

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

Claim No. CV2018-01642

BETWEEN

DEVANT MAHARAJ

Claimant

AND

MINISTER OF AGRICULTURE, LAND AND FISHERIES

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of delivery April 30 2019

APPEARANCES:

Mr. Anand Ramlogan SC, Mr. Alvin Pariagsingh, Ms. Alana Rambaran instructed by Mr. Jared Jagroo Attorneys at law for the Claimant.

Ms. Delisa Noel-Christopher instructed by Ms. Savi Ramhit Attorneys at law Defendant.

JUDGMENT

1. Judicial review is a central control mechanism of administrative law (public law) by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a

safeguard which is essential to the rule of law; promoting the public interest; policing the parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power¹.

2. The primary issue in the instant action concerns the failure by the Defendant to comply with his duty under the **Livestock and Livestock Products Board Act**² (“the Act”). The Claimant is seeking a declaration that the Defendant has breached his statutory duty pursuant to section 3 of the Act to establish a Livestock and Livestock Products Board (“the Board”); an order of mandamus to compel the Defendant to appoint the Board in accordance with the Act; and costs.

THE CLAIMANT’S POSITION

3. The Claimant’s position was set out in his affidavits filed on the 16 May 2018 (“the Claimant’s Affidavit”) and the 5 November 2018 (“the Claimant’s Reply”). The Claimant stated he is a former Minister of Food Production with responsibility for the Board, President of the Sanctuary Workers’ Trade Union, a political and social activist.
4. As a former Minister of Food Production, he has been receiving a myriad of complaints from members of the livestock industry concerning the failure of the Defendant to appoint the Board. Due to this failure the industry is faced by a number of problems relating to livestock production including, inter alia:

¹ Paragraph 1.1 Judicial Review Handbook 6th ed by Michael Fordham QC

² Chapter 67:05

- i. The training of farmers to make value added products such as cheese;
 - ii. The importation of pregnant dairy heifers from the United States;
 - iii. High levels of abortion and sub-fertility in dairy cattle;
 - iv. Construction of a model animal cooling shed;
 - v. Project to reduce the ecological footprint of the pork industry;
 - vi. Constraints of the poultry industry;
 - vii. Control and prevention of Avian Viruses in domestic poultry.

5. According to the Claimant's Affidavit, during the tenure of the last Board between 2010 to 2015, the Board did the following:
 - i. Imported pregnant jersey heifers;
 - ii. Opened and launched two pasteurization facilities;
 - iii. Imported small ruminant;
 - iv. Implemented the Revised Mulato Grass Planting Project 2014;
 - v. Launched the Milk Pasteurization Plant at Sugarcane Feeds Centre and Aripo Livestock Farm Station;
 - vi. Established the Central Dairies Milk Processing Facility;
 - vii. Imported cattle into Trinidad and Tobago for local distribution;
 - viii. Validated milk subsidies to dairy farmers.

6. At paragraphs 8 to 9 of the Claimant's Affidavit, he referred to articles published in the local newspapers between October 2015 and February

2018 in which the Defendant referred to a review being conducted on the Board's operations. The Defendant was recorded in the national media as having admitted that the review of the Board was completed since 2017 but to date no decision had been made regarding the appointment of the Board.

7. According to the Claimant, the failure and/or refusal and/or omission by the Defendant to appoint the Board causes serious prejudice to the livestock industry since it is utilized by members of the industry to keep abreast with policies and guidelines and as a forum to voice any negative and/or positive comments, thereby creating a communication channel between the Ministry and the relevant stakeholders.
8. By Pre Action Protocol letter dated 14 February 2018 and delivered to the Defendant by registered post, the Claimant forewarned of his intention to institute proceedings for the Defendant's failure to appoint the Board. There was no response to the Pre-Action Protocol letter.

THE DEFENDANT'S RESPONSE

9. The Defendant's response was set out in the affidavit of Ms Lydia Jacobs, Permanent Secretary in the Ministry of Agriculture, Land and Fisheries filed on the 24 October 2018 ("the Jacobs Affidavit"). In it, Ms Jacobs stated that:
 - a) The Board will be appointed. However, a number of activities needs to be done before it can be appointed.
 - b) When the Defendant took office in 2015, he noted that no comprehensive analysis of the livestock and poultry sector had been done nor was any clear mandate given to the Board. There were also no regulations to govern the operations of the Board.

- c) The Defendant through his investigations revealed that the Board had not been fully constituted for prior periods due to the increasing lack of interest from the various stakeholders. It was also revealed that there was no basis for determining how these members would be nominated.
- d) The Animal Production and Health Division has been performing some of the functions of the Board.
- e) The Director of the Animal Production and Health Division indicated that no complaints were received with respect to any hardship being suffered by stakeholders as a result of the non-appointment of the Board.
- f) A Consultant was engaged by the Defendant to conduct an evaluation of the livestock sector and to undertake a wide spread consultation with the sector. The Final Report was provided given by the Consultant to the Defendant in August 2017. This was reviewed by the Defendant and certain recommendations were made to Cabinet in April 2018. Cabinet approved certain policy decisions relating to the local livestock sector.
- g) No mechanisms were provided for in the Act to perform the Board's general duty as provided for in the Act.

10. The Claimant's Reply addressed the new matters set out in the Jacobs Affidavit and contended that:

- a. The Defendant had failed to indicate when the Board will be appointed or what steps have been taken to appoint it;

- b. Sections 5 and 7 of the Act empower the Board to meet on a monthly basis, take decisions, co-opt persons to attend meetings, and generally, the power to do all things necessary or convenient to perform both its general functions under section 3 and its specific functions under section 6 of the Act.
- c. Proof of the Board's performance of its mandate is documented in its annual reports which the Board is duty bound to submit at the end of every financial year;
- d. The Board was properly constituted under the chairmanship of Mr Carl Khan;
- e. Although local poultry producers had organized among themselves, this does not represent the state of the entire livestock sector;
- f. The Animal Production and Health Division performs a very specific special function which cannot act as a replacement for the Board;
- g. Despite the Final Report from the Consultant having been submitted, more than a year later, nothing had been done to appoint the Board or address the alleged shortcomings of the Board;
- h. The complaints received by the Claimant pre-date the appointment of Ms Jacobs as the Permanent Secretary in the Ministry.

RELEVANT PROVISIONS OF THE ACT

11. Before dealing with the preliminary and substantive issues it is necessary to set out the relevant provisions of the Act which are sections 3, 4 and 6.

12. Section 3 of the Act establishes the Board. It states:

“There is hereby established, a Board to be known as the Livestock and Livestock Products Board having the general duty to promote greater efficiency in the livestock industry and the livestock products industry, and to perform the particular functions specified in section 6.”

13. Section 4 of the Act vests in the Defendant the power to appoint seven members to the Board, each one representing a different sector of stakeholder in the Livestock and Livestock products industry in Trinidad and Tobago. The Defendant is also charged with appointing a Chairman from the members of the Board.

14. The functions of the Board are set out in section 6 of the Act as:

“6. The functions of the Board are—

 - (a) to administer, on behalf of the Government of Trinidad and Tobago any programmes supportive of the livestock industry;
 - (b) to promote and guide the formation of cooperatives within the livestock industry;
 - (c) to collect, store and disseminate data and information on the activities of the livestock industry;
 - (d) to monitor problems affecting production and marketing with a view to making appropriate representation to the relevant authorities;
 - (e) to provide a forum for communication among farmers in the livestock industry;
 - (f) to maintain a register of livestock producers and processors;

- (g) to advise and influence policy-makers in the best interest of the livestock industry;
- (h) to identify research and development and training needs and provide development opportunities for the livestock industry;
- (i) to establish and operate auction yards to facilitate the sale of animals;
- (j) to set quality guidelines for the sale of livestock and livestock products.”

PRELIMINARY MATTERS

15. The Defendant did not file any application to set aside the permission granted to the Claimant to pursue the substantive relief sought in the instant judicial review action. However, in the Defendant’s submissions, preliminary objections were raised on the issues of delay and locus standi by the Claimant.

Locus standi

16. Counsel for the Defendant argued that the Claimant is not involved in the livestock industry or the livestock products industry. He is not a farmer or a member of the livestock industry and/or any of the stakeholders of the Act. Therefore, he is not invested with sufficient interest to bring this action. Although in paragraphs 2 and 3 of the Claimant’s Affidavit he indicated that he has had complaints from members of the industry because he was the former Minister of Agriculture, his only nexus to the claim is his former portfolio as Minister of Agriculture.

17. It was also submitted by the Defendant that the Claimant failed to show that the instant application is justifiable in the public interest as required under section 5 (2) (b) of the **Judicial Review Act (“the JRA”)**.
18. Counsel submitted that the Claimant failed to meet the requirement under section 7(2) of the JRA for the Registrar to publish notice of a public interest application as soon as it has been filed. This notice would invite any other person with a more direct interest in the matter to file a similar application or apply to be joined as a party within 14 days. Where there is no similar application or joinder, the Court may grant leave to the applicant and there is no evidence here of any such notice being published.
19. Senior Counsel for the Claimant responded that the Court ought not to entertain the objection by the Defendant at this stage that the Claimant has no locus standi since this is a matter which ought to have been dealt with after the leave stage and before the Court engaged the substantive issues.
20. Senior Counsel for the Claimant also argued that in any event, the Claimant has locus standi to pursue the instant matter since he has established a sufficient interest as a former Minister of Agriculture who has received complaints from members of the livestock industry and that the issue raised in this case is of great public interest. Therefore, it would be a wrong exercise of discretion to refuse leave and so permit the substantive issues to remain unresolved.
21. Sections 6 and 7 of the **JRA** deal with locus standi in judicial review. Section 6 of the JRA provides:

6. (1) No application for judicial review shall be made unless leave of the Court has been obtained in accordance with Rules of Court.
- (2) The Court shall not grant such leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

22. Section 7 deals with leave of the Court in public interest matters. It states:

7. (1) Notwithstanding section 6, where the Court is satisfied that an application for judicial review is justifiable in the public interest, it may, in accordance with the section, grant leave to apply for judicial review for a decision to an applicant whether or not he has a sufficient interest in the matter to which the decision relates.
- (2) Upon the filing of an application for leave under subsection (1), the Registrar shall immediately cause notice of the application to be published on two days in each of two daily newspapers circulating in Trinidad and Tobago.
- (3) A notice under subsection (2) shall name the applicant, state the decision which is the subject matter of the application, describe the nature of the relief being sought, and any other relevant matter, and invite any person with a more direct interest in the matter to file a similar application, or to apply to be joined as a party to the proceedings, within fourteen days of the last publication of the notice.
- (4) Where no one files a similar application or applies to be joined as a party within the time specified in subsection (3), the Court may grant leave to the applicant.

(5) Where an application is filed within the time specified in subsection (3) and the Court is satisfied that:

(a) the person applying (“the second applicant”) has a more direct interest in the matter than the first applicant; and

(b) the first applicant does not possess any special expertise or ability that will materially enhance the presentation of the case,

The Court may refuse to grant leave to the first applicant and grant leave instead to the second applicant, but in that event the second applicant shall not be liable to pay the costs of the first applicant.

(6) Where an application to be joined as a party is made by more than one person within the time specified in subsection (3), the Court may grant leave to such applicant or applicants as it thinks fit.

(7) In determining whether an application is justifiable in the public interest the Court may take into account any relevant factor, including:

(a) the need to exclude the mere busybody;

(b) the importance of vindicating the rule of law;

(c) the importance of the issue raised;

(d) the genuine interest of the applicant in the matter;

(e) the expertise of the applicant and the applicant’s ability to adequately present the case; and

(f) the nature of the decision against which relief is sought.

(8) Where an application is filed under section 5(6), the Court may not make an award of costs against an unsuccessful applicant, except where the application is held to be frivolous or vexatious.

23. Rule 56.2 CPR sets out who may apply for judicial review. It provides:
- 56.2 An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application including-
- (a) any person who can show that he has been adversely affected by the decision which is the subject of the application;
 - (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
 - (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
 - (d) any statutory body where the subject matter falls within its statutory remit; or
 - (e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application.

24. Before the JRA in 2000, in 1986 Lord Donaldson in **R v Monopolies and Mergers Commission ex parte Argyll Group PLC**³ devised the following test regarding the issue of locus standi:-

“The first stage test which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other

³ (1986) 1 WLR 763 at 773

discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance".

25. I agree with Senior Counsel for the Claimant that the issue of lack of locus standi was a preliminary challenge which the Defendant ought to have taken upon being served with the substantive Fixed Date Claim. The Defendant did not respond to the Claimant's Pre-Action Protocol letter raising the issue of the Claimant's lack of locus standi and he did not apply to set aside the permission to file for judicial review on the basis of lack of locus standi. For these reasons the Defendant's submissions on the lack of locus standi do not find favour with me and I am not minded to dismiss the claim or set aside the permission on this basis.
26. In any event, when I examined the Claimant's Affidavit, I am of the opinion that the Claimant has demonstrated that he has a sufficient interest to maintain the challenge for the relief sought given the liberal approach taken by the Court to the assessment of sufficient interest in judicial review actions.
27. In **Chandresh Sharma v The Attorney General**⁴ the Court of Appeal made the following observations:-

"32. The word "decision" in Section 5 is not to be given a narrow meaning. It covers any deliberate acts or omissions amounting to unlawful administration. See **Florence Bobb and Girlie Moses v Manning (unreported) Civ. App. No. 97 of 2002**, per Nelson J.A.

⁴ CA 115 of 2003

33. The trend in judicial review is towards a liberal interpretation of standing: **R v Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd. [1995] 1 WLR 386; [1995] 1 All E.R. 611**. In the present case the appellant is an M.P. I would be inclined to treat him as having at least a “sincere concern for constitutional issues” and so as having a sufficient interest pursuant to Section 6(2) of the Act”.
28. The Claimant is a former Minister of Agriculture who has received complaints from stakeholders in the livestock industry regarding the non-appointment of the Board and the lack of proper plans and policy in place. As a former Minister of Agriculture with responsibility for the appointment of the Board he is well placed to have an appreciation of the impact on the livestock industry by the non-appointment of the Board. I therefore do not consider him to be a meddlesome busybody and as such he has a sufficient interest in the matters under section 6 of the JRA.
29. Further, even if the Claimant may not have been directly affected, the issue which he has raised here is important which is the failure by the Defendant to comply with his duty under the Act to appoint the Board since it effectively deprives members of the public and the livestock industry from the benefits of having a Board appointed as prescribed by the Act. Further, the Defendant is the only authority vested with the power to appoint the Board and these proceedings are the only way in which the Defendant can be made answerable or responsible to the public about the non-appointment of the Board. It also concerns a

member of the Executive failing to comply with his statutory duties with consequential effects.

30. Before I leave this issue I must address the Defendant's assertion of the failure of compliance with the requirements of section 7(2) of the JRA for the granting of leave in the public interest⁵. In my opinion this objection is made too late since the failure to meet the requirements of section 7(2) of the JRA ought to have been properly raised at the leave stage or via an application to set aside leave. The Defendant did not make any such application or objection. Therefore, it is within the Court's discretion at the substantive stage if to grant the relief having regard to the sufficiency of the Claimant's interest⁶. Such application was not made therefore the Court at this stage of the trial must consider whether it should exercise its discretion to grant relief having regard to the Claimant's standing.

Delay

31. It was submitted on behalf of the Defendant that the instant action should be dismissed since the Claimant failed to act promptly; provided no good reason for his delay and no good reasons were advanced for extending time to file the instant action.
32. Senior Counsel for the Claimant submitted that the Defendant failed to state whether the objection on the basis of delay was on the granting of leave or the granting of relief. It was argued on behalf of the Claimant that the Defendant's submissions were misconceived since: there was no application to set aside the grant of leave and time is therefore to be taken as having been implicitly extended; in any event, when considering whether an application is sufficiently prompt, the presence or absence of

⁵ Paragraph 27 of its Submissions filed on 19th February 2019

⁶ See Mr. Fordham QC in the Judicial Review Handbook 5th Edition at para. 38.3.6

prejudice or detriment is likely to be the predominant consideration; there is no evidence before the Court of any prejudice, detriment or hardship to a public authority or third party which would deter the granting of leave or the granting of relief; the failure of the Defendant to appoint the Board is a continuing breach of a continuing duty; and the substantive trial having commenced, the principles that would compel a court to extend time and grant leave are equally relevant when the issue of delay is raised at the trial.

33. I have treated with the objection of delay as if it was with respect to the granting of leave both at the leave stage and at the trial stage.

Procedure for objecting to leave

34. It was submitted on behalf of the Claimant that the Defendant is not entitled to object to the granting of leave on the basis of delay at the substantive hearing since the objection ought to have been at or before the leave stage (via Pre Action Correspondence), or where leave is granted ex parte, via an application to set aside leave. As such it was contended that the leave which was obtained implied an extension of time. In support of this position the Claimant relied on the learning in **Balwant v Statutory Authorities Service Commission**⁷ which was referred to by Jones J (as she was) in **Sanatan Dharma Maha Sabha v the Minister of Finance**⁸.
35. In **Balwant** the decision complained of by the Applicant had been communicated to her almost 9 years before the leave was sought. In granting the leave the order did not expressly extend the time for making the application but the Court found that the effect of the order was to implicitly extend time for making it. At the hearing of the substantive

⁷ HCA No 402 of 2001

⁸ HCA 1095 of 2004

application, the Respondent filed a notice expressly challenging the grant of leave. The Court held that the Respondent was entitled to pursue its application to set aside the leave at the substantive hearing.

36. The facts in the instant case are distinguishable from that in **Balwant**, since there was no application filed in the instant case by the Defendant to set aside the leave on the basis of delay. It was also never raised in the Jacobs Affidavit. Therefore, there is no basis for the Defendant challenging the leave granted at the substantive hearing. In any event, although the order for leave did not expressly extend the time for making the application, it was implicit that such time was extended.

The test for delay at the leave stage

37. Section 11 of the JRA and Rule 56.5 of the CPR deal with delay at the leave stage.
38. Section 11 of the JRA provides that:
11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
 - (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

- (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.
- (4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision.

39. Rule 56.5 CPR repeats the factors set out in section 11(1) of the JRA. It provides:

- 56.5
- (1) The judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.
 - (2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.
 - (3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to-
 - (a) cause substantial hardship to or substantially prejudice the rights of any person; or
 - (b) be detrimental to good administration.

40. In the recent decision of the Privy Council in **Devant Maharaj v NEC**⁹ the issue was whether the trial judge was correct in setting aside the leave granted for judicial review on the basis of delay. The Privy Council considered the interaction of section 11 of the JRA with Rule 56.5 CPR. It made the following observations on the test the Court is to apply in considering the issue of delay when deciding whether to extend time for the granting of leave to file judicial review proceedings:

[34] Delay or lack of promptitude is addressed in both subsections 11(1) and 11(2) and in CPR rule 56.5(1). In this regard, it seems clear that the requirement that an application shall be made promptly and in any event within three months from the date when the grounds first arose (section 11(1)), “undue delay” (section 11(2)) and “unreasonable delay” (rule 56.5(1)) all refer to a single concept. Extension of time is addressed expressly only in section 11(1). Prejudice and detriment are addressed in section 11(2) and in rule 56.5(3).

[35] The scheme of the legislation does not provide any support for the view that section 11(1) should be applied in isolation from other provisions, in particular section 11(2) Furthermore, rule 56.5(3), which does not have a counterpart in the relevant legislation in England and Wales, expressly provides that when considering whether to refuse leave or relief because of delay the judge must consider the issues of prejudice and detriment.... Moreover, subsection 11(3) provides that “in forming an opinion for the purpose of this section” the court may have regard to such other matters as it considers relevant.

⁹ [2019] UKPC 5

- [36] More generally, and quite independently of the particular provisions in Trinidad and Tobago, as a matter of principle, considerations of prejudice to others and detriment to good administration may, depending on the circumstances, be relevant to the determination of both whether there has been a lack of promptitude and, if so, whether there is good reason to extend time....
- [38] In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review...
- [39] If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way....
- [41] The allocation of issues of delay and extension of time, on the one hand, and prejudice and detriment to good administration on the other, to discrete hearings may have lent some support to the notion that extension of time is a threshold issue and that issues of prejudice or detriment do not arise at that stage.... However, **[R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990] 2 AC 738]** provides no justification for the claimed insulation of these issues from each other....
- [43] For these reasons the Board accepts that.... far from constituting an insulated residual discretion, considerations of

prejudice and detriment are capable of being of key relevance to the issues of promptitude and extension of time.

[46] The Board finds itself in agreement with Jamadar JA's view (paragraph 48) that, reading section 11 as a whole, a judge considering whether there is a good reason for extending time must take account of a broad range of factors, including but not limited to, considerations under subsections 11(2) and 11(3), the merits of the application, the nature of the flaws in the decision making process, whether or not fundamental rights are implicated and any public policy considerations, to the extent that they may be relevant.

41. In **Devant Maharaj v NEC** the Privy Council emphasized that "the statutory test is not one of good reason for delay but the broader test of good reason for extending time"¹⁰. It opined that the issues of delay and extension of time under sections 11(1) and 11(2) of the JRA are not insulated from considerations of prejudice and detriment. It was also of the view that Rule 56.5(3) of the CPR is linked to section 11 of the JRA which expressly provides that when considering whether to refuse leave or relief on the basis of delay, the Judge must consider the issues of prejudice and detriment to good administration, these provisions must be read as a whole¹¹ and they are relevant factors in determining whether there has been a lack of promptitude in making the application and, if so, whether there is good reason to extend time¹².

¹⁰ Paragraph 38 of Lord Lloyd-Jones

¹¹ Paragraph 35 of Lord Lloyd-Jones

¹² Paragraph 36-37 of Lord Lloyd-Jones

42. Therefore, the issue of delay cannot only be examined in terms of time but it must be considered with the merits of the proposed application, the issue of prejudice to the Defendant or any third party and good administration.

The test for delay at the trial

43. In **B v The Children’s Authority of Trinidad and Tobago**¹³ the Defendant raised the issue of delay in granting the order at the trial of the claim for judicial review. At paragraph 175 Kokaram J addressed the preliminary issue as:

“It is plain that the time period for the application is a “filter” to assist in good governance and to prevent administrators constantly looking over their shoulders. The grant of an extension of time must be for good reason. Such reason balances the interest of good administration and the vindication of rights. The question of promptitude and good reason is all to be decided against the backdrop of the unique facts of each case. The question of prejudice and detriment to good administration must be taken into account in the exercise of the discretion to extend time to apply for leave.”

44. The Court of Appeal explained the factors to be considered when determining what amounts to a good reason to extend time at paragraph 25 in **Abzal Mohammed v the Police Service Commission**¹⁴ as:

“The question of what amounts to a good reason [to extend time] is the subject of debate in many cases ... It is sufficient to say that among the factors to be taken into account are (a) length of delay (b) reason for delay (c) prospect of success (d) degree of prejudice (e) overriding

¹³ CV 2016-04370

¹⁴ Civ App 53 of 2009

principle that justice is to be done and (f) importance of the issues involved in the challenge. This is not an exhaustive list of factors...”

45. Therefore, the Court is required to consider the same factors on the issue of delay when deciding to extend the time at the leave stage and at the trial stage. The main issue is whether there is “a good reason” to extend time and grant relief.
46. In the instant matter, the Defendant did not state in his closing submissions what date the Court must consider in determining the delay. According to the Claimant’s Affidavit, the breach by the Defendant is a continuing one since the latter has failed to appoint the Board since October 2015. In **Chandresh Sharma v Manning and Ors**¹⁵ the Claimant had filed for judicial review against the Defendants for a failure to perform a statutory duty under Section 7 of the **Freedom of Information Act**¹⁶. The Court held that the Claimant had been guilty of delay in bringing proceedings after almost 4 years but the Court considered at paragraphs 24 to 26 whether there was good reason to extend time since the allegations made were a continuing breach of a continuing duty.
47. The Jacobs Affidavit stated that the Final Report from the Consultant on the review of the livestock section was given to the Defendant in August 2017 and Cabinet approved certain recommendations in April 2018. The Jacobs Affidavit did not even exhibit the Final Report or any other relevant material to substantiate her assertions. The duty of disclosure is critical in public law matters since its purpose is to assist the Court. This position was articulated by Tiwarry- Reddy J in **Oswald Alleyne and others v the Attorney General of Trinidad And Tobago**¹⁷ who stated at pages 12-13:

¹⁵ Civ App No 144 of 2005

¹⁶ Chapter 22:02

¹⁷ HCA 3133 of 2003

“In Civil Appeal No. 58 of 1991 Crane v. Bernard and Ors. Davis J.A. stated at page 11: “Further it is now the clear duty of a public authority to assist the Court by bringing forward in judicial review proceedings, and I would think in constitutional matters also, all facts and matters which are relevant to the determination of the issues. It is not that the Appellant has a right to have disclosed to him all information relevant to the decision of a public authority which he is seeking to impugn, but rather that the Court is entitled to have this information divulged to it so that it may do justice between the parties. This doctrine has been affirmed by Sir John Donaldson MR in R v. Lancashire County Council ex. p Huddleston 1986 2 AER 941 at 945, letter b, where he says- ‘...in my judgment...if and when the applicant can satisfy a judge of the public law court that the facts disclosed... to the applicant are sufficient to entitle the applicant to apply for judicial review of the decision...it becomes the duty of the respondent to make full and fair disclosure.”

48. The judgment of Tiwary J was affirmed by the Privy Council which reversed the Court of Appeal.
49. The material non-disclosure of primary evidence is an important factor which must be considered by the Court when exercising its discretion to grant leave to apply for judicial review as it goes to the merits of the case and the prospect of success.
50. The Claimant’s Application for leave was filed in May 2018 which was one month after the Cabinet’s approval of certain recommendations, in which case the Claimant made his application within the 3-month period. If the

delay is from the date the Defendant received the Consultant's Report, then the Claimant's delay is approximately 1 year and 3 months in filing these proceedings. Therefore, at best the delay is approximately 1 year and 3 months.

51. The issue to be determined in the instant matter is serious since it concerns the continuing failure by the Defendant a member of the Executive to comply with his statutory duty as imposed by an Act of Parliament. Indeed, the duty which is imposed on the Defendant is the failure to appoint the Board which is charged with the statutory duty of promoting greater efficiency in the livestock industry and the livestock products industry, and to perform the particular functions specified in section 6 of the Act.
52. According to the Claimant's Affidavit during the tenure of the last Board between 2010-2015 it did the following which were not disputed by the Defendant: it imported pregnant jersey heifers; opened and launched two pasteurization facilities; imported small ruminant; implemented the Revised Mulato Grass Planting Project 2014; launched the Milk Pasteurization Plant at Sugarcane Feeds Centre and Aripo Livestock Farm Station; established the Central Dairies Milk Processing Facility; imported cattle for local distribution; and validated milk subsidies to dairy farmers.
53. While the Defendant submitted that the grant of leave is detrimental to good administration, the only evidence in the Jacobs Affidavit on the issue of prejudice is that the Animal Production and Health Division was not in receipt of any complaints. There was no evidence in the Jacobs Affidavit of any hardship or prejudice to the rights of any person.
54. In my opinion, there are sufficient reasons for the Court at this stage to grant an extension of time to the Claimant for making the application for

leave to apply for judicial review notwithstanding the delay of 1 years and 3 months. It would not result in any substantial hardship or prejudice to the Defendant or any third party and it would not be detrimental to good administration because the Board provides a unique and important function in which the public has an interest.

SUBSTANTIVE ISSUES

55. The substantive issues are:
- (a) Whether the Defendant is under a statutory duty to appoint members to the Board?
 - (b) If so, whether the Defendant's delay in doing so was unreasonable and in breach of that statutory duty?
 - (c) Whether the Claimant is entitled to an order of mandamus?
 - (d) What is the appropriate costs order?

WHETHER THE DEFENDANT IS UNDER A STATUTORY DUTY TO APPOINT MEMBERS TO THE BOARD?

56. It was submitted on behalf of the Claimant that under section 4 of the Act the Defendant has a statutory duty to appoint the Board. Counsel submitted that the use of the word "shall" in section 4 suggests that the appointment of the Board by the Defendant is mandatory. Under section 4 of the Act, the Defendant has a positive duty to appoint the Board and under the rule of law the Defendant as a member of the Executive cannot choose to disobey the law on the ground of good explanation. If the Defendant wished to review policy and introduce a different arrangement for the livestock industry, the government would be entitled to lay a bill

before the Parliament, repeal the existing law and replace the Board with another entity.

57. Counsel for the Defendant argued that the Defendant is acting within his authority under the Act by not appointing the Board for three reasons. The legislative scheme of the Act does not provide any factors the Defendant needs to consider to determine who to appoint as members of the Board. There were matters which had to be done before the Defendant determined the factors to be followed to satisfy the mandate of the Board under the Act, and from investigations conducted by the Defendant, the Board in its previous form failed to promote a more efficient livestock industry.
58. The Defendant did not dispute that there is a statutory duty on him to appoint the Board. His contention was that he has not done so since the legislative framework is ambiguous and gives him no guidance in appointing persons who would meet the legislative purpose of the Act of creating a more efficient livestock industry.
59. There are several reasons why there is no merit with the Defendant's argument. Firstly, section 4 of the Act places a mandatory obligation to appoint the Board by the language used therein. The use of the word "shall" prima facie suggest that it is a mandatory duty¹⁸. In any event the Defendant has not argued that the use of the word "shall" in section 4 has any other meaning than that of a mandatory obligation.
60. Secondly, the legislative scheme of the Act contemplates the Board reporting to Parliament and not to the Defendant and therefore it is

¹⁸ See Judicial Review Handbook 6th ed by Michael Fordham QC at paragraph 39.3.6 (B)

the Defendant's duty to act in a manner which will not frustrate the purpose of the Act. Section 9 of the Act mandates the Board to submit an annual report to the Defendant who in turn has a duty to lay the said report before Parliament either within 14 days of receiving it or where Parliament is not in session, within 14 days of the commencement of the next session.

61. Thirdly, section 4 of the Act is clear on the persons whom the Defendant must appoint and the process used in appointing them. Section 4(1) and (2) provides:

“4 (1) the Board shall be appointed by the Minister and shall consist of seven Members of whom-

- (a) one shall represent the Ministry responsible for Agriculture;
- (b) one shall be nominated by the Tobago House of Assembly;
- (c) one shall represent the meat-processing sub-sector after the Minister consults with the sub-sector;
- (d) one shall represent the small ruminants sub-sector after the Minister consults with the sub-sector;
- (e) one shall represent the dairy sub-sector after the Minister consults with the sub-sector;
- (f) one shall represent the port after the Minister consults with the sub-sector
- (g) one shall represent the poultry industry after the Minister consults with the sub-sector.

(2) The Minister shall appoint a Chairman from the members of the Board and the appointment of the Chairman or a member shall, subject to subsection (3) be for such period as may be specified in the instrument of appointment.

62. Fourthly, there was no evidence in the Jacobs Affidavit how the Board in its previous form failed to promote a more efficient livestock industry.
63. According to the Jacobs Affidavit the Board had not engaged in matters connected to its general mandate and specific functions as set out in section 6 of the Act. Paragraph 6 of the Jacobs Affidavit stated:
- “I have been informed by the Minister and verily believe that at the time he took office in 2015 a comprehensive analysis of the livestock and poultry sector had not been conducted by the Ministry and so no clear mandate had been given to the Board in the context of an overarching policy. I am further informed by the Minister and verily believe that having met with the then Chairman of the Board, and after reviewing documents made available to him, the Minister concluded that the Board itself had not engaged in matters connected with its general mandate and its specific functions as set out in section 6 of the Act.
64. Notably missing from the Jacobs Affidavit are the documents which the Defendant reviewed which caused him to conclude that the Board had not engaged in matters connected with its general mandate and its specific functions. In my opinion, the absence of the said evidence clearly demonstrated that there was no basis for asserting that the Board was not complying with its mandate.
65. For these reasons I have concluded that the Defendant was not acting within his authority under the Act by failing to appoint the Board.

IF SO, WHETHER THE DEFENDANT'S DELAY IN DOING SO WAS UNREASONABLE AND IN BREACH OF THAT STATUTORY DUTY?

66. It was submitted on behalf of the Claimant that the Defendant has breached his statutory duty by not appointing the Board since October 2015 and that the excuses by the Defendant for the delay in appointing the Board are unreasonable and irrational. Counsel argued that there was no obligation for the Defendant to take reasonable steps to acquaint himself with the relevant issues and material surrounding the Board in order to make an informed determination of the appointment of it. Counsel also argued that there was no evidence after 3 years of the specific issues addressed, findings or recommendations which were required.
67. Counsel for the Defendant submitted that the Defendant's delay in the appointment of the Board was reasonable since the Defendant was (a) reviewing documents; (b) talking to the then Chairman of the Board, investigations which revealed lack of interest in nominating persons from the meat processing, dairy and poultry sub-sectors; (c) the Ministry was conducting a review of the livestock sector; (d) in April 2018 Cabinet approved certain policy decisions relating to the local livestock industry; and (e) the Act failed to give any guide on how the mandate of the Board is to be discharged.
68. The Jacob Affidavit stated that the reasons for the delay in appointing the Board are:
- a) The Minister upon taking office in 2015 and after reviewing documents and talking to the then Chairman of the Board, the Minister concluded that the Board itself had not engaged in

matters connected with its general mandate and its specific functions as set out in the Act.

- b) Upon investigations by the Minister, it was revealed that the Board had not been fully constituted for prior periods due to the increasing lack of interest from the meat processing, dairy and poultry sub-sectors in nominating persons under section 4 of the Act or retaining their members on the Board.
 - c) The Ministry was conducting an evaluation of the livestock sector in order to evaluate it, identify and resolve constraints of its development and identify strengths and opportunities for its growth. A final report was provided in August 2017 and subsequently reviewed and certain recommendations made to Cabinet.
 - d) Only in April 2018, the Cabinet approved certain policy decisions relating to the local livestock sector.
 - e) The Act itself also remained failed to specify the mechanism in which the Board will have the ability to achieve their duty under Section 3 and section 6 of the Act. Accordingly, there is no guide on how the mandate of the Board is to be discharged.
69. Section 15 of the JRA deals with applications for judicial review where there is a failure to make a decision. It was common ground that the appropriate test to determine whether the lapse amounted to “unreasonable delay”

for **Richard Ramnarace v the Police Service Commission**¹⁹ where the Court stated:

“In order to determine whether such lapse amounted to ‘unreasonable delays’ for the purpose of **Section 15 of the Judicial Review Act**, the Court employed a two stage process:

“Each lapse of time was tested against the definition formulated by Lord Diplock in *Thornhill v the Attorney General* that is to say by considering whether in the circumstances the lapse of time was longer than it should have been.

If the lapse of time constituted delay, the Court considered whether the delay was such that no reasonable Commission would incur.”

70. The circumstances of the instant case were that there is a mandatory duty on the Defendant to appoint the Board which is responsible in promoting the efficiency of the livestock industry. The natural consequence of failing to do so is that there must be an impact on the industry. In my opinion in a period of at least three years from the dissolution of the Board in October 2015 to the completion of the evaluation of the livestock section in August 2018 is a longer lapse of time than it should have been.
71. I am also of the view that the three year lapse of not appointing the Board was unreasonable for the following reasons. Firstly, under the Act, there is no obligation for the Defendant to acquaint himself with the material surrounding the Board to appoint the Board. Even if there was, there is no reason to account for failing to do so within a 6-month period.
72. Secondly, there was no evidence in the Jacobs Affidavit of the “activities that needed to be undertaken before a Board could be appointed”, nor any

¹⁹ CV 2007-00218 at paragraph 16

evidence of how these activities precluded the appointment of members of the Board.

73. Thirdly, there was also no evidence in the Jacobs Affidavit of the specific issues which were to be addressed to warrant a “consultation” and “comprehensive analysis” before the Board could be appointed.
74. Fourthly, even after the Final Report from the Consultant the Jacobs Affidavit failed to reveal the findings of the said Report and the recommendations. The Jacobs Affidavit also failed to indicate why the work of the Consultant needed to be conducted without the Board being in place.
75. Lastly, the evidence of the Claimant is that the delay in appointing the Board has had a debilitating effect on the functioning of the livestock industry in Trinidad and Tobago since there were a number of outstanding issues being faced by livestock producers namely: (a)The training of farmers to make value added products such as cheese; (b)The importation of pregnant dairy heifers from the United States; (c) High levels of abortion and sub-fertility in dairy cattle; (d) Construction of a model animal cooling shed; (e)Project to reduce the ecological footprint of the pork industry; (f)Constraints of the poultry industry; and (g)Control and prevention of Avian Viruses in domestic poultry.²⁰

WHETHER THE CLAIMANT IS ENTITLED TO AN ORDER OF MANDAMUS?

76. It was submitted on behalf of the Defendant that that even if the Court finds that the Defendant failed to comply with his statutory duty without good reason, an order for the relief of a mandamus should be refused since

²⁰ Paragraph 6 of the Claimant’s Affidavit

the decision challenged has had little to no impact on the stakeholders for which the Act would impact upon; the Claimant had made this application almost three years after the non-appointment of the Board without providing reasons for such delay; and the effect of granting this remedy would compel the Defendant to appoint an ineffective Board since the Act is silent on how they are to achieve their mandate. This would in effect fail to achieve the purpose of the Act and waste the State's resources and time.

77. In **R (BiBi) v Newham London Borough Council**²¹ Schiemann LJ described the functions of the Court in judicial review proceedings as:

“The Court has two functions- assessing the legality of actions by administrators and, if it finds unlawfulness on the administrator's part, deciding what remedy it should give.”

78. The Court has an overall discretion as to whether to grant a remedy or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following: (1) the nature and importance of the flaw in the challenged decision; (2) the conduct of the Claimant; and (3) the effect of granting the remedy²².

79. In my opinion, the Defendant's position that any appointment of a Board would be ineffective is untenable since the duties of the Board is clearly set out in the Act; and it is not for the Defendant to decide not to act since he has a statutory duty imposed on him. There was also no evidence of any details of how previous Boards were ineffective. For these reasons I am satisfied that an order for mandamus is appropriate in the circumstances.

²¹ [2001] EWCA Civ 607 [2002] 1 WIR 237 at [40]

²² Nichol v Gateshead Metropolitan Borough Council (1988) 87 LGR 45.

WHAT IS AN APPROPRIATE COSTS ORDER?

80. It was submitted on behalf of the Claimant that costs follow the event and that the Claimant should be awarded his costs certified fit for Senior and Junior Counsel to be paid by the Defendant and to be assessed in default of agreement. It was also argued that the Defendant's conduct in raising preliminary issues at the trial was unfair and ought to be deprecated by penalizing the Defendant with an order for costs in any event and that to mark its disapproval the Court should order costs on an indemnity basis since much time was spent in addressing these new points that could and should have been addressed in the principal submissions.
81. Counsel for the Defendant argued that the application be dismissed and the Claimant pay the Defendant's costs.
82. Part 66 CPR sets out the general rules relating to costs. Rule 66.6(1) CPR states that the general rule is that the court "must order the unsuccessful party to pay the costs of the successful party".
83. Rule 66.6(4) CPR further provides that "In deciding who should be liable to pay costs the court must have regard to all the circumstances". Rule 66.6(5)(a) CPR requires the court to have particular regard to "the conduct of the parties". Rule 66.6(6)(a) CPR explains that the conduct of the parties includes "conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any pre-action protocol."
84. Costs in judicial review matters are assessed costs pursuant to Rule 67.3(b) (iii) and Rule 67.12 CPR.

85. I have no reason to deviate from the general rule of ordering the unsuccessful party, the Defendant to pay the Claimant's costs to be assessed by the Registrar in default of agreement. I have decided to certify the costs fit for Senior and Junior Counsel since the Defendant's failure to comply with the Practice Direction²³ on responding to the Claimant's Pre-Action Protocol letter meant that the Claimant required the skill and expertise of Senior Counsel in this matter in moving forward with his claim since he did not know if the Defendant was going to oppose his claim. Further, Senior Counsel's skill was more so required to comprehensively address certain objections to the claim, which ought properly to have been raised before the substantive hearing, in the closing submissions. While I do not condone the Defendant's conduct in doing so I am not prepared to award costs on an indemnity basis since I am of the opinion that costs assessed on a party and party basis would adequately compensate the Claimant's attorneys for the work done in this matter. Also, I am of the view that a direction for costs to be paid on an indemnity basis is reserved for certain matters and this public law matter does not fall into such category.

CONCLUSION

86. In my opinion the issue of lack of locus standi was a preliminary challenge which the Defendant ought to have taken upon being served with the substantive Fixed Date Claim. The Defendant did not respond to the Claimant's Pre-action Protocol letter raising the issue of the Claimant's lack of locus standi and he did not apply to set aside the permission to file for judicial review on the basis of lack of locus standi. For these reasons the

²³ See the General Pre-Action Protocols General and Appendix D on Pre-Action Protocols for Administrative Orders

Defendant's submissions on the lack of locus standi do not find favour with me.

87. In any event, I am of the opinion that the Claimant, as a former Minister of Agriculture has demonstrated that he has a sufficient interest to maintain the challenge for the relief sought. He is well placed to have an appreciation of the impact on the livestock industry by the non appointment of the Board. I do not consider him to be a meddlesome busybody and as such he has a sufficient interest in the matters under section 6 of the JRA.
88. Even if the Claimant may not have been directly affected, the issue which he has raised is important which is the failure by the Defendant to comply with his duty under the Act to appoint the Board since it effectively deprives members of the public and the livestock industry from the benefits of having a Board appointed as prescribed by the Act.
89. The Defendant's objection on the failure of compliance with the requirements of section 7(2) of the JRA for the granting of leave in the public interest²⁴ in my opinion was made too late since this ought to have been properly raised at the leave stage or via an application to set aside leave. The Defendant did not make any such application or objection. Therefore it is within the Court's discretion at the substantive stage if to grant the relief having regard to the sufficiency of the Claimant's interest.
90. As to delay, there are sufficient reasons for the Court at this stage to grant an extension of time to the Claimant for making the application for leave to apply for judicial review notwithstanding the delay of 1 year and 3

²⁴ Paragraph 27 of its Submissions filed on 19th February 2019

months. It would not result in any substantial hardship or prejudice to the Defendant or any third party and it would not be detrimental to good administration because the Board provides a unique and important function in which the public has an interest.

91. With respect to the substantive issues, based on the legislative scheme the Defendant is under a statutory duty to appoint the Board and lay an annual report before Parliament within a specific time frame upon receipt of same from the Board. The Act also clearly states the persons whom the Defendant must appoint and the process in appointing them.
92. The Defendant's failure to appoint a Board for a period of at least three years is unreasonable and the reasons by the Defendant for the delay were without merit. Accordingly, I have concluded that the Claimant is entitled to an order for mandamus.
93. I have also ordered that the Defendant pay the Claimant's cost to be assessed by the Registrar certified fit for Senior and Junior Counsel.

ORDER

94. It is declared that the Defendant has breached his statutory duty pursuant to Section 3 of the Livestock and Livestock Products Board Act Chapter 67:05 to establish a Livestock and Livestock Products Board.
95. The Defendant is directed to appoint a Livestock and Livestock Products Board in accordance with Section 4 of the Livestock and Livestock Products Act Chap. 67:05 within 42 days of this order.
96. The Defendant to pay the Claimant's assessed costs certified fit for Senior and Junior Counsel.

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Margaret Y Mohammed

Judge