

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00468

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW PURSUANT TO SECTION 6(1) OF THE JUDICIAL REVIEW ACT
CHAPTER 7:08**

BETWEEN

PAN TRINBAGO INC.

(A body corporate established by The Pan Trinbago (Incorporation) Act No. 5 of 1986)

Claimant

AND

THE NATIONAL CARNIVAL COMMISSION OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday 14th December 2017

Appearances:

Mr. Ramesh Lawrence Maharaj SC leads Mr. Ronnie Bissessar instructed by Ms. Saskia Samlal for the Claimant

Mr. Douglas Mendes SC leads Mr. Rishi P.A. Dass instructed by Mr. Dharmendra Punwasee for the Defendant

JUDGMENT

Introduction- Opening Cue¹

1. This claim for judicial review concerns the relationship between Pan Trinbago Incorporation (Pan Trinbago)² and National Carnival Commission of Trinidad and Tobago (NCC)³ in the

¹ An “opening cue” is the beginning of the steelband’s performance. Three sharp bangs would be heard from a bell (normally a cowbell) which would signal silence from the steelband and the audience. After a brief pause, the performance begins. “Hear the Song of Trinidad” by Eric Fe;ten 15th August 2016.

² The Claimant, is a body corporate established by the Pan Trinbago (Incorporation) Act No.5 of 1986 .

³ The Defendant.

management of Panorama and the legitimate expectations of Pan Trinbago to certain rights or benefits that may have arisen and which impact their dealings with one another.

2. Pan Trinbago contends that it has a legitimate expectation to retain the responsibility for ticket sales at Panorama. The legitimate expectation is alleged to have arisen from a Cabinet Policy established in 1997 and a settled practice with the NCC as the overall manager of Carnival. The claim calls into question whether NCC's interference with such an expectation, at the 2017 edition of Panorama, was proportionate and fair in all the circumstances.
3. Panorama is a premiere Carnival event and the culmination of weeks of work to deliver a cultural product on a national stage instilling great pride and reverence of this indigenous art form.

“Now the steelband tent will become a cathedral and these young men priests. They will draw from back pockets those rubber-tipped sticks which they had carried around all year, as the one link to the music that is their life, their soul, and touch them to the cracked faces of the drums.”

-Earl Lovelace “The Dragon Can’t Dance”

4. The iconic steelpan is more than a national musical instrument. Referred to colloquially as “pan”, it is a symbol of equality, creativity and ingenuity. The notes on the pan are so varied it can play any genre of music from classical music to contemporary soca. A pan yard has become its own community and Panorama the ultimate showcase of talent, joy and freedom. The pan is revered and immortalised by artists, writers, poets, historians and social scientists.
5. Hand in hand with pan's future is our Carnival- a delightfully confused mixture of generational wisdom and expression of self and identity. These values, the intangible and immeasurable joy from these festivals for most or many in this jurisdiction transcends economics, are deeply societal and as Lovelace points out, spiritual.
6. The pan movement emerged from a deep history of empowerment. Social rebellion inherent in this movement also brought with it a sense of pride of owning its future and creating a sense of space and belonging in a migrant land. From a socio-historical perspective any negative interaction with the State resonates with a past history of subjugation by colonials over the governed and erupts into a fear that the struggle for freedom is under threat.

7. The sweetest melody may float from the pan. Its future should be secured for generations to come. But the controversies surrounding it evident in this litigation by no means pays homage to its rich legacy. From the evidence in this case it seems that as a financial product, pan is in need of financial care. This is a matter of policy for policy makers but usefully sets the backdrop to a controversy over money in the development of pan's future, its role in Carnival and national development. But disputes such as these only highlight unnecessary controversies for pan and Carnival's future.
8. Should the control of the sale of tickets and collection of revenue from selling tickets for Panorama (or pan events) be vested in the NCC, the body in charge of the regulation of Carnival or vested in Pan Trinbago, the body responsible for pan? There is an obvious overlap in the functions and responsibilities of these two bodies that makes co-operation between them vital to secure pan's future. These questions may fall into a blind spot of macro-political or macro-economic policy issues which usually fall outside the Court's scrutiny. That is, however, not to say that the Court will permit administrative fairness to be jettisoned in the pursuit of such policies.
9. But this dispute should never have reached this stage.
10. The parties promised this Court an early resolution of this claim. A trial date first in July 2017 then in October 2017 was rescheduled on the representation by both parties that a settlement was imminent. Ironically, in a case about legitimate expectations, both parties disappointed this Court's expectation that a consent order would have been presented to it in November 2017. This has left us scrambling at the last moment to have a judicial determination of this matter on this Court's insistence on the heels of Carnival shy of two months away. Perhaps this is endemic of our Carnival culture, but these parties need to get serious about the use of their funds rather than resort to expensive litigation without proper negotiations and discussions. This by no means is an admonishment of the commendable legal representation obtained by both parties in this matter. But this would not be the only source of conflict between two bodies whose objects clearly overlap and until they establish their own internal mechanisms to resolve these conflicts they will continue to waste their stakeholders' resources in unnecessary litigation.

11. Policies and practices set by administrators not unusually will change to meet new demands.
The only requirement of the law as developed under the principle of legitimate expectation is that promises made to groups and settled practices they enjoy should not be frustrated unless there is an overriding public interest. The touchstone for a reversal of policy is fairness, not that the policy could never be altered.
12. In this claim for judicial review, Pan Trinbago, complains about the decision of NCC made by letters of 24th and 25th January 2017 to collect and retain the proceeds of sales of tickets for the National Panorama Semi-Finals (small, medium and large bands) on Sunday 12th February, 2017 and the National Panorama Finals (medium and large bands) on Saturday 25th February, 2017. This event has passed but conceivably the controversy may raise its head in Panorama 2018. If indeed there is no intention to perpetuate that decision then really this fight is over money that has already been paid over to NCC.
13. By its first letter NCC indicated to Pan Trinbago that it will manage the ticket sales and all related activities with respect to Panorama 2017 and Pan Trinbago was directed to “cease and desist from representing to the public any jurisdiction over these matters”. By its second letter NCC indicated that “it will be responsible for the printing, marketing, advertising, distribution and collection of revenue” for the semi-finals and finals of Panorama 2017.
14. This was the first time Pan Trinbago allegedly heard of this and they complain that such a decision not only changes a policy and established practice but unfairly alters it without any consultation with them.
15. Since 1998, it was an established practice that Pan Trinbago was responsible for all ticketing and was entitled to retain the proceeds of all ticket sales from Panorama events. This was as a result of Cabinet Minute No. 2007-8/7/97 dated 14th August 1997 and this practice continued without demur until NCC’s letter of 24th January 2017.
16. The narrow issues to be decided in these judicial review proceedings are:
 - a) whether this expectation (whether to a procedural or substantive benefit) is legitimate having regard to the lawful purposes to which NCC’s funds are appropriated;
 - b) whether there is a sufficient overriding interest to justify a departure from the settled practice; and

- c) If so, whether there was adequate consultation with Pan Trinbago to effect this change.
17. To resolve these issues involves analysis of the roles the parties play in the management of Carnival in particular, Panorama; the true intent and effect of the Cabinet decision of 1997; the conduct of the parties in relation to the conduct of Panorama for the last twenty (20) years and more importantly, the legitimacy of the claims for either body to assume such control over these proceeds of Panorama. Ultimately, the claim calls for a balancing of the competing values of preserving the freedom of decision makers on the one hand and ensuring fairness to the holders of legitimate expectations. Without assuming the role of the administrator, the Court is tasked with this balancing exercise, judging competing claims and actions with the measure of administrative fairness. Tilted too far on one side is an abuse of power, tilted to the other is administrative inertia.
18. The gate receipts of Panorama historically account for an average of \$3million. In the context of Pan Trinbago's overall cost to organise Panorama of approximately \$30million, the revenue from ticket sales is the proverbial "drop in the bucket". That money has been traditionally used by Pan Trinbago to make up its shortfall in delivering the Panorama product and to assist in its yearly administrative expenses. NCC has not advanced any reason for the use of these funds in these proceedings save to offset excess funding and for what is set out in the National Carnival Commission of Trinidad and Tobago Act Chapter 42:01 (NCC Act) as its financial compliance model nor have they stated explicitly that such revenues obtained by those sales will be for the benefit of pan's development or for Pan Trinbago's other events.
19. In my view, there was a settled policy and practice for Pan Trinbago to control the receipt of tickets and retain the revenue. Indeed they acted on this for years in preparing their finances and saw it as a means to maintain a measure of liquidity and plan its events for the rest of the year. Both parties saw no difficulty in these arrangements until 2017 when the Minister sounded a change in approach. However, for this expectation to be legitimately breached there should be sufficient overriding interests or meaningful consultations.
20. NCC has not advanced any reasons to justify the interference with this expectation that is either proportionate or justified. Any alleged unlawfulness in Pan Trinbago's retention of gate receipts as being inconsistent with the NCC Act is insufficient on its own to trump the settled policy upon which Pan Trinbago had arranged and planned its affairs for just under 20 years.

The allegation of insolvency and mismanagement has not been made out by NCC on the facts to justify an interference or departure from the general rule.

21. In any event, I am of the view that there were no consultations as required by law to properly, clearly and openly bring to the mind of Pan Trinbago the clear intention of NCC to manage and retain the ticket sales. The consultations that NCC engaged with Pan Trinbago can be characterised as being perfunctory, unfocused and last minute. They were insufficient to bring about such a radical and sudden change in policy and approach so soon before the event.
22. For the reasons set out in this judgment the decisions under review are illegal, unfair and amounts to a breach of Pan Trinbago's legitimate expectations both to a procedural benefit of compliance with the policy and the substantive benefit to retain the proceeds of Panorama and the decisions will be quashed.
23. In this judgment I set out a brief perspective into the formless and spontaneous cultural expression known as "Carnival" and one of its main components of pan and the attempts to impose a structure through the development of various stakeholder groups as caretakers of this indigenous art form. Then, after a brief examination of the facts leading up to the decisions, I analyse the various legal issues raised by the parties in this battle between pan and NCC.
24. I recognise this ultimately as a relational dispute between two bodies that must cooperate with one another and I have also approached this case with a therapeutic key mindful to bring about a satisfactory resolution to their dispute. There are underlying themes which may not be necessarily determinative of the issues raised in these judicial review proceedings but which certainly is a paramount consideration of practical importance for the parties of the issue of accountability in the use of state funds in the management and operation of Carnival activities by the Government who heavily subsidises, for the moment, steelpan and Carnival events.
25. In an attempt to assist the parties post this judgment, I volunteer my own thoughts on a practical way forward on their relationship which has no binding effect on them.

Setting the stage-Trinidad and Tobago's Carnival and Panorama

26. To understand the nature of this dispute is to understand Carnival and the significance of the various special interest groups (SIGs). Brought to Trinidad and Tobago by the French planters, the French celebrated Carnival on the last two days before the Lenten fast began on Ash

Wednesday. They held masked balls on the Monday (Lundi Gras) and Shrove Tuesday (Mardi Gras). During that period of slavery, the slaves would look on at the celebrations and it was not until the abolition of slavery that the Carnival celebrations came onto the streets in 1839. However, Carnivals from 1839 to 1881 were shadowed with violence due to brawls between different groups of masqueraders. After a “bitter clash between the police and the canboulay masqueraders” in 1881, 1882 saw a shift to a more peaceful Carnival. Bands were organized by a band leader and calypso and pan would follow with the steelband having its first appearance in the streets in 1945. Carnival continued to grow and flourish and today it is the biggest festival of the year in Trinidad and Tobago.⁴

27. Carnival is but one cultural product in this multinational, multi-ethnic milieu of migrants in Trinidad and Tobago. It is by far the most popular for its all-inclusivity, formlessness, evolutionary shape which makes it seamlessly move from generation to generation giving each its voice. Its existence almost defies rules and attempts to regulate it. From European and African origins, our Carnival celebrated once a year grew from an expression of rebellion against subjugation by colonial rule, social resistance, radical self-representation to now a fusion of cultures of the island and expression of release. Carnival is, in many respects, a cultural refraction of socio-ideological force. It is a statement of and on various conditions and perspectives of the twin island republic at the particular moment and space of its spectacle.⁵ It is the subject of anthropologists, political commentary, sociologists, artists and commentators.
28. Intrinsic to the Carnival is the masquerade, the parade of bands, calypso or kaiso⁶ and the steelpan. These elements historically were key expressions of former slaves, self-expression and rebellion morphing into identity and self. Carnival will be starved without them. Cumulatively, they congregate Carnival Monday and Carnival Tuesday in parades of the bands, Panorama and Kaiso all in competitive format. The Carnival of these elements cumulatively comprise a deep socio-political statement. The drum itself was seen as an act of

⁴ Historical Dictionary of Trinidad and Tobago by Michael Anthony, pages 103-106. See also The Book of Trinidad by Gerard Besson and Bridget Brereton.

⁵ Steelband Music in Trinidad and Tobago: The Creation of a People’s Music by Willian R. Aho.

⁶ Kaiso is a type of music which originated in West Africa and later evolved into calypso music. See Twin Island Rhythms <http://www.twinislandrhythms.com>

rebellion and pressured in the development of the steelpan for the bamboo a consistent rhythm of self-government⁷.

29. The pan movement itself emerged from impoverished roots. It was discovered almost by accident and has developed internationally. Its impact on our community development is not to be lightly overlooked.

“The steelband is essentially a creation of the masses with their poor housing, overcrowding, unemployment, large families and general lack of opportunity for recreation and cultural expression. It was as if in unconscious protest of these delimiting circumstances that underprivileged youths evolved a medium of self-expression which seems destined to make a distinctive contribution to the cultural life of the West Indies.”⁸

30. Our Carnival has spawned several by products throughout the world notably in England and Canada by Caribbean migrants. In the Caribbean alone there are off shoots of the Carnival product at various times of the year following a similar pattern of packaging of pan, kaiso and masquerades.

31. In Trinidad and Tobago itself, Carnival activities are principally centred in the major cities of Port of Spain in North, San Fernando in the South and Scarborough in Tobago. The culmination of the weekend’s activities takes place in the famous grand stage, the Queens Park Savannah. Both Skinners Park and Queens Park Savannah have grown as cultural centres with various towns and villages also participating and facilitating Carnival events. Carnival Monday and Tuesday are not official public holidays but it practically is with the entire country enveloped in Carnival activities almost 24 hours of the day. The work becomes the Carnival. Panorama itself is a keenly anticipated affair more so at the semi-final and final stages.

32. In post-independent Trinidad and Tobago, it is therefore easy to understand why Carnival is held up as a national event, a unifying force and a cultural expression whose returns are in a

⁷ In the shango cults of Trinidad, as among the Yoruba, drums are the most important musical instruments. Shango cult drums in Trinidad, made in sets of three, resemble the double-headed bala drums more than the other drums found among the Yoruba-the igbin (open-ended log drums with single leather heads, tuned by wooden pegs, which stand on three legs); the dundun or gangan (two-headed, hourglass-shaped, ‘pressure’ drums; or the shallow hemispherical gudugudu drum with a single fixed head)” (1208) See *The Shango Cult in Nigeria and in Trinidad* George Eaton Simpson.

⁸ *The Canon Farquhar Committee* (1952).

sense immeasurable. But, of course, there is a price to pay for the running of these events. The task of harnessing an organic cultural form of expression into an economic activity which necessitates structure is self-evidently prone to its own challenges. Over the years, 2012 to 2017 alone, a total of \$182 million was pumped into Panorama by the NCC for the benefit of Panorama and pan activities for the Carnival. The Government heavily subsidises this national product and the Minister of Culture would typically be engaged in oversight of the Carnival product.⁹

33. Over the years different groups were formed to manage different aspects of Carnival, of pan, bands and kaiso each eventually being incorporated by Acts of Parliament. As mentioned earlier in this judgment, it is important for the legal analysis of this dispute to understand the key roles played by each of these SIGs in Carnival.

Setting the stage-The Orchestra¹⁰

Pan Trinbago

34. Pan Trinbago was established by the Pan Trinbago (Incorporation) Act No. 5 of 1986. Prior to Pan Trinbago's statutory incorporation it was known as the Steelband Association of Trinidad and Tobago which was formed in 1949 and thereafter as the National Association of Trinidad and Tobago Steelbandmen until 1971 when it became known as 'Pan Trinbago'. In 1997, it was awarded the Trinity Cross, the nation's highest award, for its work with the steelpan and steelbands.

35. Pan Trinbago's aims and objectives are outlined by section 3(a) and 3(b) of the Pan Trinbago Act which are to promote the development of the steelband movement and the steelpan as an indigenous cultural art form. Other relevant objectives as set out in the Pan Trinbago Act include presenting, managing, conducting, arranging and organising concerts, competitions, festivals of music and tours, to advance and protect the welfare and interest of its members and to encourage and to conduct research programmes on the steelpan. As a body corporate, it has

⁹ Trinidad and Tobago Guardian Newspaper "Culture bodies have to make do for 2017", 14th October 2016, Exhibit "K.D.S.1".

¹⁰ The steelband orchestra comprises of different types of pan instruments such as tenor pan, guitar pans, bass pans. There are placed in different sections of the orchestra. Each pan/section will contain their own pitch/harmony. www.steelpan-steeldrums-information.com

the power to purchase or acquire land, accept subventions or donations, construct national headquarters and to apply for patents.

36. Its constitution further elaborates on the importance of this body: to act as the representative of member steelbands, promote steelband music in every way it deems fit and to preserve the steelpan as an indigenous musical art form.

37. It is also recognized as the World Governing Body for Pan and as the national representative body for the steelpan and steelbands within Trinidad and Tobago. Its operations are managed by its Central Executive.¹¹

38. Pan Trinbago's current membership comprises approximately three hundred (300) steelbands. Since its incorporation in 1986, it has caused and facilitated¹²:

(i) The incorporation of Trinidad and Tobago Pan Instruments Limited (TTPIL) as a subsidiary of Pan Trinbago on 5th July 2010 which is a steelpan factory which manufactures and assembles steelbands;

(ii) The incorporation of Pan Trinbago Investments Corporation Limited (Panvesco) on 10th September 1991 (which was continued on 14th April 1998) as a wholly owned subsidiary of Pan Trinbago which as guarantor for Pan Trinbago in respect of loans and/or debentures and is the investment arm of Pan Trinbago. Panvesco is also responsible for collecting the proceeds of ticket sales for all Panorama events hosted by Pan Trinbago.

(iii) A three year contract (2014-2017) with the Caribbean New Media Group (CNMG) to boost their programming content and viewership by permitting CNMG to be the principal media broadcaster for Pan Trinbago's events.

¹¹ This Central Executive presently comprises of:

- (i) Keith Diaz- President
- (ii) Richard Forteau- Secretary
- (iii) Michael Joseph- Public Relations Officer
- (iv) Darren Sheppard-External Relations Officer
- (v) Andrew Salvador- Treasurer
- (vi) Allan Augustus- Trustee
- (vii) Trevor Reid- Trustee

¹² Paragraph 14 of the Affidavit of Michael Joseph filed on 7th February 2017.

- (iv) An agreement with the National Lotteries Control Board (NLCB) to obtain sponsorship for Pan Trinbago's events.
- (v) Annual events including (but not limited to) Panorama, Pan Champs in Concert, Pan Jazz and Pan in the Countryside.
- (vi) Smaller and less popular steelbands to be provided with financial assistance for them to promote the art form in villages and small communities nationally.

The NCC

- 39. The creation of the NCC was the State's attempt to regulate Carnival, to harness its shapeless powerful energy.
- 40. In 1991, NCC was established as the overarching body corporate to oversee Carnival under the provisions of the NCC Act. In piloting the Bill the Ministry of Culture set the framework for the Bill in Parliament:

“This is the recognition of the national cultural value of the almost universal nationwide artistic talent and disposition in all our people that is a vision, a work ethic and creativity and a devotion to work which, if organized properly, managed and harnessed can form the base of a very solid and reliable “industrial revolution” which would be capable of making our country into a new productive society, based on a viable, progressive and productive work ethic which slavery and the plantation system have discouraged in our people.

The love of work, Mr. Speaker, and the application and exploitation of the creativity endemic in the talents of our people have an enormous potential for economic, social and, of course, political advance and progress in what we call our global village of today. This bill before this House recognizes in the annual carnival exercise, this potential for infinite creativity, this pursuit of achievement, this joy of invention, of innovativeness.

The need to have this potential and human energy organized and harnessed to the national development plan which we have been designing since the inception of this present Government, is implicit in the spirit and intention of the bill before this House today. The speed with which carnival and calypso, particularly Trinidad style, has spread through

migrant nationals to the United Kingdom, Canada, the United States of America and the Caribbean, is a major factor in the decision by this Government to take steps to set up efficient machinery by which our carnival can be converted into a functional machinery for generating hard currency revenue at the present time before the outer world produces, what we would like to call in the carnival community, an imitation Carnival and Calypso festival.”¹³

41. The objects of the NCC set out in section 4 of the NCC Act are as follows:

- (a) To make Carnival a viable national, cultural and commercial enterprise;
- (b) To provide the necessary managerial and organisational infrastructure for the efficient and effective presentation and marketing of the cultural products of Carnival; and
- (c) To establish arrangements for ongoing research, the preservation and permanent display of the annual accumulation of Carnival products created each year by the craftsmen, musicians, composers and designers of Carnival.

42. Section 5 of the NCC Act provided that the NCC shall be managed by a Board of Commissioners “which shall consist of nine persons who have demonstrated an interest in the cultural or commercial aspects of Carnival and with experience or training in finance, management, government, international trade, law, export-oriented business, commerce, culture or the arts, appointed by instrument in writing by the Minister.” Of those persons there is one representative of each of the SIGs.

43. The NCC’s functions performed pursuant to section 9 of the NCC Act are as follows:

- (a) The regulation, co-ordination or conduct of all Carnival activities throughout the country held under the aegis of the Government;
- (b) The development, maintenance and review of rules, regulations and procedures for the conduct of Carnival festivities throughout the country;

¹³ The House of Representatives, 8th February 1991.

- (c) The identification, evaluation and promotion of all Carnival-related industries with a view to the enhancing and marketing of their cultural products and services; and
- (d) The development and implementation of a marketing strategy for Carnival with a view to optimising the revenue-earning potential of the festival and its contribution to the national economy, considering—
 - i. the unexplored potential of Carnival;
 - ii. the possibility of marketing of Carnival products and activities in domestic and export markets;
 - iii. the contribution by the private sector to the funding of specific aspects of Carnival; and
 - iv. The establishment of closer promotional links between the tourist industry and the Carnival industry.

44. Prior to Carnival 1998, all major Carnival events including the Panorama Competitions were run by NCC through committees and sub-committees established by the NCC. This included the printing and sale of tickets for the various events and the collection and retention of the proceeds of such sale. Furthermore, the ultimate control, responsibility and accountability for public funds provided by the government for the funding of Carnival resided with the NCC's Board of Commissioners.¹⁴ The NCC remained largely responsible for the construction, maintenance, operation and management (including the provision of sound and lighting facilities) for the various events of all Carnival venues including the Queens Park Savannah, Skinners Park and various locations within San Fernando and Port of Spain.

Other Groups

45. Later on, other organisations were formed to represent Kaiso and Mas after the establishment of the NCC in 1998 and 2007 which were Trinbago Unified Calypsonians' Organisation (TUCO) in the Trinbago Unified Calypsonians' Organisation (Incorporation) Act No. 33 of

¹⁴ Paragraph 7 of the affidavit of Kenneth De Silva filed on 25th April 2017.

1998 and The National Carnival Bands Association (NCBA) in the National Carnival Band Association Act No. 27 of 2007.

46. These three elements, Kaiso, Mas and Pan were to be harnessed by NCC to work in unison under its umbrella for a more efficient product of Carnival. The synergies between these associations and NCC is clearly demonstrated by the composition of the NCC board with the representatives of these bodies having an automatic appointment to the NCC board.
47. These main players are the operative components to host a festival consisting days and many weeks of competitions. Having regard to the significance of the Carnival product and the Government's support of it, frequent demands are made for funding and controversy erupted in this case with the demand for those funds.

The first notes

48. The controversy in this case has its origins with the government becoming involved in settling a policy for Carnival in 1997 through a Cabinet Sub-Committee. In 1997 the sub-committee met with Pan Trinbago, NCBA and TUCO to identify the problems associated with the production of Carnival and to make recommendations for its improvements from 1998.¹⁵
49. **The 1997 Cabinet Policy:** By a Cabinet Minute of 1997 Cabinet agreed that in order to “improve Carnival in Trinidad and Tobago in 1998 and beyond, each Carnival Body/Organisation be administratively responsible for its own area of production of Carnival.” The Cabinet Minute outlined the role and responsibilities of the NCC, NCBA, TUCO and Pan Trinbago as follows:

Role of the National Carnival Commission

- Facilitator in relation to accommodation, stage, lighting and general security
- Research
- Auditing and Accounting
- Marketing (international) and Public Relations
- Monitoring subventions

¹⁵ Paragraph 8 of the affidavit of Kenneth De Silva filed on 25th April 2017.

- Co-ordinator of all activities

Responsibility for:

- Responsibility for joint activities
- Responsibility for regional carnival organization and funding
- Income generation with regard to year round activities
- Complementary role to carnival bodies (to act in a supplementary role if and when necessary)
- Co-ordination of accreditation, concessionaires, sponsorships, copyrights, donations.

Role of the National Carnival Bands Association

- Street parades in Port of Spain and environs on Carnival Monday and Tuesday, the parade route to be extended to the environs of the Savannah
- Junior Carnival
- Kings and Queens shows- preliminaries, semi-finals and finals
- Traditional Carnival shows
- Pre-Carnival Mas shows
- The production of Pre-Carnival packages
- Judging of parade of bands, the judging of each band to be on one day only, the day to be determined by the drawing of lots.
- Participating in decision concerning accreditation, sponsorship, copyrights, donations.
- Marketing (local)
- Ticket sales for related activities.

Role of the Trinbago Unified Calypsonians Organization

- All Calypso competitions with the exception of Soca Monarch
- All Junior Calypso shows
- Judging of Calypso competitions
- Participating in activities concerning accreditation, sponsorship, copyrights, donations.
- Marketing (local)
- Ticket sales for related activities.

Role of Pan Trinbago

- All Panorama Activities
- School Panorama
- Judging of Steelband competitions
- Participating in activities concerning accreditation, sponsorship, copyrights, donations
- Marketing (local)
- Ticket sales for related activities

50. We are not told in this dispute what was the genesis for the establishment of the Cabinet subcommittee but it is evident that six (6) years after the incorporation of NCC, the umbrella group responsible for Carnival, it was necessary for the State to set boundaries for the operations of each of the stakeholders and the oversight body and later to fill a lacuna in the NCC Act by practice. It also made provision of a fund of the sum of \$11.3million to be considered for the production of Carnival 1998.¹⁶

51. Cabinet at that time had laid down what they thought necessary as the parameters of NCC and the SIGs for the proper functioning of the cultural product of Carnival despite the provisions of the NCC Act setting out the responsibility of NCC as a co-ordinator of Carnival activities. The clear mandate of operations for each SIG for Carnival was a road map and template to secure the future of pan, mas and kaiso in Carnival.

52. From this Cabinet note however, it was not expressly stated that the SIGs would receive the proceeds of ticket sales. It simply said “ticket sales for related activities”. Conceivably, that could have meant that the SIGs would issue tickets and sell them and the proceeds of sales would be to the credit of NCC. Indeed, the Cabinet note also states that NCC would be

¹⁶ The role of the Cabinet is significant because by virtue of section 75 of the Constitution of Trinidad and Tobago Chap. 1:01 the Cabinet has the authority to make decisions in respect of policy for the government. Section 75 of the Constitution provides as follows:

- “(1) There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefore to Parliament.
- (2) The Cabinet shall consist of the Prime Minister and such number of other Ministers (of whom one shall be the Attorney General), appointed in accordance with the provisions of section 76 as the Prime Minister may consider appropriate.”

responsible for “income generation” throughout the year. However, this is not what any of the parties understood “ticket sales” to mean. It was understood by them all as each SIG being responsible for their area of “expertise” and enjoying the benefit of the revenue. In the case of Pan Trinbago they will be responsible for pan and the ticket sales and receive the revenue from those sales. The parties agree that since that time to 2016 it was a settled practice for the ticket sales for Panorama to be conducted in that manner by Pan Trinbago without demur.

53. It would be appropriate at this stage to deal with another aspect of the State’s direct involvement in Carnival and pan. To this extent, over the years annual subventions are made available to the different SIGs for the Carnival and pan events.
54. Prior to the establishment of the NCC in 1991, the Government subsidised Panorama and pan events by direct payments of subventions with the only condition that Pan Trinbago will account to the State for the use of those funds. Mr. Michael Joseph, the Public Relations Officer (PRO) for Pan Trinbago explained that as early as 1984 by letter dated 15th February 1984 Cabinet had agreed to grant an annual subvention to Pan Trinbago. This comprised the payment of 1/3 of the cost of salaries and costs of productions accepted by the Ministry assigned responsibility for steel band matters to an approved maximum figure. One condition was that Pan Trinbago has to produce audited annual statements of accounts for the preceding year before the release of funds.
55. That was the model preceding the NCC. Subsequent to the formation of NCC, Pan Trinbago had to account to NCC. The State has provided NCC with varying levels of funding each year to assist in the production of Carnival. This, of course, like any other state agency is done after consultation with the Line Minister and the approval by the Executive upon the submission by NCC. The amount of funding requested each year is assessed on the NCC’s estimated expenditure for the upcoming year and the estimated expenditure of the SIGs for the production of the various upcoming Carnival events under their respective purviews. To make an accurate assessment of funding required by Government, NCC required each stakeholder to orient their budget identifying expenditure for the production of various Carnival events. Once approved, the budget is included in NCC’s own estimated expenditure and submitted to the Ministry.

56. After getting its budget approved, NCC then enters into negotiations with each SIG for funding of the Carnival events. For the last five years, from 2012 to 2017, Pan Trinbago through this system received a total of \$182 million from NCC.
57. Almost 20 years later in 2016, the State would have cause to revisit its earlier decision on the sale of tickets. It came against the backdrop of austerity measures with the decline in our economy.
58. 2016 austerity measures: In 2016, after the presentation of the National Budget, NCC noted that government financing for NCC in Carnival 2017 was substantially reduced. This caused considerable disquiet from stakeholders and various threats to boycott the Carnival. In the Guardian's article "*Culture Bodies have to 'make do' for Carnival 2017*"¹⁷, the following was reported:

"With reference to next year's Carnival, the minister continued: "The allocation to the National Carnival Commission (NCC) has been reduced as the NCC no longer has a loan, which was a substantial amount to the allocation made in the 2015-2016 budget.

An area of concern within the steelband fraternity for the past few months has been the non-payment of money by Pan Trinbago to pan musicians for performing at the 2016 National Panorama competition. The minister explained: "Pan Trinbago receives a sum of money from the NCC to manage Panorama. With regards to their internal affairs and finances, how they pay out money is strictly to the remit of Pan Trinbago. Pan Trinbago has to organise its finances based on the 2016-2017 subvention from the NCC and that has not been decided as yet. We intend doing that pretty early to ensure that they can then consider how they will service their outstanding debts and the arrangements they will make for Carnival 2017. I have been in constant communication with Pan Trinbago sensitising them to the fact that their allocation will most likely be reduced in keeping with the general reduction of expenditure that the government has embarked upon."

David Lopez, chairman of the National Carnival Bands Association (NCBA), is concerned that no significant mention was made in the budget regarding culture and its myriad components.... "With respect to carnival and what is expected I have always said the money that is divested to the NCC for carnival does not redound to the benefit of the

¹⁷ Exhibit "K.D.S.1" of the affidavit of Kenneth De Silva filed on 25th April 2017.

producers of the carnival. The people who benefit are the service providers; the people who provide the stages, tents, sanitation amenities, lighting and sound, and all the hospitalities pertaining to food and drink. In terms of the money that is allocated, the government continues to say we have to tighten our belts and come up with creative ways of generating revenue. If we look at the money that goes into carnival in recent budgets, of \$344M that goes to the NCC to run the carnival, out of that the three interest groups that have the responsibility of producing carnival just get about \$75M in all. In terms of money allocated to culture from this recent budget, which has not been mentioned, the minister indicated under the transfer of subsidies to statutory bodies might indicate exactly how much will be given to the NCC...”

Keith Diaz, president of Pan Trinbago Inc, said on Tuesday: “I wish to state very clearly that the economic situation in the country is faced by all Trinbagonians; all of us. In the pan movement we will try and work with whatever allocation is given to us by government for the 2017 National Panorama competition.

“We would also like to state in other areas we will like to have continued dialogue with government in plans that Pan Trinbago has to carry the movement forward. We are a part of this nation and we would like to be heard as I think that we also have valuable suggestions that will redound beneficial to the entire national community. The pan factory is one of the projects that we know can boost business in our beloved country, creating employment for many....”

Lutalo Masimba (Bro Resistance), head of Trinbago Unified Calypsonians Organisation (TUCO) said last Monday: “Tuco is accustomed to cuts. We received cuts in our subvention for the past few years, so if we get cut for 2017 you can’t get blood. What we are very concerned about though is the framework with which we operate. We are concerned about the long overdue acquisition of 50 per cent of local content on the national airwaves; have been lobbying for our broadcast license since 1999 and we have a serious concern about the scarcity of performance spaces nationwide. These things are more critical than cuts in a budget and allocations for carnival. Overall, Tuco finds it extremely sad that on one hand the government is talking diversification to boost the nation’s GDP and the development of the creative industries and on the other is cutting the funding. This will stifle the economic activity of the creative arts, and carnival in particular.”

59. There were also allegations about Pan Trinbago's poor financial state and of their own members claiming unpaid monies for the Panorama 2016.
60. Upon reviewing Pan Trinbago's unconsolidated audited financial statement as of 30th June 2016, NCC noted Pan Trinbago's had an accumulated deficit of \$10,485,585.00 as at 30th June 2016 and also that their liabilities had exceeded their current assets and investments. Thereafter, a meeting was held between Pan Trinbago and NCC on 28th October 2016 where NCC advised Pan Trinbago that it would be disbursing payments from Pan Trinbago's 2017 budgetary allocation directly to the final recipients due to the state of Pan Trinbago's finances.
61. Subsequent to the meeting, Pan Trinbago furnished NCC with a document dated 1st November 2016 which indicated that Pan Trinbago would boycott the Panorama competition if the government did not allocate \$30million to Pan Trinbago for Panorama.
62. The Line Minister of Community Development, Culture and Arts met with the NCC chairman on 5th December 2016 and outlined her concerns over about the publication in the electronic media about the financial conditions and management of the SIGs. Mr. De Silva was informed by the Minister that NCC should "exercise greater financial prudence and implement more stringent controls over Carnival related expenditure in the circumstances of the worsening economic conditions."
63. In a letter of 8th December 2016 the Minister wrote to the NCC setting out the following recommendations:

“Recommendations for Carnival 2017

- a) Each special-interest group be asked to submit its 2017 Carnival administrative cost for discussions with the NCC;
- b) The NCC use agreed upon schedule to pay approved Carnival Administrative costs for each special-interest group on the Board;
- c) While the Groups plan and execute the events of Carnival according to an NCC approved format and budget, the suppliers and price-winners be paid directly by the NCC;
- d) The NCC control the sale of tickets at national events;

- e) The NCC devise a method of making funding available from the proceeds of Carnival for the developmental agenda of the special interest groups and submit same for discussion with the ministry.

These recommendations are forwarded for your attention.”

- 64. Of course the NCC is itself an autonomous body which must exercise its own discretion in the manner in which it will run and organise Carnival. To the extent that the Minister makes recommendations, it is not a fait accompli that the commissioners will all agree with the State’s recommendation or implement it. It is just a suggestion by the State to an independent body comprising various stakeholders of Carnival. Intrinsic in that set up must be the understanding that the shape and regulation of Carnival could only be achieved through the co-operation of the constituent arms of pan, band and kaiso.
- 65. However, it was clear that the State was intent on making the different stakeholders self-sufficient and non-reliant on state sponsorship. By NCC controlling sales of tickets it presumably went hand in hand with devising a method of making funding available from the proceeds of those tickets for the development agenda of the SIGs. It is conceivable from those two latter objectives that the sales of tickets and developing the products of each of the respective stakeholder went hand in hand. Although this was not made altogether clear in this case.
- 66. It was the manner in which NCC went about the task of changing the policy that existed with regard to the sale of tickets for Panorama that has led to this controversy.
- 67. I shall by way of continuing to “set the stage” examine briefly the background to the decisions which are being challenged. It will be necessary for me to examine it in further detail later in this judgment in my discussion of the legal issues of legitimate expectations, unlawful purpose and consultations as raised by the parties.

Setting the stage –the discussions

- 68. By letter dated the 1st December 2016, Pan Trinbago provided NCC with its proposed budget for Panorama 2017 in the sum of \$24,792,000.00 which took into account its expected revenues of \$3 million from ticket sales under the expectation that the 1997 Cabinet policy would continue.

69. Upon the requested clarification by NCC of Pan Trinbago's intention to maximise revenues from the ticket sales for Panorama 2017, Pan Trinbago by letter dated 13th December 2016 indicated that all ticket sales and collections for Panorama 2017 was being handled by Panvesco, a wholly owned subsidiary of Pan Trinbago.
70. By letter dated 7th January 2017, Pan Trinbago provided NCC with additional information relating to Pan Trinbago's expenditure for Panorama 2017.
71. On 10th January 2017 Pan Trinbago had notice of the Minister's recommendation when Pan Trinbago received a letter from NCC requesting an urgent meeting to discuss the Minister's proposal.
72. On 13th January 2017, NCC proposed that the parties execute a management contract. By virtue of this contract, Pan Trinbago was to receive a management fee for hosting Panorama 2017 and NCC was to be responsible for all ticketing arrangements and receive all the proceeds of the ticket sales. On the evening of the same day, Pan Trinbago issued a counter proposal stating that Pan Trinbago was prepared to execute a management contract with NCC but Panvesco would manage the ticketing arrangements and receive the proceeds of sale tickets from Panorama 2017.
73. On 19th January 2017, Panvesco wrote to NCC informing them that they were 'customarily' in charge of managing the sales of Panorama tickets and were engaged with Pan Trinbago for Panorama 2017 as well. Panvesco further informed them that Pan Trinbago was indebted to Panvesco in the sum of \$2,478,076.34.
74. On 23rd January 2017, Pan Trinbago submitted a revised budget estimate for Panorama 2017 in the sum of \$27,209,798.00. NCC realized that Pan Trinbago would exceed its budgetary allocation for Carnival 2017 and took the decision to control the sale of tickets and collect the revenue from such sale for the following reasons:
- a) Pan Trinbago's audited unconsolidated financials as at 30th June 2016 clearly disclosed that Pan Trinbago was insolvent with potential liabilities exceeding its assets by approximately \$24,000,000.00;
 - b) In light of this insolvency there was the potential that any monies from Pan Trinbago's budgetary allocation paid directly to Pan Trinbago or the revenue

received by Pan Trinbago from ticket sale would be subject to claims from Pan Trinbago's creditors;

- c) The Line Minister's recommendations set out in the letter of 8th December 2016 and their consideration of Pan Trinbago's counterproposals thereto;
- d) In light of Pan Trinbago's insolvency and the confirmation that Pan Trinbago was indebted to Panvesco, any monies from Pan Trinbago's budgetary allocation paid directly to Pan Trinbago or the revenue received by Pan Trinbago from ticket sale would potentially be subject to a claim from Panvesco;
- e) The concern that Pan Trinbago had mismanaged a substantial sum paid to it in relation to Carnival 2016 for the payment of player remittances but which were clearly not used for those purposes;
- f) By taking control of ticket sales, the NCC would be better able to control the disbursement of funds related to Carnival and ensure tighter control over spending;
- g) The economically unrealistic fee of \$3,462,750.00 that Pan Trinbago demanded in the unsolicited proposed management agreement and the infeasible terms thereof; and
- h) A consideration of the objects, functions and obligations of the NCC under the Act.

75. By email dated 23rd January 2017, NCC's corporate secretary informed Panvesco's secretary that Pan Trinbago had instructed the National Lotteries Control Board (NLCB) to sell Panorama tickets.

76. Up to this point there is no formal correspondence from NCC to Pan Trinbago clearly setting out NCC's intention to assume responsibility for ticket sales for Panorama. This was only made expressly clear by letter dated 24th January where NCC indicated to Pan Trinbago that it will manage all the ticket sales and related activities with respect to Panorama 2017 and Pan Trinbago was directed to "cease and from purporting to the public any jurisdiction over these matters." At point 7 of the letter, NCC stated:

"As you are aware, the NCC has long ago indicated its intention of managing ticket sales and all related activities with respect to Panorama 2017. The latter will include the issuing of Complimentary passes, Performers and Workers Badges, Gate Control and

Accreditation. You are therefore invited to submit required names and lists by February 1st, 2017. Accordingly, you are hereby advised to cease and desist from purporting to the public any jurisdiction over these matters, including co-mingling of audiences between the North Stand and a fictive Greens.”

77. By the letter dated 25th January 2017 NCC stated that “it will be responsible for the printing, marketing, advertising, distribution and collection of revenue” for the finals and semi-finals of Panorama 2017. The letter was as follows:

“National Panorama 2017 Responsibilities

We are confirming our earlier discussions that the National Carnival Commission (NCC) will be responsible for the printing, marketing, advertising, distribution and collection of revenue for the following steelband shows:

- National Panorama Semi- Finals (Small, Medium, Large) Sunday February 12th 2017
- National Panorama Finals (Medium, Large) Saturday February 25th 2017.

Pan Trinbago will be responsible for the following:

- National Panorama Finals: Single Pan Sunday January 29th 2017
- National Panorama Finals: Small Bands Thursday February 23rd 2017.

Pan Trinbago will also be responsible for all other steelband shows in connection with Carnival 2017.

Please be guided accordingly.”

78. On the same day, Pan Trinbago informed NCC that it had not issued any instructions to NLCB with respect to the sales of tickets and further that NCC was not respecting Pan Trinbago’s arrangement with Panvesco that Panvesco would collect the revenue on Pan Trinbago’s behalf. In the letter Pan Trinbago further stated:

“Paragraph 7- The discussion has always been gate receipts, which Pan Trinbago has agreed in principle, subject to the execution of a management contract. Without the execution of such a document, Pan Trinbago is unable to accede to the NCC’s demand.”

79. By letter dated 26th January 2017 Pan Trinbago replied to NCC's letter of 24th January 2017 and repeated its counterproposal. A further letter was issued the same day again repeating its counterproposal.
80. NCC thereafter requested Pan Trinbago to submit information on all of its bank accounts so that NCC can consider any further support to Pan Trinbago.
81. On 2nd February 2017, Pan Trinbago sent its pre-action protocol letter to NCC.
82. NCC has explained in Mr. Kenneth De Silva's affidavit that by letter dated 23rd January 2017, Pan Trinbago submitted a revised budget estimate for Panorama 2017 in the sum of \$27,209,798.00. It became clear to NCC that Pan Trinbago would exceed its budgetary allocation for Carnival 2017 so it took the decision, as was recommended by the Minister, to control the sale of tickets and the collection of revenue from sale at the Panorama events.
83. NCC further contended that Pan Trinbago exceeded its budget for Carnival 2017 by almost \$4 million dollars but Pan Trinbago contends that it is premature for NCC to state that it exceeded its budget by \$4 million dollars.

Post Carnival 2017

84. After Carnival, NCC accounted to Pan Trinbago for the sale of the tickets. It had retained the NLCB as its agent to manage the Panorama 2017 ticket sales and a management fee of \$75,560.00 was paid to NLCB together with an additional \$60,532.50 for the printing of tickets and implementing supervisory provision for their sale. This simply underscores the point in my view that NCC had clearly lost faith in Pan Trinbago's ability to handle the ticket sales and management of same but equally NCC of its own could not discharge this function and needed an agent to do so. NCC therefore would have expended a total of approximately \$135,000.00 to carry out the task which was previously conducted by Pan Trinbago through its subsidiary Panvesco.
85. The revenue generated from the tickets sold by the NLCB for the Panorama Semi Finals was \$941,400.00 and the revenues generated by NLCB for Panorama finals was \$709,800.00. For Panorama semi-finals the management fee payable was \$40,070.00 and for Panorama finals, the fee was \$35,490.00. The sum of \$60,532.50 was also incurred for printing tickets and implementing the provisions for the sale of the tickets. Tickets sold by NCC for Panorama

Semi Finals and Panorama Finals generated the revenue of \$1,232,700.00 and \$305,350.00 respectively. Therefore, the total revenue for each event without deductions were \$2,174,100.00 for Panorama semi-finals and \$1,015,150.00 for Panorama finals.

86. With regard to the sales of tickets on credit, the additional revenue generated from those sales was \$13,650.00. The revenue that would have been generated from the complimentary tickets would have been a staggering \$198,100.00 for Panorama semi- finals and \$248,500.00 for Panorama finals.

87. The total for the Panorama ticket sales for Semi Finals and Finals was therefore approximately \$3,189,250.00. Importantly from the evidence, the Panorama event for 2017 was not a financial success. Its gate receipts were significantly less than the previous five years and less than the anticipated amount which Pan Trinbago submitted in its 2016 estimates.

88. Subsequent to the end of the Panorama and Carnival celebrations, NCC wrote to Pan Trinbago on 14th March 2017 enquiring about a list of the players for whom cheques were to be prepared for stipends. Pan Trinbago, however denied that \$500.00 stipends were to be paid to the players and the list was not submitted. On 23rd March 2017, NCC again wrote to Pan Trinbago for the list of players and further indicated that Pan Trinbago had itself identified the \$500.00 stipends since 2016 and NCC had accordingly budgeted only for that figure. By letter dated 4th April 2017, Pan Trinbago responded that at a meeting on 31st January 2017, Mr. De Silva promised to obtain the line Minister's permission to go to the Prime Minister for \$10 million which would "take care of the \$1,000.00 per pannist as well as other matters." NCC denied that they ever proposed that they would depart from the \$500.00 stipend.

The Grounds of Review

89. These decisions to revert to the pre-1998 practice where Pan Trinbago did not control gate receipts is being challenged as ultra vires, illegal, procedurally improper and/or unreasonable. They are seeking an order of certiorari quashing the decision and declaratory relief.

90. The grounds of review can be briefly set out as follows:

- a) NCC did not have the authority in law to change the Cabinet Policy of 1997 because only Cabinet could have changed the Cabinet Policy of 1997. As such, NCC has a duty

to implement the 1997 Cabinet policy and has acted ultra vires and contrary to section 75 of the Constitution Chap 1:01 in purporting to change the 1997 Cabinet policy.

b) NCC in making the “impugned” decision:

- (i) Acted illegally in that it acted ultra vires the law and in particular, section 75 of the Constitution Chap 1:01 in that it purported to change a Cabinet made policy when it had no lawful authority to do so contrary to section 5(3)(a) and (b) of the Judicial Review Act Chap 7:08;
- (ii) Failed to satisfy and observe conditions and/or procedures as required by law contrary to section 5(3)(c) of the Judicial Review Act;
- (iii) Acted in breach of the principles of natural justice and the principles of procedural fairness contrary to section 5(3)(d) and section 20 of the Judicial Review Act;
- (iv) Acted unreasonably, irregularly and/or improperly exercised its discretion contrary to section 5(3)(e) of the Judicial Review Act;
- (v) Acted with conspicuous unfairness contrary to section 5(3)(f) of the Judicial Review Act;
- (vi) Acted in conflict with the policy of an Act in purporting to change a Cabinet made policy contrary to section 5(3)(i) of the Judicial Review Act Chap 7:08;
- (vii) Acted in error of law contrary to section 5(3)(i) of the Judicial Review Act;
- (viii) Breached and/or failed to perform a duty contrary to section 5(3)(l) of the Judicial Review Act;
- (ix) Deprived Pan Trinbago of a legitimate expectation of a substantive benefit and/or alternatively of a procedural benefit contrary to section 5(3)(m) of the Judicial Review Act; and

(x) Exercised its power in a manner so unreasonable that no reasonable person could have so exercised the power contrary to section 5(3) (o) of the Judicial Review Act.

- c) They had a legitimate expectation of a procedural and/or substantive benefit that the 1997 Cabinet Policy which stated that Pan Trinbago would be responsible for ticket sales would continue.
- d) The “impugned” decision was implemented without NCC giving Pan Trinbago an opportunity to make representations.
- e) NCC did not consider the legitimate expectation of a substantive benefit in favour of Pan Trinbago pursuant to the 1997 Cabinet policy and as such NCC unlawfully frustrated Pan Trinbago’s legitimate expectation of a substantive benefit.

91. The application for leave was filed on the heels of, a mere five (5) days from, the Panorama semi-finals and sixteen (16) days from Panorama finals. In granting leave to apply for judicial review, the parties entered into a consent order in terms that the NCC will collect and retain the proceeds of the sales of tickets for the 2017 Panorama finals and semi-finals and account to Pan Trinbago for all ticket sales and management fees paid to ticket sales agents within twenty eight (28) days of the National Panorama Finals on the basis that if the Court finds that Pan Trinbago held an enforceable substantive legitimate expectation that the NCC will part the gross proceeds to Pan Trinbago within twenty eight (28) days of any order.

92. Most of the facts are not in dispute save for one critical area of consultation and the adequacy thereof, which was the subject of cross examination. The evidence in these proceedings consist of affidavits of Mr. Keith Diaz filed on 16th June 2017, Mr. Michael Joseph filed on 7th February 2017 and Mr. Kenneth De Silva filed on 25th April 2017. There was limited cross examination of the issues of the date on which Pan Trinbago received actual notice of the Minister’s recommendation dated 8th December 2016, when the Chairman of the NCC raised with the representatives of Pan Trinbago the issue of taking control of the ticket sales and whether there were discussions between Pan Trinbago and the NCC prior to 13th January 2017 with respect to NCC’s decision to collect and retain the proceeds of the ticket sales for the National Panorama events.

The Core Issues-The Engine Room

93. The core issues arising for determination are:

- (a) Whether Pan Trinbago enjoyed a legitimate expectation to the substantive benefit of the management /revenue from gate receipts for Panorama.
- (b) Whether this was a settled practice and policy since or by the Cabinet minute of 1997.
- (c) Whether NCC is entitled to so act contrary to the legitimate expectation on the basis that:
 - (i) The expectation was illegitimate, that is, the retention by Pan Trinbago of gate receipts constitutes an unlawful benefit.
 - (ii) That there are overriding public interest factors.
 - (iii)The interference of the legitimate expectation is proportionate and justified.
 - (iv)Certain macro-economic or macro-political issues have been engaged by NCC which places its exercise of its discretion in a zone of deference or non-reviewability or outside the scope of the Court's further scrutiny.
- (d) If there exist overriding public interest considerations in changing the settled practice, were the consultations engaged by the parties (if at all) adequate.

The Submissions-The Melody

94. I am grateful for the helpful submissions of Mr. Mendes SC, Mr. Dass, Mr. Maharaj SC and Mr. Bissessar and appreciate the efficient efforts of their instructing attorneys in quickly organising the filings and written submissions. I briefly summarise their main points.

95. Pan Trinbago submitted that:

- the NCC's conduct between 1998 and 2016 to treat with the gate receipts as forming part of Pan Trinbago's revenues to be used for Pan Trinbago's operational and administrative expenses constitutes a promise or representation which is clear, unambiguous and devoid of relevant qualifications. As such, they submitted that Pan Trinbago acted to its detriment by regulating its business in contemplation of receiving and retaining the proceeds of the ticket sales.

- Critically, Pan Trinbago underscored the respective roles of these parties. NCC as the facilitator of Carnival and the SIGs and Pan Trinbago as discharging its statutory role of promoting the development of the steelband movement and the steelpan as an indigenous cultural art form. Indeed, Panorama as a pan competition falls, strictly speaking, under the purview of the statutory objects of Pan Trinbago whereas the overall responsibility of Carnival was vested with NCC. This, therefore, underscores the importance of the Cabinet minute in clarifying the roles of the respective parties and their boundaries.
- NCC had no authority to change the 1997 Cabinet policy. It seeks to retain a procedural and substantive benefit to the control of the ticket arrangements for the Panorama events and its entitlement to retain the proceeds of all tickets. If the 1997 Cabinet policy was to be changed NCC had to act fairly and to have allowed Pan Trinbago to have an opportunity to make worthwhile representations and to show that NCC genuinely considered those representations before it could have made recommendations to Cabinet. See **Judicial Review Handbook by Michael Fordham QC and Paponette v The Attorney General of Trinidad and Tobago** [2010] UKPC 32.
- They further contend that the actions of NCC were not consistent with the principles of justice and fairness. See **Haynes Plumbing 1990 Limited v The Water and Sewerage Authority of Trinidad and Tobago** CV2011-03419. Their expectation is legitimate as disbursements were made directly to Pan Trinbago from NCC's allocation received from the government.
- Pan Trinbago submitted that there was no illegality on their part in collecting the gate receipts. There is no evidence that NCC has a statutory fund and so its expectation does not conflict with the statutory provision of section 18(2) (c) of the NCC Act.
- The gate receipts are not part of the NCC fund nor state funds. It is Pan Trinbago's monies. It was from these monies, they contend, that Pan Trinbago was "able to fund its administrative and operational expenses and fulfil its statutory objective to promote and develop steelbands and the steelpan as an indigenous cultural art form in schools

and in the villages and small communities in rural Trinidad and Tobago.”¹⁸ All that was required was for Pan Trinbago to account to NCC to demonstrate financial prudence to justify another subvention or allocation the following year.

- In any event NCC is estopped from relying on a technicality or procedural irregularity to frustrate the legitimate expectation of a substantive benefit.
- The discussions between Pan Trinbago and Mr. Kenneth De Silva were not consultations in law. They contend that those discussions subsequent to the Minister’s letter of 8th December 2016 were discussions between Pan Trinbago and NCC whereby NCC was exploring whether it should make an agreement for Panvesco to handle the ticket sales on its behalf. As such, since Panvesco was owned by Pan Trinbago, these discussions were not on whether Pan Trinbago would no longer have control of the ticket sales.
- The consultations were not adequate in law for the following reasons¹⁹:
 - a) There was no consultation by NCC in respect of whether NCC should replace Pan Trinbago in its control of the sale of tickets for Panorama and to instead retain and use the proceeds of the ticket sales. There were discussions between the parties in respect of different proposals in respect of proposed management agreements. They did not amount to consultation for the purposes of public law.
 - b) There was no consultation by the Cabinet or on behalf of the Cabinet at the formative stages of the proposed new policy contained in the impugned decision. There is no evidence even that the Minister in making the recommendations were making the recommendations on behalf of the Cabinet. On the 8th December 2016 the Minister by letter to NCC made a recommendation that the NCC should take control of the selling of tickets. The Cabinet or the Minister did not hold any consultation with Pan Trinbago and Pan Trinbago was not given the opportunity for consultation in respect of the decision made by the Minister to make the recommendations to NCC.

¹⁸ Paragraph 29 of the Affidavit of Michael Joseph filed 7th February 2017.

¹⁹ Paragraph 14 of the Claimant’s Second Supplemental Written Submissions filed on 5th December 2017.

c) NCC on 10th January 2017 sent the Minister's letter to Pan Trinbago and informed Pan Trinbago of the recommendations. Its position to Pan Trinbago was that it was considering giving effect to the recommendation. In the discussions NCC subsequently had with Pan Trinbago, those were not discussions by NCC to take over the control of the management, administration and operation of the ticket sales but they were directed instead to a proposal of a Management Plan with Panvesco. It was on that basis the discussions were held. These discussions cannot constitute consultation for the change of the 1997 Cabinet policy and for NCC instead to take control of the sale of the tickets.

96. NCC submitted principally that (a) the expectation that Pan Trinbago contends is in essence for more state funding (b) it cannot be a legitimate expectation to receive these funds as it in fact constitutes earnings to be returned to the NCC fund (c) in any event, if the expectation is legitimate, there are significant overriding public interest factors to justify a departure from the policy based on the economic downturn, the instructions of the Minister, the parlous state of Pan Trinbago's accounts and the continuous financial difficulties with which NCC had to deal with directly to Pan Trinbago members (d) further the consultations engaged between Mr. Kenneth De Silva and Pan Trinbago were adequate to treat with the matter fairly in all the circumstances of the pending Panorama competitions.

Analysis- The Ramajay²⁰

97. This case has shown up a tension between the respective responsibilities and operations of NCC and of SIGs in Carnival. Financial and managerial prudence are matters which both entities should take seriously. The Government has sounded the problems of a shrinking economy in its reading of the last budget in 2016 and this must send a signal to both NCC and Pan Trinbago that it cannot be business as usual. NCC's main argument in this case of the illegitimacy of Pan Trinbago's expectation to Panorama gate receipts and revenues is met by the force of logic of a direct interest by a SIG in the revenues earned from its own event.

²⁰ Ramajay is a folk word which is used loosely to mean "let go" or "break away." In a steelband performance, Ramajay can be used to refer to the moment during a steelband performance when an individual member of the steelband explores their instrument and displays their musicianship by "breaking away" in a 'solo performance' of their steelpan. See Ramajay – www.mypanyard.co.uk

98. Stepping back and taking a “panoramic” view of the dispute, both parties are right. It is reasonable and permissible for either party to lay claim to the gate receipts or revenue. Either the NCC as the overall manager of Carnival or Pan Trinbago as the manager of pan. I stress this point for four reasons. First there is an obvious zone of co-operation that must be engaged by both parties to produce the Panorama product which the NCC Act left open for the parties. Second, this judgment would determine the legitimacy of altering a settled practice based on the 1997 Cabinet policy which gave rise to Pan Trinbago’s control of revenue for Panorama. Third, it underscores how important predictability and reliability is in administrative decision making. Fourth, it makes the point of the important intrusive nature of the doctrine of legitimate expectations, that regardless of the right of the administrator to pursue a course of action, within its statutory remit, the power to do so must give way to the legitimate expectation created by their own promises. Only when such refusal to comply with such promises is objectively justifiable as a proportionate measure in the circumstances would the administrator be permitted to defeat any such expectations. The fundamental principle underlying this is one of fairness and its counterpoint, the abuse of power, when the decision maker acts unfairly. Fairness is the hallmark of good administration.

99. Laws LJ in **R (Nadarajah) v Secretary of State for the Home Department** [2005] EWCA Civ 1363 put it this way at paragraph 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... I would prefer to express it rather more broadly as a requirement of good administration.”

100. It is clear in my view that in the absence of clear legislative boundaries or an agreement between the parties, clearly articulated policies and settled practices in relation to the treatment of ticket sales and its revenue will assume huge significance for both parties.

101. There really is no dispute in this case that there was a settled practice for Pan Trinbago to control the ticket sales and retain the gate receipts for the Panorama product at Carnivals 1998 to 2016 for almost a twenty (20) year period. This is significant for many economic, cultural and social reasons. I have earlier set out the respective roles of the parties in this dispute and

the significance of their different roles historically and practically for the organisation of our Carnival.

102. It is significant that such a settled practice emerged from the boundary setting exercise by the State in the 1997 Cabinet policy for the more efficient coordination of Carnival amongst the relevant SIGs with the overall manager of Carnival, the NCC. At the risk of oversimplification, the touchstone of liability in this judicial review action and indeed the principle that should guide the conduct of both parties is the Court's keen sense to preserve administrative fairness. Certainty and predictability of administrative action is a valuable organising principle for both parties. "A basic tenet of the rule of law is that people ought to be able to plan their lives secure in the knowledge of the legal consequences of their actions" **Paul Craig Substantive Legitimate Expectation in Domestic and Community Law July 1996 CLJ 304**. Schonberg expressed it this way "The legal protection of expectation by administrative law principles is a way of giving expression to the requirement of predictability, formal equality and constancy inherent in the rule of law" **Legitimate Expectation in Administrative Law, Schonberg**. Certainly in this case predictability is a central guiding factor in the organisation of one's affairs and establishes the case for the inherent unfairness in a breach of legitimate expectations.

103. Furthermore legitimate expectation fosters trust in government. Schonberg observed:

"Administrative power is more likely to be perceived as legitimate authority if exercised in a way in which respects legitimate expectations. Perceived legitimate authority is more efficacious because it encourages individuals to participate in decision making processes to co-operate with administrative initiatives and to comply with administrative regulations."

Legitimate expectations

104. Legitimate expectations has achieved an important place in developing the law of administrative fairness. It is an expectation which is founded on the reasonable assumptions which is capable of being protected in public law. It enables the citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be

dealt with in a particular way²¹. Regardless whether it is a procedural or substantive benefit, the law will require the promise to be honoured unless there are good reasons to depart from it and to do so fairly.

105. In **Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct by Richard Moules (2009)** the learned author noted at paragraph 47:

“Perhaps more conveniently the concept of legitimate expectation is used to refer to the Claimant’s interest in some ultimate benefit which he hopes to retain (or, some would argue, attain.) Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation.

In other words the expectation arises not because the Claimant asserts a specific right to the benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness.

The law recognises that the interest cannot be properly withdrawn (or denied) without the Claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

106. It is that underlying interest which the law seeks to preserve in the development of the law of legitimate expectations. To a certain extent, viewed from that perspective, the distinction between a procedural or substantive legitimate expectation can be one without difference. For if the interest is preserved even after inadequate consultation there can be no complaint. To this extent, it is really the interest which is jeopardised in most legitimate expectations which litigants seek to protect or preserve.

107. Even if a promise is made by a different body there can still give rise to a legitimate expectation that administrative bodies will act consistently with that declared promise. See **R (on the application of O’Callaghan) v Charity Commission for England and Wales** [2007] EWHC 2491. In this case, there is both the existence of a promise made by Cabinet by the 1997 Cabinet policy but more importantly an application and adoption of that policy by NCC consistently for the past twenty (20) years conferring a benefit to Pan Trinbago of the gate receipts and revenues of Panorama. Although, of course, Cabinet cannot authorise an illegality

²¹ See **Michael Fordham’s Judicial Review Handbook (6th Edition)** at paragraph 41.1.1.

or usurp the power of another body created by statute that must discharge its statutory duties. Equally, a policy is required to be followed because of the public interest in a decision maker abiding by what it has said it will do. **Mandalia v Secretary of State for the Home Department** [2015] UKSC 59. As NCC admits in its written submissions, the promises of Cabinet binds the NCC if it adopts the promise made by Cabinet.

108. The nuances of procedural and substantive legitimate expectation may be difficult to apply in practice and subject to varying approaches since its detailed discussion in **R v North and East Devon Health Authority, Ex p Coughlan** [2001] QB 213. For this jurisdiction, importantly, the seminal Privy Council judgments in **Paponette v The Attorney General of Trinidad and Tobago** [2010] UKPC 32 and **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17 has settled the law on the application of this aspect of administrative fairness putting firmly in place a touchstone of liability on factors which call for an examination of the nature of the representations giving rise to the expectations and the reasons and process to be engaged to permit a frustration of those expectations.

109. In **Paponette**, the Judicial Committee of the Privy Council was faced with the manifest unfairness of the government inducing maxi taxi owners to move their operations to a new location on the assurance that they would not, inter alia, be under the control of their competitor, The Public Transport Service Corporation (PTSC), a statute controlled transport company and that management of the facility would be handed over to them. Six years later the PTSC not only took over management of the operations but began charging a fee for the facility. Sir Dyson treated the representation as giving rise to substantive legitimate expectation and it was for the public authority to provide that the failure to honour its promises was justified in the public interest.

110. Importantly, in that case, Sir Dyson stressed the need in those circumstances of the public authority to prove the existence of an overriding public interest to defeat the applicant's legitimate expectations:

“This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be

justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must “articulate its reasons so that their propriety may be tested by the court.”²²

111. The Law Lords noted that the initial burden lies on the applicant to prove the legitimacy of his/her expectation, that is, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. Once these elements have been proven, the onus then shifts to the respondent to justify the frustration of the legitimate expectation and to identify any overriding interest on which it relies to justify the frustration of the expectation.²³ The Law Lords cited with approval Lord Woolf’s commentary in ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213 where he stated at paragraph 57:

“Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”

112. Notably, Lord Brown in his dissenting opinion succinctly asked the central question in matters such as these, was the decision so unfair as to amount to an abuse of power? Notably, he had considerable sympathy for the Government’s position in changing its policy for the benefit of taxpayers. That case simply had to do with the imposition of a user fee which the

²² ***Paponette v The Attorney General of Trinidad and Tobago*** [2010] UKPC 32, paragraph 42.

²³ ***Paponette v The Attorney General of Trinidad and Tobago*** [2010] UKPC 32, paragraph 37.

majority felt, despite Lord Brown’s practical analysis that the Association should be expected to pay a fee for the facility, through the force of the application of the doctrine of legitimate expectation precluded the PTSC from doing so at its obvious financial detriment.

113. In **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, Lord Carnwath took the opportunity to extensively analyse the law of legitimate expectations, reconcile the various authorities and categories of legitimate expectation (as he described them a “patchwork of possible elements to consider”) and explain **Ex p Coughlan** in the development of the law on procedural and substantive legitimate expectations. Lord Neuberger noted the uncertainty in relation to substantive legitimate expectation. To settle this, Lord Carnwath traced the development and examined **Coughlan** and **R v Secretary of State for Education and Employment, Ex p Begbie** [2000] 1 WLR 1115 and the following cases of **R (Nadarajah) v Secretary of State for the Home Department** [2005] EWCA Civ 1363 and **R (Niazi) v Secretary of State for the Home Department** [2008] EWCA Civ 755.

114. Lord Carnwath summarised the modern authority in favour of a narrow interpretation of the **Coughlan** principle which he states as:

“Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification”, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind.”²⁴

115. In both **Paponette** and **United Policy Holders Group** the applicants were able to cross the threshold of demonstrating that clear assurances devoid of qualification were made and were legitimate. In **United Policy Holders Group** the Privy Council was prepared for the sake of argument to accept that the threshold was crossed. Where the respondents succeeded in **United**

²⁴ **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, paragraph 121.

Policy Holders Group and failed in **Paponette** is to sufficiently set out for the Court the clear explanation to resile from the expectations. See paragraph 68 of **United Policy Holders Group** which states:

“68. In so far as it is suggested that the government should have topped up the Fund, as and when it needed topping up, from its own moneys, the evidence was that this would have required a commitment over the years to inject around \$7 billion, which gives rise to the sort of macro-economic/political considerations which are to be found in the remarks of the Prime Minister quoted in paras 20, 56 and 57 above. The government’s evidence before the Court of Appeal set out in some detail how difficult the future financial prospects of Trinidad and Tobago were in September 2010. Mr Dookeran explained how important it was that the IMF approved, as it duly did, his budget for 2010/2011 as “appropriately geared towards supporting the recovery”, and that the credit ratings agencies gave, as they did, a satisfactory assessment of the debt of Trinidad and Tobago. He said that there would have been “catastrophic consequences for the economy of Trinidad and Tobago” if all policyholders were “compensate[d] ... fully”. The effect of his evidence was that considerations of this sort played a very prominent part in the government’s decision in September 2010 to abandon the Assurances and embark on the 2010/2011 policy. It is hard to see how the Court of Appeal could be criticised for accepting this evidence and giving it great weight in deciding whether it was reasonable for the government to abandon the Assurances.”

116. In the settled law of legitimate expectations it is for the applicant to establish the nature of the settled practice, its legitimacy and that it is clear, unambiguous and devoid of relevant qualification. The onus then shifts to the respondent to demonstrate good reason judged by the Court to be proportionate to resile from it. As demonstrated in **United Policy Holders Group**, there has developed a zone of exclusion for the Court in macro-political and macro-economic issues giving such issues weight in deciding whether it was reasonable for the administrative body to abandon settled policy or practice. There is no authority which has been submitted to suggest that the Court should assess the legitimacy of the macro-economic or macro-political issues. Conceptually, to do so would infringe the doctrine of separation of powers and be too

incursive into the field of discretion and administration which is unsuited in the law of judicial review.

117. What is very apparent, however, in both **Paponette** and **United Policy Holders Group** is the Court's desire, despite its reticence to do so, to engage in a balancing exercise in considering the merits of the administrator's reasons to depart from settled practice. This is important as it underscores Court's ability to engage in hard-edged reviews of the type explained by Fordham:

“Hard edged questions represent an important exception to the rule against the forbidden substitutionary approach. They can be thought of as questions which the public body has to decide but is not permitted to get wrong. In reviewing such questions, the Court does precisely what is forbidden on soft review: it does substitute its own view. That is because the role of the reviewing Court here is to ensure objective ‘correctness’.”

118. Despite the declared zone of exclusion of macro-economic and macro-political policies a Court must and should always be wary of the administrator who simply pulls the macro-economic and political policy “trump card”. The reasons advanced must always be open to scrutiny. Lord Carnwath in **United Policy Holders Group** would simply be affirming that the intensity of the review is on a sliding scale. It depends upon the circumstances including matters such as detrimental reliance. In the majority's call in **Paponette** for administrators to condescend to particularise their reasons to depart from settled practice simply in my view necessarily invites the Court's review of those reasons, the intensity of review of which will vary with the nature of the case.

119. **Ex p Begbie, Niazi and Nadarajah** are important illustrations of the attempt to set the limits of the field of inquiry. This gives rise to Lord Carnwath's field of macro-economic and macro-political considerations which the Court should avoid. The more a decision lay in the macro-political field, the less intrusive would be the Court's supervision. But by no means is it also the case that a public authority can pull the macro-economic and macro-political factor trump card without some analysis by the Court on at least *Wednesbury* reasonable grounds. Citing *Wade and Forsyth (Administrative Law, 7th ed. (1994), p. 404)* in **ex p Begbie** Laws LJ observed:

“Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political.”

120. For this reason Lord Carnwath was content to say that it is for the Court to judge the proportionality of the reasons advanced to resile from a promise:

“In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind.”²⁵

121. Schiemann J in **R (on the application of Bibi) v London Borough of Newham** [2001] EWCA Civ 607 simplifies the task of the Court in making its assessment of the legitimate expectation cases in asking itself three broad questions:

- a) what has the public authority, whether by practice or by promise, committed itself;
- b) whether the authority has acted or proposes to act unlawfully in relation to its commitment;
- c) what the Court should do.

122. From a consideration of the authorities on this aspect of the law from those three broad heads of enquiry, the following useful principles can be culled:

- a) A legitimate expectation arising from a promise or representation made by or on behalf of a public authority must be taken into account in the decision-making process so long as to do so falls within the power of the decision-maker.
- b) Generally speaking, the promise or representation must be clear and unambiguous and legitimate. If a representation is susceptible to multiple interpretations, the interpretation applied by the public authority will be adopted (this interpretation is subject to *Wednesbury* unreasonableness). The question is whether how on a fair reasoning of the promise it would have been reasonably understood by those to whom it was made. The fact that there may be some

²⁵ **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, paragraph 121.

uncertainty does not necessarily mean that a representation was not clear and unambiguous if they were devoid of relevant qualification.

- c) The question of whether reliance is required is an open one. Detrimental reliance will usually buttress the claimant's claim and be a factor in the balancing exercise to be conducted by the Court. However, no issue as to reliance occurs if the representations are calculated to induce reliance.
- d) Unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Fairness requires the decision-maker to give reasons if effect is not given to the expectation, so that such reasons may be tested in Court.
- e) It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. There may be circumstances where it is possible to identify the relevant public interest from the terms of the decision itself. Or the implication of the promise made is that it was for only a reasonable period.
- f) It will be a matter for the Court to weigh the requirement of fairness against that interest or strike the appropriate balance of fairness between the interest of the applicant and the overriding interest relied upon by the authority.
- g) Even if the decision involves the making of a political choice with reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties. If the decision-maker does not take into account the legitimate expectation, the decision may constitute an abuse of power and may be vitiated by reason of failure to take account of a relevant consideration.

See **Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority** [2014] 1 SLR 1047, **Paponette, United Policy Holders Group, Ex p Coughlan, ex p Begbie**.

123. From these principles it is understandable why some jurisdictions have not found favour with the principle of substantive legitimate expectations as it may lead easily to the interference by the judiciary into the affairs of government. See the discussion in **Making Sense of Substantive Legitimate Expectations in New Zealand Administrative Law** by Stuart

Angus McGilvray. Australia and Canada are particularly suspicious of it as Lord Carnwath observed in **United Policy Holders Group**. Australia in particular jealously protects the ultra vires principles in relation to administrative power and this is difficult to reconcile with substantive legitimate expectations.

Clear Unambiguous promise/representation

124. There are two dimensions to answering the question – what has the NCC committed itself to doing? First, there is no controversy that the 1997 Cabinet policy was a clearly articulated Cabinet policy making an unqualified promise and representation to a clearly defined and limited class of persons, the NCC and SIGs.
125. For the purposes of this case in relation to Pan Trinbago, it is a declared policy agreed by Cabinet that in order to improve Carnival:
- a) Pan Trinbago is administratively responsible for its own area of production inter alia all Panorama competitions and ticket sales for all related activities.
 - b) All parties, including NCC, understood this to mean that the revenue derived from the sale of tickets for Panorama will be retained by Pan Trinbago.
126. Second, the NCC adopted the regular and settled practice and course of conduct whereby as the statutory coordinator of Carnival activities, pan was run by Pan Trinbago and it collected the gate receipts and revenues for Panorama.
127. Both the representation made by the policy and the settled practice was clear, unambiguous and devoid of any relevant qualification. I say so as firstly, it was reasonably understood by both NCC and Pan Trinbago that this was a legitimate policy that must be followed and that there was no uncertainty by the term “ticket sales” in the Cabinet minute. Second, the context in which this representation was made is one in which Cabinet had previously made direct disbursements to Pan Trinbago in 1984 as to its funding. Then the NCC Act was proclaimed to bring more structure to the management of pan with the NCC taking over the production through subcommittees. The 1997 Cabinet policy was then effected reinvesting Pan Trinbago with this responsibility and the benefit of ticket sales and revenue from Panorama. This was consistent with the purpose of improving Carnival for 1998 “and beyond.”

128. Mr. De Silva himself recognised this in cross examination when questioned if he was aware that there was an existing Cabinet policy for Pan Trinbago to control the ticket sales to which he replied “That was the established practice.” A practice that came into being and established based on the 1997 Cabinet policy and consistently followed by the NCC for just under twenty (20) years.
129. There is nothing in this policy to suggest that it was time specific. To the contrary, instructions were given to the Attorney General to review the NCC Act to give effect to this policy. To the extent that the NCC Act contemplated that a statutory fund would be created to take into account “gate receipts”, it clearly was contemplated that this 1997 Cabinet policy would have impacted upon such statutory provisions. It matters not that the amendments were not in fact made. It is but an indication of the intention of Cabinet as followed by NCC to regulate the relationship of the parties where the NCC Act was silent on these matters. Far from casting a shroud of illegitimacy on such an exercise it was perfectly open to Cabinet, NCC and the SIGs to arrive at an agreed understanding of their respective roles, responsibilities and interests in the operationalizing of Carnival under the umbrella of the NCC Act. This type of policy therefore is not qualified or conditional or transient. It appeared to be a step in the direction of further re-defining the boundaries of the SIGs.
130. There is no real issue in this case and it could hardly be argued otherwise that the representations made by Cabinet and the conduct of NCC had the requisite degree of clarity and unambiguity to give rise to an expectation by Pan Trinbago to manage the ticket sales and retain the revenues of Panorama.
131. It is important then in such a context to note the policy having a pressing and focused impact on the particular group Pan Trinbago in the sense described by Laws LJ in **Niazi**. To that extent, this group is entitled to expect this policy to remain intact for their benefit and the continuation of which they have been assured by its explicit wording, its presumed and actual meaning and its treatment by the parties themselves.

Detriment

132. Detrimental reliance on the representation and promise is a critical feature in this case which achieves at least two things. First, it establishes the nature and legitimacy of the

expectation and second, it is to be weighed in the balance when considering any overriding interest to permit a frustration of the legitimate expectation.

133. Both Lord Hoffman and Lord Carnwath in **United Policy Holders Group**, underscored that detriment is not an essential ingredient to prove the existence of legitimate expectations. It does however, where it exists, provides further support for the existence of the representation and the question of the fairness on which resiling from it will be adjudged.
134. In this case, Pan Trinbago for just under twenty (20) years planned the Panorama and collected the revenue from ticket sales. Indeed, it is a promise that they will receive the revenue in return for their management of Panorama. The evidence demonstrates that Pan Trinbago planned its activities and finances and structure of the year's activities on the basis of the receipt of this approx. \$3million from proceeds of Panorama. A simple look at Pan Trinbago's audited statements makes this point. Under their income statement it is listed as 'revenues Panorama'. Looking at the note on Panorama revenues, the revenues are listed as donations, government grants, bar sales, media rights, rental of booths and ticket sales.
135. They entered into contractual arrangements with Panvesco over the years to manage the ticket sales and were indeed indebted to them for the services which they provided.
136. For the period 2013 to 2016 Pan Trinbago utilised on average \$7million from the ticket sales as revenue for its operations. As Mr. Michael Joseph explained these monies have been utilised for the applicant's operational and administrative expense as well as to defray the cost of hosting (without any or any substantial government subvention) Pan Jazz, Pan in the Countryside, Pan Champs in concert and Pan is beautiful. These are other income generating pan events held outside of Carnival.
137. Furthermore, Pan Trinbago based on this financial or funding model had entered into financial obligations to third parties such as First Citizen's Bank (FCB) and a loan of \$6million of which Panvesco is the guarantor. It makes monthly payments to this loan which was secured to meet various financial commitments. A look at its financial statements over the period will demonstrate how its operations have been organised. The revenue from Panorama has been catered for in its operations.

138. Against this backdrop, abrupt changes in policy will be open to review and challenge. Lord Hodge in **Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius** [2016] 1 LRC was sensitive to the unfairness of abrupt changes in policy especially for groups or individuals who would have been the subject of the promise.
139. To this extent, Pan Trinbago is no different from the maxi taxi association in **Paponette** or to Mrs. Coughlan in **ex p Coughlan**. They were a “limited entity/person” to whom an express and unqualified promise was made which induced them to act in a manner in finding a huge enterprise of operationalising Panorama and to receive the gate receipts for the promotion and development of pan.
140. NCC’s evidence is clear, until the 1997 Cabinet policy NCC took on the burden of Panorama. This responsibility was now conferred unto Pan Trinbago. To them goes both the burden and benefit.
141. In my view, Pan Trinbago has crossed the threshold in proving a legitimate expectation to a substantive right to the receipt of gate receipts at its highest and at the very least, to a procedural right to be notified and consulted before there is a change in this policy.
142. NCC has argued quite forcefully that the expectation of Pan Trinbago to retain the revenue of gate receipts is illegitimate and that what NCC has committed itself to do over the last twenty (20) years is wrong in law. By reverting to the pre 1998 practice the NCC was simply abiding by the law. In any event, the Court should not adjudge too harshly the acts of the NCC in resiling from the practice having regard to macro-economic and macro-political issues raised in this case and more particularly, its legal constraints under the NCC Act. This point raises both the legitimacy of the expectation but more importantly a reason in the macro-political and macro-economic field to which the Court should defer. They will be dealt with separately.

The “legitimacy” of the expectation

143. I agree with NCC’s submissions that as a general operating principle an expectation even if established must yield to the governing statute. See **R v Secretary of State for Education ex p. Begbie** [2000] WLR 1115, 1125. See **Auckland Harbour Board v R** [1924] AC 318 at 326 and **Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius** [2016]

1 LRC. It is a salutary principle of law that a public authority ought not to be held to promises made outside its jurisdiction and authority.

144. **Auckland Harbour** relied upon by NCC however, is simply an authority for the proposition that a statutory body could not expound public monies inconsistent with the direction or allocation of Parliament. In that case, monies which had not been authorised by an Act of Parliament were paid over to a third party. Clearly, there was no authority in law so to do. However, in this case, it is a case where money was paid over by NCC to Pan Trinbago ultra vires the NCC Act. In contrast, what NCC did was legitimately, as the governing coordinator of Carnival activities, permit a SIG to run and operationalise Panorama by providing to it an allocation paid from its statutory fund. The Panorama revenue was retained by Pan Trinbago in circumstances where all parties recognised that the gate receipts were that of Pan Trinbago and not that of NCC. Simply put, if it was made clear that the gate receipt of Panorama were NCC's then it would have been lawfully payable to NCC.

145. In my view, simply put, it is not altogether clear from the evidence of NCC that the gate receipts of Panorama do, on its face, constitute proceeds destined for the NCC fund. It is entirely open to NCC to make that determination and it is not an illegitimate decision for them to say that Panorama receipts will be for that body to whom the burden of planning and operationalising it was conferred.

146. I agree with NCC that there is no need to provide evidence that NCC has established a fund. The fact is, from a proper reading of the sections 18 to 24 of the NCC Act, NCC monies comprise a statutory fund from various sources or streams of revenue. Section 18 legitimises NCC's ability to raise revenue from these several sources. Of course a key and presumably major source would be the government's allocation. Sections 18 and 19 of the NCC Act which addresses the NCC fund provide as follows:

18. (1) There is hereby established the National Carnival Commission Fund (hereinafter referred to as "the Fund").

(2) The Fund shall comprise—

(a) Moneys appropriated by Parliament for the purpose;

(b) Revenue earned from services rendered;

(c) **Gate receipts, sales, donations, grants and royalties;**

(d) Loans raised by the Commission;

(e) All sums from time to time falling due to the Commission in respect of its operations;

(f) Funds generated from Bond issues guaranteed by the Minister with responsibility for Finance or assets of the Commission; and

(g) Funds provided from such sources as the Minister with responsibility for Finance may approve.

(3) The Minister with responsibility for Finance may give directions as to the amounts in which and times at which moneys referred to in subsection (2) (a) are to be paid to the Commission.

(4) Moneys appropriated under subsection (2) (a) may be disbursed only where the budget of the Commission is approved and laid in the Parliament in accordance with section 21.

19. (1) The money comprising the Fund shall be applied in defraying the following charges:

(a) The remuneration, fees and allowances of Commissioners and members of any Committee appointed by the Commission;

(b) the salaries, fees, remunerations, gratuities, severance pay and other benefits of the officers, agents, servants and technical and other advisers of the Commission;

(c) Principal and interest on any loan raised by the Commission;

(d) such sums as may be considered appropriate to be set aside in respect of depreciation on the property of the Commission; and

(e) Any other expenditure or obligation authorised by the Commission and properly chargeable to revenue.

(2) The Commission may create reserve funds out of which money may be expended for the establishment of academic, technical or vocational grants or for such other charitable or benevolent purposes as may, in the opinion of the Board be

beneficial to or for the enhancement of the welfare of artistes, designers and composers of musical works engaged in Carnival and other worthy persons contributing to Carnival activities and the financing of projects for future expansion.

(3) Where the Commission has expended money under subsection (2) it shall list the names of the recipients and the amount of money given to each recipient together with a brief explanation of the reason for the expenditure in a Schedule to the annual financial statement of the Commission required under section 24(2).

(4) The funds of the Commission that are not immediately required to be expended in the meeting of any obligation or the discharge of any function of the Commission may be invested from time to time in securities approved by the Minister with responsibility for Finance for investment by the Commission.

147. NCC skillfully made the point that NCC would, in allowing gate receipts to elude its grasp, permit State funds to be flitted away and be removed from the inquiring eye of the Auditor General. See sections 24 of the NCC Act and Sections 9, 10, 13, 21, 27, 33 and 34 of the Exchequer and Audit Act Chap 69:01 and the constitutional importance of the role of the Auditor General in the accountability of public funds. Pan Trinbago according to them were simply taking NCC's money after it was already given money by NCC as a grant to run Panorama. If the Court sanctions such an expectation according to NCC it would perpetuate an illegality. The argument is attractive as it is unduly alarmist.

148. There is no evidence by NCC in these proceedings as to how this Fund was managed by them. Unlike Pan Trinbago, there are no accounts provided by NCC, for instance, demonstrating how the monies of this fund was utilised for Carnival activities and Panorama in particular.

149. There is absolutely no financial record of NCC or any evidence from it to suggest that it earned any revenue from any other income stream.

150. Parliament in its wisdom provided by statute for such a mechanism. Importantly, in relation to the funding from the State, the Minister of Finance will direct how much money is paid to NCC after NCC's budget is approved and laid in Parliament in accordance with section 21 of

the NCC Act. Mr. De Silva is correct therefore to point out how NCC's funding is derived first by the SIGs presenting their budgets to NCC for the Carnival product then NCC presenting its budget to the Minister for approval and to be laid in Parliament. Section 21 of the NCC Act provides:

“21. (1) The Commission shall prepare in such form as the Minister with responsibility for Finance directs, estimates of income and expenditure of the Commission for each financial year, and if he so directs, for any other period specified by him and the Commission shall submit estimates so prepared not later than such date as that Minister directs.

(2) The Minister shall lay the budget as approved by him and the Minister with responsibility for Finance before Parliament within fourteen days of the approval or, if Parliament is not in session, within fourteen days after the commencement of the next sitting.”

151. Furthermore, the evidence suggests that after the budget is approved by the Minister and allocations made to NCC, it then negotiates with the SIGs with regard to funding. Further, for 2016, Pan Trinbago did not receive the full amount of its allocation in one cheque but that disbursements were made incrementally from the allocation of \$24million. Clearly, these disbursements were made to Pan Trinbago from the monies of NCC. These monies must come from the Fund and not otherwise.

152. This is so as importantly, the NCC must keep proper accounts in relation to this fund. See section 24 of the NCC Act. Although section 24 refers to “payments out of the moneys of the Commission” this could only be referenced to the payment out of the Fund, the statutory recognised pool of monies of the NCC from various sources.

153. It would be absurd if not inconsistent with principles of transparency and accountability to provide for the establishment of a Statutory Fund and accounting mechanisms yet permit the NCC to open “private accounts” which fall outside the purview of the NCC Act. This however does not mean automatically that the gate receipts of Panorama constitute NCC monies or money to be paid into the fund.

154. In my view, having considered section 18 of the NCC Act within the context of the objects of the NCC Act and the evidence in the management of Panorama, the Panorama gate receipts

are not NCC funds to be paid into its statutory fund unless there is an agreement by the parties to this effect or that such receipts are a debt arising from the exclusive management of Panorama by NCC. I say so for the following reasons.

155. First, section 18(1) of the NCC Act provides for the various means by which NCC can raise funds. Whether from moneys appropriated from central government, from revenue earned from its own services, loans raised by the NCC and the like fund to comprise of “gate receipts, sales, donation, grants and royalties.” NCC is empowered by section 9(1) of the NCC Act to inter alia “conduct Carnival activities” indeed in holding NCC events in Carnival be it Carnival tents or shows for which tickets are to be sold. The gate receipts for those events conducted by NCC would be revenue raised by NCC and will fall within the category of revenue streams identified in section 18(1) of the NCC Act. Section 18(1) of the NCC Act therefore only categorises the seven possible methods by which NCC can raise its own revenue to carry out its statutory functions. This by no means is linked automatically to Panorama nor is it a reference to Panorama’s gate receipts unless of course Panorama is an event being conducted exclusively by NCC.

156. Second, it is interesting to note that the fallacy of pointing to section 18(1) (c) of the NCC Act as qualifying gate receipts to “Panorama’s gate receipts” simpliciter is that section 18(e) also requires sums from time to time falling due to the NCC in respect of its operations. If, therefore, Panorama revenues are not sums falling due to the NCC in respect of its operations then logically the gate receipts of Panorama could not then be elevated ipso facto to the status of an income or revenue stream of NCC.

157. Third, nowhere has it been stated that Panorama is run by the NCC. Rather, NCC’s evidence goes the other way to suggest that:

- a) Prior to 1998 NCC was in charge of running Panorama and the gate receipts. This indeed is consistent with section 18 of the NCC Act.
- b) After 1998 the SIGs were in charge of their events after the boundary setting exercise of the 1997 Cabinet Minute.
- c) Under cross examination it was put to Pan Trinbago that in fact NCC had no desire to take over control and management of Panorama from Pan Trinbago.

- d) There is no evidence of the type of operations or expenses of NCC for Panorama even justifying a return to it of the revenue generated by Panorama.
- e) On a bare principle of fairness it does not appear reasonable to suggest that the revenue earned from Panorama through the efforts of Pan Trinbago is that of NCC.

158. Fourth, I accept as a logical proposition that once the funds are allocated for the benefit of the SIGs for the management of its Carnival product the revenues derived in the execution of that product is not that of NCC. Thus, upon NCC releasing or allocating historically an average of \$30million to Pan Trinbago for its Carnival event, NCC's duty to the SIGs and the Auditor General under section 21 and 22 of the NCC Act is to identify how that money was disbursed legitimately for that purpose to the SIG. The evidence reveals how the NCC enters into negotiations and disburses the sums allocated to Pan Trinbago as a SIG over the course of the year. For this the NCC must account to Parliament under the mechanisms of the NCC Act. These no doubt will be reflected as expenses. Its revenues can only be such sums due to it as a result of its own operations. Conceptually, it will include gate receipts from its own managed events. It cannot use such a mechanism of accounting to Parliament to "huff" funds which are not earned by it. Of course, it must also account for any income generating event which NCC itself hosts, manages and produces. In relation to Panorama, however, it is Pan Trinbago who accounts to NCC for the monies obtained from NCC and the income generated from the Carnival product.

159. Fifth, historically, the gate receipts for twenty (20) years have been treated without demur or controversy and for good reason to be the revenue of Pan Trinbago to assist it in its developmental needs throughout the year or to defray the shortfall in costs for the Panorama event. Alarmingly, NCC has not said in these proceedings nor in its submissions that the said "gate receipts" which it wishes to retain from Panorama will be utilised for the benefit of pan's development. Rather the evidence suggests that it would be used to offset its indebtedness to the NCC.

160. Sixth, these existing arrangements are overall consistent with NCC's statutory objectives: to make Carnival a viable national, cultural and commercial enterprise. Indeed in providing the necessary managerial and organisational infrastructure for the efficient and effective presentation and marketing of a Carnival product, its insistence that the SIG runs profitable

products of Carnival does not necessarily translate of itself that the SIG's profit is NCC's profit. That indeed could be another acceptable model of operation but NCC as a facilitator of SIGs is also another model which apparently has been in place historically between the parties.

161. Seventh, from a socio-political perspective, this present practice is consistent with the view of Government subsidising a national cultural product for the citizens of Trinidad and Tobago. Indeed section 9(1) (a) of the NCC Act belies the point that the Carnival activities regulated and coordinated and conducted by NCC throughout the country is held under the aegis of the Government. It is entirely a matter of policy for the government to decide on the financial model for Carnival through the NCC, whether it is used to subsidise the SIGs or that NCC itself becomes an income earning generating vehicle from all Carnival events whether they are organised by SIGs or not. Far be it as being an unlawful benefit, it in reality represents an obvious gap in the legislation. To this extent it is noted that the 1997 Cabinet policy directed the Attorney General to make the appropriate amendments to the NCC Act and until then it remains entirely within the remit of the parties to regulate their own affairs in an area which begs for an obvious ethos of co-operation.

162. Eight, it is apparent that the boundaries of income earnings and revenues generated from Carnival products has not been clearly defined by the statute and it is into this grey area that the practice has developed over the course of some twenty (20) years that the revenue of Panorama is that of the SIG. There is nothing in this NCC Act which is inconsistent with that view. Section 19(e) of the NCC Act gave NCC the power to apply the gate receipts to Pan Trinbago and there was no obligation under the NCC Act for the gate receipts to be paid directly into the NCC fund (if it exists) before it applied those sums to Pan Trinbago.

163. Ninth, the interpretation of "gate receipts" as articulated by NCC in section 18 (2) (e) taken to its logical conclusion must mean **ALL** gate receipts from Carnival events regardless of whether it is organised by NCC. If a private body decides to host a calypso tent for example the gate receipts would be, by that argument, NCC's during Carnival. "Donations" for example to Pan Trinbago cannot mean donations to Pan Trinbago to host Panorama but NCC's. "Sales" of tickets by Pan Trinbago cannot mean the sales of Pan Trinbago during Carnival but NCC's. "Grants" given to Pan Trinbago to host Panorama cannot mean a grant to Pan Trinbago it is NCC's grant. "Royalties" for Pan Trinbago's Panorama becomes NCC's. I do not think that

Parliament intended for such an absurd result. Those income streams of donations, grants, ticket sales must be in relation to NCC's effort, product and brand and not otherwise. In other words, these revenue streams must be linked to NCC's operations and properly due to them from services they render. Not unusually, section 18 (2) (b) of the NCC Act provides for revenue "earned from services rendered". In section 18 (2) (d) it provides for loans raised by the NCC and by 18 (2) (e) sums falling due to NCC in respect of its operations. There must be a nexus to NCC operations. If such Panorama operations are hived off, which is not expressly prohibited by the NCC Act, to Pan Trinbago, they have legitimately hived off any entitlement to gate receipts earned from that SIGs effort.

164. Finally, the submission made that in reality Pan Trinbago wants more than its just due from NCC. Having been given a specific allocation to run Panorama it now wants an additional sum representing gate receipts. This misses the point that it is for NCC to make clear whether Panorama receipts are NCC revenues or that of the SIGs. Having represented over the past twenty (20) years that gate receipts are not that of NCCs it cannot point to section 18 to now lay claim to this revenue stream unless there is a deliberate change in the 1997 Cabinet policy requiring NCC to manage Panorama. In my view, it simply smacks of unfairness for NCC to lay claim to this revenue stream and not make any statement of commitment that the proceeds of revenue from Pan Trinbago would be used for the benefit of pan's overall development.

165. Running Panorama is one thing but if NCC wants to make the cultural product of Carnival a year round activity more attention would be paid to pan and thus income raised by pan events should be destined for the benefit and development of pan. It is noted that a special reserve fund is catered for in the NCC Act yet no evidence has been adduced by NCC as to its use or purpose of that fund.

166. This analysis is entirely consistent with the authorities cited by NCC. In **Auckland Harbour Board v R** [1924] AC 318 at 326, it was stated:

"For it has been a principle of the British Constitution now for more than two centuries....that no money can be taken out of the Consolidated Fund into which the revenues of the State had been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation, or ratify an

improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires*....”

See also **Steele Ford and Newton v Crown Prosecution Service** (No 2) [1994] 1 AC 22

167. In **Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius** [2016] 1 LRC 248 where the Privy Council noted at paragraphs 52 and 53:

“[52] The courts will enforce an expectation only if it is legitimate. There is an established line of authority that nobody can have a legitimate expectation that he will be entitled to an ultra vires relaxation of a statutory requirement: *R v Attorney General, ex parte ICI plc* [1987] 1 CMLR 72, 60 TC 1, p 64G per Lord Oliver; *R v IRC, ex parte MFK Underwriting Agents Ltd* [1990] 1 All ER 91, [1989] STC 873, [1990] 1 WLR 1545, p 1569 per Bingham LJ, p 1573 per Judge J, *Ali Fayed v Advocate General for Scotland* [2002] STC 910, 77 TC 273, 2003 SLT 745, para 135 per Clerk Gill LJ, 2004 SLT 798, paras 115 – 119 per Lord President Cullen. Those cases are all concerned with tax legislation and the Board recognises that, as Judge J stated in *MFK* (above) the correct approach to legitimate expectation in any particular field of public law depends on the relevant legislation. But what is at stake here is the principle of legality. In *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, [2000] ELR 445, the Court of Appeal considered an argument that the Secretary of State was required to exercise his discretion to continue to fund a primary school pupil's education at a private school until her secondary education was complete under an assisted places scheme which the Government had abolished by legislation, because an announcement by the governing party when in opposition had created a substantive right legitimate expectation. The court's principal reason for rejecting that submission was that an undertaking to allow all children in the position of the claimant's child to continue in an assisted place was contrary to the limited discretion which the statute had given the Secretary of State. There could be no legitimate expectation that the Secretary of State would act contrary to the statute: Peter Gibson LJ at p 1125D-G, Laws LJ at p 1129E, Sedley LJ at p 1132B. See also *R (Sovio Wines Ltd) v The Food Standards Agency* [2009] EWHC 382 (Admin), paras 95 – 98 per Dobbs J.

[53] The Board notes that there are obiter dicta in the decision of the Court of Appeal in *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1, [2004] 3 WLR 249 that fairness might prevail over legality in the context of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights (specifically *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319 and *Stretch v United Kingdom* (2003) 38 EHRR 196, [2004] LGR 401, [2004] 1 EGLR 11). But the Board is not concerned with that context in this case. Further, in that context, it agrees with the editors of De Smith's *Judicial Review* ((7th ed) paras 12.078-12.079) that (a) the law should be slow to weaken the principle of legality and (b) “an unlawful representation should not prevail where third party interests were or might be compromised”. In this case in which the FSC was exercising regulatory powers in the interests of policy holders and others, third party interests were clearly engaged. Thus on any view there could be no legitimate expectation that the FSC would act in a way which was contrary to its statutory obligations, which included “[taking] measures to suppress illegal . . . practices”: s 6 of FSDA”

See also *Fisherman and Friends of the Sea v Minister of Planning* [2017] UKPC 37.

168. There is no inconsistency with the system of accounting submitted by NCC. What has happened is simply that Pan Trinbago will account to NCC as to the use of the funds disbursed to it and NCC will account for same to Parliament in its annual submission to the Minister which is subject to the oversight of Parliament and the Auditor General.

169. If there was a general view of financial impropriety or of financial imprudence or that NCC was being deprived of significant income, neither the Auditor General nor any Member of Parliament has for twenty (20) years raised its voice. This adds force to Pan Trinbago's submission that any attempt by NCC to rely on this newly discovered “unlawful payment” must be adjudged through the lens of proportionality and fairness.

170. Indeed, is it NCC's case that Pan Trinbago must repay to it all the revenues received since 1998? Clearly it is not and it has not been articulated as such by Mr. De Silva. If indeed this was the case the Auditor General would have made this clear. The Court must take into account that this “unlawfulness point” is not merely an alleged oversight by NCC or even the Cabinet but of no more important and independent a figure as the Auditor General himself.

171. Furthermore, if there was a general view that Pan Trinbago is not entitled to retain the revenue for reason of its financial impropriety then on what basis has NCC released the massive sum of \$24million to Pan Trinbago? Clearly, it is on the same basis that Pan Trinbago will, as has been done in the past even pre 1991 that it will dutifully account to NCC for the sums spent by it.

172. Even if there was an inconsistency with the NCC Act, the real issue is that NCC now wants to control the revenue of Panorama without expending the effort to manage it. The Court is in reality being asked to adjudge the reasons advanced by NCC to resile from the Cabinet policy and its own settled practice or promise judged to be proportionate taking into account the legitimacy of macro-political and economic factors.

Estoppel/Proportionality

173. Pan Trinbago relied upon the authority of **Stretch v United Kingdom** [2003] 38 EHRR 196 to demonstrate that public authorities may be estopped from contending their act was unlawful notwithstanding its unlawfulness. In **Wells and others v Minister of Housing and Local Government and Land Development** [1967] 1 WLR 1000 Lord Denning noted:

“Now I know that a public authority cannot be estopped from doing its public duty, but I do not think it can be estopped from relying on technicalities; and this is the technicality, to be sure.I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid, that which would otherwise be invalid.”

174. In **Dowdery Construction Ltd v Secretary of State for Transport, Local Government and the Regions** [2002] All ER (D) 01 (Jan), Richards J stated:

“[47] Again it is common ground that estoppel by convention can operate in an appropriate case in the planning context. It requires that the parties have a shared assumption of fact or law on the basis of which they have regulated their dealings and that it would be unjust or unconscionable to allow one of the parties to resile from the shared assumption.”

175. However, I do not think the doctrine of estoppel is appropriate or relevant in a discussion on legitimate expectations. It featured in the earlier cases on legitimate expectations but is not apt to describe the concept as now articulated by Lord Carnwath and Sir Dyson. The doctrine

of legitimate expectations can stand on its two feet and it is unnecessary to reach for principles rooted in private law to explain the question of what is fair in administrative action. In **R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd and one other action** [2002] UKHL 8 Lord Hoffman conceded that there was an analogy with the law of estoppel. However:

“But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998... public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.”²⁶

176. In my view, for the reasons expressed above, the statute does not expressly provide that these gate receipts of Panorama in the manner they are presently raised through the management of Pan Trinbago are that of NCC. It is permissible for the NCC to enter into arrangements contractual or otherwise to permit parties to operationalise functions of Carnival and legitimately obtain the revenue for it. One would even think that by encouraging SIGs to do so they are placed on the path of self-sufficiency towards sometime in the future when they shall no longer be the drain on the public purse.
177. Even if it was unlawful, which I do not accept it is, this would be the exceptional case where the settled practice and the detriment suffered by Pan Trinbago is enough to lawfully require an overriding interest to resile from the promise and not allow NCC to retreat into a shell of a sudden discovery of a twenty (20) year old illegitimate practice which has had no demonstrable detrimental effect on NCC’s own operations.
178. Furthermore, the scope of legitimate expectations doctrine encompasses those policies set mistakenly but having a detrimental impact. The citizen has a defence when they are the victims of an officially induced error of law reinforces the suggestion that reliance on an ultra vires representation should be protected in some way.

²⁶ **R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd and one other action** [2002] UKHL 8, paragraph 34 and 35.

179. The better approach for the Court when faced with an alleged illegal act which is the basis for the expectations, is to undertake a balancing approach that if the harm to the individual outweighs the harm to allowing the ultra vires conduct to be binding then the representation should bind. In asking both parties to address me on prejudice it was apparent that the only prejudice incurred by NCC is the deprivation of a revenue it was prepared not to take into account for years and has no intention of recovering from Pan Trinbago which amounts to over \$30million in the twenty (20) years of observing this settled practice. The fact that there is no interest in recovering the \$30m or at least within a limitation period of four (4) years gives a clue-in to the lack of merit in this point raised by NCC either as an unlawful benefit or belt tightening exercise.

Illegality

180. As a ground of review, illegality means that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. See **Council for Service Unions v Minister for the Civil Service** [1984] 3 WLR 1174. It is clear that NCC cannot alter a Cabinet policy. Both parties treated the Cabinet minute as establishing a policy that governed their relationship. Insofar as ticketing sales were concerned for Panorama, the policy as understood by them was that this fell under the control of Pan Trinbago. There is no evidence that Cabinet changed this policy save for the communications of the Minister herself to the NCC which were merely recommendations.

181. However to the extent that both parties in this case have pointed out that the NCC must act independently and make its own decisions and that the recommendations of the State are not edicts, the point is better made that the decision maker, the NCC in this case, must have acted consistently with the Cabinet policy unless there are good reasons to depart from it and to do so in a fair manner. The Cabinet policy firmly roots Pan Trinbago's case in legitimate expectations rather than illegality.

Overriding Interest

182. Far from a concern of the legitimacy of Pan Trinbago to retain the revenue as inconsistent with the NCC Act, as there is no evidence of this point being raised directly in the affidavit of

Mr. De Silva or in his communications with Pan Trinbago, the real reason advanced to resile from the settled policy is the swirling allegation of financial impropriety.

“The Court will only permit a procedural legitimate expectation to be defeated if there is an overriding reason to resile from it, in which case the court will itself judge the adequacy of the reasons advanced for the change in approach when balanced against what fairness requires”

See para 19.65 **Judicial Review: Principles and Procedure** Jonathan Auburn, Jonathan Moffett, Andrew Sharland. Reasons of urgency or insufficient time to follow the procedural steps are some examples deployed as reasons in the case of procedural legitimate expectations. See **R v Lord Chancellor, ex p Law Society** (1994) 6 Admin LR 83. In such cases detrimental reliance makes it difficult for the administrator to easily resile from the promises.

183. In the case of a substantive legitimate expectation the inquiry is more intense. It is to determine whether to resile from the promise is so unfair as to be an abuse of power. Lord Carnwath usefully pointed out that the reasons will be adjudged as what is proportionate and just.

184. The learned authors in **Judicial Review Principles and Procedure** noted at paragraph 19:72:

“However it is clear that in the context of substantive legitimate expectations, the intensity of the review will vary according to the facts of the particular cases. If the change of approach by the public body involves the questions of policy affecting the public at large or a significant section of it, or involves social and political value judgments such as those as to priorities of expenditure, then the Court might in effect, do no more than inquire whether the public body has acted rationally: the more a decision lies within the macro-political field, the less intrusive will be the standard of review applied by the Court. However, where a case is discrete and limited, with no wide-ranging issues of general policy or none with multi-layered effects, and where the Court can envisage clearly what the full consequence of its intervention will be, the Court is more likely to scrutinize closely whether there is a sufficient overriding public interest to justify the change of approach. In most

case, however, the Courts will have regard to the public body's own assessment, provided the assessment was properly made.”

185. The learned authors further went on to state at paragraph 19:76:

“Bearing these comments in mind, the following factors are likely to be relevant when considering whether a public body is entitled to resile from a substantive legitimate.

- 1) The importance of the subject matter of the representation to the individual concerned and the likely consequences to the individual of the public body departing from its representation.
- 2) Whether, and to what consequence, the individual has relied on the representation.
- 3) The specificity of the representation and whether it was made on more than one occasion.
- 4) The purposes for which the representation was made, particularly if it was given by the public body in order to obtain some advantage of itself or for the public more generally.
- 5) Whether the representation relied upon was made by mistake. The Courts will be less likely to hold a public body to a substantive legitimate expectation arising out of a statement that was made by mistake, particularly if the mistake was corrected before it was acted on, and particularly if holding the public body to the mistake would adversely affect the public interest.
- 6) The likely consequences of requiring the public body to abide by its promise. In particular, if giving effect to a substantive legitimate expectation would only have relatively limited financial consequences for the public body, the Courts will be more likely to hold a public body to the substantive legitimate expectation, whereas if there would be wide ranging consequences, particularly consequences impacting on third parties, the Courts will be less likely to hold a public body to it. The Courts may also

have regard to whether holding the public body to the substantive legitimate expectation would offend the principle that like cases should be treated alike.

- 7) Whether the public body has taken steps, such as paying compensation or implementing transitional measures, to ameliorate the consequences of not giving effect to the substantive legitimate expectation. This may be of particular relevance in cases where the substantive legitimate expectation arises out of the adoption of a policy by the public body and the public body wishes to apply a different policy. In such cases, the fact that such ameliorative measures have been considered and applied may weigh heavily against any departure from a substantive legitimate expectation being unlawful.”

186. The reasons advanced by NCC to resile from the promise are in essence the financial mismanagement of the funds of Pan Trinbago. In first reading the papers and the written submissions of the Defendant I was unsure of NCC’s exact reasons apart from the unlawful benefit point and a general allegation of financial ruin of Pan Trinbago. I specifically asked NCC to identify clearly their reasons for resiling from the practice. They have identified the following as their reasons in their submissions:

“54. The decision of the Defendant was made against the background of the perilous and insolvent position of the Claimant and the straitened financial circumstances nationally because of the financial downturn:

- a. The Claimant’s financial statement as at 30 June 2016, audited by PKF, Chartered Accountants, disclosed that the Claimant has an accumulated deficit of approximately \$10.5M and its liabilities exceeded its then current assets by approximately \$15M [**TB2B/p.241/para15**]. The NCC’s concern about the financial state of the Claimant was noted in a letter dated 8th November 2016 in which Mr. De Silva reminded the Claimant that disbursements for funding of Carnival events would be made for the final recipients (and not the Claimant) [**TB2B/p.242/para 18**].

- b. Based on the presentation of the 2017 national budget it became clear that there would be substantially reduced government financing for Carnival 2017 [TB2B/p.240/para 13].
- c. Subsequent to the budget presentation, at a meeting held with the Minister on 5th October 2016, the Minister expressed the requirement that the NCC exercise greater financial prudence and implement stringent controls of Carnival related expenditure in the circumstances of worsening economic conditions [TB2B/p.243/- para 21].

55. It was against this background that the Defendant made its decision as set out by Mr. De Silva [TB2B/p. 248/ para 38] based on the following matters:

“It became abundantly clear that the Claimant would exceed its budgetary allocation for Carnival 2017. As a result of this and for the following reasons the NCC took the decision to control the sale of tickets and the collection of revenue from such sale at the Panorama events, as has been recommended by the Minister:

- a. The Claimant’s audited unconsolidated financial as at 30 June 2016 clearly disclosed that the Claimant was insolvent with potential liabilities exceeding its assets by approximately \$24,000.000.00;
- b. In light of this insolvency there was the potential that any monies from the Claimant’s budgetary allocation, paid directly to the Claimant or the revenue received by the Claimant from ticket sales would be at subject to claims from the Claimant’s creditors;
- c. The Line Minister’s recommendations set out in the letter of 8 December 2016 and our consideration of the Claimant’s counterproposals thereto;
- d. In light of the Claimant’s insolvency and Mr. Benn’s confirmation that the Claimant was indebted to Panvesco, any monies from the Claimant’s budgetary allocation, paid directly to the Claimant or the revenue received by the Claimant from ticket sale would potentially be subject to a claim from Panvesco;
- e. The concern that the Claimant had mismanaged a substantial sum paid to it in relation to Carnival 2016 for the payment of player remittances but which were clearly not used for those purposes;

- f. By taking control of ticket sales, the NCC would be better able to control the disbursement of funds related to Carnival and ensure tighter control over spending;
- g. The economically unrealistic fee of \$3,462,750 that the Claimant demanded in the unsolicited proposed management agreement and the infeasible terms thereof; and
- h. A consolidation of the objects, functions and objections of the NCC under the Act.”

187. The reasoning of **ex p Coughlan** took the Court beyond its traditional role into the terrain of the executive government by engaging in balancing the competing interests to determine whether sufficient overriding interests exist to frustrate legitimate expectation. The practical effect of cases on substantive legitimate expectations such as **ex p Coughlan** and **Paponette** is that Mardon House in the former could not be closed and residents relocated and the Maxi Taxi Association in the latter could not be compelled to pay a user fee unless the authorities could provide persuasive or more reasons to do so. In this area of the law of legitimate expectations, the Court is realistically always engaged in a merits review, the real question is: how intense is the review?

188. The Court is well equipped to balance the competing interests between the administrator and the affected group. Laws LJ explained in **ex p Begbie** that the Wednesbury principles itself constitutes a sliding scale of review “more or less intrusive according to the nature and gravity of what is at stake.” The facts of a particular case may be limited and discrete and having no implications for an innominate class of persons:

“In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.”²⁷

189. I therefore am entitled to analyse the reasons advanced by NCC for its inherent logic, reasonableness and rationale. I am satisfied that in doing so I am not entering into the field of macro-economic or political policy or sitting in the seat of the policy maker or running afoul

²⁷ **R v Secretary of State for Education and Employment, Ex p Begbie** [2000] 1 WLR 1115 at 1131.

of the doctrine of separation of powers. It is this Court's task to prevent the abuse of power. Simply analysing the reasons advanced by NCC on simple Wednesbury grounds will accomplish this task and demonstrate that the reasons advanced are patently unreasonable and irrational. I say so for the following reasons:

- a) There is no evidence of insolvency: Pan Trinbago has dutifully supplied to NCC its audited statement over the years. There is no allegation that Pan Trinbago has failed to do so. There is no declaration by the auditors of Pan Trinbago's insolvency. What the audit reports consistently do say is that: the conditions indicate the existence of a material uncertainty that may cast significant doubt about the organisations ability to continue as a going concern. The financial statement demonstrated that Pan Trinbago was operating on a deficit. It is reasonable to infer that unless Pan Trinbago adopts a serious restructuring of its operations they will remain in a parlous financial state despite modest revenue gains in some of their pan events.
- b) There is evidence of confusion over the payment of remittances to pan players and frequent calls on the State to assist Pan Trinbago. However, this does not equate to a solution where NCC will control gate receipts for Panorama. This should reasonably translate into (a) better accountability and (b) different payment arrangements to fund pan events or (c) the cessation of Pan Trinbago's involvement in Panorama altogether.
- c) I accept the submission of Pan Trinbago that the reason advanced of NCC concerns of their "insolvency" is illogical in the face of firstly still seeing it fit to disburse sums approximating to \$24million to an allegedly mismanaged organisation and secondly declaring an interest in gate receipts for Panorama semi-final and finals but not for Single Pan and Small Bands at Panorama events. There is no reason advanced for taking some and not all gate receipts even if this was some solution to solve the financial ills of Pan Trinbago.
- d) There is no commitment to assisting in the development of the pan product by NCC with this revenue.
- e) There is no nexus between gate revenues of approximately \$3million and Pan Trinbago's likelihood that their Panorama production will exceed budgetary allocations.

- f) There is no evidence of claims by creditors. The evidence is to the contrary.
- g) The Line Minister made no recommendation for NCC to take the Panorama revenues. On an objective review of the Minister's recommendations, which was just that and no more, it was to manage ticket sales. There was no instruction for NCC to retain gate receipts or even to take over ticket sales. Management of ticket sales may call for instead insisting on better accountability by Pan Trinbago of their ticket sales.
- h) Pan Trinbago's proposal for the payment of a management fee to run pan can hardly in my view be used as an argument by NCC to retain the revenue of Panorama. It was a legitimate issue having regard to the Pan Trinbago's managerial effort in running and operationalising Panorama.
- i) There is no evidence that pan revenues is subject to a claim by Panvesco.
- j) There is no nexus between keeping revenues and ensuring tighter control over spending by Pan Trinbago. The revenues go towards the development of pan. By NCC keeping the revenue they do so without any commitment that the money will be used for pan's benefit. In fact, it could be spent on other products which may or may not be legitimate. The fact that NCC has to account to Parliament does not answer whether they have done so in the past or done so satisfactorily. There is no evidence of NCC accounts of either their expenditure or revenues. There is no evidence of the revenue of NCC at all.
- k) The management fee is not unrealistic but simply matches on average what were the revenues from Panorama.
- l) I am not altogether clear of the logic of giving Pan Trinbago \$24million for Panorama yet retain proceeds from ticket sales of approximately \$3million (taking into account the lost revenue in complimentary tickets of approximately \$600,000.00) for NCC's use as it was fit, as a national belt tightening exercise.
- m) A consideration of the objects of the NCC Act is no reason to resile from a settled practice. It simply begs the question whether in pursuit of its objects they are acting legitimately in relation to Pan Trinbago having regard to the settled practice.

190. On the facts adduced by NCC, their desire to control some of the revenues of Panorama are illegitimate and unreasonable.

191. As the ultimate focus in this area of the law is fairness, even if this was a case of simply a legitimate expectation to a procedural benefit, NCC would still be found wanting in its duty to comport to administrative fairness. NCC simply did not give Pan Trinbago sufficient time and did not properly consult it in time for Pan Trinbago to re-arrange its own affairs to cater for the new policy. In my view, there were consultations between the parties on the issue of ticket sales but it was not made clear that NCC would take over the revenue until its letter was issued. In any event, to make such a dramatic change to access to funds, which the undisputed evidence demonstrates was used to fund year round activities would seriously prejudice Pan Trinbago and fairness would dictate that such a policy could have been implemented in 2018 to allow for Pan Trinbago to re-orient its methodology and preparation for the Panorama product.

Consultations

192. In **R v North and East Devon Health Authority ex parte Coughlan** (2001) QB 213 where Lord Woolf noted at page 258:

“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken....”

193. They further relied on **Fordham “Judicial Review Handbook” 6th Edition** paragraph 60.6.1 where the learned authors stated that:

“In any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of advice.”

“Fair consultation involves getting the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects with the consultor thereafter considering those views properly and genuinely.”

194. In **Eon Hewitt and others v The Minister of Works and Transport** CV2011-01631, Charles J in commenting on what constituted proper consultation had this to say at paragraph 69:

“[69] Proper consultation requires the “candid disclosure of the reasons for what is proposed” and that the consulted parties are aware of the criteria to be adopted and any factors considered to be decisive or of substantial importance. Where the decision-maker has access to important documents which are material to its determination whose contents the public would have a legitimate interest in knowing, these documents should be disclosed as part of the consultation process.”

195. The question of consultation is fact specific. From the cross examination of the witness, Mr. De Silva, the following is evident: First, there was no written communication to Pan Trinbago and no official communication until the letter of 10th January 2017 on the heels of Panorama semi-finals and finals.

196. Second, the formal communication then was already very late in the day when Pan Trinbago would have submitted financial statements and readied themselves for the event. Panorama preliminaries would have already taken place. The public, the notional owners of pan, would have been anticipating the Panorama events.

197. Third, the evidence of Mr. De Silva is vague as to whether he effectively communicated to Pan Trinbago that NCC is desirous of collecting the revenue of Pan Trinbago as distinct from merely that they will handle the gate receipts and ticketing. Nowhere, for example, is there any discussion that NCC would hold the revenue for Pan Trinbago. From an examination of De Silva’s own evidence I am not convinced that the consultations held with Pan Trinbago were forthright and open on the issue of NCC taking over tickets sales and receipts. A proper reading of his evidence raises the legitimate question of what does NCC really want to do? Manage Panorama? Sell tickets? Hold the revenues for Pan Trinbago? Control tickets for all Panorama events or some of the events? The confusion is evident from the Minister’s own recommendation that NCC controls the sale of tickets at national events. If NCC wanted to implement a decision only to take the gate receipts from Panorama this was not made clear in Mr. De Silva’s oral and written communication before the decision was made.

198. Mr. De Silva in his cross examination was well aware that the decision would have changed a settled policy established by no other higher authority than Cabinet. He recognised the importance of consultation. Yet he points to his 10th January 2017 letter as evidence of consultation on the issue. A proper reading of that letter leaves the matter too far open as to what NCC wanted to discuss. An open discussion of the management of pan or pan's finances is an involved and historically intricate question. To engage in such a discussion requires intense deliberation and preparation. No doubt this is consistent with the negotiations which ensued about Panvesco and financial statements. If gate receipts were mentioned at all in that milieu it would have been, in my view, merely as a side wind, a "by the way" treatment of an equally fundamental issue governing the relationship of the parties.
199. Mr. Diaz, the President of Pan Trinbago could not assist the Court on the nature of the conversation with NCC. But a matter as important as this should not have to depend on oral evidence and recollection of oral discussions. There are no minutes. There are no written contemporaneous records from NCC. There is no written correspondence from NCC prior to 10th January 2017. In fact the written correspondence is all the other way from Pan Trinbago which does not address the alleged interest of NCC to take over gate receipts.
200. Far from being critical of Mr. Joseph's evidence in cross examination as admitting that the issue of gate receipts was discussed prior to the 10th January 2017 letter, I am quite sympathetic to what appears on the face to be his inconsistent answers. In fact Mr. Joseph answering 'yes' to the question whether the "question of NCC controlling sales came up in the discussions" is far removed from the type of consultations that are required. Further, Mr. Joseph's answer to the question whether NCC communicated to Pan Trinbago before they sent the Minister's letter that they were considering taking over control of ticket sales, was plain and consistent with the evidence "I was not quite clear on that". I myself am unclear as to what NCC wanted to achieve in its alleged "consultation" with Pan Trinbago.
201. Fourth, the decisions themselves of 24th and 25th January 2017 are themselves inconsistent and carried different meanings from managing ticket sales to managing Panorama. It is obvious that such confusion played even on the minds of Mr. Joseph and Pan Trinbago members.

202. Fifth, the discussion with Panvesco is also ambivalent. It could either mean that Mr. De Silva communicated that NCC would take over the revenue or that they wanted to know more about Pan Trinbago's ability to handle the ticketing.
203. Further, it is manifestly unfair to rely on the reasons of financial impropriety or mismanagement as the key to alter the policy in its decision on 24th January 2017 when such an allegation was never made directly to Pan Trinbago for them to respond adequately or at all. What fundamental fairness requires is contextual. See **R v Secretary of State for the Home Department Ex p Doody** [1994] 1 AC 531. In this case there was no opportunity given to Pan Trinbago to meet a frontal allegation by NCC that they are insolvent and that they have mismanaged the State's funds.
204. Good and fair administration would require that NCC properly and openly communicate to Pan Trinbago that (a) they will be changing the settled policy of gate revenue and gate receipts (b) set out clearly the reason why it was being done, acknowledging the settled practice observed for about twenty (20) years of Pan Trinbago managing Panorama and receiving the benefit of the gate receipts. To take such a drastic step in such a short time frame was manifestly and conspicuously unfair not only to Pan Trinbago but to the public as well having regard to the confusion garnered by the late decision of NCC jeopardising this Carnival product.

Conclusion-The Finale

205. On the facts of this case I have found that the expectation to retain the ticket sales was legitimate. It was a settled practice and it was unfair to resile from it so soon into the Carnival season and on the basis of the reasons given by NCC. There are no sufficient reasons advanced by NCC to resile from the settled practice and the nature of consultations was not characterised by the open and frank engagement required by the law. For the reasons in this judgment the decisions of NCC under review will be quashed and I make the order set out below.

- a. A declaration that the Defendant in making the decision – directing Pan Trinbago that NCC will collect and retain the proceeds of the sales of tickets for the National Panorama Semi-Finals (small, medium and large bands) on Sunday 12th February 2017 and the National Panorama Finals (medium and large bands) on Saturday 25th February 2017 acted unreasonably, irregularly, improperly in breach of the principles of natural

justice and deprived the Claimant of a legitimate expectation contrary to sections 5(3) c, d, e, f, l and m of the Judicial Review Act Chap 7:08.

- b. An order of certiorari quashing the said decision.
- c. An order that the Defendant do pay the gross proceeds of the sales of tickets for the National Panorama Semi-Finals (small, medium and large bands) on Sunday 12th February 2017 and the National Panorama Finals (small, medium and large bands) on Sunday 25th February 2017 to the Claimant.
- d. The Defendant do pay the Claimant its costs of the claim to be assessed in default of agreement.

206. In **Bibi Schiemann** LJ observed at paragraph 24:

“There are administrative and democratic gains in preserving for the authority the possibility in the future of coming to different conclusions as to the allocation of resources from those to which it is currently wedded. On the other hand there is value in holding authorities to promises which they have made, thus upholding responsible public administration and allowing people to plan their lives sensibly. The task for the law in this area is to establish who makes the choice of priorities and what principles are to be followed.”

207. Legitimate expectations in the context of Panorama beats out the theme of fairness by public authorities in the treatment of persons and groups with whom they have made representations and policies which govern their relationship. In the context of abuse of power, unfair treatment by resiling from promises resonates and is antithetical to the very essence of the origins of Pan and Carnival as being sensitive to the abuse of power. However, if the Carnival product is to survive, parties must release themselves from historical suspicions and embrace a culture of development and cooperation. NCC and Pan Trinbago are no doubt part of the same orchestra and they must find a way not to beat discordant notes.

208. The real tension in this case is about the State’s concern over Pan Trinbago’s ability to properly exercise financial and managerial prudence in the management of their affairs. NCC clearly has had to deal with settling spats between Pan Trinbago and its members over monies

due to them and in light of a shrinking economy has given rise to concerns of financial prudence and accountability.

209. Such tension arises, as I have analysed above, against a backdrop of the management of a Carnival product which is in itself formless and to a certain degree difficult to regulate. It involves for the NCC a task of managerial expertise to deal with SIGs which historically may harbour a sense of resentment to restriction on their freedom. The threatened boycott of 2017 Carnival unless funding is obtained by NCC seems to echo the rebellion of our past from which the pan was forged and seems to still dictate the nature of the relationships between the parties.
210. Parties must earn the trust of each other in the management of their distinct spheres of endeavour, NCC in the overall management of Carnival, Pan Trinbago in the management of pan. There is at Carnival time an intersection of these responsibilities and the mechanisms by which both parties' work must be characterised by mature deliberation and consultation and a duty of cooperation. All must beat the same tune.
211. But this judgment is not meant to fossilise public authorities from changing their policy. The dictates of fairness as evolved through the law of substantive legitimate expectation from **ex parte Coughlan** to **United Policy Holders Group** sets the parameters of permissible activity for administrators in altering established policies and practices.
212. It is clear that financial prudence would dictate other operational mechanisms to ensure that there is no haemorrhaging of public funds in the preparation of Carnival. This calls for a concerted effort by all SIGs to re-examine their own operations. I have seen correspondence passing between the parties in these proceedings to suggest that there are other areas of dispute between the parties in relation to funding. In so far as the revenue stream of Panorama is concerned, parties should be concerned about pan's future. There is authority in the NCC Act for the NCC to set aside a special reserve fund. As part of the commitment of this Court to offer solutions to resolve disputes I offer the following non-binding opinion for the parties' consideration in resolving what no doubt will be an ongoing discussion on the use of funds.
- (a) Consider the establishment of a stakeholder accounting which the proceeds are placed and held jointly by the parties and shared in the portion of their efforts for the preparation of Panorama.

- (b) Subject the use of funds by SIGs to proper accounting mechanisms.
- (c) Establish a special reserve fund in which the Panorama proceeds are payable for the establishment of a Pan Exhibition or other projects the parties think fit or appropriate to memorialise pan for future generations.
- (d) Establish a dispute resolution mechanism with the use of certified mediators or mediation agencies to resolve disputes between NCC and special interest groups in the preparation of Carnival. The parties to agree a formula for the submission of disputes to such bodies for their assistance in resolution within a time specific context.
- (e) Moreover in the context of the 1997 Cabinet policy having arisen as a result of the work of Cabinet sub-committee the time appears ripe for open consultations with all SIGs and the public on pan, its relationship with NCC and the State, its funding model, its financial viability as a commercial product and its future as our indigenous art form and the world's only musical invention in the 20th Century.

213. The only practical issue facing these parties is the question of trust and accountability. They have in their own disposal means by which they can agree amongst themselves, however elaborate their own schemes, to ensure the proper use of funds. As I have pointed out to them, the judicial determination of the claim as filed comes nowhere close to dealing with that live practical and recurring problem which they both must face in the months and years to come. The decision under review is with respect to Panorama 2017. That has come and gone. Carnival 2018 is upon us and there is enough time for parties to meet and consult on the way forward to the cohesion of plans for the 2018 Carnival season. It is with the greatest reluctance that I delivered judgment recognising the gap between justice as defined by these papers and justice “on the greens”.

214. It is still within the power of both parties to find reasonable solutions to assist their cooperative joint exercise for future Carnival. This, of course, is not only their challenge but their mandate.

“Save pan, well let that be more than just a slogan

Give it your utmost attention

Or as Black Stalin say,

*We might wake up one day
And hear that steelband come from
In the United Kingdom”
-Merchant (1985)²⁸*

**Vasheist Kokaram
Judge**

²⁸ “Pan in Danger” by Merchant (Dennis Franklin).