REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-03943

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

AND

IN THE MATTER OF THE IMPROPER AND/OR UNLAWFUL AND/OR UNREASONABLE AND/OR IRRATIONAL AND/OR PROCEDURALLY UNFAIR CONDUCT OF AN AUDIT INTO THE LIFE SPORT PROGRAM

AND

Between

ASHWIN CREED
CORNELIUS PRICE
THEODORE CHARLES
RONNELL BARCLAY Claimants

AND

THE CENTRAL AUDIT COMMITTEE COMPRISING
LESTER HERBERT
INSHAN MOHAMMED
NISA CHURAMAN
~~**MARY HUSSEIN**~~[1]
KHEMKARAN KISSUN Defendants

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES
Mr. Kiel Taklalsingh, Mr. Vivek Lakhan-Joseph, Mr. Rajiv Persad and Mr. Peter Taylor, Attorneys-at-law for the Claimants.
Mr. Stephen Singh and Ms. Shalini R. Campbell, Attorneys-at-law for the First, Second, Third and Fifth Defendants.
Mr. Daniel Khan, Attorney-at-Law for the Fourth Defendant.

JUDGMENT

[1] The faired judgment has been corrected to reflect the Order of the Honourable Mme. Justice Dean-Armorer on the 12th day of November, 2015, by which the fourth defendant Mary Hussein was removed as a defendant in these proceedings on the ground that she had not been served because she had no involvement in the 2014 Audit Report.

JUDGMENT

Introduction

1. In 2012, the Ministry of Sport of Trinidad and Tobago developed the Life Sport Programme, which was designed to assist *"at risk youth"* in Trinidad and Tobago. Two years later, and in the context of widespread negative media coverage of the Life Sport programme, the Minister of Finance directed the Central Audit Committee ("CAC") to conduct an audit into the financial affairs of Life Sport.
2. In this application for judicial review, the Claimants have sought an order of certiorari quashing the Final Audit Report on the ground that they were denied an opportunity to be heard, before CAC presented its Final Report to the Minister of Finance.
3. In the course of this judgment, the Court considered whether the CAC, as an investigative body, was under a duty to be fair to persons who might be adversely affected by their report.
4. The Court also considered the circumstances in which a legitimate expectation might arise and whether the CAC, in these proceedings had frustrated the legitimate expectation of the claimants.

Procedural History

5. On the 24th October, 2014, the claimants filed an Application, pursuant to Part 56.2 of the ***Civil Proceedings Rules (CPR)***[2], for leave to apply for judicial review.
6. An order was granted in their favour on the 17th November, 2014 and on the 28th November, 2014, the claimants filed their Fixed Date Claim Form. They sought the following items of relief:

[2] Civil Proceedings Rules 1998 (as amended)

"1. A Declaration that the Central Audit Committee acted in bad faith in the purported conduct of the audit into the Life Sport Program published on the 24th July, 2014;

2. A Declaration that the Central Audit Committee infringed the Claimants' right to natural justice in relation to the conduct of the Audit into the Life Sport Program;

3. A Declaration that the Audit in relation to the Life Sport Program was made and/or concluded and/or published in breach of the mandate of the Central Audit Committee and/or in breach of the legitimate expectation of the Claimants;

4. A Declaration that the failure of the Central Audit Committee to specifically inform [sic] the Claimants, before the making and/or publishing of the Audit Report into the Life Sport Program, of the respective adverse allegations and/or findings and/or conclusions, was done in breach of the Claimants' right to be heard and/or is procedurally unfair;

5. A Declaration that the Central Audit Committee made several findings and/or assumptions of fact within the Audit Report into the Life Sport Program, in the absence of evidence and/or without any reasonable basis for so doing;

6. A Declaration that the Central Audit Committee exercised its power, in the conduct of the audit into the Life Sport Program, in a manner that is so unreasonable that no reasonable auditor would have done so;

7. A Declaration that the Central Audit Committee took into account irrelevant considerations in arriving at its conclusions within the Audit Report conducted into the Life Sport Program;

8. *A Declaration that the Central Audit Committee failed and/or neglected and/or omitted to take into account relevant considerations in arriving at its conclusions with the Audit Report conducted into the Life Sport Program;*

9. *An order of certiorari quashing the Audit Report of the Central Audit Committee made and/or concluded and/or published in relation to the operations of the Life Sport Program;*

10. *Legal Costs;*

11. *Damages for and/or injury to the Claimants respective reputations;*

12. *General Damages;*

13. *Interest;*

14. *Such further and/or other relief as the Court deems fit and appropriate."*

7. Pursuant to the permission of this Court, the Fixed Date Claim Form was amended on the 19th February, 2015. By the amendment the words *"Central Audit Committee"* were deleted from the rubric of the Claim and the names of the defendants were inserted in their place.

Evidence

8. The evidence in these proceedings was by way of affidavit only. The claimants relied on the affidavits of Ashwin Creed[3] and Cornelius Price[4]. The claimants also relied on these affidavits in support of their substantive claim.

9. On the 19th March, 2015, three (3) affidavits in opposition were filed on behalf of the defendants. The deponents were:

[3] See the affidavit of Ashwin Creed filed on the 27th October, 2014
[4] See the affidavit of Cornelius Price filed on the 24th October, 2014

- Varuna Ramdial
- Khemkaran Kissun
- Inshan Mohammed

Affidavits in reply were filed with the Court's permission on the 22nd April, 2015. The deponents were:

- Ashwin Creed[5]
- Cornelius Price[6]
- Theodore Charles[7]

Submissions

10. The Court gave directions for written submissions. These were filed on behalf of the claimants on the 11th June, 2015 and by the defendants in opposition on the 11th August, 2015. With the Court's permission, the claimants filed submissions in reply on the 6th October, 2015.

11. Pursuant to an application by the fourth defendant, the name "Mary Hussein", was removed from the proceedings, on the ground that she had not been served with the claim because the fourth defendant, Mary Hussein had no involvement with the 2014 Audit Report.

Facts

12. In September, 2012, the Ministry of Sport conceived and implemented the Life Sport Programme, whose primary mandate was socio-economic transformation through sport. The programme was conceptualised to address issues affecting *"at risk youth"* between 16 to 25

[5] See the affidavit in reply of Ashwin Creed filed on the 22nd April, 2015
[6] See the affidavit in reply of Cornelius Price filed on the 21st April, 2015
[7] See the affidavit in reply of Theodore Charles filed on the 22nd April, 2015

years in depressed communities in Trinidad and Tobago.[8] The Life Sport Programme was managed by a statutory body, Sport Company of Trinidad and Tobago (SporTT) which fell under the purview of the Minister of Sport.[9]

13. The claimants were all engaged in the Life Sport Programme in various capacities. The first claimant, Ashwin Creed, at the material time, had been the Permanent Secretary in the Ministry of Sport.[10] Cornelius Price, the second claimant was the Programme Director of Life Sport.[11] Theodore Charles was the Assistant Director of Administration to the Life Sport[12], and Ronnell Barclay was the Project Manager for Life Sport.[13]

14. Between August, 2013 and July, 2014, the Life Sport Programme was subjected to two audits by the Central Audit Committee ("CAC"), which had been established by the Cabinet of the Republic of Trinidad and Tobago in September, 2001. The relevant Cabinet Minute was exhibited in these proceedings as *"VR3"*[14]. This Cabinet Minute records Cabinet's agreement that:

> *"(c) a Central Audit Committee, headed by a Director be established within the Ministry of Finance to monitor the internal operations of all State Agencies…"*

The powers and duties of the CAC were set out at paragraph (f) of the Cabinet Minute. The powers which were invested in the CAC, by Cabinet include the following:

> *"(ii) to determine whether funds are being spent appropriately by State Agencies in accordance with agreed guidelines…*

[8] See the affidavit of Cornelius Price filed on the 24th October, 2014.
[9] See the affidavit of Cornelius Price filed on the 24th October, 2014 at paragraph 11.
[10] See the affidavit of Ashwin Creed filed on the 27th October, 2014.
[11] See the affidavit of Cornelius Price filed on the 24th October, 2014 at page 2.
[12] See the affidavit of Cornelius Price filed on the 21st April, 2015 at paragraph 26.
[13] See the affidavit of Cornelius Price filed on the 24th October, 2014 at page 5.
[14] See the affidavit of Varun Ramdial filed on the 19th March, 2015.

(iv) to evaluate and analyse the procedures and practices relating to the auditing of the procurement of goods and services by State Agencies

(v) to conduct a review of the internal audit plans of State Agencies…

(xv) to perform ad hoc investigations as identified by the Minister of Finance

(xvi) to have access to all relevant information of State Agencies in order to carry out a proper internal audit

(xvii) to have access to all facilities of State Agencies, including computer facilities and other electronic databases and files, paper records, reports, management letters and other documents of the State Agency and its subsidiaries.

(xviii) to submit to the Minister of Finance an annual report outlining the activities of the Committee during a financial year, the report to be laid in Parliament;"

15. In August, 2013, the then Minister of Finance commissioned the first audit into Life Sport. The Permanent Secretary in the Ministry of Finance wrote to the Deputy Permanent Secretary by Memorandum dated August, 2013, in order to indicate that the Minister of Finance had requested an audit of the Life Sport Programme by the CAC. The Permanent Secretary asked the Deputy Permanent Secretary to arrange for members of the CAC to begin the audit.[15]

[15] See a copy of the memorandum dated August, 2013 exhibited as "KK5" to the affidavit of Khemkaran Kissoon.

16. The CAC began the first audit in September, 2013 and submitted their final report to the Minister of Finance in January, 2014.[16] In late May, 2014, the CAC received instructions from the Minister of Finance to conduct the second audit. On this occasion, they were commissioned to conduct an audit into the Life Sport Programme from its inception. The report which emanated from this second audit became the target of judicial review in these proceedings.

17. The Committee assigned to conduct the second audit comprised the following persons:

- Mr. Lester Herbert
- Mr. Khemkaran Kissoon
- Mr. Varuna Ramdial
- Mr. Inshan Mohammed

18. Three members of the Committee were named the defendants to this claim. The members of the CAC received the oral instructions of the Minister of Finance, through Mr. Herbert, to examine every voucher for discrepancies, to ensure that proper internal controls were followed and to verify the levels of activities at Life Sport Centres. Terms of Reference were approved by the Minister of Finance and sent for the information of number of Minsters and Permanent Secretaries including the first claimant.

19. On the 26th May, 2014, three (3) members of the CAC attended a press conference which had been called by Mr. Cornelius Price, Director of Life Sport. Mr. Price had called a press conference for the purpose of refuting the allegations which had been made in the media

[16] See the affidavit of Inshan Mohammed filed on the at paragraph 15.

concerning the Life Sport Programme. At this meeting, members of the CAC were mere observers. They made notes of the allegations and responses.[17]

20. The CAC held an introductory meeting with the Chief Executive Officer on the 29th May, 2014 and the audit began on the 2nd June, 2014, with the review of payment vouchers at the SporTT's Office.[18]

21. The members of the 2014 Committee examined cheques and voucher payments and with the assistance of police officers conducted field investigations of a number of different Life Sport Centres.[19] Over the following two (2) months, the members of the Committee would hold a series of meetings with one or more of the defendants.

22. On the 26th June, 2014, members of the CAC met with Mr. Theodore Charles, Assistant Director of Life Sport and the third claimant in these proceedings. The meeting was held at the Ato Boldon Stadium and the Committee Members discussed a number of issues with Mr. Charles. These included: janitorial contracts, rental of tables and chairs, event planning. By this meeting, the CAC was merely seeking information.

23. Another meeting was held on the 2nd July, 2014, at the Ministry of Sport. On this occasion, the full CAC team met with the Life Sport Director, Mr. Cornelius Price and discussed its findings up to the 2nd July, 2014. It was the contention of the defendants that at this meeting, Mr. Cornelius Price was given an opportunity to address a number of findings including:

    - Going all out even planners
    - Vocational training
    - The reimbursement of Davough Cummings20.

[17] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraph 8.
[18] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraph 9.
[19] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraphs 10 and 11.
[20] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraph 14

24. On the 3rd July, 2014, the full CAC team met with Mr. Theodore Charles and Mr. Ronnell Barclay, the third and fourth claimants at the Ato Boldon Stadium. The CAC requested this meeting to discuss all matters except *"the e-beam contract."* At this meeting, the members of the CAC indicated that they requested explanations and several documents which had not been provided. The audit into Life Sport continued until 11th July, 2014.[21]

25. On the 16th July, members of CAC met with Mr. Ashwin Creed, Mr. Cornelius Price and Mr. Theodore Charles at the Ministry of Sport. It was the evidence of Mr. Inshan Mohammed, that the CAC presented an invoice to the claimants with a request for an explanation. Mr. Mohammed stated further that no satisfactory explanation was forthcoming.[22]

26. At the meeting, which was held on the 16th July, 2014, Mr. Ashwin Creed requested that the members of the CAC hold an exit meeting.[23] The concept of the exit meeting was explained by Mr. Ashwin Creed in his affidavit of the 24th September, 2014. It was Mr. Creed's evidence that an exit meeting is used to put preliminary findings and or conclusions of the auditors to those who are concerned with or are affected by the subject matter of the report, so as to enable those persons to consider the report, to comment and give their input.[24]

27. It was accepted and admitted, by deponents on behalf of the defendants, that Mr. Herbert agreed, on behalf of the CAC, to engage in an exit meeting prior to the submission of the Final Report.[25]

[21] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraph 15
[22] See the affidavit of Inshan Mohammed filed on the at paragraph 26
[23] See the affidavit of Varuna Ramdial filed on the 19th March, 2015 at paragraph 17
[24] See the affidavit of Ashwin Creed filed on the 27th October, 2014 at paragraph 6.
[25] See the affidavit of Varuna Ramdial filed on the 3rd March, 2015 at paragraph 17.

28. Following the meeting of the 16th July, the members of the CAC continued their preparation of the report. However, on the morning of the 18th July, 2014, members of the CAC were informed by Mr. Herbert, that the Minister of Finance requested that the Final Report be delivered by 10:00 a.m. on that day. On behalf of the defendants, Mr. Ramdial testified as follows:

> *"Because of the timeline given for the submission of the report we could not conduct an exit meeting with Mr. Creed as he had requested…"*[26]

29. It was accepted by all parties that the Final Audit Report was laid in Parliament on the 24th July, 2016.[27] It was debated by the then Prime Minister, Mrs. Persad Bissessar, who indicated that the Report would be forwarded to the Director of Public Prosecutions (DPP) and the Integrity Commission for their action. It received wide media coverage, and was subjected to press commentaries.

30. The claimants prepared a response and delivered it to the defendants. The response was exhibited as *"AC2"*. The defendants failed to respond to or to acknowledge the response.[28]

31. It has also been undisputed that the report contained adverse findings against Life Sport and its Managers. These have been summarised and set out at paragraph 19 of the affidavit of Cornelius Price.[29] The claimants allege that the Final Report made these adverse findings against them:

> *"i) There were widespread breaches of proper procurement practices;*
>
> *ii) The approval given by Cabinet was not strictly adhered to;*
>
> *iii) Persons at the coordinating level may have been involved in criminal activity;*

[26] See the affidavit of Varuna Ramdial filed on the 19th March, 2014 at paragraph 18.
[27] See the affidavit of Cornelius Price filed on the 24th October, 2014 at paragraph 15.
[28] See the affidavit of Ashwin Creed filed on the 27th October, 2014 at paragraph 18.
[29] See the affidavit filed by Cornelius Price filed on the 24th October, 2014 at paragraph 19.

iv) There were several instances of fraudulent activity by suppliers to the Program;

v) There may have been widespread theft of equipment from the Program;

vi) There may have been breaches of the Proceeds of Crime Act;

vii) Exorbitant and questionable payments were made in several instances;

viii) There was poor control and monitoring of the Program by the Ministry of Sport."

32. The defendants have not denied those adverse findings were made. The claimants refer to negative implications in the Final Report, which suggested that there may have been complicity by officers of the Ministry. In particular the Report cited the payment of thirty-four million dollars ($34,000,000.00) to E-Beam Interact Limited.[30]

Issues

33. In these proceedings, four (4) broad issues arise for the Court's determination.

They are:

1. Whether the CAC acted unfairly by failing or omitting to give the claimants an opportunity to be heard before the submission of the Final Report to the Minister of Finance.
2. Whether the CAC acted in breach of a legitimate expectation which was held by the claimants.
3. Whether the CAC acted irrationally or in bad faith

[30] See the affidavit of Cornelius Price filed on the 24th October, 2014 at paragraph 20.

Law, Reasoning and Decision

34. In the paragraphs, which follow, the Court will treat with the law and its application, as it relates to each issue and their impact on the final disposition of this claim.

Irrationality and Bad Faith

35. It is convenient for the Court, at the outset, to consider the issues of irrationality and bad faith.

36. It is trite law that the threshold for establishing irrational behaviour is notoriously high and that a decision could be set aside only where it has been established that it is so unreasonable that no reasonable authority would have made it. In the words of Lord Diplock,

> *"Such a decision is one which is so outrageous in its defiance of logic or of accepted moral standards that no decision-maker placed in the position of the defendant would have made it."* [31]

37. Similarly, in his treatise ***Judicial Review Handbook***, Michael Fordham refers to high threshold epithets: the colourful phrases used to signify that only in a strong case will the Court interfere on the ground of irrationality.[32] These include "perversity" and that the decision maker must have taken leave of his senses.[33] Having examined the evidence which had been filed on behalf of the defendants, it is my view, that the defendants approached their task in a systematic, professional and rational manner and the claimants have accordingly, failed to meet the high threshold of irrationality.

[31] See CCSU v. Minister for the Civil [1984] 3 All ER 935 at 951
[32] See Fordham, Judicial Review Handbook (4th Edition) at paragraph 57.2
[33] See Fordham, Judicial Review Handbook (4th Edition) at paragraph 57.2 and 57.2.2

Bad Faith

38. I turn now to consider the allegation of bad faith. This ground was defined in ***De Smith's, Judicial Review*** in these terms:

> *"Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal interest…"*

39. It is my view that there is no evidence in these proceedings that the defendants acted with any improper motive. The evidence suggests that the defendants were mandated to conduct an exercise in the public interest, and that they carried out their duties under much public pressure. I have found no trace of fraud, dishonesty, malice or personal self-interest.

Natural Justice

40. Fairness will often require that a person who may be adversely affected by a decision will have an opportunity to make representations on his own behalf, *"…before the decision is taken, with a view to producing a favourable result…"*[34] These were the words of Lord Mustill in ***Rv. Secretary of State for the Home Department ex parte Doody***[35] where his Lordship formulated a five point synopsis of the meaning of fairness.

Re Pergamon Press Ltd[36]

41. One specific manifestation of the requirement of fairness is the obligation of investigative bodies to be fair. This was the principle to be distilled from ***Re Pergamon Press Ltd***[37], a

[34] As per Lord Mustill in Rv. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 at 560
[35] Rv. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 at 560
[36] Re Pergamon Press Ltd [1970] 3 WLR 792
[37] Re Pergamon Press Ltd [1970] 3 WLR 792

case relied on by the claimants, in support of their submission that an investigative body had an obligation to hear persons who are likely to be adversely affected by their investigation.

42. In that case, inspectors were appointed by the Board of Trade pursuant to Section 165(b) of ***the Companies Act*** 1948 (UK), to investigate the affairs of Pergamon Press Ltd. The inspectors were to provide a report to the Board. Both past and present Directors of the company were called upon to give evidence. The Directors refused to answer unless certain assurances were given by the inspectors.

43. Lord Denning, while recognising that the inquiry was not a court of law, considered the wide repercussions of the report. He had this to say:

> *"But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. … I am clearly of the opinion that the inspectors must act fairly.*[38]

44. The duty of fairness included an obligation to permit persons, who were adversely affected by the report, to have an opportunity of contradicting what is said against them. These were the words of Lord Denning:

[38] Re Pergamon Press Ltd [1970] 3 WLR 792 at page 797

"…but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him."[39]

45. The Appeal in ***Pergamon Press Ltd***[40] was dismissed on the ground that the inspectors had acted properly and that the directors had no right to demand further assurances. ***Pergamon Press Ltd***[41] was nonetheless useful in resolving the instant claim, since it provided guidance as to the obligation of fairness which is carried even by mere investigative bodies.

46. The defendants sought to distinguish ***Pergamon Press Ltd***[42] on the ground that it was not an application for judicial review. Although the defendants are correct in their observation that ***Pergamon Press Ltd***[43] was not an application for judicial review, it is my view that that is of no consequence. What is relevant is the exposition of the principle that, even where an investigative body is not charged with a duty to make a decision, such body still carries an obligation to be fair.

Peter Thomas Mahon and Air New Zealand Ltd. And Others[44]

47. The claimants also relied on the case of ***Peter Thomas Mahon and Air New Zealand Ltd. And Others***[45], which arose out of events in late 1979, when a DC-10 Aircraft operated by Air New Zealand Ltd. flew directly into the lower snow-clad slopes of Mt. Erebus. All passengers and crew members were killed. A Judge was appointed by Royal Commission

[39] Re Pergamon Press Ltd [1970] 3 WLR 792 at page 797
[40] Re Pergamon Press Ltd [1970] 3 WLR 792
[41] Re Pergamon Press Ltd [1970] 3 WLR 792
[42] Re Pergamon Press Ltd [1970] 3 WLR 792
[43] Re Pergamon Press Ltd [1970] 3 WLR 792
[44] Peter Thomas Mahon and Air New Zealand Ltd. And Others [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808
[45] Peter Thomas Mahon and Air New Zealand Ltd. And Others [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808

to investigate the cause of crash. The Judge, Peter Mahon, found deliberate concealment of administrative details, on the part of the Chief Executive Officer of the airline.

48. The Privy Council, hearing an appeal from the Court of Appeal of New Zealand on an application for judicial review, held that the Royal Commission had breached the rules of natural justice. Lord Diplock, in the course of his judgment, identified two rules which were applicable to Commissioners exercising an investigative jurisdiction. The first, which is not directly relevant to this claim, was that the decision of the investigative body should be based on some probative evidence. The second rule, which is apposite to this claim, required the investigator to consider the evidence put forward by persons, against whom an adverse finding could be made.

49. Lord Diplock explained the second rule in this way:

> *"The second rule requires that any person represented at the inquiry who will be adversely affected by the decision should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."*[46]

50. The claimants have relied on this case, in support of their argument that they were entitled to be heard by the CAC before the Final Report was submitted to the Minister of Finance.

[46] Peter Thomas Mahon and Air New Zealand Ltd. And Others [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808 at page 821

Rv. Secretary of State Exp. Imperial Tobacco[47]

51. The defendants have countered that the claimants had no right to an opportunity to be heard since the final report did not constitute a decision, but was only one step in a process which would be completed by the Minister of Finance. For this reason, they contended, that the application for judicial review is premature.

52. In support of their submission, the defendants have relied on the case of ***Imperial Tobacco***[48], which was an application for judicial review of the Report of the Scientific Committee on Tobacco and Health (SCOTH).

53. SCOTH, the authors of the impugned Report, had been established in February, 1994, pursuant to the Government's White Paper entitled, *"Health of the Nation"*. It was an expert, scientific committee appointed to provide advice to the Chief Medical Officer on Scientific Matters concerning tobacco and health.[49] The SCOTH report was presented to the Chief Medical Officer in February, 1998 and published without prior consultation or notification to the applicant. Hidden J, in ruling against ***Imperial Tobacco***[50]**,** found that the function of SCOTH was to provide advice and that, in their advisory capacity, the scientific body had no obligation to be fair.

54. In the course of his judgment, Hidden J, considered the decision in ***Pergamon Press***[51] as well as the decisions in three (3) commonwealth cases. They were:

[47] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409
[48] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409
[49] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409 at page 3
[50] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409
[51] Re Pergamon Press Ltd [1970] 3 WLR 792 [1917]

Re Attorney General of Canada v. Canadian Tobacco Manufacturers[52], ***Aisworth v. Criminal Justice Commission***[53] and ***Peters v. Davidson[54].*** Hidden J, distinguished all four (4) authorities, finding that they were not comparable to the case of ***Imperial Tobacco[55].***

55. The learned Judge found that the SCOTH Report belonged to a category of scientific and expert reports which were commissioned in the formulation and development of government policy. In his view, judicial review of such advisory reports would have the effect of severely compromising the development of public policy.[56]

56. Ultimately, Hidden J contrasted the Reports which had been considered in the Commonwealth cases with the SCOTH Report and said:

> *"SCOTH is a very different body from the sort of advisory or investigative body which has been held to be the subject of the duty to act fairly. There is a wide difference between a body which investigates specific sets of factual circumstances relating to particular individuals or parties and a body which makes general recommendations which inform the policy making process"*[57]

57. Accordingly, this Court was presented with two apparently conflicting lines of authority. The first included cases such as ***Pergamon Press Ltd[58]*** and ***Peter Thomas Mahon and Air New Zealand Ltd. And Others***[59]. These were ostensibly in conflict with ***Imperial Tobacco[60].***

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[52] Re Attorney General of Canada v. Canadian Tobacco Manufacturers [1986] 26 DLR (4th) 677
[53] Aisworth v. Criminal Justice Commission [1992] 175 CLR 564
[54] Peters v. Davidson [1999] 2NZLR 164
[55] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409 at page 10
[56] See R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409 at page 10
[57] See R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409 at page 15
[58] Re Pergamon Press Ltd [1970] 3 WLR 792
[59] Peter Thomas Mahon and Air New Zealand Ltd. And Others [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808
[60] R. v. Secretary of State for Health Ex p. Imperial Tobacco Ltd (Judicial Review) 1999 WL 1805409

58. Having considered the authorities together, it was my view, that there was, in fact, no conflict and that the authorities were easily reconciled by reference to the two categories identified by Hidden J at page 15 of the Report.[61] There is no obligation of fairness on the body which is mandated to conduct a wide investigation and to make general recommendations to inform the development of government policy. By contrast, an investigative body, which is mandated to enquire into the activities of specific persons and into specific circumstances, has a duty to be fair and to extend an opportunity to be heard to persons who are adversely affected by their investigation.

59. The CAC, whose report is impugned in this application for judicial review, falls into the second category of investigative bodies. The Audit of the CAC was trained on specific persons, natural and corporate. Consequentially, the outcome of the investigation was specific in its denigration of specific persons and events. As in ***Pergamon Press***[62] and ***Mahon***[63], the CAC was under a duty to be fair. Fairness in this context included a duty to alert persons to adverse comments, which might be made against them and to allow them an opportunity to present evidence or arguments which might dissuade the investigator from making such comments.

[61] See paragraph 56 Supra
[62] Re Pergamon Press Ltd [1970] 3 WLR 792
[63] Peter Thomas Mahon and Air New Zealand Ltd. And Others [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808

Rees v. Crane[64]

60. Similarly, in the Privy Council decision of ***Rees v. Crane***[65]**,** Justice Crane was held to be entitled to an opportunity to be heard, regardless of the fact that the decision to appoint an investigative tribunal was only the first step in elaborate statutory procedure.

61. In the instant claim, the defendants have not denied that the report contained potentially damaging material against the claimants or that the Final Report, having been submitted to the Minister, found its way into Parliament and was subjected to widespread public scrutiny.

62. In these circumstances, it is my view that the claimants were entitled to be treated fairly and in particular, they were entitled to an opportunity to make representations before the Final Report left the control of the CAC, as the investigative body.

63. I also disagree with the defendants that the meetings which were held between the parties constituted opportunities to be heard. Those meetings were in fact part of the investigative work of the defendants and the claimants were, in my view, entitled to have sight of the Final Report.

Prematurity

64. Common Law Courts have demonstrated their reluctance to intervene, where judicial review would interfere with the conduct of administrative proceedings.[66] In such circumstances, the Courts have refused judicial review on the ground of prematurity.

[64] Rees v. Crane [1994] 2 AC
[65] Rees v. Crane [1994] 2 AC
[66] See the Judgment of this Court in PC Curtis Applewhite v. The Police Service Commission (PSC), Basdeo Mulchan & Lloyd Crosby, CV 2010-4494

65. One example of such reluctance may be found in the application of ***PC Curtis Applewhite v. PSC***[67]**,** where this Court refused to grant judicial review of the decision of a disciplinary tribunal to overrule a no case submission.

66. The defendants have relied on the decision in ***Applewhite***[68] in support of their contention that this Application for judicial review is premature. They argue that ***the Exchequer and Audit Act***[69] provides an opportunity for statutory bodies to be heard by the Minister of Finance, before an audit is presented to Parliament. Accordingly, I considered ***the Exchequer and Audit Act***[70] and in particular, whether ***the Act***[71] contemplated that the affected statutory body should be heard, at a later stage, by the Minister of Finance and not by the committee which conducted the audit.

The Exchequer and Audit Act

67. I have set out the relevant sections of ***the Exchequer and Audit Act ("the Act")***[72]:

Section 4(2) of ***the Act***[73] provides:

> *"The Permanent Secretary to the Minister…or any officer in the Treasury authorised by him, shall be entitled to inspect all offices and to have access to such official books, documents and records as may be necessary for the exercise of the powers and duties of the Treasury under this Act."*

[67] PC Curtis Applewhite v. The Police Service Commission (PSC), Basdeo Mulchan & Lloyd Crosby, CV 2010-4494
[68] PC Curtis Applewhite v. The Police Service Commission (PSC), Basdeo Mulchan & Lloyd Crosby, CV 2010-4494
[69] The Exchequer and Audit Act, Ch. 69:01
[70] The Exchequer and Audit Act, Ch. 69:01
[71] The Exchequer and Audit Act, Ch. 69:01
[72] The Exchequer and Audit Act, Ch. 69:01
[73] The Exchequer and Audit Act, Ch. 69:01

Section 31(3) of ***the Act***[74] provides:

> *"The Auditor General shall report on his examination and audit accounts referred to in this section and shall transmit the report to the appropriate Minister for presentation to Parliament…"*[75]

Section 31(3) also requires the Minister

> *"to obtain the observation of the statutory body on any matter to which attention has been called by the Auditor General"* [76]

68. The defendants have relied on Section 31(3) in support of their submission that there is statutory provision, which requires the Minister to hear the statutory body which is affected by the report.

69. However, Section 31(3)[77] cannot be read in isolation and has to be considered in the context of the whole of Section 31[78]. Section 31(1) invests a general power in the Auditor General in these terms:

> *"Notwithstanding anything to the contrary contained in any other written law, the accounts of any statutory body shall be audited by the Auditor General if Parliament by resolution so directs…"*

Section 31(2) sets out the duties of the Auditor General in the exercise of the power conferred.

70. In my view, the defendants do not have the facility of relying on Section 31 of ***the Exchequer and Audit Act***[79]. That section sets out a specific procedure, by which the Auditor General

[74] The Exchequer and Audit Act, Ch. 69:01
[75] The Exchequer and Audit Act, Ch. 69:01
[76] The Exchequer and Audit Act, Ch. 69:01 at Section 31(3)
[77] The Exchequer and Audit Act, Ch. 69:01
[78] The Exchequer and Audit Act, Ch. 69:01
[79] The Exchequer and Audit Act, Ch. 69:01

undertakes a report pursuant to a resolution of Parliament. The evidence which was tendered on behalf of the defendants did not suggest that the CAC, itself a creature of Cabinet, even remotely pretended to be the Auditor General. Moreover, the CAC conducted the audit pursuant to the verbal directive of the Minister of Finance and not pursuant to a resolution of Parliament. It is therefore my view that Section 31 of ***the Act***[80] and the defence of prematurity are wholly irrelevant to the instant claim.

Legitimate Expectation

71. In the event that I am wrong in this conclusion, I turn to consider the ground of legitimate expectation. One of the classic definitions of the legitimate expectation may be found in Lord Diplock's statement in ***CCSU v. Minister for the Civil Service***[81]**,** where a legitimate expectation was defined as an expectation which arose from a settled practice or an express promise by a public authority.

72. In consonance with Lord Diplock's definition, the claimants contended that they were also entitled to an exit meeting according to a settled practice in the public service. Such was the evidence of Mr. Creed who deposed that he had been employed in the public service for 35 years and that he had supervised numerous audit processes.[82] Mr. Creed stated further that when audits are being conducted, the preliminary findings or conclusion of the audit committee are put forward, for the input and comment of those concerned, by way of the exit meeting. The defendants refuted the allegation that such a practice existed.

73. The claimants, as the parties alleging the existence of a settled practice, carried the burden to prove their allegation. In so far as the defendants have refuted their allegation, the

[80] The Exchequer and Audit Act, Ch. 69:01
[81] CCSU v. Minister of the Civil Service [1984] 3 All ER 935 at page 949
[82] See the affidavit of Ashwin Creed filed on the 24th October, 2014.

claimants ought to have attempted to establish their case by cross-examination. This, they have failed to do and have accordingly failed to discharge their burden of proof. This issue of fact falls to be resolved in favour of the defendants and I find as a matter of fact, that the claimants failed to discharge their burden of proving that there was a settled practice of audit committees holding an exit meeting.

74. The evidence in respect of an express promise was however very different. The uncontroverted evidence in this case was that the CAC promised the claimants an exit meeting and that they reneged on their promise when the Minister of Finance unexpectedly called for the Report. This was a promise to allow consultation. It therefore was not an expectation of a substantive benefit.

75. In ***Re. (Bibi) v. Newham*** [2002] 1 WLR 237, the Court of Appeal Schiemann LJ set out 3 practical questions which arise where there is an allegation of legitimate expectation. The first of these is to what the pubic authority has by practice or promise committed itself to, 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.[83]

76. The expectation of these claimants was based on a promise by the CAC that they would be afforded an opportunity to be heard. Their expectation was that if the promised opportunity was not forthcoming, even then they should have been afforded an opportunity to persuade the Committee to keep their promise.

77. The Committee however, has not contended that it paid any mind to the promise which it had made to allow the claimants an exit meeting. There was no suggestion that they informed

[83] See Re. (Bibi) v. Newham LBC [2002] 1WLR 237 at 244

the claimants that they were constrained to renege on their promise or that they brought the promise to the attention of the Minister.

78. In my view there was a breach of the Claimant's legitimate expectation and on that ground, it is my view that the Report should be quashed and remitted to the Committee for the purpose of fulfilling acting as they should.

Order

79. I have considered the appropriate relief. I will grant the following declaratory relief:

> *"IT IS DECLARED that:*
>
> *1. The Central Audit Committee comprising the Defendants acted in breach of the rules of natural justice in relation to the Audit into the Life Sport Program.*
>
> *2. The Audit in relation to the Life Sport Program was made in breach of the legitimate expectation of the Claimants.*
>
> *3. The failure of the Central Audit Committee comprising the Defendants specifically to inform the Claimants, before the making of the Audit Report into the Life Sport Program, of the respective adverse allegations and findings was procedurally unfair."*

80. In respect of the claim for damages, it is my view that the claimant has not proved the existence of a parallel common law right. They have proved that the Committee failed to give them an opportunity to be heard. They have not been able to prove that their reputations would have suffered any less, had such an opportunity been given. Moreover, the claimants have led no evidence to support their claim for damages. The claim for damages is accordingly refused.

81. It is further ordered that the defendants do pay to the claimants costs of and associated with the application for judicial review certified fit for counsel.

Dated this 18th day of November, 2016.

M. Dean-Armorer
Judge[84]

[84] Ms. Aleema Ameerali, Judicial Research Counsel 1