other facility of that kind that any effort is made to erect one subsequent to today shall also be demolished and that there should no more attempts of any kind to erect any camp along the right of way of the highway".

[56] During the cross-examination of the Chief of Defence Staff, Brigadier Kenrick Maharaj, he said the following words: "My mission that day was to demolish the structures and remove them from the land. I was justified in doing that because I was carrying out the instructions of the Minister of National Security . . . I had no request from the Commissioner of Police to demolish the structures. I was acting on the instructions of the Minister of National Security to demolish the structures on State lands."

Dr Kublalsingh's hunger strike and ensuing representations said to create a second legitimate expectation

[57] On 16 November 2012, after this claim was filed, Dr Kublalsingh embarked on a 24-hour continuous daily hunger strike on the pavement outside the Prime Minister's office. He said he would not cease until the Government stopped work on the highway and agreed to appoint an independent team to do a technical review. He asked that it include a hydrology report, a cost-benefit analysis and a social impact analysis. The hunger strike drew a lot of public interest, most of it sympathetic. A tent was pitched to shield him from the sun. After a few days he lay in a makeshift bed and began to look emaciated. Concerns were raised about his health. By letter of 26 November 2012 various well-known public interest groups, among them the Joint Consultative Council ('the JCC'), wrote the Prime Minister proposing the establishment of a technical review committee as a means of "defusing the escalating crisis that had been triggered". Among other things it stated:

> "Given the heightened public interest in this matter and the crisis conditions that threaten to engulf Dr Kublalsingh, we propose the following in the interest of bringing the crisis to an immediate end, and thereafter for proceeding towards an outcome with strong public trust.
>
> We thus propose:
>
> (a) That if an independent review exists on matters pertaining to the hydrology, drainage, environmental engineering, transport and highway engineering and economic analysis, then this review should be made public immediately;
>
> (b) If such an independent technical review does not exist, then a technical review committee should be established with the specific mandate as outlined in the proposal below to enquire into that portion of that link to the Point Fortin Highway which has significant environmental implications."

[58] There was no existing independent review. The NIDCO Preliminary Report obviously did not fit that description. The Government therefore presumably selected the second option. However, Dr Kublalsingh refused to call off his hunger strike until the Government officially committed to it. On 3 December 2012 the leading public interest organisations met with Government officials at the offices of the Ministry of Works and Infrastructure seeking the appointment of an independent committee that should report within 60 days. An agreement was signed. It was evidenced by a press release signed by Mr George, the Minister of Works and Infrastructure, and other high-ranking public officials, including Dr Charles, NIDCO's CEO.

[59] On the next day two daily newspapers, Newsday and Trinidad Express, carried news of statements made by the Prime Minister to their two reporters in telephone interviews. The Newsday report said this: "Government has committed to abiding with the conclusions arrived at the meeting between Government Ministers and the JCC [the lead public interest group]". It further stated that the Government would abide by the terms of the agreement and the outcome of the review. The Trinidad Express report was in virtually the same language. Works on the highway ceased the next day.

[60] A committee was appointed, headed by Dr James Armstrong and included 19 respected professionals in all the fields relevant to the terms of reference. It was officially called the Highway Review Committee ('the HRC'). Dr Kublalsingh ended his hunger strike upon publication of the news reports. I do not doubt that the agreement was genuinely pursued as a means of avoiding the disaster of Dr Kublalsingh's death by starvation or organ failure. I feel safe in saying that serious political and humanitarian issues were at stake.

[61] One of the defendant's deponents, Davendranath Tancoo, testified that the Prime Minister never said the words carried in the Newsday or the Trinidad Express newspapers. He said that he was present when the Prime Minister

received a telephone call from an unknown person, that he overheard her speaking on the telephone, and that she never said what was reported in both newspapers. I find it strange that two of the three daily newspapers would publish a story almost in the same terms, and even stranger, if Mr Tancoo is right, that a retraction or correction was not immediately made. I am not prepared to believe Mr Tancoo's evidence.

[62] The HRC deliberated and delivered its report in 60 days. The exercise cost the taxpayers $742,400. The defendant suggested to me that these monies were paid gratuitously and that, in law, for the reasons I will set out below, the Government was not bound by the HRC's recommendations. Among other things, the HRC recommended that the reroute suggested by the claimants was not feasible, but it also recommended that further technical investigations were needed, and that construction should be halted in the meantime.

[63] It is true to say that in the joint press statement issued on 3 December 2012 that was signed by the JCC, Government Ministers and NIDCO, besides agreeing to the creation of the HRC it was stated that "work will continue on sites of the highway released to the contractor". As to whether the highway or any interchanges south of the first interchange were already formally released to OAS I am not certain. The JCC published its own press statement containing the terms of reference which went further than the joint press statement. Notwithstanding the above, I think that the Prime Minister's statements reported in the newspaper went further than both the joint press statement and the JCC's press statement in promising that "the Government will abide by the terms of the agreement and the outcome of the review".

[64] If the Prime Minister was misquoted, she deliberately decided not to correct the public record. She may have had tactical reasons for doing so but I cannot speculate about her thinking. The only thing that I can take note of is that an allegedly false report was published and not retracted. The words alleged to

have been said may have had the desired humanitarian effect of causing Dr Kublalsingh to end his hunger strike, but this court is only concerned with the legal effects of un-retracted public statements and pays no regard to the motive in not retracting them.

[65] As indicated earlier, among other things, the HRC recommended that no works should continue on the highway until further investigations were carried out. The Government did not cease the work nor undertake the further investigations recommended by the HRC. No further discussions with the HRM took place. Just after the release of the HRC report the claimants applied for the conservatory order which truncated the hearing of the substantive matter. The matter was hotly contested over many months and involved the filing of some 39 additional affidavits. There were many strong grounds advanced for the grant of the conservatory order. However, for the reasons I gave in my judgment I refused it. By that time the Debe interchange was well underway and many miles of roadway to the south had already been cleared and levelled, including the highway from Debe to Mon Desir. The three other main highway interchanges were in advanced stages of construction.

The claim before the court

[66] The Amended FDC was filed on 4 August 2014. The seven claimants seek the following reliefs:

1. A declaration that the decisions to commence and/ or continue construction of the Mon Desir to Debe segment of the Solomon Hochoy Highway Extension project breached and/ or contravened the rights of the claimants guaranteed under section 4 of the Constitution to:

    a. The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law – section 4(a);

b. The right of the individual to respect for his private and family life – section 4(c)

2. A declaration that actions and/ or decisions of:

a. The Minister of National Security the Honourable Mr Austin Jack Warner in:

i. Deciding to forcibly remove the claimants and to demolish and remove the claimants' protest camp;
ii. Requisitioning and/ or deploying and/ or directing the members of the defence force for the purpose of removing the claimants and demolishing and removing the claimants' protest camp;
iii. Requisitioning and/ or deploying and/ or directing the members of the defence force to arrest, detain, assault and batter the first claimant;
iv. Directing and overseeing the removal of the claimants and the demolition and removal of the claimants' protest camp; and
v. Participating in the removal of the claimants and the demolition and removal of the claimants' protest camp.

b. The Minister in the Ministry of National Security the Honourable Mr Colin Partap in participating in the removal of the claimants and the demolition and removal of the claimants' protest camp were unlawful and in particular:

1. Breached and/or contravened the rights of the claimants guaranteed under section 4 of the Constitution to:

a. The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law – section 4(a);
b. The right to protection of the law – section 4(b);
c. The right of the individual to respect for his private and family life – section 4(c)
d. The right to express political views – section 4(e)
e. Freedom of movement – section 4(g)
f. Freedom of conscience, thought and expression – section 4(i) [see also 4(h)]
g. Freedom of association and assembly – section 4(k)

2. Breached the separation of powers under the Constitution and was contrary to the rule of law.

3. A declaration that the members of the defence force and/or the police service in:

   a. Accepting instructions from the Minister of National Security the Honourable Mr Jack Warner without lawful authority to remove the claimants and to demolish and remove the claimants' protest camp;

   b. Removing the claimants and demolishing and removing the claimants' protest camp;

   c. To permit the Minister of National Security the Honourable Jack Warner and the Minister in the Ministry of National Security the Honourable Mr Colin Partap to join and participate in the removal of the claimants and the demolition and removal of the claimants' protest camp

   d. Arresting, detaining, assaulting and battering the first claimant;

   acted unlawfully and in particular:

   1. Breached and/ or contravened the rights of the claimants guaranteed under section 4 of the Constitution to:
      a. The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law – section 4(a)
      b. The right to protection of the law – section 4(b)
      c. The right of the individual to respect for his private and family life – section 4(c)
      d. The right to express political views – section 4(e)
      e. Freedom of movement – section 4(g)
      f. Freedom of conscience, thought and expression – section 4(i) [see also 4(h)]
      g. Freedom of association and assembly – section 4(k)
   2. Breached the separation of powers under the Constitution in a manner contrary to the rule of law

4. A declaration that the decision to establish and maintain a defence force camp at the site of the protest camp is unlawful and in particular:

a. Breached and/ or contravened the rights of the claimants guaranteed under section 4 of the Constitution to:

(1) The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law – section 4(a)
(2) The right to protection of the law – section 4 (b)
(3) The right of the individual to respect for his private and family life – section 4(c)
(4) The right to express political views – section 4(e)
(5) Freedom of movement – section 4(g)
(6) Freedom of conscience, thought and expression – section 4(i) [see also 4(h)]
(7) Freedom of association and assembly – section 4(k)

b. Breached the separation of powers under the Constitution in a manner contrary to the rule of law.

5. Vindicatory Damages for the said breaches and contraventions of constitutional rights;
6. Aggravated and exemplary damages;
7. Damages for trespass, wrongful arrest, assault, battery and false imprisonment;
8. Such further and/ or other relief as the Court may in exercise of its jurisdiction under section 14 of the Constitution and under its inherent jurisdiction consider appropriate for the purpose of enforcing and protecting or securing the enforcement and protection of the Claimant's said rights;
9. Costs

The Issues

[67] The issues to be decided in this constitutional motion are these:

(1) Have the claimants or any of them established that the decision to continue the construction of the highway was in breach of any assurances or representations made by officers of the State such as

would amount to a breach of a legitimate expectation or expectations not to be deprived of their fundamental rights to (i) the enjoyment of property and the right not to be deprived thereof except by due process by law under section 4(a), and (ii) their rights to respect of their private and family life under section 4(c) ; and

(2) Have the claimants or any of them established that the circumstances surrounding the destruction of the protest camp amounted to a breach of their fundamental right (i) under section (4)(a) to the security of the person and enjoyment of property and not to be deprived thereof except by due process of law; (ii) under section (4)(b) to the right to the protection of the law; under section (4)(c) to the right of the individual to respect of his private and family life; (iii) under section (4)(e) to the right to express political views; (iv) under section (4)(g),(i), and (k) respectively, to freedom of movement, freedom of conscience, thought and expression, and freedom of association and assembly and, if so, are any of the claimants entitled to damages for assault and battery in being apprehended during the destruction of the protest camp; and

(3) Whether the demolition of the protest camp and the setting up of an army camp on that site thereafter breached the separation of powers under the constitution and was contrary to the rule of law and further whether the circumstances surrounding the demolition of the camp and in particular the involvement of the Minister of National Security breached any rights guaranteed under the constitution.

The first issue

[68] This is a public law matter involving fundamental rights guaranteed under the constitution. The rights that are said to be infringed in the first issue involve the actions of the State in ways that are highly prejudicial to the lives of some or all the claimants, except the first claimant, Dr Kublalsingh.

It was submitted that any assessment must be conducted on the basis of the anxious scrutiny test propounded by the House of Lords in *Bugdaycay v Secretary of the State for the Home Department* [1987] 2 WLR 606, which was approved and applied by Mendonça JA in *Ferguson v AG* Civil Appeal 207 of 2010.

[69] Lord Bingham distilled the principles of the anxious scrutiny test as laid down by the House of Lords in *Bugdaycay* and in *R v Secretary of the State for the Home Department, ex parte Brind and Ors* [1991] 1 AC 696 in his judgment in *R v Ministry of Defence ex parte Smith* [1996] QB 517. This is what he said:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of reasonable responses open to a reasonable decision maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way justification before it is satisfied that the decision is reasonable in the sense outlined above."

[70] In *de Freitas v Permanent Secretary of the Minister of Agriculture, Fisheries and Land and Housing* [1999] 1 AC, the Privy Council noted that even the anxious scrutiny test developed three years earlier in *Smith*, is not necessarily appropriate for the protection of human rights. A test of proportionality was suggested. The anxious scrutiny test is a heightened version of the well-known *Wednesbury* test for unreasonableness. The leading case on the proportionality standard of review is *R (on the application of Daly) v the Secretary of State for Home Department* [2001] 2 AC 532. Lord Steyn noticed that the intensity of review would be greater under a proportionality test. He said this at paras 26 and 27:

“There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? . . . The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.

Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence*, *Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The

challenge based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test.

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

[71] Lord Steyn highlighted that it was important for the court to conduct the proper analysis in cases involving Convention rights because the differences in approach between the traditional ground of the review and the proportionality approach may sometimes yield different results (para 28).

[72] The UK Human Rights Act which domestically legislated Convention rights, is similar to the fundamental rights sections in Chapter I of our Constitution. A proportionality test, it seems to me, ought to be preferred because the Constitution is the supreme law of the land and the rights involved in this case involve very serious questions of breach. The proportionality test appears to have been adopted by the Privy Council in *Paponette v AG* [2011] 3 WLR 219 at para 38 where it was held that a public authority that wishes to frustrate a legitimate expectation bears the burden of proof in establishing that such a frustration "is objectively justified as a proportionate measure in the circumstances".

[73] Unlike the proceedings before me at the hearing of the application for the conservatory order where I was asked to stop the construction of the highway, this case demands that I assess the quality, nature and effects of promises and assurances that were freely given by the executive branch of the State. I fully understand the macroeconomic imperatives that, in part, informed my thinking in refusing the conservatory order. But macroeconomic imperatives have little to do with the substantive case. I fully appreciate the national development interests that the highway serves and I also recognize that if these interests required the Government not to veer course it had the unquestioned legal authority to stay on course and to refuse to give in to public pressure created by the activities of the HRM. The question is whether the representations which I set out above are capable of creating legitimate expectations.

[74] In *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 Laws LJ said this at para 68:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so".

[75] The issue of fairness is one for the court to decide, not the executive branch of Government. The Government's macroeconomic or developmental policy considerations have little to do with the assessment of promises and the court ought not to defer to them in the determination of the substantive motion.

[76] Schiemann LJ in *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at para 19 offers useful guidance:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment, the third is what the court should do".

[77] Insofar as the first two questions are concerned these are matters of evidence and law. Insofar as the third question is concerned, this court can only grant declarations and undertake an assessment of damages, as the highway is by now a *fait accompli*.

[78] At the close of the case, Mr Martineau, having regard to the first question, submitted that these are not interlocutory proceedings and that any evidence of promises or assurances reported in the newspapers were inadmissible hearsay. He relied on *AG v KC Confectionary Limited* (1985) 34

WIR 387 at 399 and *Steve Ferguson and Ors v The Attorney General and Anor* Civ. Appeal No. P-085 of 2013 CA, 4 June 2014 to support that proposition.

[79] *KC Confectionary* involved a policy decision to place certain imported items on the country's Negative List. One of the supporting affidavits purported to postulate the Government's importation policy in relation to certain items. The affidavit did not contain any phrase that the knowledge of the policy was based on the deponents' information or belief and it was held that it was not in compliance with Order 41, rule 5 RSC. According to Persaud JA, since it was not an interlocutory matter, the affidavit must contain only such facts as the deponent is able by his own knowledge to prove. It was held that the deponent could not have personal knowledge of the Government's policy unless it has been proclaimed.

[80] The facts in this case are very different. Firstly, there are many newspaper reports that assert and reassert that the Government would undertake two reviews and would stop construction pending the reviews and on no occasion was any retraction or qualification offered to correct the newspaper reports. Secondly, the failure to publish a retraction of the many newspaper reports must be regarded as a deliberate decision in the context of public law. Thirdly, in the absence of a retraction, the question is whether affected persons could reasonably rely on the newspaper reports that they read to ground a legitimate expectation.

[81] *Ferguson* was a case that, in part, involved a determination of the intention of Parliament in passing certain legislation. The claimants attempted to use newspaper reports of what individual members of Parliament had said outside of the House to discover its intent. There are very strict and ancient rules governing the interpretation of Parliamentary will and Smith JA had little difficulty in rejecting the newspaper reports as a means of discovering the intention of the legislature. The case before me is quite different.

[82] It is not in dispute that the Amended FDC contained meticulous details of all the facts that were relied upon. All these facts were contained in the supporting affidavits and copies of the newspaper reports were annexed to several of them. The affidavits take the place of a Statement of Case which would otherwise be required in an ordinary civil claim (Part 8.2 CPR). It was open to the defendant if it felt that the newspaper reports were inadmissible hearsay to have promptly taken an evidential objection. It was also open to the defendant to adduce its own evidence to contradict the newspaper reports. If it had done so, the truthfulness of the newspaper reports would have been a fact in issue. Some parties occasionally waive their right to object to hearsay evidence and allow it to go in.

[83] In administrative law cases, the affidavits in opposition are regarded as the defence to the claim. Part 56.11 specifically equates the obligations of a defendant in a civil action to a defendant in an administrative law action: ". . . the provisions of Part 10 apply to such an affidavit". Having not traversed the allegations of fact contained in the newspaper reports, it stands to reason that the defendant must be deemed to have admitted them on the pleadings. It is not only a matter of sitting back and failing to specifically deny or not admit the various representations reported in the newspapers that were annexed to the supporting affidavits. Part 10 requires all defendants to not only deny but to provide specific reasons why an averment is not admitted or denied: *VSN Investments Limited v Seasons Limited* CV 2006-01349, (unreported), 29 April 2015, a decision of Judith Jones J (as she then was).

[84] It seems to me somewhat unfair for the defendant to launch this objection so late in the day, when, had it raised an earlier objection, it was open to the claimants to file hearsay notices for their admission or to file affidavits by the news reporters. Finally, I take note of the fact that during the cross-examination of several of the claimants, it was not put to them that the

newspaper reports were untrue or that they had no reason to believe their accuracy. In my opinion, the newspaper reports are admissible as to the truth of their contents.

[85] It is not disputed that the Prime Minister promised a review at her meeting with Dr Kublalsingh and others at the temporary Houses of Parliament. According to the Oxford Dictionary of English, 3rd Ed. (2010), the following definitions are given for the word "review":

> *"Noun* (i) an informal assessment of something with the intention of instituting change if necessary: *A comprehensive review of UK Defence policy; (ii)* a critical appraisal of a book, play, film, etc.
> . . .
> *Verb* (i) assess something formally with the intention of instituting change if necessary*: The Home Secretary was called on to review Britain's gun laws. . .*etc."

[86] It is settled law that in order to found a claim based on legitimate expectation, the statement in question must be "clear, unambiguous and devoid of relevant qualification": Bingham LJ in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffman in *R (Bancoult) v Secretary for State for Foreign and Commonwealth Affairs* (No. 2) 2009 AC 453, at para 60.

[87] I do not accept that the first representation of the Prime Minister made on 16 March 2012 at the temporary Houses of Parliament meant that the Government would simply "look over" its policy. This is the upshot of the defendant's closing submissions. I accept the Oxford Dictionary's definition that a review involves an element of instituting change if necessary. The sample sentences given by the editors of the Oxford Dictionary are tellingly apt.

[88] The HRM had by that time already written a detailed letter setting out all its concerns and objections and it is presumably based on that letter and its public activities that the HRM was finally invited to meet with the Prime Minister. For a review to be meaningful, the specific concerns of the objectors would obviously have to be taken into account. After all, they alone provided the stimulus that triggered the review. A precise understanding of those concerns and objections might have been possible without the need for an oral hearing if the letter was a technical position paper prepared by experts, but the letter cannot be described in such terms. Having regard to NIDCO's Preliminary Report, which the defendant eventually offered as proof of a review in satisfaction of the Prime Minister's promise, it seems that little, if any, of the HRM's concerns were meaningfully addressed.

[89] I am satisfied that the review prepared by NIDCO was not a review in the proper meaning of that word. It was simply a restatement and justification of the Government's policy without sufficient or any regard for the specific concerns and objections of the HRM and the claimants. This first assurance or promise by itself goes very far along the road in creating a representation within the parameters of *MFK Underwriters*.

[90] How could it be that the promised review was not intended to be technical? All the issues raised by the HRM were technical. Further, I find it hard to divorce from my mind the idea that the review would not be the product of an independent mind. The entity charged with the responsibility to construct the highway conducted the review and officers of several Government departments headed by members of a Cabinet that decided the policy were involved in the preparation of that report. To assert that the review was not intended to be independent is akin to saying that I should sit on the appeal of my own judgment. The NIDCO report which comprised a mere 10 pages was simply a justification for constructing the

highway and did not meaningfully address the concerns of the HRM or the claimants.

[91] In my opinion, having held that the newspaper reports are admissible, and having regard to the statements that are recorded in those news reports, I have no doubt that works on the highway were promised to be put on hold pending a meaningful review.

[92] During the events that lead to the promulgation of NIDCO's Preliminary Report, an assurance was given by NIDCO that "NIDCO would not carry out construction works on the Debe to Siparia segment of the highway until they have examined the concerns of HRM and those of the community" (see affidavit of Carson Charles, 15 February 2013, para 17).

[93] During the meeting at the Ministry of Works, the HRM abruptly left the meeting when the composition of the review committee could not be agreed. Dr Kublalsingh wanted equal representation, but Minister Warner insisted that the committee of nine would only include two members of the HRM and one of them would be Dr Kublalsingh. Dr Kublalsingh wanted the committee to include technical professionals. After that meeting, Minister Warner said that works will be stopped for a period of four months pending the review.

[94] One 1 June 2012, in response to the aborted meeting at the Ministry of Works and Infrastructure, the Prime Minister was reported in the newspaper to have said that works will be halted pending the provision of technical advice.

[95] I have already set out the facts as I have found them in relation to the correspondence leading up to the meeting at which the NIDCO Preliminary Report was issued. Dr Kublalsingh made pertinent written requests of Minister Warner relative to the terms of reference and methodology of the

review, the names and qualifications of its members, the time period for carrying out the review and the parties who would be allowed to present material before the reviewers. Minister Warner never responded to the letter. Instead, they were asked to present comments without first hearing what the Government had to say or without first seeing the NIDCO Preliminary Report, copies of which were already in the hands of the chairperson, presumably sitting at the head table.

[96] It seems to me to be extremely disingenuous to have promised a review, to have invited stakeholders to attend before the Government's appointees, and to first ask for the stakeholder's representations while, at the same time, having the undisclosed NIDCO Preliminary Report already in their hands. Such a consultation is a mere pretence or charade that something meaningful is taking place. It was not in keeping with the several promises that had been made. The evidence discloses that NIDCO also prepared a Final Report but never delivered it to Dr Kublalsingh.

[97] This procedure breached every rule of natural justice: it did not grant prior disclosure of the Report; it did not permit the claimants any time to prepare a response to the Report; and it effectively permitted the Government to decide to continue the construction of the highway without hearing the claimants or the members of the HRM in relation to the review which had been undertaken. In this regard, see *Panday v Virgil* CA Mag App 75 of 2006 per Margot Warner JA at para 39. Minister Warner and Mr Garibsingh superficially state in their affidavits that the claimants were free to comment on the NIDCO Preliminary Report after the meeting. A right to be heard only makes sense prior to a decision-making process. The issuance of the NIDCO Preliminary Report triggered the public declarations that the works would continue, and the tractors returned to the site.

[98] The NIDCO Preliminary Report did not contain any new studies to address the HRM's concerns or objections. If a review is undertaken because of the

objections and concerns of particular stakeholders, it seems axiomatic that those concerns or objections should be sincerely taken into account. In the unique circumstances of this case, I find it hard to accept that a review could be undertaken without some level of consultation with or involvement of the claimants or the HRM. To be a meaningful exercise the review committee should also have included experts entirely disconnected from those who decided the policy that was the subject of the review.

[99] The decision to continue the construction of the highway led Dr Kublalsingh to go on a hunger strike. This triggered a second set of promises that again, in my view, created legitimate expectations. In coming to this conclusion, I have analysed the evidence of the representations reported in the newspaper, contained in the Public Notice issued by Dr Moonilal's Ministry, and in the agreement entered between the JCC and the Minister of Works and Infrastructure. The newspaper report of the Prime Minister's statement that the Government would abide by the terms of the agreement and the outcome of the review is clear, unambiguous and devoid of relevant qualification. The HRC's recommendation that the works be halted until further investigations were undertaken was not followed.

[100] All the claimants except Dr Kublalsingh are persons with property rights which have been affected by the construction of the highway. Such an interference is sufficient to ground a claim under section (4)(a): *Paponette* at para 25. It is likewise clear that the frustration of a legitimate expectation that was engendered in relation to property rights can amount to a breach of the due process provisions in section (4)(a): *Paponette* at para 49.

[101] It is not essential that a representation should be made to a specific person. If a claimant is part of the class of persons affected by, and the subject of, the representation, it will be enough. "It would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of the policy. . .": *R (on the application of*

Rashid) v Secretary of State for the Home Department [2005] EWCA Civ. 744 at para 25. "Where the legitimate expectation derives from an express representation, that representation need not be made to the applicant personally or directly": *De Smith* paras 12-022.

[102] *Paponette* makes it clear that the question for the court must be "how on a fair reading of the promise it would have been reasonably understood by those to whom it was made" (at para 30). In the case before me, at the very least, there was an agreement to appoint an independent committee to review and that the review would be considered. If the Review Committee recommended a change, it is to be presumed, bearing in mind the facts and the public utterances, that the recommended change would be fairly considered in deciding whether to continue building the highway in the way that it was originally envisioned. However, the representations went further than a mere promise to consider.

[103] A legitimate expectation, once established, can only be defeated by an overriding public interest: *R v North and East Devon Health Authority ex parte Coughlan [2001] 1 QB 213*, approved in *Paponette* at para 34. According to their Lordships in *Paponette* at para 37, once the claimant establishes the legitimacy of his or her expectation "the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirement of fairness against that interest".

[104] No overriding public interest has been advanced to justify the breach of the Government's promises. Once a legitimate expectation has been engendered, which in my view it has, it is unlawful for a public authority to fail to take it into account. *Paponette*, at para 46, makes this clear:

> "Where an authority is considering whether to act inconsistently with a representation or promise which it has

> made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account."

[105] In order to rely on any overriding public interest, the defendant must establish a material change in circumstances that did not exist at the date of the promise: *Paponette*, at para 32. The representations are therefore binding until there is a material change in circumstances capable of justifying the breach of the promise. The macroeconomic, social advantages and cost implications of the contract to build the entire extension (including the highway) cannot amount to a material change in circumstances when they were already well-known known at the time that the promises were made. All the representations surrounding the appointment of the HRC were freely made and the agreements were offered to the public as a genuine attempt to save Dr Kublalsingh's life. The breach of the promise is an entirely disproportionate response as there were no new circumstances to justify it.

[106] The right to property is secured under section 4(a) of the Constitution. It is secured not only against removal or deprivation but against interferences with its enjoyment which fall short of a deprivation: *Paponette* at para 35. Property rights were codified as early as 1215 in Magna Carta. In *Bahadur v AG* [1989] LRC (Const) 632, property was defined as including tangible forms of real and personal property but also less tangible forms such as social welfare benefits, public services and other things to which people are entitled by law and regulations. The enjoyment of property, in the ordinary meaning of the word "enjoyment", must necessarily be affected if a major highway runs through or near to it. The enjoyment of property is not meant to be limited to the legal definition of enjoyment such as is the right of a

person with a legal or equitable interest in land. I see no reason to disapply the concept of nuisance or other forms of interference to the words in section 4(a). The claimants have satisfied the court that their enjoyment of property was adversely affected.

[107] The due process clause in section(4)(a) was defined by Lord Millet in *Thomas v Baptiste* [1999] 3 WLR 249 at 259 as giving effect to the very concept of procedural fairness:

> "The due process clause requires the process to be judicial; but it also requires it to be "due." In their Lordships' view "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law: see the illuminating judgment of Phillips J.A. in *Lassalle v. Attorney-General* (1971) 18 W.I.R. 379 from which their Lordships have derived much assistance.
>
> The clause thus gives constitutional protection to the concept of procedural fairness. Their Lordships respectfully adopt the observation of Holmes J. in *Frank v. Mangum* (1915) 237 U.S. 309, 347: "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard."

[108] In *Paponette* it was held that a mere interference with the enjoyment of property in breach of a legitimate expectation would constitute a breach of the due process provisions of section 4(a).

[109] I am satisfied that all the claimants, save for Dr Kublalsingh, have rights to the enjoyment of property, whether they live in the vicinity or adjacent to the highway and whether or not, prior to or during the course of these proceedings, they have been served with Acquisition Notices. The fact that the highway is being built with Town and Country Planning approval or an

EMA certificate is immaterial to the question as to whether or not their legitimate expectations have been frustrated. Any perfectly lawful undertaking can be rendered unlawful if the public authority promises to adjust its recognised legal right to proceed and then breaks the promise.

[110] Insofar as family rights are concerned, section (4)(c) provides similar protections as those in Article 8 of the European Convention on Human Rights. According to the learned authors of *Lester, Pannick & Herberg: Human Rights Law and Practice* at para 4.8.53, Article 8 provides no explicit procedural requirements. The decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by the Article. At para 4.8.67, the learned authors postulate that the concept of a home is flexible enough to invite "a pragmatic consideration whether the place in question is that where a person 'lives and to which he returns, and which forms the centre of his existence'. It does not require legal property rights in order to be grounded.

[111] At para 4.8.78 the authors go on to say this:

> "In assessing whether there has been a violation of Article 8 in the environmental context, the court may first assess the substantive merits of the Government's decision for compatibility with Article 8. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interest of the individual . . . As for the decision-making process, although Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded by Article 8. A court should consider all the procedural aspects, such as the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available."

[112] The right of the individual to respect of his or her private and family life is not an insubstantial or flimsy right. In the absence of procedural requirements, such as the due process provisions in section (4)(a), it is more likely to be proven in a clear case that targets particular individuals. However, respect for family rights is intrinsically connected to property rights as I have defined them above, especially when the properties in question are enjoyed by individuals who live there as families and treat these properties as their homes. It might be going too far to assimilate the due process provision in section (4)(a) with the right to respect for private and family life in section (4)(c). However, in my view, where section (4)(a) rights have been infringed in the way that I have found them to be infringed and the infringement is intrinsically connected to the infringement of section (4)(c) rights, namely, where the breach involves both the enjoyment of property and the family life enjoyed on that property, a court ought not to entirely disregard the due process provisions in section (4)(a) when considering a breach of the section 4(c) rights. If I am wrong about that, the claimants' assertions of a breach of their section (4)(c) rights are nonetheless based on breaches of their legitimate expectations for the respect for their private and family life. Such breaches are clearly unlawful in terms of both substantive and procedural legitimate expectations.

[113] In answer to the first issue I therefore hold that the claimants, save for the first claimant, Dr Kublalsingh, have established that the decision to continue the construction of the highway was in breach of the Government's assurances or promises and amounted to a breach of their legitimate expectations not to be deprived of their fundamental rights to the enjoyment of property and the right not to be deprived thereof except by due process by law under section 4(a) and their right to respect of their private and family life under section 4(c).

The second issue

[114] The concept of the separation of powers is a fundamental principle of our democracy and fundamentally demarcated in our Constitution. It is beyond any doubt that it exists as a check and balance against the abuse of power by the executive branch of the State: *Endell Thomas v AG* [1982] AC 113; *Hinds v R* [1977] AC 195. The creation of all the Service Commissions in the Constitution was designed to insulate the entire public service from political interference. Insofar as the direction and control of the Police Service is concerned, a Minister of Government may not direct the Commissioner of Police or any officers serving under him or her to achieve any end save for the reporting of a crime.

[115] The Police Service is not an adjunct of the Government. According to Mr Warner's affidavit, he spoke to Assistant Commissioner of Police (South), Fitzroy Frederick, to request a police presence at the site "to maintain law and order and to deal with any breaches of the peace". According to this evidence, it was not an instruction and the police were free to ignore or comply with his request. This assertion does not answer the question whether Mr Warner acted lawfully in making the request nor does it shed any light on the lawfulness of the decision by the Assistant Commissioner to send a large contingent of armed police officers to the protest camp. A first question that the Assistant Commissioner might have asked is whether at the time of the request, breaches of the peace were taking place at the protest camp such as would require the maintenance of law and order. I can answer that question for Assistant Commissioner Frederick. At the time of the request there was no breach of the peace and no need to maintain law and order. A deeper analysis or assessment of the risk was needed.

[116] The defendant relied on the decision of *R (Hicks and others) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening*) [2018] 1 All ER 374 to support the submission that rights under the Constitution may not be interpreted in such a way as to make it

impractical for the police to perform their duties. *Hicks* is a case with many distinguishing factual features. In that case, a Royal wedding date had been announced. Members of the royalty, visiting heads of state, and thousands of citizens were expected to converge in central London. There was good reason to believe that there would be substantial acts of violence. Protests in central London had turned violent in the months before the wedding. The intelligence services had positive evidence of an international terrorist threat. The car of the Prince of Wales had been attacked during student protests in the build-up to the Royal wedding. The police had intelligence that activities aimed at disrupting the celebrations were being planned on social websites. The police felt that an attempted attack was highly likely, and thousands of police officers were deployed across the metropolis. The issue in that case was whether the planning and execution of the policing operation did not make proper allowance for the democratic rights of anti-monarchist protestors to express their views in a peaceable way. In that case the presence and actions of the police were held to be justified.

[117] Nonetheless, Lord Toulson, writing on behalf of an impressively comprised panel of the Supreme Court (Lords Mance, Reed, Carnwath and Dyson), said this at para [4]:

> "The power of the police, or any other citizen, to carry out an arrest to prevent an imminent breach of the peace is ancient, but it remains as relevant today as in times past. The leading domestic authorities on the subject are the decisions of the House of Lords in *Albert v Lavin* [1981] 3 All ER 878, [1982] AC 546 and *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police, interested parties)* [2006] UKHL 55, [2007] 2 All ER 529, [2007] 2 AC 105. There are important safeguards for the citizen, in order to prevent breach of the peace powers from becoming 'a recipe for officious and unjustified intervention in other people's affairs' (in Lord Rodger's words in *Laporte* [2007] 2 All ER 529, [2007] 2 AC 105 (at para [62]). The essence of a breach of the peace is violence. The power to arrest to prevent a breach of the peace which has not yet occurred is confined to

> a situation in which the person making the arrest reasonably believes that a breach of the peace is likely to occur in the near future (quoting again from Lord Rodger in *Laporte*, at para [62]). And even where that is so, there may be other ways of preventing its occurrence than by making an arrest; there is only a power of arrest if it is a necessary and proportionate response to the risk."

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[118] The question must therefore be asked whether the decision of the Assistant Commissioner was a proportionate response to the risk that existed at the time that he decided to accede to Mr Warner's request. In my view, there was no such risk. For the most part, the camp was occupied by ordinary citizens of advanced age. They had no militia to defend the camp. The camp was involved in a form of protest that was educational and non-violent. There was no contingent of protestors at the camp at 6:30 am on 27 June 2012. The evidence discloses that one or two persons had slept there that night. There is no evidence of the Assistant Commissioner carrying out a risk assessment. Had he done so, he would certainly have found the risk to be very low. His response, judging by the number of policemen, most of them armed, demonstrates a disproportionate response to a threat that did not exist.

[119] There is no demarcated separation of powers between the military and the police in the Constitution. However, although the Minister of National Security is administratively responsible for both the military and the police, he or she is not their ruler.

[120] Section 191(2) of the Defence Act, Chp. 14:01 says this:

> "The Chief of Defence Staff who shall be appointed from among the officers of the Force shall be vested with responsibility for the operational use of the Force and shall in the exercise of any power connected with such responsibility conform with any special or general directions of the Minister."

[121] The defendant submitted that the use of the Defence Force is not limited to times of war or during periods of public emergency. The defendants rely on this section to justify the instruction given to the Chief of Defence Staff by Mr Warner. This section in my view vests in the Chief of Defence Staff the responsibility for the operational use of the force. Insofar as he exercises any power connected to that responsibility, he is required to conform with any special or general directions of the Minister. It goes without saying, even though it is not specifically stated in the section, that the directions of the Minister must be lawful. If it were not so, the army might become the Minister's private militia.

[122] There is no doubt that Brigadier Maharaj had the authority to make the decision to send the members of the Defence Force to the protest camp. The real issue is whether he can exercise that authority based on Mr Warner's request. The legality of the request is therefore a critical matter.

[123] Sections 7 to 12 of the Constitution describe how emergency powers may be invoked. Such powers are vested in Parliament and the President and involve the declaration of a state of public emergency. The armed forces are not intended to operate as a parallel domestic force either in aid of civil power or a Minister's assessment of a state of public emergency without strict conformity to the Constitutional requirements for the invocation of the emergency powers set out in sections 7 to 12. Importantly, such a period is said to exist upon the issuance by the President of a formal Proclamation. There was no such state of public emergency at the protest camp.

[124] The evidence at trial establishes that the HRM were in physical occupation and control of the protest camp. Although the legal title to the occupied lands was never established, it seems likely that these lands were either vested in NAMDEVCO by some form of grant from the State or were lands

owned by the State. I have no reason to doubt that if the HRM were trespassers, it was open to NAMDEVCO or the State to promptly serve a notice to quit on the occupants and to seek a summary order for their removal from a Magistrate. No such notice was served either promptly or at all. No letter was ever written asking them to vacate.

[125] The length of time that the camp existed, just over two months, was adequate for such a process to be undertaken. If I am to believe the affidavit evidence of NAMDEVCO'S CEO that no permission was given to the HRM or the claimants and that that land was earmarked for a warehouse, I find it curious that NAMDEVCO did not immediately take steps to dispossess the trespassers. Although make-shift in terms of the integrity of its built structures, the protest camp appears to have had all the elements of a long-term possession. It had prayer rooms, male and female mobile toilets (which obviously would require a service contract for the disposal of waste), altars for prayer, a kitchen with wares, a sleeping area, and food crops. It is either that the CEO was in dereliction of his duties or that, in keeping Dr Kublalsingh's evidence, he gave permission to the HRM to occupy those lands. The important point however is that no lawful powers for the eviction of a trespasser were invoked by NAMDEVCO or the Government.

[126] There is no evidence that the police requested the use of military support and the Chief of Defence Staff admitted that he received no request from the police. Mr Warner elected not to give evidence and therefore the claimants were unable to cross examine him on the allegations that he had made and to have an opportunity to get him to refute his own allegations. The weight of his evidence is therefore compromised.

[127] The dawn raid on a non-violent protest camp, occupied at the time by one or two unarmed, middle aged men without a notice to quit, or any lawful process save for the wishes of a Minister of Government, would have been traumatising and shocking to the HRM and the claimants.

[128] It cannot rightfully be said that Dr Kublalsingh committed a breach of the peace in attempting to protect the protest camp. The police laid no such charge against him. What he did was try to save the camp from demolition by persons acting without lawful process as any right thinking citizen would. Obviously, with all its nearby heavy equipment, OAS could have easily been directed by NIDCO to conduct the exercise. The army corps of engineers were not better equipped than OAS. If the protest camp was in the path of the highway, it would have been OAS's contractual duty to seek to clear the land. It was a disproportionate response to the existence of the protest camp for the Minister to activate the Defence Force and to request the presence of armed police officers.

[129] The protest camp had become by that time, a symbol of defiance, by a movement that was the focus of increasing public attention. The only thing worthy of note by way of official complaint was traffic congestion created by people who were slowing down to look at what was taking place inside the camp. One cannot blame an occupier of premises if traffic slows down to admire the occupier's shop window.

[130] I get the impression that Mr Warner's decisions were meant to demonstrate the brute force of the State and its intolerance of the HRM's persistent dissent. The citizenry has a right to express its dissent by any lawful means. Nothing has been adduced before me to prove that the presence of the protest camp was unlawful, whether in terms of its location or its activities.

[131] Traffic management is one of the functions of the traffic branch of the police service, and if any unnecessary traffic congestion is being created that is causing a nuisance to other road users, it is their duty to keep the traffic flowing. They have no right to demolish the shop with the exciting shopwindow that is attracting so much attention. I think that the true purpose of the operation was to swiftly remove the protestors from the

eyes of the public, and in so doing, to silence the expression of their dissent. The right to freedom of expression is protected in section (4)(i) of the Constitution.

[132] In my opinion therefore, the destruction of the protest camp infringed the following guaranteed rights under the Constitution:

(1) The right to the protection of the law: section (4)(b);
(2) The right to express political views: section (4)(e);
(3) Freedom of conscience, thought and expression, section: (4)(i); and
(4) Freedom of association and assembly: section (4)(k).

[133] I also hold that the request made by Minister Warner to the Chief of Defence Staff, breached the separation of powers under the Constitution in a manner contrary to the rule of law.

[134] Insofar as the claimants allege that Dr Kublalsingh and Elizabeth Rambharose were assaulted and battered, I have come to the conclusion that they were. It is trite law that an assault is established once the claimant can prove that a reasonable man, if placed in his position at the relevant time, would have feared that unlawful physical force was about to be applied to him. Retrospective interpretations of what constitutes an assault are irrelevant. What is important is an objective analysis of how a reasonable person would have felt placed in the same circumstances as the claimant. It is also trite law, that a battery is defined as the application of force to another resulting in harmful or offensive contact. The elements necessary to constitute a battery are the application of physical force and the absence of a lawful basis for applying it.

[135] If a party of police or army officers invaded property I occupied with intentions to demolish it and I was convinced that they had no legal right to enter it, it would be reasonable for me to resist them. And if, in the course

of my resistance, I was assaulted or battered, I would also be entitled to damages. It has now been held that the Defence Force and the police had no lawful right to invade or demolish the protest camp. In light of that finding, it is difficult to accept that the police had any right to arrest Dr Kublalsingh for doing what any reasonable man would do in defence of the property that the claimants physically occupied and controlled.

[136] As far as I see it, this is a case of one trespasser dispossessing another, and the first trespasser had a better right to enjoy the property than the second trespasser. In my opinion, Dr Kublalsingh and Ms Rambharose are entitled to damages for assault and battery. Dr Kublalsingh is further entitled to damages for wrongful arrest and false imprisonment and the claimants are jointly entitled to damages for trespass.

Third Issue

[137] The stated purpose of establishing an army camp at the site of the protest camp was to prevent the HRM from returning to the site. No evidence has been adduced that the HRM wanted to return there. No order has been sought by the claimants to repossess the area where the protest camp stood. It seems to me that, having exercised such brute force, no sensible person would have ventured back to that place. Instead the claimants acted in a civilised manner and invoked the powers of this court to condemn their eviction. A declaration that the setting up of the army camp was unconstitutional, such as has been sought by the claimants, serves no useful purpose. The claimants having been dispossessed and, expressing no desire to return, there is no contravention of constitutional rights if anyone else occupied the land in their stead.

Reliefs

[138] In light of my findings, I am prepared to grant the specific declarations that I shall set out below. Before doing so, I must deal with the question of damages.

[139] The purpose of a constitutional declaration is often a sufficient vindication of the breach of a constitutional right. In *Oswald Alleyne v The Attorney General of Trinidad and Tobago* (2015) 88 WIR 475, Lord Toulson opined that "often the Court will find that more than words are required to redress what has happened. There are no standard rules, but the fact that the injured part has suffered damage will obviously militate in favour of a monetary award".

[140] In *Attorney General v Ramanoop* [2005] UKPC 15, Lord Nicholls of Birkenhead said this at paras [17], [18] and [19]:

> "[17] Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection Chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.
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> [18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law.
>
> [19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will

depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award."

[141] In *Alphie Subiah v The Attorney General of Trinidad and Tobago*, [2008] UKPC 47 Lord Bingham at para [11] said this:

"The Board's decisions in *Ramanoop*, paras 17 - 20, and *Merson*, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in *Merson's* case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of *Ramanoop*, and *Merson*, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable . . .Having identified an appropriate

sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in *Merson*, however, the purpose of such an additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression.

[142] Mendonça JA in *Naidike v The Attorney General of Trinidad and Tobago* (Civil Appeal No. 86 of 2007) helpfully summarized the legal principles emanating from the above-mentioned decisions at para [56]:

> "In light of those decisions it can be seen that in granting redress under Section 14 of the Constitution, the Court is concerned to uphold or vindicate the constitutional right that has been violated. In some cases, a declaration articulating the fact of the violation will be sufficient. In most cases more will be required. When more is required and the Court sees it fit to award compensation, the comparable common law measure of damages is a useful guide. In determining the appropriate compensation, the Court is nevertheless concerned to vindicate or uphold the constitutional right. The nature of the damages awarded should therefore always be vindicatory. That means that in appropriate cases the award may exceed more than a purely compensatory amount. The Court therefore having identified an appropriate amount as a compensatory award must ask itself whether that sum affords adequate redress or whether an additional award should be made to vindicate the person's constitutional right. Where it is appropriate to award more than a purely compensatory amount, the purpose of this additional award is to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and to deter further breaches".

[143] The facts of this case disclose egregious conduct on the part of the Government. The first promise of a review was made by a person no less

than the Prime Minister. This surely must have been received as a promise coming from a believable and genuine source. The promise was repeated on other occasions by another Minister of Government and other public officials. It seems to me that these representations were disingenuously made for the purpose of gaining a tactical advantage and diffusing a complex predicament. The claimants had every right to expect that there would have been a meaningful review whether or not they formed part of the review committee. The fact that the HRM walked out of the meeting called to discuss the composition of the review committee and its terms of reference does not mean that they had no further part to play in the process. Their non-participation as members of the review committee did not mean that they were to be entirely excluded from the decision-making process. The catalysts of the review were thus deliberately and spuriously rendered inanimate.

[144] The events at the office of the Ministry of Works when the NIDCO Preliminary Report was presented was a travesty and a sham. The entire exercise resulted in a report that amounted to a rubberstamping and not a meaningful review of the policy that the HRM and the claimants opposed. It took Dr Kublalsingh's hunger strike and the possible catastrophe of his death to trigger the HRC Review. Again, the actions of the Government in disregarding the HRC recommendations were a grievous departure from a formal assurance. Having spent over $700,000 for the HRC Report, it is unconscionable that the Government should have decided to entirely disregard its recommendations. Insofar as the claimants' legitimate expectations were concerned, both broken promises amounted to a shocking betrayal. The State ought to strive to embody the nation's highest moral and ethical principles in all that it says and all that it does. In effect, the actions of the Government appear to have been an attempt to out-manoeuvre Dr Kublalsingh and the HRM by any means necessary in order to facilitate the continued construction of the highway as originally conceived.

[145] No evidence has been submitted as to the value of any of the claimants' lands lost or affected by the construction of the highway, and no value has been put on the protest camp that was destroyed. Insofar as the assessment of damages is concerned, I have some difficulty in awarding compensation that is comparable to the common law measure of damages. The common law measure of damages for the breach of these legitimate expectations and the destruction of the protest camp have not been quantified before me. Nonetheless, from their affidavits I have a full understanding of the extent of the frustration and agony that the claimants endured.

[146] I must take into account that the claimants were always genuinely acting in defence of their right to the enjoyment of their property and the ancestral communities which they or their kin inhabited. They were not involved in public activism designed to thrust them into the political limelight. They were, at all times, sincere, straightforward and trusting. The justice of the case demands an award of damages that takes account of the broken promises and the shock and humiliation of the Government's *blitzkrieg* attack on the protest camp in stark violation of the Constitutional provisions that I previously identified.

168. In the illuminating article, *Legitimate Expectation–An Odyssey*, Irish Jurist, (2013), 50, Professor Hilary Biehler draws comparisons between the equitable remedies available in cases of proprietary estoppel and the remedies available in breaches of a legitimate expectation. He postulated that the doctrine of legitimate expectation was historically derived out of the same concepts involved in proprietary estoppel, namely, holding a promisor to his promise, and it gave a court of equity free reign to design an appropriate form of relief that satisfies the equity. Of course, the two doctrines are now entirely separate, each one standing on its own legs. An

important point he makes, insofar as relief in cases of breach of legitimate expectation is concerned, is the effect of detrimental reliance. It is clear that detrimental reliance is not strictly required as an element of proof in cases of breach of legitimate expectation: *Paponette*. However, it seems to me that where it has been proven in cases of legitimate expectation it ought not to be discounted at the stage of the assessment of damages.

169. In this case the promises had the effect of delaying the filing of the constitutional motion by way of the FDC. Had the promises not been made the claimants would likely have sooner approached the courts. Further, it was only when the promises relative to the HRC report were broken, and construction work continued, that the claimants decided to belatedly pursue their conservatory order as a form of interim relief, midway during directions for the hearing of the substantive matter. The delay in applying for the conservatory order played a significant role in my refusal of their application. The reliance on the promises was clear. The detriment created by that reliance, apart from their injured feelings and the shock of their protest camp's destruction, was the delay in applying for the interim conservatory order. There is no way of being absolutely sure that the interim order would have been granted had it been sought earlier. But I can say this: the promptness of the application would have counted in the claimants' favour in determining their interim application. To my mind, a constitutional court, in making an award of damages, ought to take proper account of the nature of the detriment created by the reliance on a false promise.

[147] Having regard to the facts of this case, I make an award of damages to the claimants in the sum of $350,000 for those constitutional infringements. In order to reflect the sense of public outrage, to highlight the importance of our constitutionally enshrined fundamental rights and freedoms, and to also to deter the reoccurrence of such conduct, I make an additional award

to the claimants of $150,000 in damages. The total award is therefore $500,000. I will also award damages in favour of Dr Kublalsingh for wrongful arrest, assault, battery and false imprisonment. The imprisonment was brief but traumatic. It also caused tremendous embarrassment as it was a headline story in every news media. With respect to Ms Rambharose I will make an award of damages for assault and battery. Those figures will be given below.

[148] In all the circumstances, I make the following declarations and orders:

(1) A declaration that the decision to continue construction of the Mon Desir to Debe segment of the Solomon Hochoy Highway extension breached and/or contravened the rights of the claimants guaranteed under sections (4)(a) and (4)(c) of the Constitution;

(2) A declaration that the actions and/or decisions of the Minister of National Security, Mr Austin Jack Warner, in deciding to forcibly remove the claimants and remove their protest camp, in requisitioning and/or deploying the Defence Force for the purpose of removing the claimants and demolishing the protest camp, and in participating and in being present on the morning of the camp's destruction were unlawful and breached and/or contravened the claimants' rights guaranteed under the following sections of the Constitution: (4)(a), (4)(b), (4)(e), (4)(i), and (4)(k);

(3) A declaration that the demolition of the protest camp breached the doctrine of the separation of powers under the Constitution and was contrary to the rule of law;

(4) A declaration that the members of the Defence Force and the police force in acceding to, being persuaded by, or deciding to accept

and/or comply with the request of the Minister of National Security had no lawful authority to remove the claimants and to demolish the protest camp and to arrest, detain, assault and batter the first claimant and breached and/or contravened the claimants' rights guaranteed under the following sections of the Constitution: section(4)(a), (4)(b), (4)(e), (4)(i) and (4)(k);

(5) The defendant shall pay damages to the claimants in the sum of $500,000 for breaches of these constitutional rights;

(6) The defendant shall pay damages to the first claimant, Dr Wayne Kublalsingh, for wrongful arrest, assault, battery and false imprisonment in the sum of $50,000;

(7) The defendant shall pay damages to the third claimant, Elizabeth Rambharose, for assault and battery in the sum of $15,000;

(7) The defendant shall pay the costs of the Fixed Date Claim to be assessed by a Registrar in default of agreement on a date to be fixed by the Court Office and certified fit for two Senior Counsel and two Junior Counsel.

(8) There shall be a stay of execution of 42 days.

[149] I take this opportunity to thank all four Senior Counsel and their respective teams for their invaluable assistance to the court on the challenging questions of law and fact and in their management of the thousands of pages of material presented to the court.

James Christopher Aboud

Judge