THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013 – 01162

BETWEEN

AFRA RAYMOND **CLAIMANT**

AND

THE MINISTER OF FINANCE AND THE ECONOMY **DEFENDANT**

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances: Mr Gilbert Peterson SC leading Mr Kingsley Walesby for the Claimant

Mr Russell Martineau SC leading Mr Gerald Ramdeen instructed by Ms Savitri Maharaj and Ms Stephenie Sobrian for the Defendant

Dated: **26 February 2015**

RULING

1. By an application of 25 September 2014, the claimant sought permission of the court to rely on a further affidavit of himself in support of his application for judicial review. This claim

is one under the **Freedom of Information Act, Chap 22:02** for disclosure of certain documents which have in effect been refused.

2. These documents relate to what is locally known as the "Clico Bailout".

3. The additional evidence sought to be relied on concerns three categories of statements. The first category relates to statements made by the then Ministers of Finance, Mr Winston Dookeran and Mr Larry Howai, respectively, in Parliament. The second category concerns statements made in affidavits of Minister Winston Dookeran. The third relates to a newspaper reproduction of a statement made by Minister Larry Howai. The second and third category statements are for comparison with the Parliamentary statements.

4. The application to adduce further evidence has been resisted on several grounds. These essentially are the lateness of the application; relevance; and admissibility.

5. The background to this claim can be stated shortly. The claimant made a freedom of information application on 8 May 2012 to the defendant. These were for:

1. CL Financial Limited's audited financial statements for 2008 to 2011 along with any interim, preliminary, draft or unaudited statements relied upon by the Ministry of Finance;
2. Other information or analysis regarding the composition of the creditors of CL Financial, in particular EFPA holders, the dates of repayments and the identities of those whose investments have been repaid;
3. A presentation made to Members of Parliament in September 2011 as a briefing on the Central Bank (Amendment) Bill and the Purchase of Rights and Validation Bill 2011 including copies of all slides powerpoint, tables, charts, schedules, text or other information which comprised the presentation.

6. There being no clear answer to the requests at 1 and 2 above, a claim was filed for judicial review, and permission was granted.

7. In these proceedings, on behalf of the defendant, Mrs Kimi Rochard, filed an affidavit on 12 July 2013 saying, among other things, that the information relates to CL Financial Limited, which is a private company and not a public authority falling under the purview of the **Freedom of Information Act**.

8. As things now stand the essential order being sought by the claimant is a declaration that the claimant is entitled to be provided with this information. The court at the trial will have to decide if these documents are susceptible to be disclosed.

9. It should be noted that after each side put in its evidence, the court directed written submissions and scheduled an oral hearing on 29 September 2014 for each side to highlight its main arguments and seek to refute the arguments of the other side. The claimant's attorneys filed their written submissions on 7 February 2014 and the defendant's attorneys filed theirs on 8 April 2014. The present application then came after submissions were filed and on the eve of the trial.

10. The application in all the circumstances can be considered to have been made late. Leave to file judicial review was granted on 27 March 2013. The claim and evidence in support was filed on 10 April 2013. There was delay occasioned by discussions to try to resolve the matter. The defendant's affidavit was filed on 12 July 2013. The claimant responded to that affidavit by an affidavit on 14 October 2013.

11. The claimant also says that it is only when the Rochard affidavit was filed in July 2013 that it became clear what the position being adopted by the defendant in relation to the request was. But in any event, this was before the claimant had filed his reply affidavit.

12. There has been no explanation given by the claimant for the lateness of the present application filed 4 days before the oral submissions were to be held and after written submissions were filed in relation to certain of the statements made well before the claim was even filed.

13. Two of the statements being sought to be relied on were made on 16 September 2011; and 14 September 2011. This was well before the claim was filed. Two other statements were made or reported in September 2014. However, given that the claimant is seeking to contrast these statements, not much turns on the timing of the earlier statements since the claimant is asserting that the relevance of the first two statements is as against the September 2014 statements.

14. In other words, it was only after the September 2014 statements were made that the first statements became relevant. That may explain the 14 September 2011 Hansard statement since it is being contrasted with the statements being made by Mr Howai in September 2014. However, it does not explain why Minister Dookeran's Hansard statement of 16 September 2011 was not put in before. The intention of putting it in according to the claimant is to "show a recognition by the then Minister of the public interest in disclosure of all relevant information pertaining to the bail-out of CL Financial Limited and also an expression of his intention to do so."

15. At very least, the significance of the 16 September 2011 statement should have been known to the claimant from July 2013 after the Rochard affidavit was filed, but really from the beginning of the claim.

16. Notwithstanding the lateness of an application to use additional evidence, a court can still seek to exercise a discretion to admit such a statement if it is relevant. The court is not limited to what was before the decision maker at the time of the decision. In his book **Judicial Review Handbook**, 5th edition, Michael Fordham at para 17.2 states:

> "The starting point is to focus on evidence which was before, or available to, the public body at the time of its impugned action. But other evidence can be relevant and admissible in judicial review, including where it relates to: (1) the impugned action; (2) background information; (3) a ground for judicial review; (4) a further issue arising; and sometimes even (5) material which is now, or would now be, before the decision maker."

17. The question is does the 16 September 2011 Hansard statement fit into any of these categories. At best, it seems to be information before the decision maker, that is, the attitude of the relevant Minister and it may also be considered to be in the nature of background information. The statement, when carefully read, is essentially saying the Ministry is preparing a public document outlining the "**necessary information**" that led to the CL Financial story. It also says the document would assess the current challenges and justify the proposals that have been put forward to account to the nation so that the public can evaluate their performance in the future. It says the information given to senators will be converted into an easy to read document. The statement does not assert a commitment to provide "**all relevant information** pertaining to the bail-out of CL Financial Limited" or of "an intention to do so". It certainly does not evince an intention to provide the specific documents asked for in the freedom of information request.

18. The statement of the Minister cannot therefore be seen to be relevant to the determination of this claim. On this basis, the 16 September 2011 Hansard statement is not allowed.

19. The second objection is to the statements made in Parliament by Ministers Dookeran and Howai. The defendant has submitted that what is said in Parliament is privileged and the courts are not permitted to receive such statements except in limited circumstances.

20. The starting point to this analysis is the **Constitution of the Republic of Trinidad and Tobago**. Section 55 states:

> **55.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Senate and House of Representatives, there shall be freedom of speech in the Senate and House of Representatives.
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> (2) No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.
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> (3) In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.
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> (4) A person called to give any evidence before either House or any committee shall enjoy the same privileges and immunities as a member of either House.

21. The Constitution is clear. Section 55 (1) provides for freedom of speech in Parliament. There is no limit. There is no exception. Section 55(2) is, in my view, separate. It prohibits the bringing of any claim, whether civil or criminal, against anyone for things said or statements made in Parliament.

22. An essential pillar underlying our constitutional framework is the separation of powers among the Parliament, Executive and Judiciary.

23. What then does this mean for someone seeking to use statements made in Parliament? In what circumstances can statements made in Parliament be used? And can the statements being advanced here be relied on for the purpose for which it is being sought?

24. A long line of cases have established how the courts are to deal with applications to adduce statements of Members of Parliament consistent with the freedom of speech in Parliament that is ingrained as part of our constitutional framework, the separation of powers that underlies the structure of the Constitution, and the balance that must be struck between the fair determination of cases and the need to protect freedom of speech in Parliament.

25. In the case of ***Pepper v Hart (1993) 1 All ER 42*** Lord Browne Wilkinson **at page 69** stated there are certain instances when statements made in Parliament can be used as an aid to interpretation. He said:

> "I therefore reach the conclusion, subject to any question of parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear. Further than this, I would not at present go."

26. In ***Wilson v First County Trust Ltd (No 2)*** **[2003] UKHL 40, [2004] 1 AC 816**, Lord Nicholls of Birkenhead at paragraph 60 stated:

> "What is important is to recognise there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way "questioning" what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone."
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> The use by courts of ministerial and other promoters' statements as part of the background of legislation, pursuant to *Pepper v Hart*, is one instance. Another instance is the established practice by which courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament."

27. In the case of **Pepper (Inspector of Taxes) v Hart - [1993] 1 All ER 42** Lord Browne-Wilkinson at page 68 said:

> "As to the authorities, in *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378, [1972] 1 QB 522 the plaintiff sued the defendant, a member of Parliament, for an alleged libel on television and sought to introduce evidence of what the defendant had said in the House of Commons as proof of malice. Browne J held, rightly in my view, that such use would breach art 9 as questioning the motives and intentions of a member of the House. To the extent that he went further so as to suggest that in no circumstances could the speeches be looked at other than for the purposes of seeing what was said on a particular date, his remarks have to be understood in the context of the issues which arose in that case. Those issues included an allegation that the defendant acted improperly in Parliament in saying what he did in Parliament. That plainly would amount to questioning a member's behaviour in Parliament and infringe art 9.
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> In *R v Secretary of State for Trade, ex p Anderson Strathclyde plc* [1983] 2 All ER 233 an applicant for judicial review sought to adduce parliamentary materials to prove a fact. The Crown did not object to the Divisional Court looking at the materials but the court itself refused to do so on the grounds that it would constitute a breach of art 9 (at 237, 239 per Dunn LJ). In view of the Attorney General's concession and the decision of this House in *Brind*'s case, in my judgment *Ex p Anderson Strathclyde plc* was wrongly decided on this point.

28. Lord Browne-Wilkinson further observed at pages 68 to 69:

> "Accordingly the use of clear ministerial statements by the court as a guide to the construction of ambiguous legislation or for the mere fact that statements were made would not contravene article 9. No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the Minister's statements or his reasoning."

29. These cases were followed by **Toussaint v The Attorney General of St Vincent [2007] UKPC 48 (16 July 2007).** What follows is a lengthy quotation from the judgment of Lord

Mance, but it explains the background to this issue and sets out how the courts should treat with ministerial statements in Parliament:

> "10. Against this background, the Board turns to article 9 of the Bill of Rights and the wider common law principle identified in *Prebble*. Article 9 precludes the impeaching or questioning in court or out of Parliament of the freedom of speech and debates or proceedings in Parliament. The Board is concerned with the proposed use in court of a statement made during a parliamentary debate. But it notes in passing that the general and somewhat obscure wording of article 9 cannot on any view be read absolutely literally. The prohibition on questioning "out of Parliament" would otherwise have "absurd consequences", e.g. in preventing the public and media from discussing and criticising proceedings in parliament, as pointed out by the Joint Committee on Parliamentary Privilege, paragraph 91 (United Kingdom, Session 1998-1999, HL Paper 43-I, HC 214-I). On the other hand, article 9 does not necessarily represent the full extent of the parliamentary privilege recognised at common law. As Lord Browne-Wilkinson said in *Prebble* at p. 332C-D, there is in addition:
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> > "a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges."
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> 11. In *Prebble* the defendants, in answer to a claim by a minister for defamation, wished to aver that the minister had made misleading statements in the New Zealand House of Representatives to the effect that the government did not intend to sell state assets when he was conspiring to do just that, and that the conspiracy had been implemented by dishonestly and improperly introducing legislation into the House. Lord Browne-Wilkinson said at p. 332F-G:
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> > "According to conventional wisdom, the combined operation of article 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead. It would also prohibit any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of the alleged conspiracy."
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> 12. Lord Browne-Wilkinson went on at pp. 332G-337A to reject the defendant's submissions that the principle only operated to prevent questioning in proceedings asserting legal consequences against the maker of the statement for making the statement, or in proceedings brought by the member of Parliament making the statement. The "basic concept" was that members of the House and witnesses before committees should be able to:

> "speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks he would not know whether or not there would subsequently be a challenge to what he is saying (p. 334B-C)."

13. At p. 336G-H, Lord Browne-Wilkinson identified three issues as in play in cases such as the present: the need to ensure that the legislature can exercise its powers freely on behalf of its electors, the need to protect freedom of speech and the interests of justice in ensuring that all relevant evidence is available to the courts. He said that, while the first of these must prevail, the other two cannot be ignored. Summarising the resulting position, he said at p. 337A-B:

> "For these reasons (which are in substance those of the courts below) their Lordships are of the view that **parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading.** Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under section 108 of the Crimes Act 1961."

14. He continued with these important words:

> "However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House."

15. He then discussed the separate right which the United Kingdom Parliament used, until 1980, to assert, to restrain publication of its proceedings, and observed that this had given rise to confusion in some authorities between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety (p.337C-D). He concluded at p. 337F-G that the judge had been right to strike out the defendant's pleadings so far as they relied on matters in Parliament as part of the alleged conspiracy or its implementation, but added that:

> "Their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course."

16. Consistently with this, the House of Lords has on a number of occasions stated that use may be made of ministerial statements in Parliament in judicial review proceedings. *R v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696 is an example noted by Lord Browne-Wilkinson in *Pepper v. Hart* [1993] AC 593, 639F. Similar recognition of this "established practice" is found in the speeches in *Wilson v.*

First County Trust Ltd. (No. 2) [2003] UKHL 40; [2004] 1 AC 816 of Lord Nicholls of Birkenhead (para. 60), Lord Hope of Craighead (para. 113) and Lord Hobhouse of Woodborough (para. 142). Further examples were noted in the Report of the Joint Committee on Parliament Privilege quoted by Lord Bingham of Cornhill, giving the opinion of the Board in *Buchanan v. Jennings* [2004] UKPC 36; [2005] 1 AC 115, paragraph 16.

17. In such cases, the minister's statement is relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it. This is unobjectionable although the aim and effect is to show that such conduct involved the improper exercise of a power "for an alien purpose or in a wholly unreasonable manner": *Pepper v. Hart*, per Lord Browne-Wilkinson at p. 639A. The Joint Committee expressed the view that Parliament should welcome this development, on the basis that "Both parliamentary scrutiny and judicial review have important roles, separate and distinct in a modern democratic society" (para. 50) and on the basis that "The contrary view would have bizarre consequences", hampering challenges to the "legality of executive decisions by ring-fencing what ministers said in Parliament", and "making ministerial decisions announced in Parliament … less readily open to examination than other ministerial decisions"(para 51). The Joint Committee observed, pertinently, that

> "That would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts (para 51)."

18. In *R (Javed) v. Home Secretary* [2001] EWCA Civ 789; [2002] QB 129, the Court of Appeal of England and Wales addressed the position (not directly relevant in the present case) of subordinate legislation tabled and approved in Parliament. It said, correctly in the Board's view, that both article 9 of the Bill of Rights and the wider common law principle accommodate the right and duty of the court to review the legality of subordinate legislation. The court can review the material facts and form its own judgment on the legality of subordinate legislation tabled in both Houses of Parliament and approved there, even though the result might be discordant with statements made in parliamentary debate.

19. **The present case is concerned with executive action outside the House of which the Prime Minister gave prior notice to the House in his budget speech. Mr Clayton submits that the Prime Minister's statement in the House of Assembly is relied upon simply for its explanation of the motivation of the executive's action outside the House. The only allegation of impropriety relates to that action. It is *not* alleged that the Prime Minister misled the House or acted improperly within the House. The Prime Minister's statement in the House is relied on for what it says, rather than questioned or challenged.** If Mr Clayton is right in these submissions, then the Board agrees, in the light of the authorities cited above, that the use proposed of the Prime Minister's statement falls squarely within the permissible, though subject still to the need to address the evidential impact of s. 16 of the 1966 Act.

20. Mr Clayton's submissions depend upon the use made of the Prime Minister's statement being limited in the manner indicated in the previous paragraph...."

30. The claimant is commendably frank in saying why he is seeking to rely on certain statements made by Ministers Dookeran and Howai in Parliament. He is saying their statements justify the court in ordering disclosure of the requested documents under the Freedom of Information Act. And why does he say these statements are relevant? At paragraph 6.2 (b) of his proposed affidavit, he says the extract from Minister Howai's budget statement "shows that the Minister of Finance's statement that the bailout has been of assistance to 'many of the companies in the group' is **not only erroneous but is also highly misleading**. It also raises questions... including where the lawful authority for that spending emanates from..."

31. The next reason the claimant advances is to show the "**contradictory statements** that have been made to date by various Ministers of Finance as to how much money has been paid by CL Financial Limited to EFPA holders." In light of these "contradictory statements" he says the requested information should be disclosed.

32. The claimant will be inviting the court to make findings or agree with him that the statements made in Parliament show that the Minister's statement is both erroneous and highly misleading; that there is no lawful authority for the spending; and that the Ministers have been making contradictory statements in Parliament.

33. This invitation will lead to precisely what these leading cases say the court cannot do. The statements are not being adduced for the fact that they were made. There is no issue of statutory interpretation. They are not being used to explain conduct or motivation for conduct occurring afterwards. They are being adduced rather for the court to conclude that the Minister Dookeran's Parliamentary statement of 14 September 2011 has been contradictory to his affidavit assertions and to Mr Howai's newspaper statement and that Mr Howai has been

erroneous and misleading in his Parliamentary Budget Speech assertion, which then justifies the disclosures sought under the **Freedom of Information Act**. This is an invitation the court is precluded from accepting.

34. Nothing that is said here should be interpreted to be saying that the court is in any way seeking to fetter public criticism or scrutiny of what is said in Parliament. Persons are free to reproduce, comment on, criticise, analyse, condemn and even rubbish what parliamentarians say in Parliament. What is being applied here is simply a principle of law on the limited use that can properly be made in a claim before the court of what has been said in Parliament.

35. The issues in the judicial review claim before the court turn on the interpretation of provisions of the **Freedom of Information Act**. In particular, they concern whether the nature of the status of CL Financial will prohibit the reliefs being sought against the defendant and whether the claimant is entitled to the disclosure sought given the framework of the Act.

36. In those circumstances even if the Parliamentary statements were admissible, they would be devoid of the context at the time they were made; they would at best be marginally relevant to any section 35 analysis the court must undertake; and would likely be insufficient to come to the conclusions being advanced by the claimant.

37. Given the court's findings, the affidavit evidence of Mr Dookeran is also not relevant as the relevance of it was to undertake a comparison of what is asserted on affidavit as opposed to what was said in Parliament. I should further note that only extracts of the affidavits have been referred to. The claimant's application did not seek to attach as exhibits those affidavits referred to in the affidavit supporting this application.

38. The same position holds for the newspaper extract of Mr Howai's statement that it was meant as comparison and therefore is not relevant without the admission of the statements made in Parliament.

39. For these reasons the application to rely on a further affidavit of the claimant filed 25 September 2014 is disallowed. That affidavit is accordingly struck out. I thank the attorneys on both sides for their very helpful submissions.

40. I will hear the parties on costs.

Ronnie Boodoosingh

Judge