REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2017-03999

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO THE JUDICIAL REVIEW ACT CHAPTER 7:08

BETWEEN

(1) COMPREHENSIVE NEPHROLOGY SERVICES LIMITED

(2) BIOMEDICAL TECHNOLOGIES LIMITED

(3) CARIBBEAN KIDNEY DISEASE SOCIETY

Claimants

AND

(1) THE PRIME MINISTER AND HEAD OF THE CABINET OF THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO REPRESENTING HIMSELF AND ALL OTHER MEMBERS OF THE CABINET

(2) THE MINISTER OF HEALTH

(3) THE NORTH-CENTRAL REGIONAL HEALTH AUTHORITY

Defendants

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Thursday 13 July 2021

Appearances:
Mr. Ramesh Lawrence Maharaj S.C. leading Mr. Ronnie Bissessar and instructed by Mr. Varin Gopaul-Gosine for the Claimants

Mr. Douglas Mendes S.C. leading Mr. Michael Quamina and instructed by Mr. Charles Law for the Defendants

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JUDGMENT ON THE CLAIMANTS' APPLICATION FOR JUDICIAL REVIEW FILED ON 27 NOVEMBER 2017

I. Introduction

[1] ***Biomedical Technologies Limited*** (hereinafter **"*BTL*"**), the Second Claimant, is a company incorporated in Trinidad and Tobago whose principal business is the marketing, sale and maintenance of medical equipment. ***Fresenius Medical Care (Holdings) Ltd*** (hereinafter **"*FMCHL*"**) is a company incorporated in England in the business of providing dialysis services and centres; a subsidiary in a group of companies whose ultimate controlling company is German. ***Comprehensive Nephrology Services Limited*** (hereinafter **"*CNSL*"**), the First Claimant, is a company incorporated in Trinidad and Tobago and originally jointly owned by BTL and FMCHL. However, FMCHL transferred its shares to BTL on 20 October 2016. ***Caribbean Kidney Disease Society*** (hereinafter **"*CKDS*"**), the Third Claimant, is a not-for-profit company incorporated in Trinidad and Tobago on 27 October 2017. CKDS, however, previously operated as an unincorporated public interest pressure group since about 2007. CKDS' principal mandate is to be an advocate for patients who suffer from kidney disease and to promote wellness by encouraging the provision of efficient systems for the delivery of adequate health care to kidney patients.

[2] The First Defendant is the ***Prime Minister and Head of the Cabinet of Government of the Republic of Trinidad and Tobago***, representing himself and all other members of the Cabinet. The Second Defendant, the ***Minister of Health***, is the public person, who is charged with oversight of the entire health system in the Republic of Trinidad and Tobago. He plays a central role in protecting and promoting public health. The Third Defendant, the ***North-Central Regional Health Authority***, (hereinafter **"*NCRHA*"**) is a body corporate established under the **Regional Health Authorities Act, Chap 29:05**, (hereinafter ***"the RHA Act"***) with the responsibility for the provision and development of health care in its region, subject to the direction of the Minister of Health. NCRHA is the owner of the ***Eric Williams Medical Sciences Complex*** (hereinafter **"*EWMSC*"**). ***South-West Regional Health Authority*** (hereinafter **"*SWRHA*"**), though not a party to these proceedings, is another body corporate established under the **RHA Act**. SWRHA is the owner of ***San Fernando General Hospital*** (hereinafter **"*SFGH*"**).

[3] On 6 November 2017, the Claimants filed an Application pursuant to **section 6 of Judicial Review Act, Chap. 7:08** (**"the JRA"**) and **Part 56.3(1) and (2) and 56.7(1)(b) of the Civil Proceedings Rules 1998** ("**the CPR**") for leave to apply for Judicial Review

of the following decisions (hereinafter *"the impugned decisions and/or impugned actions"*):

(i) *the decision of the Cabinet of the Republic of Trinidad and Tobago (hereinafter "the Cabinet") made after 8 August 2017 and continuing in the Cabinet failing to take action or the Minister of Health failing to take action or the NCRHA failing to take action to do all things which were and are necessary to facilitate the construction and operation of two Full Service Renal Dialysis Centres at EWMSC and SFGH;*

(ii) *the decision of the Minister of Health made after 8 August 2017 and continuing in the Minister failing to give the requisite specific or general directions to the NCRHA pursuant to* ***section 5(1) of the RHA Act*** *for the NCRHA to do all things necessary to facilitate the construction and operation of the centres;*

(iii) *the decision of the NCRHA made after 8 August 2017 and continuing in failing to do all things necessary to facilitate the construction and operation of the centres;*

(iv) *the delay after 8 August 2017 and continuing by the Defendants for them and each of them to take the necessary action to have the Centres constructed and operational constitutes unreasonable delay pursuant to* ***section 15 of the JRA****;*

(v) *further and/or in the alternative, the delay between the period of 1 September 2015 to 7 August 2017 of the Defendants to take the necessary action to facilitate the construction and operation of the Centres constitute unreasonable delay pursuant to* ***section 15 of the JRA****;*

(vi) *the unlawful frustration which occurred after 8 August 2017 and continuing of the legitimate expectation of a substantive benefit which was created in favour of the First and Second Claimants, CNSL and BTL that the Third Defendant, the NCRHA, would execute the requisite documents which were necessary for the Third Defendant to execute for the First and Second Claimants, to get the requisite security to raise the financing for the construction and operation of the centres; and*

(vii) *the unlawful frustration which occurred after 8 August 2017 and continuing of the legitimate expectation of a substantive benefit which was created in favour of the Third Claimant, CKDS, and its members that government would provide the centres for the Third Claimant, CKDS, its members and members of the public at which they would receive adequate renal treatment, therapy and replacement services in a clinical and non-clinical environment.*

[4] On 13 November 2017, the Court heard the Claimants' Application *ex parte* and leave was granted for the Claimants to pursue their claim for judicial review in terms of the reliefs sought in paragraph 10 of the application for leave and which said reliefs are recited in paragraph 6 below for the purpose of avoiding repetition. Pursuant to leave having been granted, the Fixed Date Claim was filed on 27 November 2017 supported by the principal, supplemental and further supplemental affidavits of **David Jaikissoon**, ***Director of both CNSL and BTL***, filed on 6 November 2017, 13 November 2017 and 24 January 2018 respectively, the affidavits of **George Anthony Laquis**, ***a medical doctor*** **and *Honorary Chairman of CNSL***, and **Krishna Ramkumar**, ***Director and Chairman of CKDS***, filed on 6 November 2017 and the affidavit of **Martin Charles Lawrence**, ***Director and Secretary of CKDS***, filed on 27 November 2017.

[5] The Claimants also sought constitutional relief in the Fixed Date Claim, for which leave is not required, pursuant to **section 14(1) of the Constitution** and **Part 56.7(1)(b) of the CPR** that the impugned decisions and/or inaction of the Defendants and/or each of them in failing to ensure that the 2 Full Service Renal Dialysis Centres at the EWMSC and at the SFGH are constructed and operational amount to a contravention of the right to life of the **3rd Claimant, *CKDS*** and its members guaranteed under **section 4(a) of the Constitution**.

[6] The reliefs sought by the Claimants in the Fixed Date Claim are:

(i) A declaration that the decision of the Cabinet of the Republic of Trinidad and Tobago "the Cabinet") made after 8 August 2017 and continuing in failing to take the necessary action for the NCRHA to do what was necessary to facilitate the construction and operation of two (2) Full Service Renal Dialysis Centres at Eric Williams Medical Sciences Complex ("EWMSC") and San Fernando General Hospital ("SFGH") ("*the Centres*") is unlawful.

(ii) A declaration that the decision of the 2nd Defendant, the Minister of Health, made after 8 August 2017 and continuing in failing to give the requisite specific or general directions to the NCRHA pursuant to **section 5(1) of the RHA Act** to do all things necessary to facilitate the construction and operation of the Centres is unlawful.

(iii) A declaration that the decision of the 3rd Defendant, NCRHA, made after 8 August 2017 and continuing in failing to do all things necessary to facilitate the construction and operation of the Centres is unlawful.

(iv) (a) A declaration that the 1st and 2nd Claimants, CNSL and BTL are the beneficiaries of a legitimate expectation of a substantive benefit that the 3rd Defendant, the NCRHA, would execute the requisite documents so that the First and Second Claimants, CNSL and BTL, will obtain financing for the construction and operation of the Centres.

(b) A declaration that the 3rd Defendant, the NCRHA, after 8 August 2017 and continuing unlawfully frustrated the said legitimate expectation of a substantive benefit in failing to take steps to execute the requisite documents so that the 1st and 2nd Claimants, CNSL and BTL, will obtain financing for the construction and operation of the Centres.

(v) (a) A declaration that the 3rd Claimant, CKDS, and its members are the beneficiaries of a legitimate expectation of a substantive benefit created by the representations made to them by the Cabinet and Ministers of Government acting on behalf of the government that the government would construct and operate the Centres so that the 3rd Claimant, CKDS, and its members and other members of the public would receive adequate renal services.

(b) A declaration that the Defendants after 8 August 2017 and continuing by their decisions and/or actions or inactions unlawfully frustrated the said legitimate expectation of a substantive benefit in favour of the 3rd Claimant, CKDS, and its members.

(vi) A declaration that the delay from 1 September 2015 to 8 August 2017 and/or the failure by the Defendants to make the relevant decisions during this period to give effect to and to implement the Cabinet's said decision and policy for the construction and operation of the Centres constitute unreasonable delay pursuant to **section 15 of the JRA** and is also unlawful.

(vii) A declaration in favour of the 3rd Claimant, CKDS, and its members that the impugned decisions and/or action and/or inaction of the Defendants referred to hereinabove to have the Centres constructed and operational also amount to a contravention of their right to life guaranteed in **section 4(a) of the Constitution**.

(viii) (a) An Order that the Defendants pursuant to **section 15(3)(a) of the JRA** be and are hereby directed within 28 days of any order herein to make the requisite decisions to facilitate the construction and operation of the Centres.

(b) Alternatively to the order referred to above in (viii) (a), an Order of *mandamus* pursuant to **section 8(1)(a) of the JRA** directing the Defendants to make the requisite decisions within 28 days of any order made herein to facilitate the construction and operation of the Centres.

(ix) An Order pursuant to **section 8(1)(d) of the JRA** for such other orders, directions or writs as the Court considers just and as the circumstances warrant.

(x) Any other Order that appears to the Court to be justified by the facts proved before it pursuant to **Part 56.14(3) of the CPR**.

(xi) An Order that the Defendants do pay the Claimants' costs of their application for leave to apply for judicial review, the substantive claim and any other application as ordered and directed by the Court and assessed by the Court pursuant to **Part 56.14(5) of the CPR**.

(xii) Such interlocutory relief as the Court may consider necessary.

(xiii) Such further and/or other relief as the justice of the case may require.

[7] The Defendants entered an appearance to the Claim on 7 December 2017 noting their intention to defend the entirety of the Claim. Accordingly, on 23 May 2018, the Defendants filed the affidavits of **Richard Madray**, ***the Permanent Secretary of the Ministry of Health*** and **Terrance Deyalsingh**, ***the Minister of Health***, in opposition to

the Claim and affidavits of the Claimants. On 26 June 2018, the affidavits of David Jaikissoon and Krishna Ramkumar were filed in reply to the Defendants' affidavits.

[8] The first Case Management Conference was convened on 2 July 2018. At that hearing, it was ordered by consent that the parties file and serve such or any procedural applications, including applications for the filing of affidavits in reply, together with submissions in support. The Court gave further directions for the filing of the Claimants' submissions in support of their Fixed Date Claim and the filing of the Defendants' submissions in opposition. However, neither the Claimants nor the Defendants filed any procedural applications.

[9] Nonetheless, the Claimants filed their written submissions on 4 December 2018 and the Defendants filed submissions in response on 5 February 2019. The matter proceeded to trial of the substantive issues on 12 July 2019 where oral submissions were presented by the parties in support of their written submissions as well as Mr. Maharaj had provided the Court with a speaking note. At the end of trial, the Court ordered the filing of further written submissions by the Claimants and reply submissions by the Defendants. The Claimants filed their further written submissions on 12 August 2019 and the Defendants filed their reply submissions on 18 October 2019.

II. Factual Background

Undisputed Evidence

[10] In or about early 2008, the Cabinet found it necessary in the public interest to establish two (2) Full Service Renal Dialysis Centres (hereinafter "*the Centres*"), at the EWMSC and SFGH respectively, to offer complete clinical and non-clinical renal services to the general public. This was as a result of (i) the increasing number of kidney patients requiring renal services; (ii) the limitations of the existing public health care institutions; (iii) the shortcomings of the contracted private facilities; and (iv) consistent with Trinidad and Tobago's international treaty obligations.

[11] In that regard, Cabinet decided to proceed on a design, build, operate and transfer model so that the Contractor would bear all the costs of designing, constructing, outfitting and operating the Centres before transferring and handing back to the Government to operate. By adopting this model, there would be no costs incurred by the Government

in the construction and initial operation of the Centres. All financing and operating risks were borne solely by the Contractor.

[12] Cabinet directed the Ministry of Health to invite tenders and on 15 July 2008, the Minister of Health directed the NCRHA to invite tenders for the design, construction, financing, outfitting, operation and transfer of the Centres to be carried out by an independent Contractor with proven international experience. This was on the basis that the Contractor, after it designed and built the Centres, will then operate them for a 10-year period (later increased to 13 ½ years) before transferring the Centres to the Government.

[13] The construction and operation of the Centres were part of the Government's policy to improve the health care of kidney patients by providing adequate dialysis and renal services to improve the life expectancy and the quality of life and health of kidney patients.

Claimants' Evidence

[14] On 8 September 2008, BTL together with its then joint venture partner FMCHL successfully submitted a joint tender for their participation through CNSL for the design, construction, financing, outfitting, operation and transfer of the Centres. On 6 May 2010, a written contract (hereinafter "*the Master Contract*") was executed by the NCRHA as the Client with CNSL, FMCHL and BTL (collectively referred to as **"*the Contractor*"**) for the Contractor to construct and operate the Centres in 2 phases, namely the Design/Build Phase and the Services Phase. The Master Contract was initially for a term of ten (10) years.

The contract term was subsequently increased to 15 years which included a period of 1½ years referable to the Design/Build phase and 13½ years referable to the Services Phase. The NCRHA, in executing the Master Contract, acted in accordance with the directions given by the Minister of Health pursuant to **section 5(1) of the RHA Act** and the Minister of Health was acting in accordance with the policy decision and instructions of the Cabinet.

[15] On 6 May 2010, there was also a ceremony to celebrate the signing of the Master Contract between the NCRHA and CNSL, FMCHL and BTL. At the ceremony, the then Minister of Health, Mr. Jerry Narace, the then Permanent Secretary in the Ministry of Health, the then Chairman of the NCRHA, representatives of BTL and FMCHL and the members of the media were present. The then Minister of Health delivered a feature address. In the written address which was delivered on 6 May 2010, it was recorded that the construction of the 2 Centres was scheduled to begin in 3 months' time. Accordingly, the Contractor anticipated that the NCRHA would advise of a formal commencement date sometime in early August 2010.

[16] The statements made by the Minister constituted representations made to the public that renal patients and potential renal patients could expect to have better treatment in the future as a result of the Centres since the Centres would provide them with adequate renal services in a clinical and non-clinical environment.

[17] Pursuant to the Master Contract, the Government, through the NCRHA, agreed for the Contractor to receive the benefit of the assignment of leases of the lands at both EWMSC and SFGH upon which the Centres were intended to be built. This was for the purpose of a sub-assignment to a third party to create security interests so that the Contractor would be able to obtain financing to construct and operate the Centres. This was in accordance with Clause 3(j) of each of the leases executed on 11 October 2011 and Clause 35.3 of the Master Contract.

[18] Following the execution of the Master Contract, CNSL, with the consent of the NCRHA, sub-contracted the design and construction of the Centres (hereinafter "*the contract works*") to ***Health Management Services Limited*** (hereinafter ***"Health Management"***) which was identified as a pre-approved sub-contractor in accordance with Schedule 12 of the Master Contract.

[19] The NCRHA, pursuant to Clause 8.1 of the Master Contract, scheduled a commencement date of 1 June 2011 for the Design/Build Phase of the contract works by letter dated 28 April 2011. However, by letter dated 3 January 2012, the NCRHA rescheduled the commencement date for construction works from 1 June 2011 to 5 January 2012. On 9 August 2012, a new commencement date of 1 September 2012 was

scheduled for the Design/Build Phase of the Master Contract. The Contractor, however, was only permitted to enter the EWMSC building site by letter dated 28 September 2015 and the SFGH building site by letter dated 9 May 2016.

[20] CNSL obtained the benefit of the leases for the EWMSC building site and the SFGH building site for a period of 12 years. The leases were executed on 11 October 2011. By letters dated 9 March 2012 and 12 March 2012, CNSL requested the NCRHA to provide its written consent to assign the benefit of the leases to Health Management in order to secure financing. By letters dated 10 May 2012 and 19 September 2012, CNSL was advised that the Minister had granted approval for the leases to Health Management; but in accordance with Clause 3(j) of the leases, both the NCRHA and the SWRHA were required to provide their written consents to the assignment and thereafter to execute deeds of licence in order for the security interest to be created.

[21] Thereafter, in anticipation of receiving financing and commencing the construction of the Centres, the following was done by the Contractor:

(i) The establishment of corporate offices at Munroe Road, Chaguanas;

(ii) The retention of an overseas Consultancy Project Management Team together with a counterpart local Project Management team;

(iii) The preparation of an Employment and Equipment Procurement Schedule;

(iv) The preparation of an Asset Register;

(v) The establishment of final site boundaries and site surveys in relation to the sites at EWMSC and SFGH and the hoarding off of both building sites;

(vi) The completion of Geo-Technical studies for both building sites;

(vii) The completion of architectural designs and engineering drawings;

(viii) The receipt of approvals for the EWMSC building site from Town and Country Planning Division, Ministry of Works and the Fire Department. In relation to the SFGH building site, approvals were received from the Town and Country Planning Division and the Fire Department.

(ix) The execution of a Memorandum of Understanding with Fresenius Institute of Dialysis Nursing for the retention of experienced nursing staff and the retention of a USA based recruiting agent for health personnel;

(x) The establishment of a plan for pre-operating transitioning of dialysis patients from catheters to fistulas; and

(xi) The development of a forum with local surgeons to strengthen their capacity to perform vascular access procedures.

[22] The Contractor, however, failed to receive the benefit of the assignment of the leases to Health Management. As a result, the Contractor was unable to obtain financing to commence the contract works on the scheduled commencement date of 1 September 2012. By letter dated 27 November 2012, CNSL advised the Ministry of Health that it had secured financing for the Design/Build Phase but financing was subject to the receipt of the NCRHA's written approvals for the assignment of the building sites to Health Management's financiers.

In order to perform its contractual obligations and to minimize its risks and exposure and consequentially its loss and damage arising from the NCRHA's delays, the Contractor mobilized its personnel and resources to commence the contract works on 2 January 2013 based on an estimated expenditure of TT$139.1M. However, having regard to the NCRHA's failure to provide its written approvals for the assignments of the building sites to Health Management's financiers, the Contractor, notwithstanding it had been given access to the building sites, was unable to commence the contract works on 2 January 2013.

[23] On 11 January 2013, the SWRHA, as agent for the NCRHA, advised CNSL that the Minister of Health had withdrawn his approval of the assignment of the SFGH building site from CNSL to Health Management. CNSL also received a letter dated 8 March 2013 from the NCRHA who advised CNSL that the approval for the leases of the building sites at EWMSC and SFGH had been revoked. The revocation of these approvals effectively frustrated the Contractor's ability to secure financing to commence the construction of the Centres which was supposed to commence on the original start date of 1 June 2011. As a result of the NCRHA's previous written consent in letter dated 10 May 2012, the Contractor had and was incurring considerable wasted costs referable to its mobilization.

[24] The Contractor had estimated, at the time of the execution of the Master Contract, that the total cost of the contract works was $139.1M comprising construction costs of $69M

and outfitting costs of $70.1M. The Contractor sought financing in the sum of $120M from ***ANSA Merchant Bank Limited*** (hereinafter ***"ANSA"***).

[25] In early March 2013, a draft of the proposed deed of licence that was required to be executed by NCRHA in order to create the security interest concerning the EWMSC building site was sent to NCRHA for its review on the basis that this draft will also be used as the model for a similar lease to be executed by CNSL with SWRHA in relation to the SFGH building site. By letters dated 26 March 2013 and 4 September 2013, CNSL requested the NCRHA to execute the deeds of licence.

[26] CNSL spoke with representatives of the NCRHA and the Ministry and, in good faith, negotiated to vary the Master Contract to increase the amount of sessions, the session prices and the service period having regard to the ongoing delays in commencing the construction of the Centres. The principal reason for the negotiations was to take into account the unexpected delays in the commencement of the Design/Build Phases which would have consequentially delayed the Services Phase. The session prices negotiated for the Master Contract were based on 2008/2009 figures and following the revocations in 2013, the likelihood was that the Services Phase would not commence until 2015 at the earliest. These negotiations were consistent with and motivated by the Contractor's implied obligation to act in good faith in relation to the Master Contract.

[27] CNSL wrote to the then Minister of Health, Dr. Fuad Khan, by letter dated 24 March 2013. CNSL updated Dr. Khan *inter alia* on the problems in relation to the assignments as well as in relation to the Contractor's wasted costs and expenses and requesting the Ministry's intervention so that the much needed dialysis services will be provided to the public in accordance with the Master Contract. CNSL, in the said letter, also underscored that the NCRHA's lengthy delays together with the changing economic circumstances and the considerable expenditure incurred required that the contractual arrangements be varied to allow the Centres to be built but with various amendments to the Master Contract as follows:

(i) an increase in the number of weekly dialysis sessions in each of the Centres at EWMSC and SFGH from 600 to 750;

(ii) changes in the payment terms to TAKE or PAY on the basis that the NCRHA would be contractually obliged to pay for all 750 sessions in each Centre irrespective of take up;

(iii) an increase in the price per patient on the basis that over the preceding 6 years since the pre-contractual negotiations had occurred, market rates had increased and the Master Contract made provisions for price increases every 3 years; and

(iv) an extension of the Services Phase from 10 years to 20 years.

[28] By a letter dated 27 June 2014, the Permanent Secretary of the Ministry of Health, on behalf of NCRHA, advised that the Minister had approved the leases and directed the NCRHA and SWRHA to proceed to lease the respective lands to CNSL to facilitate its financing arrangements. Further, the Ministry expressly advised CNSL that the Ministry is desirous of proceeding with the matter. In that letter, the Minister advised that it had sought Cabinet's approval for the following variations to the Master Contract:

(i) increasing the number of weekly dialysis sessions in the Centres at EWMSC and SFGH from 600 to 650;

(ii) including the TAKE or PAY provision so that the NCRHA would be contractually liable to pay for 650 sessions in each Centre and therefore, CNSL would secure a guaranteed minimum sum per month; and

(iii) extending the term of the Services Phase from 10 to 15 years.

[29] By letter dated 8 August 2014, CNSL thanked the Ministry for its favourable consideration of its proposed variations to the Master Contract and accepted its counterproposals. CNSL reminded the Ministry of Health that the Master Contract provided for the assignment of the leases by Health Management to ANSA to secure financing and requested the urgent assignments to ANSA bearing in mind that the Ministry had agreed to the assignments to facilitate CNSL's financing arrangements. In the letter, CNSL also sought the NCRHA's written consent, pursuant to Clause 30 of the Master Contract, for the transfer by FMCHL of all its shares in CNSL to BTL and, thereafter, for the delegation by CNSL to FMCHL of the management of the Centres by a management contract between them. CNSL also expressed its optimism that the Ministry of Health would finalize the variations to the Master Contract and sought a meeting for these purposes.

[30] On 29 October 2014, a conference was convened between CNSL and the NCRHA in relation to the variations to the Master Contract. CNSL agreed to submit a draft of the revised Master Contract to NCRHA for its approval but explained that this was conditional on CNSL receiving the NCRHA's written consent to the share transfer in relation to FMCHL. On 30 October 2014, CNSL again requested NCRHA's written consent to the transfer by FMCHL of all of its shares in CNSL to BTL on the basis that the assignment will not, in any way, compromise FMCHL's involvement in the management, clinical and operational aspects of the provisions of the services. Notwithstanding CNSL's numerous and repeated requests to NCRHA for its written consent to the share transfer, the NCRHA delayed in providing its written consent.

[31] However, on 19 March 2015, the then Health Minister, Dr. Fuad Khan, made a public announcement at a post Cabinet news conference at the Office of the Prime Minister. He announced that construction is set to begin immediately as Cabinet has given its approval for the construction of the Centres.

[32] By letter dated 13 August 2015, the NCRHA, pursuant to Clause 30 of the Master Contract, eventually provided its written consent to the transfer of all FMCHL's shares in CNSL to BTL so that the Contractor will be solely CNSL and BTL. In this letter, the NCRHA requested CNSL to thereafter proceed with the works under the Master Contract. Upon receipt of this letter, CNSL gave instructions to its attorneys to prepare the revised Master Contract in accordance with the NCRHA's counter-proposals. The revised Master Contract was settled in draft and immediately submitted to the NCRHA for its review (hereinafter "*the Varied Contract*"). By letter dated 28 August 2015, the NCRHA wrote to CNSL enclosing the final version of the Varied Contract and confirmed that execution of the perfected agreement would occur at the NCRHA's offices on 1 September 2015.

[33] On 1 September 2015, the NCRHA and the Contractor varied the Master Contract by executing a Varied Contract to reflect *inter alia*:

(i) The removal of FMCHL as a party to the Master Contract;

(ii) That the Contractor (now CNSL and BTL) would enter into a service agreement with FMCHL within 6 months of the execution of the proposed Varied Contract

on the basis that FMCHL will provide the services in relation to the operation of the Centres;

(iii) The extension of the services phase from 10 to 13 ½ years;

(iv) Increases in the session prices of the dialysis services in years 1, 2 and 3; and

(v) Increases in the number of weekly sessions from 600 to 660 in each Centre.

[34] The NCRHA, by executing the Varied Contract along with CNSL and BTL, made it clear that it had no objection to a delayed execution in counterpart by FMCHL when the latter had completed its negotiations with CNSL. By executing the Varied Contract, the NCRHA manifested its agreement to the removal of FMCHL as a contracting party to the Master Contract and further, gave its approval to the execution of a Service Agreement between FMCHL and the Contractor within 6 months of the date of the Varied Contract when fully executed. By letter dated 2 September 2015, following the partial execution of the Varied Contract, the NCRHA confirmed to CNSL in accordance with its contractual obligation at Clauses 3(j) of the lease agreements and Clause 35.3 of the Master Contract that the Minister had given his written approval for the assignment of the leases to CNSL's lenders to facilitate its financing arrangements.

[35] On 2 September 2015, the then Minister of Health, Dr. Fuad Khan, turned the sod to mark the construction of the Centre at EWMSC. He said that the Centre was going to be internationally accredited and the first time a medical facility will be built, equipped and financed through a public/private partnership on the basis that the only things the Government will be providing are land and patients. CKDS and its members relied on the statements and representations made by the Minister on this date to expect adequate renal services through the Centres in a clinical and non-clinical environment.

[36] However, by letter dated 21 September 2015, CNSL, in accordance with the Varied Contract, informed the NCRHA that the leases executed on 11 October 2011 between CNSL and the NCRHA/SWRHA had to be revised to reflect the new commencement dates since the original commencement date of 1 June 2011 had long expired. The NCRHA confirmed by letter dated 25 September 2015 that it would amend and re-execute the leases to reflect the Varied Contract and that in any event, CNSL could begin the Design/Build Phase of the contract works subject to the receipt of its financing. By letter dated 28 September 2015, the NCRHA granted formal permission to CNSL in

relation to the EWMSC to hoard off the building site, establish a site office, establish storage facilities on the site and identify site access routes. CNSL/BTL as Contractor did this on 6 October 2015. The Contractor elected to commence the contract works using its own resources notwithstanding that it had not yet received financing because the NCRHA had not yet executed the deeds of licence assigning the building sites to ANSA.

[37] CNSL, by letter dated 20 October 2015, requested that the SWRHA, having regard to the terms of the Varied Contract, revise the lease agreement between itself and SWRHA to reflect a new commencement date. CNSL also requested that the revised lease agreement be prepared by the SWRHA for its execution. In accordance with Clause 3.1 of the Master Contract, CNSL also requested the SWRHA to appoint its site representatives in order for CNSL to perform its contractual obligations based on the Varied Contract. By a further letter also dated 20 October 2015, CNSL wrote to SWRHA requesting it to urgently appoint its representative to facilitate performance of the Master Contract. CNSL sent a reminder letter dated 10 December 2015 to SWRHA requesting the revised lease agreement in relation to the SFGH building site and notification of SWRHA's site representatives. The NCRHA, by letter dated 9 May 2016, formally authorized CNSL to enter the SFGH building site and to hoard it off, establish a site office, establish storage facilities and identify site access routes.

[38] Having regard to the fact that the NCRHA had agreed that FMCHL was going to be removed as a contracting party to the Master Contract, the Contractor negotiated and agreed with the NCRHA that the Service Agreement would now be entered between CNSL and a subsidiary of FMCHL, namely ***Fresenius Medical Care Ltd*** (hereinafter **"*FMCL*"**), which was a globally renowned distributor of dialysis products to manage the Centres. In accordance with its obligations under the Varied Contract, in or about early 2016, CNSL circulated a draft Service Agreement to the NCRHA for its approval. The Service Agreement was between CNSL as Contractor and FMCL as Service Provider.

The NCRHA approved further variations to the Master Contract (hereinafter **"*the revised Varied Contract*"**) and the draft service agreement (principally providing for FMCL to be appointed Service Provider in place and instead of FMCHL) as well as

several ancillary agreements including a replacement guarantee. The NCRHA further agreed to convene a suitable date for the execution of the revised Varied Contract and the Service Agreement and related agreements. The NCRHA also agreed to the terms of a Power of Attorney whereby Mr. Fabio Machado (a FMCHL and FMCL representative) would execute both the revised Varied Contract on behalf of FMCHL and the Service Agreement on behalf of FMCL.

[39] The Contractor, in anticipation of the formal execution of the revised Varied Contract and the Service Agreement as well as the deeds of licence and related agreements, accelerated the contract works so that as at 4 August 2016, in relation to the EWMSC building site:

(i) 100% of the setting out and site grading had been completed;

(ii) 100% of the trench excavations had been carried out;

(iii) 100% of the reinforced pad footing ground beams and stub columns had been cast; and

(iv) 90% of the superstructure works (including the fabrication and erection of structural steel) had been completed.

These contract works had been carried out and completed by the Contractor using its own resources but the Contractor, in its discussions with the NCRHA's representatives, repeatedly warned that it urgently required its financing to be approved to complete the Design/Build Phase and to mobilize for the Services Phase.

[40] In early October 2016, the NCRHA informed the parties that it had scheduled 13 October 2016 at its offices in Mt. Hope to execute the revised Varied Contract and for the execution of the Service Agreement and to provide its written consent to the execution of the Service Agreement on the basis that when these documents were executed, it would then execute the deeds of licence and related agreements in order for the Contractor to obtain financing. However, execution was subsequently rescheduled to 18 October 2016 to permit the NCRHA's board of directors to meet on 17 October 2016 for its final approvals.

CNSL advised the NCRHA and the other parties that at the execution on 18 October 2016, in addition to the execution of the revised Varied Contract and the Service Agreement, it will also provide for execution:

(i) A replacement Guarantee since FMCHL's guarantee had been revoked by virtue of its removal as a contracting party and NCRHA had agreed that ***Lifestyle Management Limited*** (hereinafter ***"Lifestyle Management"***) would be the replacement ***Guarantor*** (hereinafter **"*the Guarantee*"**);

(ii) A collateral warranty to be executed between FMCL, CNSL and the NCRHA (hereinafter ***"the collateral warranty"***); and

(iii) A letter agreement whereby CNSL agreed to replace key equipment in the Centres in the 8th and 13th years of the Operation Services Period (hereinafter ***"the equipment replacement agreement"***).

[41] At the execution meeting on 18 October 2016, the Ministry of Health's representatives attended. However, at this meeting, the NCRHA's representatives unexpectedly announced that they could not execute the various agreements because NCRHA was of the view that Cabinet's approval was required for the removal of FMCHL as a party to the Master Contract.

[42] The Contractor, through Mr. David Jaikissoon, challenged the NCRHA's refusal to execute the various agreements as well as the NCRHA's failure to provide its written approval to the execution of the Service Agreement between CNSL and FMCL. However, NCRHA's representatives assured Dr. George Laquis and Mr. David Jaikissoon (CNSL and BTL's representatives respectively) that this approval had been ***urgently sought*** and would be given ***within two weeks***. Based on these representations, CNSL and FMCL executed the Service Agreement and Lifestyle Management executed the guarantee on the basis that the NCRHA would execute the revised Varied Contract and the collateral warranty in counterpart and thereafter the deeds of licence. The Contractor agreed to continue with the contract works as a result of the NCRHA's representation and following the meeting on 18 October 2016, the contract works continued at EWMSC.

[43] On 20 October 2016, in part performance of the Revised Varied Contract and consistent with the NCRHA's agreement and NCRHA's representations that Cabinet's approval

would be given within 2 weeks, BTL purchased FMCHL's 2500 shares in CNSL for US$50,000.00 and repaid the loan from FMCHL in the sum of US$400,000.00 owed by BTL.

[44] On 8 November 2016, the Ministry of Health hosted a meeting with CNSL and BTL's representatives to discuss the Cabinet approvals for the construction and operation of the Centres. The Minister of Health, Mr. Terrance Deyalsingh, chaired the meeting. The Minister in the Ministry of the Attorney General and Legal Affairs and Minister in the Officer of the Prime Minister, Mr. Stuart Young, was also present on behalf of the Cabinet together with the Permanent Secretary of the Ministry of Health, Mr. Richard Madray.

[45] At this meeting, Minister Young requested clarification of certain clauses in the Master Contract. In the course of the discussions, Dr. George Laquis, on behalf of the Contractor, specifically enquired of both Ministers whether the Contractor should demobilize at the EWMSC building site and stop the contract works until such time that the Cabinet gives its approvals for the NCRHA to execute the various agreements and thereafter the deeds of licence. Both ministers, in unison, responded **"*no way*"** and the Minister of Health reminded the Contractor that the construction and operation of the Centres was an ***important national project***.

The Contractor reasonably regarded the conduct and the Ministers' statements as assurances that Cabinet's approval was imminent. Therefore, the Contractor elected to continue the contract works using its own resources in anticipation that the deeds of licence would shortly be executed permitting the Contractor to obtain financing for the remaining construction and operation of the Centres. The Minister's statements at this meeting were clear, unambiguous and devoid of relevant qualifications and further supported the Contractor's expectation first created on 1 September 2015 and continued following the meeting on 18 October 2016 that NCRHA would execute the relevant documents to enable the Contractor to obtain financing.

[46] By letter dated 4 January 2017, the NCRHA advised CNSL that it was only at the NCRHA's Board meeting on 17 October 2016 that the NCRHA's Board had requested Cabinet's approval to remove FMCHL as a party to the Master Contract. Additionally,

the Contractor was further assured by the NCRHA's CEO, Mr. Davlin Thomas, that an urgent Note was being prepared for Cabinet's next meeting hence the anticipation of a short time frame. The NCRHA also requested information on Lifestyle Management to complete its due diligence for the execution of the guarantee.

[47] By letter dated 12 January 2017, the Contractor caused its attorneys to write to NCRHA providing information in relation to Lifestyle Management and the performance bond. In the letter, CNSL requested the NCRHA to *inter alia* urgently advise when Cabinet's approval will be received so that the proposed Varied Contract and the collateral warranty could be executed in counterpart so that the deeds of licence can be executed. However, despite numerous and repeated requests, the NCRHA did not execute the various agreements including the deeds of licence nor did it advise when Cabinet's approval will be forthcoming.

[48] The Contractor, having relied on these assurances to its detriment, became the beneficiaries of a legitimate expectation of a substantive benefit that the NCRHA will execute the relevant documents for the Contractor to secure financing for the Centres and a legitimate expectation that Cabinet's approval was forthcoming. The detriment suffered by the Contractor as identified above was US$50,000.00. The Contractor in continued reliance on the representations above and to its detriment has continued to contractually perform its various obligations under the Master Contract, Varied Contract, the Service Agreement, the collateral warranty, the guarantee and the undertaking. However, these works are not proceeding apace because the Contractor has not received financing to complete the contract works.

[49] Accordingly, on 3 July 2017, CNSL and BTL's attorneys at law issued a letter before action to the NCRHA requesting *inter alia* another meeting to discuss the NCRHA's repeated and unjustified delays in executing the related agreements including the deeds of licence. After getting no satisfactory response, CNSL and BTL's attorneys sent a Pre-Action Protocol Letter to the Cabinet, the Minister of Health and the NCRHA on 8 August 2017. There was no forthcoming response in relation to the Pre-Action Protocol letter from any of the parties.

[50] According to CKDS, CKDS and its members are personally and directly aggrieved by the impugned decisions and/or the impugned actions. The delay in the start of the construction and operation of the 2 Full Service Renal Dialysis Centres has directly affected the members of the CKDS who require treatment and some of them require renal replacement and therapy. The members of the CKDS have a direct stake in the decision of Cabinet to facilitate the construction and operation of the 2 centres and they are being directly affected by the delay of the Defendants in having these Centres constructed and operated. CKDS's members have a legitimate expectation created by the Cabinet that the Government would construct and operate the Centres in order for its members of the public to receive adequate renal services. The statements made by Ministers Jerry Narace and Fuad Khan and the publication of the statements to the public and to CKDS and its members consisted of representations by Government that adequate renal services would be provided by the Full Service Dialysis Centres. These were express representations made on behalf of the Government that it was committed to constructing and having operational the Centres which would provide complete renal services to renal patients and potential renal patients in a clinical and non-clinical environment. The express representations made by the Ministers on behalf of the Government made it clear and unambiguous that Government committed itself to have constructed and to have operational the Centres to provide to renal patients and potential renal patients adequate renal medical services. CKDS and its members relied on the said representations and they acted to their detriment by feeling assured that in receiving renal services in a clinical and non-clinical environment for which they would not have to pay, there was no need to set aside monies for the future in order to meet those expenses. They expected that these renal services which were promised by the Government would have been provided within a few years. Since the Centres were not constructed, they have to continue to pay for renal services which causes and is causing them grave financial stress and prejudice.

[51] Furthermore, if the Centres were constructed and were operational, it would have had a vast effect in improving the quality of the health care and the life of kidney patients including members of CKDS because:

(i) there will be a reduction of premature deaths with greater life expectancy and improvements in the quality of life;

(ii) there will be screening for early diagnoses in order to prevent the progression of early kidney disease or to manage the existing disease;

(iii) there will be the provision of adequate renal services to end stage kidney patients thereby reducing pain and suffering and improving their independence and giving them dignity;

(iv) there will be improvements in family lives when family members are comfortable that their loved ones are receiving adequate renal services;

(v) there will be the provision of vascular access, periodic blood testing, laboratory testing, provision of pharmaceuticals, chest X-rays and EKGs as part of patient management;

(vi) there will be the provision of non-clinical services including health promotion and education programs, dietician's support, social worker interventions, psychological and behavioural therapy;

(vii) there will be improved training for dialysis nurses; and

(viii) there will be significant socio-economic advantages for the national community from increasing the productive years of kidney patients and enhancing productivity by reducing early disability, early retirement and premature deaths.

[52] Accordingly, the unreasonable delay in not having these Centres constructed and operational has frustrated the legitimate expectations which were created in CKDS' favour.

[53] Furthermore, the failure of the Government to have the Centres constructed and operational has directly affected CKDS and its members who require treatment and some of them who require renal replacement and therapy. Some of the past members of CKDS have since died as a result of their inability to access renal replacement therapy. The current members of the CKDS are not receiving the requisite treatment and therapy services which they require are limited to the provision of dialysis machines, which are limited in numbers. These members are not receiving the patient care and management which they require in order to preserve and protect their lives. Accordingly, the members of the CKDS have a direct stake in the decision of Cabinet to facilitate the construction and operation of the 2 Centres and they are being directly affected by the continued failure of the Government to not construct and have operational these Centres.

[54] In that regard, the failure of Government to have the Centres constructed and operational amounts to a contravention of their right to life guaranteed in **section 4(a) of the Constitution**. It also amounts to a contravention of the right to life of kidney patients and future kidney patients.

Defendants' Case

[55] The Defendants admitted that the correspondence exchanged between the parties as far back as 2010 were in fact exchanged. However, the Defendants do not agree with the Claimants' interpretation of the contents of the various correspondence and in particular, to its effects on the various agreements between the parties. The Defendants also do not agree with the Claimants' interpretation of the terms of the various agreements.

[56] According to the Defendants, in June 2003, the Cabinet conveyed approval for the Ministry of Health to issue a Request for Proposals in order to secure a private provider for the establishment of the 2 Renal Dialysis Centres. However, attempts were made to procure a provider but they were unsuccessful. The Cabinet, the Ministry of Health and NCRHA, thereafter, determined that the most cost efficient and effective manner to establish the 2 Renal Dialysis Centres was for the facilities and works to be designed and constructed by a proposed contractor with proven international experience and afterwards, for the proposed contractor to provide the clinical and non-clinical services for a specified operation period. It was determined that the Contractor would finance, design, construct, manage, operate and transfer at the end of the Operation Service period, the facilities, equipment, operation and knowledge. All of the costs and expenses in relation to the above, would be covered in a single price per patient dialysis session, with the estimated time for the completion of the Design/Build period of 18 months from the date on which the NCRHA gave the proposed contractor notice to start.

[57] The Minister of Health directed the NCRHA to issue a Request for Proposals dated 15 July 2008 which was issued for the works and for the provision of the clinical and non-clinical services by a contractor with proven international experience. FMCHL together with its joint venture partner, BTL, submitted a tender on 8 September 2008 for their joint participation through CNSL to carry out the works and provide the clinical and non-clinical services.

[58] According to the Defendants, at all times, proven international experience was a material prerequisite for the Contractor. As appears from the pre-contract and preamble to the Master Contract, the NCRHA selected the said joint venture, as the preferred bidder, in reliance on the representation that FMCHL and BTL had the capacity to fulfill the strategic management, technical and operational requirements of the works and facilities and their successful prior experience in similar engagements. The NCRHA was granted approval on 19 March 2009 to negotiate with the preferred bidder for the establishment of the 2 Renal Dialysis Centres on a build, operate and transfer basis on lands owned by the NCRHA and the SWRHA. On 27 August 2009, the Ministry of Health informed Cabinet *inter alia* that formal negotiations began in April 2009 with the Centres to be designed and equipped by FMCHL and BTL to provide both haemodialysis and peritoneal dialysis to the patients. Negotiations continued during August 2009 to April 2010.

[59] On 12 April 2010, Cabinet agreed *inter alia* that the NCRHA could enter into a contract with CNSL, FMCHL and BTL for the establishment of the 2 Full Service Renal Dialysis Centres on a design, build, operate and transfer basis. Pursuant to that decision, the parties executed the Master Contract on 6 May 2010. However, once the agreement was signed in 2010 pursuant to Cabinet's approval, the progression of the project was plagued with several issues despite a commencement date of 1 June 2011 being set, which was subsequently extended to 5 January 2012 and then to 1 September 2012. All of these dates were missed by the Contractor.

[60] One of the issues which affected the commencement of the project was the requirements that the Contractor had to obtain to finance the project. This was complicated and involved the transfer of State land, on which the Centres were to be built, to the Contractor. Afterwards, the State land had to be assigned to the sub-contractor, Health Management. After construction, the Centres were to be sublet back to CNSL so that the said land could be used as security for financing the project. These issues, however, were not resolved until 2014.

[61] Another cause of the significant delay was the renegotiation of terms by the Contractor. By letter dated 24 March 2014 to the Minister of Health, CNSL sought to, in a material way, renegotiate the terms of the contract by outlining certain proposals for the

adjustment of the contract, citing the period of delay, the increase in market prices for dialysis services, the changing economic circumstances and the considerable expenditure incurred. Nevertheless, the Ministry of Health by letter dated 27 June 2014 indicated that it had considered CNSL's proposals and informed CNSL of Cabinet's counter-proposal. CNSL accepted the counter-proposal in certain respects by letter dated 8 August 2014 to the Ministry of Health but negotiated on other aspects. Nonetheless, in or around 19 March 2015, Cabinet agreed to the variation of the contract in certain respects. As a consequence, the NCRHA prepared a draft Variation Agreement and submitted same to CNSL, FMCHL and BTL for review. However, according to the Defendants, there was no Cabinet approval for the removal of FMCHL.

[62] By letter dated 13 July 2015, CNSL proposed additional changes to the draft Variation Agreement, which in effect sought to primarily remove FMCHL as a party from the Master Contract as guarantor and requested the consent of the NCRHA for the transfer of all of FMCHL's shares in CNSL to BTL. However, by letter dated 13 August 2015, the Acting Chief Executive Officer of the NCRHA, Mr. Chandradal Harry, did not consent to the transfer of all of FMCHL's shares in CNSL to BTL. The Defendants averred that prior Cabinet approval had not been sought and obtained for this variation of the contract. Further, as opposed to FMCHL, neither CNSL nor BTL had proven international experience required of the Contractor. Additionally, Cabinet's approval had been an integral part of every step of the process and the removal of FMCHL would have been contrary to the clear intention of the Cabinet concerning this process.

[63] Nonetheless, on 1 September 2015, the NCRHA, CNSL and BTL did execute a further contract, the Varied Contract, to vary the Master Contract dated 6 May 2010 (i) to allow for the removal of FMCHL as a party thereto and all its obligations as provided therein including as guarantor; (ii) to permit the Contractor to enter into a Service Agreement with FMCHL; and (iii) to effect amendments to the definitions including the Operations Service Period and the session price. In addition, it was also a condition precedent that the Service Agreement had to be to the satisfaction of NCRHA and was to be executed within a reasonable time after execution of the variation but no later than 6 months from the date of execution of the varied agreement. Nevertheless, the Defendants averred that there was no Cabinet approval for the removal of FMCHL as a party to the Master Contract and that FMCHL did not execute the Varied Contract. The Defendants further

averred that they are not aware of the circumstances put forward by the Claimants as to why FMCHL failed to execute the Varied Contract.

[64] CNSL indicated to the NCRHA, in letter dated 21 September 2015, that it would be re-entering the work sites and requested the urgent re-execution of the leases with the revised terms. By letter dated 25 September 2015, the NCRHA indicated to CNSL that CNSL had access to and was allowed to take possession of the work sites. The NCRHA also indicated that it continued to wait for the provision of the registered Power of Attorney of FMCHL and that the variation of the contract would be executed by FMCHL and an amended lease would be re-executed in short time thereafter. On 6 October 2015, CNSL and BTL mobilized at EWMSC building site to hoard off the building site, establish a site office, establish storage facilities and identify site routes.

[65] The Defendants averred that it is not true that in or about early 2016, CNSL circulated a draft Service Agreement to the NCRHA for its approval. At that time, a revised Service Agreement was being contemplated and discussed. Furthermore, FMCHL had not yet executed the terms of the Varied Contract of 1 September 2015.

[66] The Ministry's Dialysis Oversight Committee met with CNSL, FMCHL and BTL on 16 May 2016 and with CNSL and BTL on 21 September 2016. FMCHL insisted that it wished to be removed as a party to the Master Contract. There were discussions regarding the appointment of a suitable guarantor to replace FMCHL and the execution of a registered Power of Attorney on behalf of FMCHL. In furtherance of these discussions, a further revised variation agreement was proposed.

However, no revised variation agreement has since been executed because NCRHA's Board of Directors held the view that Cabinet's approval was necessary for the removal of FMCHL as a party to the Master Contract and that due diligence had to be carried out in relation to any proposed guarantor to ensure that the new proposed guarantor could properly take the place of FMCHL. This decision not to execute the revised variation agreement was made on 17 October 2016.

[67] After the decision was taken to not execute the revised varied agreement, Cabinet never gave NCRHA any assurance that approval would be given within 2 weeks so that

NCRHA could execute the various outstanding documents. The only representation which could have been accurately made by the NCRHA would have been that it would execute all of the necessary documents as soon as it receives Cabinet approval.

[68] By letter dated 4 January 2017, the NCRHA wrote to CNSL informing them that with the proposed change in guarantor from FMCHL to Lifestyle Management, the NCRHA must be satisfied that Lifestyle Management has the ability to perform the contractor's obligations if NCRHA were to exercise its rights to call on the guarantee and indemnity. At the date of the letter, the NCRHA only had sight of Lifestyle Management's incorporation documents, shareholding information and the bank reference. CNSL was further advised that without a full financial or operational due diligence on Lifestyle Management to satisfy itself that Lifestyle Management can step in and discharge the Contractor's performance obligations, the NCRHA was assessing an appropriate sum for the provision of a performance bond by Lifestyle Management. NCRHA indicated that it would update CNSL within 2 weeks and it was hopeful that with the provision of a figure for the performance bond, Lifestyle Management will be in agreement with same and a Cabinet Note can be finalized.

[69] CNSL responded to the NCRHA by letter dated 12 January 2017 that it proposes and offers the provision of a bond at first instance for the Design/Build period and thereafter upon the commencement of the Operation Services period; that CNSL will provide bonds with three year intervals for the remainder of the Contract. The value of the bond for the Design/Build period will be 10% of the cost of construction of the facilities and the value of the bonds given thereafter will be the same 10% of the reducing value of the Contract in 3 year tranches. CNSL further indicated that the proposal was in line with internationally recognized performance bond values.

[70] It is the Defendants' case that there has been no decision made by Cabinet or the Ministry of Health or the NCRHA to not construct the Renal Dialysis Centres. According to the Defendants, it was crucial to this project that the role of FMCHL, the party with the required international experience, not be diminished in any way so that the project would remain beneficial for those persons who suffer with kidney disease. Accordingly, it is not prudent to move forward with the project where the major partners have no proven expertise in construction of the Centres and the provision of the services.

[71] The benefits of the project, with the partner with international experience, had been confirmed by government ministers in their statements, namely Mr. Jerry Narace on 6 May 2010, Dr. Fuad Khan on 19 March 2015 and 2 September 2015. However, these statements are incapable of grounding a legitimate expectation.

[72] According to the Defendants, there is presently a Note before Cabinet seeking approval of the variation of the Master Contract dated 6 May 2010 between the NCRHA, CNSL, FMCHL and BTL, to remove FMCHL as a party and other matters essentially related to proceeding with the Contract. However, before granting approval, Cabinet needs to be satisfied that the proposed variation to the agreement, that is, removing FMCHL as a party will not, in any way, affect the quality of the dialysis service expected to be provided. However, approval has been delayed having regard to the change in economic circumstances in the country since the Master Contract was signed in 2010. Cabinet therefore requested further clarification from the Ministry of Health with respect to the overall costs associated therewith versus current expenditures on renal dialysis care, bearing in mind that once construction is completed, there will be an obligation to pay significant sums for the services. Accordingly, Cabinet's decision on the future of the project is awaited.

Claimants' Reply

[73] In response, the Claimants stated that the tender issued by the NRCHA on 15 July 2008 did not state that the Centres *"would be designed and constructed by a proposed contractor with proven international experience"*. Instead, it merely stated a *"capable operator and provider"*. The Claimants denied that the Request for Proposal provided that the Contractor must have proven international experience.

[74] The Claimants denied that the Request for Proposals provided that the estimated time for the completion of the Design/Build Phase was 18 months from the date on which the Contractor was given notice to start construction. The 18 month period was given by the Contractor after the tender was awarded and during the negotiations for the Master Contract. Furthermore, the negotiations did not commence in August 2009 but occurred between September 2008 and April 2010. Moreover, the Master Contract did provide for a Design/Build Phase of 18 months from the commencement date.

[75] The Claimants denied that the commencement dates of 1 June 2011 and 5 January 2012 were missed by the Contractor. The Claimants averred that by letter of authorization dated 28 April 2011, the NCRHA advised the Contractor that 1 June 2011 was the commencement date for the Design/Build Phase. However, the Contractor was unable to commence the Design/Build Phase until the Minister of Health turned the sod in 2015. It is the Claimants' case that the delay in the commencement of the Design/Build Phase of the Centres at EWMSC and SFGH was solely as a result of the inaction by the NCRHA and/or the Minister of Health and/or the Cabinet.

[76] The Claimants denied that they are liable or responsible for the delay in the creation of the security interests. The NCRHA and the Minister of Health initially gave approval for the creation of the security interest which meant that mortgages of the EWMSC and SFGH sites would have been obtained to permit ANSA to finance the Design/Build Phase. However, this approval was subsequently revoked without any reason given by letter dated 8 March 2013 but then reinstated by letter dated 27 June 2014. Nevertheless, since that letter, neither Cabinet, the Minister of Health nor the NCRHA has given effect to the reinstatement.

[77] Furthermore, notwithstanding NCRHA's assurance that the leases executed on 11 October 2016 would be amended and re-executed to include the extension of the Operation Services Period to 13 ½ years, the NCRHA has repeatedly refused to execute fresh leases or to sign the sub-leases and the deeds of licence even though it has approved all of the drafts submitted to it by the Contractor. Moreover, the leases have not been re-executed to reflect the new commencement date. As a result, CNSL cannot assign the benefit of its leases to Health Management since the leases do not have a commencement date. Consequently, Health Management is not able to mortgage the lands to ANSA to create security interests in favour of CNSL. In that regard, the Contractor's ability to obtain financing to complete the Design/Build Phase remained frustrated solely because of the inaction of the NCRHA/the Minister of Health/the Cabinet.

[78] The Claimants denied that the renegotiation of the Master Contract was also a cause for significant delay. The renegotiation occurred precisely because of the NCRHA/the Minister of Health/the Cabinet's inaction in approving the security interest so that the

Design/Build phase could not commence in 2011 when it should have. Furthermore, the Master Contract as varied was signed on 1 September 2015 and the sod was turned on 2 September 2015. No explanation was given for the 2 ¾ year delay to present.

[79] The Claimants did not agree with the Defendants that there was no Cabinet approval for the removal of FMCHL as a contracting party and the substitution of FMCL. The Varied Contract was executed by the NCRHA, CNSL and BTL as contracting parties on 1 September 2015. Neither the Minister of Health nor the Ministry of Health nor the Cabinet were parties to the Master Contract. Further, Clause 36.5 of the Master Contract provides that the Master Contract may not be varied except by a contract in writing by the Parties. According to the Claimants, the parties have always proceeded on the basis that Cabinet's approval to remove FMCHL as a party was not required nor needed. There was no need for the NCRHA to seek and obtain Cabinet's approval to execute the revised Varied Contract to permit the substitution of FMCL for FMCHL. Moreover, it is untrue that neither CNSL nor BTL had the proven international experience required of the Contractor. CNSL or BTL's experience or competence have never been challenged by the NCRHA/the Ministry/the Cabinet until now. Additionally, the recitals to the Master Contract do not suggest that the approval of Cabinet is an integral part of the contract process.

[80] The Claimants dispute that NCRHA said that a due diligence exercise had to be carried out by the NCRHA/Ministry in relation to the proposed guarantor, Lifestyle Management. There were no discussions about due diligence at the meeting on 18 October 2016. Based on NCRHA's assurances, all due diligence exercises had long been completed and the only reason for not executing the various documents was that Cabinet approval was required for the substitution of FMCHL and FMCL. The suggestion in the letter dated 4 January 2017 that the NCRHA had not completed its due diligence was contrived because the NCRHA had already approved Lifestyle Management as a replacement guarantor and was prepared to sign the replacement guarantee on 18 October 2016 but for Cabinet's approval.

III. Submissions

[81] The Court has had the benefit of both oral and written submissions of the parties which were elaborate and extremely thorough. There is little value in rehearsing them *in toto*

at this stage since they would be examined and applied relevant to the specific issues as they arise from the facts of this case. Nonetheless, I have set out below a simple summary of the parties' submissions.

[82] Counsel for the Claimants, Mr. Maharaj, submitted that the claims for judicial review of CNSL and BTL have arisen out of the failure of the Cabinet and the Minister of Health to approve, or even make a decision as to whether to approve the NCRHA's proposed variation of the Master Contract with CNSL and BTL. The target of the judicial review proceedings is the failure of the Minister and Cabinet to make a decision on approval. CNSL and BTL, in summary, submitted that –

(i) by virtue of the assurances given to them at both the 18 October 2016 and 8 November 2016 meeting, they had: (a) a procedural legitimate expectation that the Minister of Health, and so far as material, the Cabinet, would, at the very least, make a decision within a short time or a reasonable time thereafter as to whether to give the relevant approval; and (b) a substantive legitimate expectation that they would actually give their approval.

(ii) The NCRHA's request for approval to proceed further imposed a duty on the Minister of Health and (to the extent he delegated the decision) on the Cabinet to give a direction under **sections 5 and 16 of the RHA Act** without unreasonable delay, which they have failed to do. The Minister's failure to make a decision for so long amounts to a breach of that duty because the delay is unreasonable in the light of a range of important factors. The same applies to the Cabinet if and to the extent that the Minister has delegated his duty to make a decision to the Cabinet.

(iii) The Minister and Cabinet's conduct in delaying the actual grant of approval was unreasonable, irregular or improper within the meaning of **section 5(3) of the Judicial Review Act**.

[83] **CKDS**, in summary, submitted that-

(i) any decision to delay or withhold the relevant approval risks infringing the constitutional right to life of the CKDS's members;

(ii) CKDS's members have a legitimate expectation that the Centres will be built and operational;

(iii) the Minister and Cabinet's delay in deciding whether to grant the relevant approval is unreasonable and unlawful; and

(iv) the Court should order the First and Second Defendants to take the decision now. Given (i), (ii) and (iii) above, the Defendants' reasons for withholding approval cannot justify infringing the right to life.

[84] The Defendants' submissions, in summary, in relation to CNSL and BTL are:

(i) These proceedings are an abuse of the process of the Court since the issues raised do not sound in public law; this is not a matter for judicial review. The action ought to be brought as a claim for breach of contract.

(ii) The Claimants are guilty of undue delay in bringing judicial review proceedings.

(iii) The statements given at the meetings on 18 October 2016 and 8 November 2016 are incapable of supporting a claim of legitimate expectation with respect to an act of Cabinet.

(iv) In relation to CKDS, to employ the usual generous approach to the construction of constitutional rights, the Court would be hard-pressed to read **section 4(a) of the Constitution** as imposing on the State an obligation to provide CKDS and its members with the level of health care which it claims would be provided if the variation to the contract is approved.

IV. Issues arising for determination

[85] Based on the facts, evidence and submissions put forth by the parties, the Court has deduced that the live issues for determination are as follows:

1. **Is the Claimants' Claim amenable to judicial review?**
2. **Is there an alternative remedy available to the Claimants?**
3. **Was there undue delay by the Claimants in applying for judicial review?**
4. **Were the assurances in question capable of engendering a procedural and/or substantive legitimate expectation of a substantive benefit on the part of CNSL and BTL?**
5. **If the answer to the above question (i.e. Issue 4) is in the affirmative, was there a frustration of that legitimate expectation? If so, was there a sufficient overriding public interest which justified the frustration?**

6. **Does the failure of the Minister and/or the Cabinet to make a decision on the Cabinet Note amount to unreasonable delay?**
7. **Is the Minister's and/or Cabinet's failure to make a decision on the Cabinet Note unreasonable, irregular or improper?**
8. **Were the assurances in question capable of engendering a legitimate expectation of a substantive benefit on the part of CKDS and its members?**
9. **If the answer to the above question (i.e. Issue 8) is in the affirmative, was there a frustration of that legitimate expectation? If so, was there a sufficient overriding public interest which justified the frustration?**
10. **Does the frustration of the legitimate expectation infringe on the right to life guaranteed in section 4(a) of the Constitution of CKDS and its members?**
11. **To what reliefs are the Claimants entitled, if any?**

I shall deal with these issues individually and in turn as adumbrated above in this paragraph.

V. Law and Analysis

Issue 1: Is the Claimants' Claim amenable to judicial review?

Submissions

[86] Counsel for the Defendants, Mr. Mendes, submitted that this matter is firmly rooted in a commercial contract between the NCRHA and CNSL, FMCHL and BTL. He contended that the Claimants are seeking to call upon the Court to force a party to a contract to enter into a further contract and/or adhere to the terms and conditions of the contract which is already in existence. Therefore, the Claimants ought to have brought a claim for breach of contract as opposed to an application for judicial review.

[87] Mr. Mendes submitted that judicial review is the means by which the Courts can enforce the proper performance by public bodies of duties owed to the public whereas private law is concerned with the enforcement of personal rights of persons. Nevertheless, not every act of a public body involves duties owed to the public. Some statutory duties imposed on public bodies would create private rights in favour of individuals, enforceable by way of an ordinary private law claim only. Furthermore, public bodies do perform private law acts in respect of which they can sue and be sued in private law proceedings. Therefore, it is necessary to determine whether a decision is properly

classified as existing in public or private law. Counsel relied on the authority of **Hampshire County Council v Graham Beer t/a Hammer Trout Farm**[1] where Dyson LJ explained:

> *"The question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of the public law."*

[88] Accordingly, notwithstanding that the complaint is against a public body, it is a prerequisite that the right sought to be enforced is a public law right rather than a private law one: that the decision infringed upon a right entitled to protection under public law. It was submitted that in order to found a claim in judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. Therefore, in disputes arising from the performance of contracts, one must look at the availability of contractual remedies. If these remedies are available, the Court must decline to exercise its judicial review discretion.

[89] It was contended that there is no aspect of this matter that is public, save for the fact that a public body, NCRHA, is a party to the contract. The other parties to the contract are private entities and the terms and conditions of the contract are what one would expect to find in any commercial arrangement. It was further contended that the mere fact that members of the public who suffer from renal disease will be able to access the services once completed and operational does not introduce a sufficient public law element to bring this matter within judicial review. Furthermore, there is no evidence of fraud, corruption, bad faith and/or improper motive which might have let a claim like this in the door as a proper matter for judicial review. Counsel relied on the authorities of **Dudley Muslim Association v Dudley Metropolitan Borough Council**[2], **Hampshire**

[1] (2004) 1 WLR 233
[2] [2015] EWCA Civ 1123

County Council v Supportway Community Services Ltd[3], **R (Trafford) v Blackpool BC**[4] and **Mercury Energy Ltd v Electricity Corp of New Zealand Ltd**[5].

[90] Mr. Mendes further submitted that the following decisions by the NCRHA are not amenable to judicial review absent allegations of fraud, compensation or bad faith, namely: (i) a decision to enter into a contract; (ii) a decision to enter into a contract but not on terms proposed by the other party; or (iii) a decision not to vary existing contractual arrangements. Additionally, the same principles will apply to any decision made by Government, contracting in its own right as principal, not to enter into a contract, not to agree to specific terms or not to vary any existing contract. Contracts entered into by Government are enforceable in private law just like any other contract.

[91] Mr. Mendes contended that it is indisputable that a private individual is free to decide that it will seek the approval of someone else before entering into a contract or agreeing to specific terms or varying an existing contract. Where a private individual does so, it is hard to conceive of any cause of action which the other contracting party may have against the person whose approval is sought. Accordingly, in the exercise of its undoubted powers to enter into contractual relations, the NCRHA is free to decide to seek the approval of someone else before entering into a contract or agreeing to vary an existing one. It was submitted that given that the NCRHA's decision to not vary an existing contract is not amenable to judicial review, which same principle will be applicable to the Government, it therefore follows that any failure by the Government to make a decision whether to grant its approval or not to the NCRHA is not amenable to judicial review.

[92] In response to this point, counsel for the Claimants, Mr. Maharaj, submitted that the Minister and the Cabinet, when making the decision on whether to approve, are acting in their capacity as, respectively, the responsible Minister and the Government whose policy the NCRHA is carrying out. It was further submitted that their powers to approve or withhold approval are derived from the **RHA Act** and the **Constitution**, respectively. Therefore, it would be absurd to suggest that their powers are derived from some purely

[3] [2006] EWCA Civ 1035
[4] [2014] EWHC 85 (Admin)
[5] [1994] 1 WLR 521

private arrangement between them and the NCRHA. Furthermore, the function they are carrying out is the implementation of government policy. In making their decision, they are considering whether the NCRHA's proposed variations accord, or continue to accord, with ministerial policy and the public interest.

[93] Mr. Maharaj further contended that in making the assurances upon which CNSL and BTL relied, the Minister was acting in a public capacity, that is to say, in his capacity as the responsible Minister: he was not making the assurance in a private capacity. Moreover, the assurances were not about a private body or an act done in a private capacity; they concerned what a public body, the Cabinet, would do in its ministerial capacity. Mr. Maharaj submitted that the Minister and Cabinet are exercising a public function and the challenge is a public law challenge. Their decision-making power does not derive from the contract in question and their decision is not made under the contract.

[94] Counsel agreed with and adopted the general statement of principle of Dyson LJ in **Hampshire v Beer**[6] (supra) and the Court in **R (Trafford) v Blackpool Borough Council**[7] (supra). However, Mr. Maharaj submitted that these cases involved a decision by a public body not to enter into a contract as being amenable to judicial review because there was a public element to the decision: (***Beer*** was a case concerning a refusal by the Farmers' Market to grant a market trader a new licence; ***Trafford*** was a case concerning a refusal by the Borough Council to grant the claimant a new lease). In both cases, the decision of the contracting public body itself was amenable to review. Accordingly, the present case is *a fortiori* because the challenge is not to a decision of a contracting body but to the decision of ministers, acting in a ministerial capacity, whether to give their approval to the contracting body. Counsel also relied on the authority of **Molinaro v Kensington and Chelsea Borough Council**[8], a case which was cited at length in ***Trafford*** and which is also a case in which the Court found that a decision of a public body in relation to a contract was amenable to judicial review.

[95] Mr Maharaj, submitted that it is clear from **sections 5(1), 6 and 16(1) of the RHA Act** that the power of giving specific or general directions in the instant case to the NCRHA

[6](2004) 1 WLR 233
[7] [2014] EWHC 85 (Admin)
[8] [2001] EWHC Admin 896

on the relevant draft agreements was vested in the Minister of Health rather than the Cabinet. Nevertheless, the Minister of Health, as a member of Cabinet, was and is entitled to take into account the views of Cabinet. However, in the end, it is for the Minister of Health and not Cabinet, to decide what directions should be given to the NCRHA and it is not open to him to delegate the decision itself to Cabinet.

[96] Mr. Maharaj therefore contended that the fundamental question is not so much *whether the Cabinet has exercised its constitutional powers wrongly* but rather *whether the Minister has exercised his statutory powers wrongly and how should he exercise them in any future decision*. It was contended that the Cabinet cannot exercise its constitutional powers under **section 75 of the Constitution** in such a way as to take over the Minister's responsibilities under the **RHA Act** or to cause the Minister to exercise his statutory powers unlawfully. However, if Cabinet does so, it is subject to the same restrictions on its exercise as the Minister.

[97] Mr. Mendes, on the other hand, submitted that there is no evidence in this case that the Minister of Health gave the NCRHA any direction under **section 5(1) of the RHA Act** with regard to the variation of the contract. The only evidence of any decision made is in NCRHA's letter dated 4 January 2017 that on 17 October 2016, the Board decided to request Cabinet's approval to remove FMCHL as a party to the main contract and to conduct due diligence in relation to the proposed replacement guarantor before deciding to sign the variation contract.

[98] Mr. Mendes contended that the Claimants have contrived and contorted to construe the decision as a decision to request a specific direction from Cabinet under **section 5(1) of the RHA Act** and that the Minister of Health has delegated his power under **section 5(1)** to Cabinet. There is no evidence that the NCRHA made a request to Cabinet for a specific direction under **section 5(1)**; a decision was made to ask Cabinet for approval of the variation but there is no evidence that **section 5(1)** was invoked. Furthermore, NCRHA's decision to ask for Cabinet's approval cannot be construed as a request under **section 5(1)** since Cabinet has no power under **section 5(1)** to give specific direction. Additionally, there is no evidence that the Minister delegated his powers under **section 5(1)** to Cabinet. In any event, the power is his to exercise and he is not permitted to

abdicate this power. Neither is there any evidence of a request to the Minister under **section 5(1)** for a specific direction.

[99] Mr. Mendes further contended that the Claimant should not contend that the NCRHA made a request under **section 5(1)** to Cabinet for a specific direction. If it in fact did so, any such request would be ultra vires and void because Cabinet has no power under **section 5(1)** to give a specific direction. Nevertheless, there is no public element which makes the NCRHA's decision to seek the approval of Cabinet and no public law element in the failure of Cabinet to give that approval.

Law and Analysis

[100] **Section 5(1) of the JRA** states as follows:

> *"An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court."*

[101] It is undisputed that the Second Defendant, the Minister of Health, is a person acting in the exercise of a public duty. The Minister of Health, as the governmental head of the Ministry of Health, is charged with oversight of the entire health system in the Republic of Trinidad and Tobago. He plays a central role in protecting and promoting public health. Therefore, the Minister of Health is amenable to judicial review.

[102] The NCRHA is a public authority acting in the exercise of a public duty or function in accordance with the **RHA Act** under the direction of the Minister of Health as it relates to the provision of health care in Trinidad and Tobago. Thus, the NCRHA is also subjected to the judicial review.

[103] Before seeking to ascertain whether the Cabinet is subject to review in this case, two questions must first be answered arising from the submissions of Mr. Mendes. These are (i) whether the RHA Act has been engaged; and (ii) whether a specific direction was requested by the NCRHA from the Minister under **section 5(1) of the RHA Act** and

whether the Minister delegated his power under **section 5(1)** to the Cabinet. It is therefore necessary to first ascertain the applicability of the **RHA Act** in this case at bar.

Is the Regional Health Authorities Act applicable in this claim for Judicial Review?

[104] The NCRHA is a statutory authority created and governed by the **RHA Act**. The powers and functions of an Authority are provided for in **section 6** which ought to be exercised in accordance with specific or general directions from the Minister of Health as stipulated in **section 5(1)**.

[105] The Claimants' main contention in their claim for judicial review is the failure of Cabinet and/or the Minister of Health to approve or even make a decision as to whether to approve NCRHA's execution of the further variation agreement. Mr Maharaj submitted that the request for Cabinet's approval was at the direction of the Minister of Health pursuant to **section 5(1) of the RHA Act**. Part of Mr. Maharaj's argument that this matter is sounded in public law rests on **sections 5(1), 6 and 16(1) of the RHA Act**. These sections read as follows:

Section 5(1) of the RHA Act:

> *Subject to subsection (2), a Board shall exercise its powers and functions in accordance with such specific or general directions as may be given to it by the Minister*.

Section 6 of the RHA Act:

The powers and functions of an Authority are —

(a) to provide efficient systems for the delivery of health care;

(b) to collaborate with the University of the West Indies and any other recognised training institution, in the education and training of persons and in research in medicine, nursing, dentistry, pharmacy and bio-medical and health science fields, veterinary medicine as well as any related ancillary and supportive fields;

(c) to collaborate with and advise municipalities on matters of public health;

(d) to operate, construct, equip, furnish, maintain, manage, secure and repair all its property;

(e) to facilitate new systems of health care;

(f) to provide the use of health care facilities for service, teaching and research;

(g) to establish and develop relationships with national, regional and international bodies engaged in similar or ancillary pursuits; and

(h) *to do all such things as are incidental or conducive to the attainment of the objects of the Authority.*

Section 16(1) of the RHA Act:

(1) Subject to the approval of the Minister an Authority may—

(a) acquire, hold and enjoy any property, real or personal by purchase, devise, bequest, gift or in any other way;

(b) lease, accept surrenders of leases, mortgage, grant or accept licences, rights of way or easements.

[106] From a literal reading of **section 5(1) of the RHA Act** above, the Minister is given a discretionary power to give specific or general directions to the Board of Directors of each Authority in exercising their powers and functions under the Act. The relevant powers and functions applicable in the case at bar under **section 6** are: (i) *to provide efficient systems for the delivery of health care*; (ii) *to facilitate new systems of health care*; (iii) *to operate, construct, equip, furnish, maintain, manage, secure and repair all its property;* and (iv) *to do all such things as are incidental or conducive to the attainment of the objects of the Authority.* It is to be noted that the **RHA Act** governs the different Authorities established under **section 4.** Additionally, any decision taken by an Authority pursuant to **section 16 of the Act** must be subject to the approval of the Minister.

[107] The evidence as it stands before the Court is that the Board of Directors of the NCRHA at a special meeting on 17 October 2016 decided that it needed Cabinet's approval to remove FMCHL as a party to the main contract and to conduct a due diligence exercise in relation to the proposed replacement guarantor before executing the further variation

agreement. Mr. Mendes argues that there is no indication that this was done under the direction of the Minister of Health. He submitted that **sections 5(1), 6 and 16(1) of the RHA Act** are not applicable in this matter on the basis that there is no evidence that the NCRHA sought permission from the Minister of Health nor did the Minister of Health gave any direction to seek approval from Cabinet to have the contract varied.

[108] As to whether a matter falls within the scope of public law as opposed to private law and so be amenable to judicial review, the facts of the case must be looked at holistically and not in partitions. In 2010, the then Minister of Health gave an address at the ceremony which included the Permanent Secretary and the media. Since then, various Ministers of Health and Permanent Secretaries have been involved. Even in 2014, the then Minster of Health made a public announcement about the construction of the Centres as approved by the Cabinet. One cannot ignore the fact that the Minister of Health had approved the leases. This matter even involved more than the Minister of Health: the Minister in the Office of the Prime Minister, Stuart Young, was at the meeting of 8 November 2016.

[109] The Defendants' own case is that the Minister of Health directed the NCRHA to issue a Request for Proposals dated 15 July 2008, which was issued for the works and for the provision of the clinical and non-clinical services.

[110] On 12 April 2010, Cabinet agreed *inter alia* that the NCRHA could enter into a contract with CNSL, FMCHL and BTL for the establishment of the 2 Full Service Renal Dialysis Centres on a design, build, operate and transfer basis. It is also the Defendants' case that Cabinet's approval had been an integral part of every step of the process and the subsequent removal of FMCHL would have been contrary to the clear intention of the Cabinet concerning this process.

[111] What this shows is that the Minister of Health was directly involved in the process from the beginning and gave directions to the NCRHA as he is statutorily entitled to do pursuant to **section 5(1) RHA Act**. It also shows that the decisions of Cabinet were an integral part of the process. Notwithstanding that the power to give specific and general directions under section 5(1) is vested in the Minister, the fact is, the Minister takes his guidance on government policy from the Cabinet and is accountable to Cabinet under the doctrine of collective responsibility.

[112] It is difficult to envisage, having regard to all the facts of this case, including the parties involved acting in their public capacities, the beneficiaries involved (that is, the public), and the very public nature of this project, that this is a matter which the Court ought to deem a strictly commercial one void of invocation of the public law.

[113] Even if the decision to seek Cabinet approval was not by way of directive from the Minister pursuant to the RHA, the NCRHA would have had to transmit the request for Cabinet approval to the Minister of Health, who would have then submitted a Cabinet Note for approval. The NCRHA does not have direct contact with the Cabinet: its line of contact is through the Minister of Health. The request for approval then could only have been for a ***specific direction*** in accordance with **section 5(1) of the RHA Act**. It is therefore difficult to conclude that the RHA Act is inapplicable to the case at bar since the Minister of Health was under no obligation to act simply because the Board of the NCRHA thought Cabinet's approval was necessary. The Minister of Health could have decided that this was not necessary and acted accordingly, but this was not so. In other words, it is absurd to assume that the Minister had no power to decide otherwise or was in no way involved in the decision to seek Cabinet's approval. It is undisputed that there is a Cabinet Note before the Cabinet seeking the approval aforesaid. The question may be asked: Who takes Cabinet Notes to Cabinet? Although the request is said to be made to Cabinet for approval, the only person or body to whom such request could have been made and by whom the approval could be granted was the Minister. The Minister has sought to involve the Cabinet because on the basis of collectively responsibility he is accountable to the Cabinet and he takes his directives from the Cabinet on government policy. There is no doubt that this project had its genesis from government policy.

[114] At the core of this matter, the public is ultimately to be affected. The establishment of the renal facilities is not one privately to be enjoyed by the Claimants alone, but to the benefit of the public at large- all those persons who require these services now and in the future, under the public health institutions of this country.

[115] While I have no issue with the contention that government contracts are enforceable in private law just like any other contract, the facts in this case seem to have escaped the boundaries of private contract law simpliciter, and it is for this Court to look at the facts holistically and determine whether it would invoke the principles or remedies attributable to public law. Failure to do so would mean that the Court could fall short of

its duty in assessing whether a claim is amenable to judicial review. The point of judicial review is to hold public bodies accountable, and to do so the Courts must review the facts presented, including those *leading up to the contract*, not just the fact that a contract has been entered into or the contract document itself. The role played by the public body/bodies in arriving at the contract ought to be taken into account.

[116] An example may be drawn between different types of contracts entered into by the NCRHA. In the first example - assuming the NCRHA enters into a commercial contract for the construction of a new building to house its Human Resource Department – no serious question may arise as to whether any decision or lack of decision related thereto is amenable to judicial review. The construction might fall squarely within the powers and functions of the NCRHA pursuant to **section 6(d) of the RHA Act** and may require no more than the Board's approval in achieving its statutory mandate. This may amount to no more than a commercial agreement breach of which will sound in private law. However, in this second example - where the NCRHA enters into a contract for the provision of health services to benefit the public at large and directly relates to the provision of health services for the public, and for which the Board has thought it necessary to go, and has gone, to the Minister of Health and the Cabinet for approval, then one has to reasonably be attentive to the differences applicable to the two types of contract. The Cabinet, as provided for in **section 75 of the Constitution**, has the general direction and control of the Government and is collectively responsible to Parliament. In the latter example, therefore, the most democratically public arm of State becomes involved. Of course, the principles of the separation of powers are to be duly observed and respected and ought never to be taken lightly. However, unlike the first example, the NCRHA directly involved the Cabinet. What this does is go to the root of this matter. It shows that this matter is not simply a commercial one for which the Claimants ought to seek relief in private law, but instead, one in which the administrative functions of the State and the ultimate decision maker of policy for public affairs were called into operation so as to have the final say. In the Court's opinion, whether this final say was a 'rubber stamp' for the decision already made by the experts at the NCRHA or not, is irrelevant, as the final decision was to come from the Cabinet by way of Cabinet Minute.

[117] Further, the various Ministers of Health involved in this matter from the beginning were all acting in their capacity as holders of public office and speaking as Ministers

accountable to the public. If they were speaking in public without Cabinet's approval or out of turn, one would expect that the Cabinet as a collective body would have taken issue with their statements and publicly brought them back in line. There is no evidence that Cabinet disowned the public statements made by the several Ministers and no evidence that the Ministers were taken to task for their public assurances. In fact, the statements made publicly by the various Ministers are not disputed. What is disputed is whether the effect of those statements amounted to assurances as to create rights which can be enforceable. But this is for argument in a different issue.

[118] It is this Court's view, therefore, that Mr. Mendes' submission that there is no evidence of a request from the NCRHA to the Minister of Health under **section 5(1) of the RHA Act** for a specific direction misses the mark. If one were to assume this to be correct, this would mean that the NCRHA had direct access to the Cabinet and can bypass its line Minister, the Minister of Health. This is simply not the process. The NCHRA must go through the Minister of Health for him to submit the request for approval to the Cabinet. The procedure is clear as to Cabinet Notes.

[119] If Mr. Mendes wished to convince this Court that the Minister of Health had no discretion and was obligated to follow through with the decision of the Board, then he ought to have submitted to this Court the relevant learning and authority that establishes that the Minister ***must*** act on the decisions of the Board. This was not done.

[120] While the NCRHA is its own legal entity for the purposes of being a party to an action, it is clear from the facts of this matter that the NCRHA was not acting on its own accord but was working under the guidance, direction and approvals of the Minister of Health, who was in turn acting on approvals of the Cabinet based on government policy.

[121] I have taken judicial notice of the procedure to be adopted in submitting Cabinet Notes for consideration by the Cabinet of Trinidad and Tobago. I would state the procedure briefly below as taken from the website of the Office of the Prime Minister of Republic of Trinidad and Tobago https://www.opm.gov.tt as follows:

> *"The Cabinet is serviced by a Cabinet Secretariat which provides specialized administrative support as well as support to certain sub-committees of the Cabinet. The Secretariat receives submissions from all Ministers of*

*Government in the form of **Cabinet Notes** for consideration by Cabinet. The Cabinet Secretariat records the decisions of Cabinet and transmits those decisions to the relevant public authorities in the form of **Cabinet Minutes** for implementation."* [Emphasis added]

[122] From the above, it is clear that the Minister in charge of the different government ministries are responsible for submitting Cabinet Notes to Cabinet for consideration. The decision, thereafter, is collectively given by Cabinet and not any one Minister.

[123] The Minister of Health is responsible for the NCRHA. Consequently, the Court can safely deduce that when the Board of Directors of the NCRHA decided that it needed Cabinet's approval to execute the further variation agreement, the Board would have submitted this request for approval through the office of the Minister of Health. Thereafter, the Minister of Health would have submitted the request for approval of the execution of the further variation agreement by the NCRHA in the form of a Cabinet Note for consideration by Cabinet. It is undisputed that there is a Cabinet Note presently before the Cabinet for approval.

[124] This is confirmed by the evidence of Mr. Madray, the Permanent Secretary of the Ministry of Health, in his affidavit dated 23 May 2018. He stated thus:

*"**There is at present a Note before Cabinet seeking approval of the variation of the Contract dated May 6th, 2010**, between the NCRHA, Comprehensive Nephrology Services Limited, Fresenius Medical Care (Holdings) Limited and Biomedical Technologies Limited, to remove Fresenius Medical Care (Holdings) Limited as a party therefrom and the other matters essentially related to proceeding with the Contract. **Before granting such approval, Cabinet needs to be satisfied that the proposed variation to the agreement removing Fresenius as a party will not in any way affect the quality of the dialysis service expected to be provided**. The Note submitted to Cabinet addresses the pros and cons of excluding Fresenius and Cabinet's approval is awaited."* [Emphasis mine]

[125] From the latter underlined sentence of the above quoted paragraph of Mr. Madray, the question could be asked: How does Mr. Madray know of what Cabinet needs to be

satisfied? Isn't the answer - through the Minister? And if the Minister is involved, isn't the request for Cabinet approval through the Minister? And does this not entail a request for a specific direction by the NCRHA to the Minister under **section 5(1) of the RHA Act**? Mr. Maharaj submitted that the Minister and the Cabinet when making the decision on whether to approve are acting in their capacity as the responsible Minister and the Government respectively. It was further submitted that their powers to approve or withhold approval derive from the **RHA Act** and the **Constitution**, respectively. I accept this submission.

[126] The question which arises now is: ***Can the Court review Cabinet's inaction to give a decision on the approval of the Cabinet Note concerning the execution of the further variation agreement by the NCRHA****?*

[127] Lord Roskill in **Council of Civil Service Unions v Minister for the Civil Service**[9] stated as follows:

> *"… But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue.* ***Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds****. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand,* Wednesbury *principles* (**Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** *[1948] 1 K.B. 223). The third is where it has acted contrary to what are often called "principles of natural justice"."*

[128] There are cases before the Court which demonstrate that Cabinet is not immune from challenge by way of judicial review proceedings. If Cabinet exercises a statutory power which, if conferred on a minister would be subject to judicial review, Cabinet, likewise,

[9] [1985] A.C. 374

can be subjected to judicial review. This was decided in the Barbados case of **C.O. Williams Construction Ltd v Blackman and another**[10]. The Privy Council in this case restored the first instant decision of Sir Denys Williams CJ, who established that the Barbados Cabinet was within the reach of judicial control when he ruled that the award of a contract by Cabinet was an 'administrative act' as defined in Barbados' ***Administrative Justice Act***. This case illustrated the principle that when a policy-making organ, such as the Cabinet, undertakes to perform administrative functions which have been statutorily conferred, it cannot escape judicial review. Lord Bridge in **C.O. Williams Constructions v Blackman (supra)**, stated:

> *"When the cabinet exercises a specific statutory function which, had it been conferred on a minister instead of the cabinet, would unquestionably have been subject to judicial review,* ***their Lordships can see no reason in principle why the cabinet's exercise of the function should not be subject to judicial review to the same extent and on the same grounds as the minister's would have been****."* [Emphasis added]

[129] The Cabinet has a general function expressly stated in **section 75(1) of the Constitution**: the general direction and control of the government, and is collectively responsible for Parliament. The Court takes judicial notice that deliberations on Cabinet Notes before Cabinet for consideration are confidential and only between the members of Cabinet. As stated above, only the decisions of Cabinet are conveyed to the appropriate person or authority in the form of a Cabinet Minute. Thereafter, the relevant Ministers and their Permanent Secretaries have the primary responsibility to ensure the implementation of Cabinet decisions in their respective Ministries. However, the decision-making process of Cabinet, relating to Cabinet Notes, is entirely up to Cabinet. There is no Act of Parliament or subordinate legislation governing the decision-making process of Cabinet nor any specifying the considerations to be taken into account by Cabinet in arriving at its decision. However, the Cabinet's action or inaction can be judicially reviewed where (i) *it has been guilty of an error of law in its action*; (ii) *it exercises a power in so unreasonable a manner that the exercise becomes open to review upon "Wednesbury principles"; and (iii) it has acted contrary to what are often called*

[10] (1994) 45 WIR 94, [1994] 4 LRC 216

"principles of natural justice". I conclude therefore that Cabinet's decision and/or inaction is subject to judicial review.

[130] This Court is not asked to rule solely on any breach of Agreement between the parties, but instead on the inaction of the relevant public body/bodies involved. The criteria for determining whether a matter is public or private, is not solely based on who the parties are, albeit the decision maker ought to be a public body. It is this Court's opinion that the Claimants' Claim raises important issues of public law including: (i) the creation of legitimate expectations and the frustration thereof without justification; (ii) the duties of public bodies in their decision-making functions with the attendant issues of unreasonable delays, misuse of power, unreasonableness and irrationality in line with the *"Wednesbury principles";* and (iii) constitutional issues of the right to life and whether such right under **section 4(a) of the Constitution** has been engaged, these rights themselves not requiring leave to pursue redress. For all these reasons, I hold that the Claim at bar falls squarely within the ambit of public law and is amenable to judicial review.

Issue 2: Is there an alternative remedy available to the Claimants?

[131] The crux of Mr. Mendes' submissions was that this Claim is not amenable to judicial review on the basis that it resides in the realm of private law – breach of contract. The trajectory of his argument was not so much that there was an alternative remedy available to the Claimants but that it was their only remedy. I hold the view, therefore, that it is clear that any evidence, arguments, legal authorities and principles of law being advanced by the Defendants touching upon this issue of alternative remedy would have been subsumed and already traversed in **Issue 1** above.

[132] Equally clear, is that from the analyses and findings in Issue 1, all such arguments and challenges are bound to fail and indeed have failed. Nonetheless, for the sake of completeness, I shall interrogate the facts and submissions from this fresh perspective with a view to rationalizing and justifying the reasoning and findings of the Court arrived at in Issue 1.

[133] **Section 9 of the JRA** provides:

> *"The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances."*

[134] **Halsbury's Laws of England**[11] states:

> *"The grant of permission is nevertheless a matter within the discretion of the court. For example, when considering whether to grant permission to apply for judicial review, the court must take account of any alternative remedies available to the applicant, since where any alternative remedy has not been exhausted judicial review will not normally lie."*

[135] **Halsbury's Laws of England**[12] further states:

> ***"Where the point has not been raised at the permission stage or not until a late stage in proceedings then the court may, depending on the circumstances, determine the issue notwithstanding the availability of an alternative remedy."***

[136] According to Glidewell J in **R v Huntingdon District Council, ex parte Cowan and another**[13]:

> *"Where there is an alternative remedy available but judicial review is sought, then in my judgment* ***the court should always ask itself whether the remedy that is sought in the court, or the alternative remedy which is available to the applicant by way of appeal, is the most effective and convenient, in other words, which of them will prove to be the most effective and convenient in all the circumstances, not merely for the applicant, but in the public interest. In exercising discretion whether or not to grant relief, that is a major factor to be taken into account."***

[11] Vol 61A (2018) Para 58
[12] Vol 61A (2018) Para 58
[13] [1984] 1 All ER 58

[137] From the above authorities, it is clear that the decision to grant permission is a discretion vested in the Court. The Court can entertain judicial review even if there are alternative remedies provided there are exceptional circumstances. And where the issue of alternative remedies was ***not*** raised at a sufficiently early stage in the proceedings, the Court can determine the issue regardless of any alternative remedies: see also **Khan v Secretary of State for the Home Department**,[14] per Underhill LJ.

[138] This Court, in exercising its discretion before granting leave at the *ex parte* hearing would have taken this major statutory factor into account and would also have considered that the remedy of judicial review was the most effective and convenient for the Claimants to pursue, not merely for the Claimants themselves, but in the public interest. It is to be noted that this issue was not raised, either shortly after leave was granted or during the interlocutory and case management stage, notwithstanding that the Court gave directions for the filing of interlocutory applications. I therefore reject the submission of Mr. Mendes that the Claimants' remedy lies in private contract law. In any event, even if there was an alternative remedy in contract law available to the Claimants, the stage to raise that challenge has long elapsed.

Issue 3: Was there undue delay by the Claimants in applying for judicial review?

Submissions

[139] Another factor the Court must take into account when considering whether to grant leave to apply for judicial review is the question of delay. Mr. Mendes submitted that the Claimants are guilty of undue delay in bringing these proceedings and have not put forward any satisfactory reason for permitting over 1 year to elapse before seeking leave to challenge the failure to execute the further variation agreement on 18 October 2016. It was contended that the Claimants have attempted to obfuscate the clear delay by anchoring their Claim to the date of the Pre-Action Protocol Letter dated 8 August 2017. The Claimant filed this action just under 3 months thereafter on 6 November 2017. Mr. Mendes further submitted that time does not start running from the date an Applicant elects to send a Pre-Action Protocol Letter but from the date when the grounds for the Application first arose: **section 11 of the JRA**. Accordingly, the grounds first arose on 1 November 2016, 2 weeks after the 18 October 2016 meeting.

[14] **[**2017] EWCA Civ 424

[140] Mr. Maharaj, in response, submitted that, the Defendants cannot now raise the issue of delay since they did not file any procedural applications challenging delay whether by 31 October 2018 or at all. Mr. Maharaj contended that the Defendants, in any procedural application, is entitled to rely on **section 11 of the JRA**. Counsel relied on the authority of **Paula Barrimond v The Public Service Commission**[15] wherein Aboud J (Ag, as he then was) reviewed the Privy Council case of **Fishermen and Friends of the Sea v The Environmental Management Authority and another**[16] and the authority of **Devant Maharaj v National Energy Corporation of Trinidad and Tobago**[17] in support of his proposition.

[141] Mr. Maharaj submitted that based on the decision in **Devant Maharaj** (supra), it was incumbent on the Defendants to raise delay at the earliest time by filing an application to set aside leave. The Defendants did not do this nor did they take advantage of the order entered by consent for procedural applications to be filed notwithstanding 2 extensions were given for these purposes. It was further submitted that the extension to 8 October 2018 gave the Defendants some 5 months to file their application following the filing of their affidavits on 23 May 2018. This meant that the Defendants would have been able to adduce evidence which they could rely on to show prejudice and detriment on the basis of evidence filed by the parties.

Law and Analysis

[142] **Section 11 of the Judicial Review Act** deals with the question of delay in applying for relief and reads as follows:

> *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.*

[15] HCA. No. S-1301 of 2005
[16] [2005] UKPC 32
[17] [2019] UKPC 5

(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.

[143] **Part 56.5 of the CPR** repeats the factors set out in **section 11(1) of the JRA**. It provides as follows:

"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."

[144] **Section 11(1) of the JRA** expressly requires that an application for judicial review be made promptly and in any event within 3 months from the date when grounds for the application first arose. However, this requirement is made subject to the Court's jurisdiction to extend the period for making an application if the Court considers that there is good reason to do so.

[145] The jurisdiction to set aside a prior grant of leave is agreed. It is a jurisdiction that is exercised before the substantive hearing with caution and usually only for good cause

and where the initial granting of leave is subsequently recognized as being clearly erroneous: per Lord Slynn, in **R v Criminal Injuries Compensation Board, ex p A.**[18]

[146] In **Balwant v Statutory Authorities Service Commission**[19], leave to apply to for judicial review was granted *ex parte* despite a delay of almost 10 years. In granting the leave order, 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. The Respondent filed a notice of intention to apply to set aside leave shortly after it was granted. The notice was in the usual form, indicating that the application would be made at the hearing of the motion. Christopher Hamel-Smith J (Acting) considered the reasoning of the House of Lords in **R v Criminal Injuries Board ex parte A**[20] and held that the leave-granting judge must have implicitly extended time. However, while recognising that **section 11(1) of the JRA** restricted the consideration of timeliness to the application for leave stage, he regarded the Respondent's notice of preliminary objection as a viable means of legitimizing such an objection at the substantive hearing.

[147] Nonetheless, the facts in the instant case are distinguishable from **Balwant** (supra). There was no application filed in the instant case by the Defendants to set aside the leave on the basis of delay. However, in Mr. Madray's affidavit on 23 May 2018, he stated that his affidavit in response was sworn to but without prejudice to the submissions from Senior Counsel for the Defendants as to (i) delay of the Claimants in applying for Judicial Review; (ii) the existence of an alternative remedy; (iii) whether there is any basis for a legitimate expectation; and (iv) whether the matter as a whole is properly one for judicial review. Mr. Madray does not raise the issue of delay further in his affidavit.

[148] In **Paula Barrimond v The Public Service Commission** (supra), Aboud J (Ag, as he then was) examined at what stage the right to raise delay is exercisable. The learned Judge stated as follows:

> *"A respondent is undeniably entitled to rely on section 11 of the JRA, but at what stage is the right to raise delay exercisable? Subsection (2) confers a*

[18] [1999] 2 AC 310; 341 B-F
[19] HCA No. 402 of 2001
[20] [1999] 2 AC 330

discretion on the court to refuse leave if there has been undue delay in making the application. The language in subsections (1) and (2) suggests that the issue is to be determined at the leave stage and not at the substantive application stage. If the application for leave is made at a contested ex parte or converted inter partes hearing then the appropriate place to take the objection is at the leave stage. However, most applications for leave are made ex parte, uncontested, and unless the delay is apparent enough to be recognised or is specifically drawn to the judge's attention by the applicant's counsel, and he expressly extends the time, the directive in the first limb of subsection (1) will appear to have been overlooked. Where the leave-granting judge expressly extends the time to make the application, the exercise of his discretion is reviewable on appeal or by application to set aside. Sometimes, evidence of delay is unearthed after the extension is granted and a respondent will have recourse to interlocutory remedies before the leave-granting judge, or another judge, to reverse the grant. Cases arise where undue delay is apparent on the papers, but the judge has nonetheless granted leave without expressly extending time to make the application. In both cases, which is to say, on grants made ex parte, uncontested, where there is apparent delay and time is expressly extended or in cases where the order is silent, the question arises: what is the appropriate stage of the proceedings for the respondent to take the objection? More directly put, can the objection be taken at the substantive hearing, and, if so, by what procedure?" [Emphasis mine]

[149] Aboud J further stated:

"To paraphrase Nelson JA, undue delay is disapplied from substantive applications, and a notice of a preliminary objection sustains its life only as an appendage of the substantive motion. In my view, barring cases where the issue of delay is deferred, if leave has been granted ex parte and the order is silent as to an extension of time, it must be presumed that the leave-granting judge extended time: an extension of time is implicit in the grant of leave. A respondent therefore should promptly make a separate interlocutory application to set aside leave. Such an application has an independent life

and is not an appendage of the motion for substantive relief. It can be heard before or together with the substantive application. The right of appeal against a decision in the interlocutory application is independently preserved. In the event that an applicant has misrepresented the facts of his timeliness, the prospects of the interlocutory application would be strengthened. <u>If all the evidence of delay is apparent on the papers filed in the leave application, the implied extension of time is made more resistant (but not impervious) to complaint</u>." [Emphasis mine]

[150] In the case at bar, leave was granted *ex parte* on 13 November 2017 and the Leave Order was served on the Defendants on 15 November 2017. The Defendants did not file any interlocutory application to vacate the Leave Order nor did they file a notice of intention to take a preliminary objection at the hearing of the substantive application. Further, on 2 July 2018, the Court directed that the parties should file any procedural applications together with submissions in support by 14 September 2018. This time was further extended to 8 October 2018 and thereafter again to 31 October 2018. The Defendants did not file any such applications before the Court. Trial of substantive application was, thereafter, fixed for 12 July 2019.

[151] The Leave Order obtained *ex parte* on 13 November 2017 did not expressly extend the time for the Claimants to make their application for Judicial Review. Nevertheless, the Leave Order did grant leave for the Claimants to apply for Judicial Review. Consequently, it was implicit that the question of delay would have been taken into account, and if necessary, such time would have been extended. In fact, this Court would have granted leave to the Claimants after due consideration of all relevant considerations, including the requirement that applications for leave be made promptly.

[152] Having considered the authorities above, and applying the *ratio* in **<u>Paula Barrimond</u>** (supra) and **<u>Devant Maharaj</u>** (supra), the Court is of the view that there is no basis for the Defendants to challenge the leave granted at the substantive hearing. As a consequence of the Defendants' failure to promptly file a separate interlocutory application to set aside leave, especially when directed to do so with a deadline until 31 October 2018, the Defendants cannot now seek to rely on the issue of undue delay in applying for judicial review. Consequently, the issue of undue delay in applying for

judicial review in this matter at bar is moot and therefore the Defendants' arguments on this issue fails.

Issue 4: Were the assurances in question capable of engendering a procedural and/or substantive legitimate expectation on the part of CNSL and BTL?

Procedural Legitimate Expectation

[153] Mr. Maharaj submitted that the assurances given at the 18 October 2016 and 8 November 2016 meetings gave rise, at the very least, to a *procedural* legitimate expectation (a) that a decision on whether to give the approval would be within 14 days or at least within a short time thereafter; alternatively (b) that the decision would be made within a reasonable time. Therefore, by virtue of this legitimate expectation, the Minister and the Cabinet were and are under a duty under **section 15 of the JRA** to make a decision, which duty the Court can force them to perform under that statutory provision on the grounds of unreasonable delay.

[154] Implicit in the specific assurance that approval would be given within 2 weeks was that a decision would be made on whether to grant the approvals within that time or at least within a reasonable time after it was given. Further, there is no dispute that CNSL and BTL relied upon the assurance and that these assurances gave rise at least to a *procedural* legitimate expectation that a decision on whether to approve would be made within 14 days or at least shortly thereafter. Mr. Maharaj contended that the two week assurance given by the NCRHA's representatives was indisputably made with the authority of the Minister of Health because its representatives were there and Mr. Madray does not suggest that it was given without his authority. Mr. Maharaj submitted that "he" made the assurance in the exercise of his statutory powers as Minister of Health and therefore, for that reason alone, it was his responsibility to see to it that it was made good.

[155] Mr. Maharaj submitted that where a person, such as the Minister, vested with the statutory power to make a decision, gives an assurance to the effect that another entity (that is Cabinet) will make it for him within a certain time, the person to whom he has delegated the decision, is as much bound as he is. Likewise, if Cabinet was merely advising the Minister on its view as to how he should exercise his powers, he remained

bound by the assurance and Cabinet was not entitled to act in such a way as to frustrate it.

[156] Mr. Maharaj further submitted that CNSL and BTL were entitled to take it that in giving the two week assurance, the Minister was speaking for the Cabinet since he is a member of Cabinet and was speaking of matters within his own province and area of responsibility. Additionally, the change for which Cabinet approval was said to be needed had been proposed in early 2016 and then discussed with the Minister of Health and he was obviously content with it since there was an execution meeting on 18 October 2016. Accordingly, CNSL and BTL had no reason to suppose that the Minister would have any difficulty in obtaining Cabinet approval.

[157] Counsel relied on the judgment of Denning J in **Robertson v Minister of Pensions**[21] for the applicable principles by which one arm or department of government might bind another or bind the government as a whole:

> *"In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments, for they also are but agents of the Crown. The War Office letter therefore binds the Crown, and, through the Crown, it binds the Minister of Pensions. The function of the Minister of Pensions is to administer the Royal Warrant issued by the Crown, and he must so administer it as to honour all assurances given by or on behalf of the Crown."*

[158] Mr. Maharaj further submitted that there is no suggestion that any of the other things the Minister or the Ministry of Health's representatives said or suggested at either of the meetings were said without Cabinet approval. The Minister in the Office of the Prime Minister, Minister Stuart Young, was also present at the meeting of 8 November 2016

[21] [1949] 1 KB 227 at 232

which was set up as a response to the NCRHA's request to the Cabinet and the Ministry for approval of the agreed arrangements. The Minister in the Office of the Prime Minister was therefore there representing the Cabinet and the Government's point of view.

[159] Mr. Maharaj contended that the effect of these other assurances was (i) that Cabinet approval was a formality and the NCRHA would execute all necessary documents as soon as approval was received; (ii) there were no material impediments to proceeding immediately with the project as now constituted; and (iii) Cabinet's approval would at least be given within a reasonable time.

Substantive Legitimate Expectation

Submissions

[160] Mr Maharaj submitted that the effect of the assurances given on the 18 October and 8 November 2016 was to create a legitimate expectation of a substantive benefit, that is, that the relevant approval would be given within a short or a reasonable time so as to allow CNSL and BTL to proceed with the project to build the Centres. However, the delay so far has frustrated this.

[161] It was submitted that the guiding principles concerning the creation and protection of legitimate expectations have been clarified by the Privy Council in: **Paponette v Attorney General**[22] and **United Policyholders v Attorney General**[23]. From these authorities, Mr. Maharaj contended as follows:

(i) where a public body makes a representation or promise to an identifiable person or class of people that it will act in a certain way and the representation is ***clear, unambiguous and devoid of relevant qualification***, and the person to whom the statement is made relies upon it, then the courts will hold the public body to its statements, unless the public body can show good policy reasons in the public interest for departing from it; and

[22] [2012] 1 AC 1
[23] [2016] 1 WLR 3383

(ii) the public body's justification for departing from its promise is assessed by applying a proportionality test; that is, by judging whether the departure from its statement and the frustration of the expectation was a proportionate measure in the circumstances.

[162] Mr. Maharaj submitted that the meaning and effect of a representation are determined by how, on a fair reading of what was said, the representation would reasonably have been understood by those to whom it was directed. He relied on the authority of **R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence**[24]. Mr. Maharaj contended that the assurances given on 18 October 2016 and 8 November 2016 were clear and unequivocal representations that –

(1) Cabinet's approval to the execution of the documents would be given within two weeks from the date of 18 October 2016 meeting;
(2) in any event, Cabinet's approval was a formality and the NCRHA would execute all necessary documents as soon as approval was received;
(3) there were no material impediments to proceeding with the project as then constituted; and
(4) (if the representation was not made), Cabinet's approval would at least be given within a reasonable time.

[163] It was also contended that CNSL relied on these assurances by continuing the works and BTL relied on them by buying out and repaying FMCHL so as to give rise to substantive legitimate expectations and in particular, that Cabinet's approval would actually be given.

[164] Mr. Mendes, on the other hand, did not separate his arguments in terms of *procedural* and *substantive* legitimate expectations but dealt with this issue simply from the general perspective of legitimate expectations. He submitted that the statements made at the meetings on 18 October 2016 and 8 November 2016 are incapable of supporting a claim of legitimate expectation with respect to an act of Cabinet, which is an independent body, whose decisions are made after deliberations by its members collectively.

[24] [2003] QB 1397

Furthermore, neither the representatives of the NCRHA nor the individual Ministers could create a legitimate expectation on behalf of the Cabinet. Additionally, the statements were certainly not clear and unambiguous that any or any favourable decision would be made by Cabinet.

[165] Mr. Mendes contended that in order for a representation to give rise to a legitimate expectation, it must be made by or on behalf of the public authority who it is said created the legitimate expectation. Counsel relied on the text of **Wade & Forsythe on Administrative Law at page 453** where the learned authors stated:

> *"Some points are relatively clear. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the obligation."*

Counsel also relied on the introductory paragraph on legitimate expectation from the **Judicial Review Handbook, 6th edition**[25] wherein the learned author quoted Laws LJ in **R (Nadarajah v Secretary of State for the Home Department**[26] as follows:

> *"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."*

[166] Mr. Mendes submitted that for an expectation to bind a public authority, it must emanate from that authority. Counsel quoted Schiemann LJ in **R (Bibi) v Newham London Borough Council ; R (Al-Nashed) v Newham London Borough Council**[27] as follows:

> *"If the public body has done nothing and said nothing which can legitimately have generated the expectation that is advanced to the court, the case ends there. It seems likely that a representation made without lawful power will be in this class."*

[25] By Michael Fordham QC 2012
[26] **[2005] EWCA Civ 1363**
[27] [2002] 1 WLR 237

[167] Mr. Mendes further submitted that in the case of a public body, a binding representation may come from someone who has either **actual or ostensible authority** to make the representation. Mr. Mendes quoted Keane LJ in **South Bucks DC v Flanagan**[28] as follows:

> *"At the outset of his submissions on this aspect of the case, Mr Lamming conceded that a legitimate expectation based on a representation allegedly made on behalf of a public body can only arise if the person making the representation as to that body's future conduct has actual or ostensible authority to make it on its behalf. That would seem to be right. Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."*

[168] Mr. Mendes therefore submitted that there is no evidence that Cabinet authorized either the NCRHA or the individual Ministers to speak on its behalf whether generally or as to what decision it might make in response to the request made by the NCRHA for approval. He submitted that from the evidence, the person who the NCRHA claims to have received the assurance is not identified and therefore, it is impossible to know whether that person had either actual or ostensible authority to speak on behalf of the Cabinet. There is no evidence that the NCRHA claimed to have that authority. Mr. Mendes submitted that this is confirmed by the evidence of Mr. Madray that no one had any authority to give any assurance on the part of Cabinet as to when the approval would be granted.

[169] Mr. Mendes contended that neither Minister Young nor Minister Deyalsingh had actual or ostensible authority to make any representation on behalf of Cabinet as to what decision it would make. There is no evidence that they claimed any such authority and no evidence that Cabinet bestowed any such authority on them. Furthermore, it would be wrong to bind Cabinet by any such Minister's or statutory authority's representations

[28] [2002] 1 WLR 2601

before Cabinet has had the opportunity to deliberate on a particular issue. Any ruling would undermine Cabinet's constitutional mandate to exercise "*general direction and control of the government of Trinidad and Tobago*" and to be "*collectively responsible therefor to Parliament*": **section 75 of the Constitution**.

[170] In other words, no one can assume the authority to represent what Cabinet will decide, and it would be constitutionally impermissible for Cabinet to vest anyone with the authority to say what Cabinet will decide and thereby bind Cabinet. Any such delegation of authority would constitute an abdication of Cabinet's constitutional duty to exercise general direction and control of government and be collectively responsible to Parliament. Nonetheless, even if either the NCRHA or the Minister had actual or ostensible authority to bind Cabinet, the representations as to the assurances Cabinet gave are not clear and unambiguous.

[171] Mr. Mendes submitted that the mere fact that the Claimants have resorted to rely on what Mr. Jaikissoon *"understood the representations"* to be is a clear indication that the representations were not clear and unambiguous. While the Claimants claim that this was their understanding, they have failed to provide any foundation whatsoever as to what possibly could have led them to have such a detailed understanding from an assurance that Cabinet approval would be had in two weeks.

[172] Mr. Mendes further submitted that it is difficult to describe Minister Young's or Minister Deyalsingh's statements of **"*no way*"** as a clear and unambiguous statement that Cabinet's approval was a mere formality and would be forthcoming. Furthermore, Cabinet as a separate and independent body which operates on the premise of the outcome of deliberations of all of its members to arrive at a collective decision, could not be bound by the views of one or even 2 members. Additionally, there is no evidence that either Minister indicated that they were speaking on behalf of the Cabinet and capable of making any statement upon which the Claimants could rely as binding on Cabinet.

[173] It was further submitted that the promise must be made by the authority that is expected to act. In this case, the purported promise was made by representatives of the NCRHA who are not members of the Cabinet, nor were they authorized to speak on behalf of the

Cabinet. Therefore, the fact that the Ministers of Government told the Claimants not to stop work does not mean that the NCRHA is legally bound to execute any agreement with the Claimants nor does it mean for that matter that Cabinet would agree to anything.

Law and Analysis

[174] ***Michael Fordham in Judicial Review Handbook, 5th Edition, para. 41.11*** defines legitimate expectation as an expectation which, although not amounting to an enforceable right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a 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 way. The terms of the representation by the decision-maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things:

(i) That a hearing or other appropriate procedures will be afforded before the decision is made; or

(ii) That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied[29].

[175] The principle of legitimate expectation has been recently explained in the Privy Council case of **United Policyholders Group and others v Attorney General of Trinidad and Tobago**[30]. In delivering the decision, Lord Neuberger stated:

> *"37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to*

[29] De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th Edition, para. 8-046
[30] [2016] UKPC 17

Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2009] AC 453, para 60.

38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty - see e.g. Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.

39. Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again Ng Yuen Shiu [1983] 2 AC 629, 636). However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field" (in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131), or indeed the macro-economic field. As the cases discussed by Lord Carnwath show, such issues have been considered by the Court of Appeal of England and Wales, perhaps most notably, in addition to Begbie, in R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213, 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, and also by the Board in Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1." [Emphasis added]

[176] In **Paul Lai v Attorney General of Trinidad and Tobago**[31], the Court of Appeal detailed some of the basic principles of law in respect of legitimate expectation. In the judgment of Moosai JA, the law was stated at paragraphs 120 to 122 as follows:

> *"[120] A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim similar behaviour. A legitimate expectation may arise "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue." A representation inducing a legitimate expectation can therefore be express or implied. De Smith's Judicial Review [7th edn. (2013) [12-030] posits that to qualify as "legitimate" the expectation must possess the following qualities:*
>
> *(i) The representation must be clear, unambiguous and devoid of relevant qualification;*
>
> *(ii) The legitimate expectation must be induced by the conduct of the decision-maker;*
>
> *(iii) The representation must be made by a person with actual or ostensible authority to make the representation;*
>
> *(iv) The person who seeks to rely upon the representation must be one of the class to whom it may reasonably be expected to apply; and*
>
> *(v) The representation must be preceded by full disclosure.*
>
> *Further, detrimental reliance, though it may be a relevant consideration, is not an essential element of a legitimate expectation: [see also Ramnath and ors v Public Service Commission Civ. App. No 123 of 2008].*
>
> *[121] In R (on the application of Simpson and others) v Chief Constable of Greater Manchester Police [2013 EWHC 1858], Supperstone J at paras. 39 and 41 of that judgment, helpfully summarised Laws LJ's review of the law of legitimate expectation in R (on the application of Bhatt Murphy (a firm)*

[31] Civil Appeal No P129 of 2012

and other) v Independent Assessor [2008] EWCA Civ 755. Supperstone J stated, inter alia:

> *"[39]… The cases show that broadly the doctrine encompasses two kinds. There is procedural legitimate expectation, and there is substantive legitimate expectation. In the procedural case there is a promise or practice of notice or consultation in the event of a contemplated change in policy. In a substantive case there is a promise or practice of present and future substantive policy (para 33). .....*

Meeting on 18 October 2016

[177] The Claimants' evidence is that at the meeting on 18 October 2016, which was scheduled for the execution of the revised Varied Contract, the Service Agreement and the Collateral Warranty, NCHRA was of the view that Cabinet approval was required for the removal of FMCHL as a party to the Master Contract.

[178] Mr. Jaikissoon, in his affidavit dated 6 November 2017 at paragraphs 140 -143 deposed as follows:

> "*140. On 18 October 2016, despite our challenges to the NCRHA's refusal to execute the various agreements,* ***the Contractor was assured by the NCRHA's representatives that Cabinet approval had been sought by it and NCRHA was assured that Cabinet approval would be given within two (2) weeks****.*
>
> *141. Based on the NCRHA's representations that Cabinet approval would be given within two (2) weeks so that the NCRHA would shortly execute various agreements and thereafter execute the Deeds of Licence, CNSL and FMCHL executed the Service Agreement and LML executed the Guarantee on the basis that NCRHA would execute the revised Varied Contract and the Collateral Warranty in counterpart and thereafter the deeds of licence.*

142. I understood the representations being made by the NCRHA at the meeting on 18th October 2016 was that it would execute all of the agreements that were necessary for the Contractor to secure financing for the construction and operation of the Centres as soon as it receives Cabinet approval. ***Further, that Cabinet's approval had been given in principle and the formal approval was imminent and that a Cabinet Note had been prepared for those purposes and on that basis the Contractor should continue with the contract works****.*

143. The Contractor therefore agreed to continue with the Contract Works as a result of the NCRHA's representation and following this meeting on 18th October 2016 the Contract Works continued at EWMSC."

[179] Dr. Laquis, in his affidavit dated 6 November 2017 at paragraphs 67 and 68, deposed as follows:

"*67. I was present for the meeting on 18th October 2016 and to my surprise the NCRHA's representatives refused to sign any of the agreements saying that they needed to obtain Cabinet's approval first. I recall my annoyance which was shared by Mr. David Jaikissoon who was also present and Ms. Ariana Krishingee who was the Contractor's legal counsel.* ***I complained that this was the first time that the NCRHA had told us about needing Cabinet approval and the NCRHA's representatives were sympathetic and based on their explanations I understood them to be saying that Cabinet approval had been given in principle and was merely a formality****.*

68. Notwithstanding my annoyance about the delays I was sufficiently comforted by the NCRHA's explanations and assurances and I specifically informed the NCRHA that BTL will proceed with its proposed purchase of FMCHL's 2500 shares in CNSL and to repay the loan taken by BTL in anticipation of proceeding with the service agreement." [Emphasis added]

Meeting on 8 November 2016

[180] The Claimants' evidence is that the Ministry of Health requested CNSL and BTL to attend a meeting on 8 November 2016 to discuss Cabinet's approvals for the

construction and operation of the Centres where both Minster of Health, Mr. Deyalsingh, and the then Minister in the Office of the Prime Minister, Mr. Young, were present.

[181] Mr. Jaikissoon, in his affidavit dated 6 November 2017 at paragraphs 146 - 148, deposed as follows:

> "146. *...Dr George Laquis on behalf of the Contractor in my presence specifically enquired of both Ministers whether the Contractor should demobilize at the EWMSC building site and stop the contract works until such time that the Cabinet gives its approval for the NCRHA to execute the various agreements and thereafter the deeds of licence.*
>
> *147.* ***Both Ministers in unison responded with a resounding "no way" and the Minister of Health reminded us that this was an important national project****.* ***I understood from the Ministers' statement that Cabinet approval was merely a formality and forthcoming****;* ***I was happy that Minister Young was present*** *since he was now very familiar with the documents and I got the impression that he would facilitate the Cabinet approval.*
>
> *148. The Contractor regarded the Ministers' statements as meaning that Cabinet's approval had been given in principle and the formal approval was imminent and therefore the* ***Contractor elected to continue the Contract works using its own resources in anticipation that the deeds of licence would shortly be executed*** *permitting the Contractor to obtain financing for the remaining construction and operation of the Centres."* [Emphasis mine]

[182] Dr. Laquis, in his affidavit dated 6 November 2017 at paragraphs 72 and 73, deposed as follows:

> "*72. I recall, however, asking pointedly of both Ministers whether the Contractor should demobilize at the EWMSC building site and stop the works until the Cabinet's approval had been given so that the NCRHA could execute fresh leases and sign the documents to enable the Contractor to obtain its*

financing. ***Both Ministers were, however, adamant that the project should continue and the Minister of Health made the point of saying that the Centres were an important national project****.*

73. I was very pleased by what I heard at the meeting on 8th November 2016 since ***it supported the representations made by the NCRHA on 18 October 2016 that suggested that Cabinet approval had been given in principle was merely a formality****; I was also satisfied that Minister Young who enthusiastically supported the project would ensure that the Cabinet approval would be delivered shortly****."* [Emphasis mine]

[183] According to the Claimants, the effect of the assurances given on 18 October 2016 and 8 November 2016 was to create a legitimate expectation of a substantive benefit, that is, that the relevant approval would be given within two weeks or within a short reasonable time frame.

[184] In order to found a claim based on the principle of legitimate expectation, the statement or representation in question must be clear, unambiguous and devoid of relevant qualification, as the authorities cited above have demonstrated. In applying the law above to the facts of the matter at bar, the question to be answered is: ***were the representations made by the NCRHA on 18 October 2016 and the statements made by Ministers Deyalsingh and Young on 8 November 2016, sufficiently clear and unambiguous so as to give rise to procedural and/or substantive legitimate expectations of a substantive benefit?***

[185] I take notice that the evidence given on affidavit by Mr. Jaikissoon and Dr. Laquis as to what transpired at the meetings of 18 October 2016 and 8 November 2016 as quoted in paragraphs [178] – [182] above, has not been challenged in any material particular by the evidence given in the *Madray* or *Deyalsingh* affidavit. What is challenged is the *effect* of the representations made by the Defendants at those meetings. In this regard, **Part 56.11 of the CPR** is called into operation which provides:

"Any evidence filed in answer to an application for an administrative order must be by affidavit but the provisions of Part 10 apply to such affidavit."

[186] **Part 10 of the CPR** deals with the procedure for disputing the whole or part of a claim and the provisions to be included in a **defence**. The relevant provision of **Part 10** applicable to this issue is **Rule 10.5 of the CPR** which sets out a defendant's duty to set out his case if he intends to defend. It states:

> *(1) The defendant must include in his defence a statement of all the facts in which he relies to dispute the claim against him.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In his defence the defendant must say—*
>
> *(a) which (if any) allegations in the claim form or statement of case he admits;*
>
> *(b) which (if any) he denies; and*
>
> *(c) which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove.*
>
> *(4) Where the defendant denies any of the allegations in the claim form or statement of case—*
>
> *(a) he must state his reasons for doing so; and*
>
> *(b) if he intends to provide a different version of events from that given by the claimant, he must state his own version.*
>
> *(5) If, in relation to any allegation in the claim form or statement of case the defendant does not—*
>
> *(a) admit or deny it; or*
>
> *(b) put forward a different version of events, he must state each of his reasons for resisting the allegation.*
>
> *(6) The defendant must identify or annex to the defence any document which he considers to be necessary to his defence.*

Rule 10.6(1) sets out the consequences for not setting out a defence to the effect that the *"defendant may not rely on any allegation which he did not mention in his defence, but which he should have mentioned there unless the court gives him permission to do so."* The effect of **Part 10.5 of the CPR** is adequately summarised in **Zuckerman on Civil Procedure Principles of Practice Third Ed at page 301, para 7.27** as follows:

"The old system of bare denials and "holding defences" was wasteful and no longer acceptable. Today, the function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute."

[187] **Part 10.5 of the TTCPR** is the equivalent to **Part 16.5(1)-(6) of the UKCPR**. **Rule 16.5(5) of the UKCPR** stipulates: ***"Subject to paragraphs (3) and (4), a defendant who fails to deal with an allegation shall be taken to admit that allegation."*** While the wording in the TTCPR in this rule might be slightly different, it has been held to have the same effect. In the Court of Appeal case of **M.I.5 Investigations Ltd v Centurion Protective Agency Ltd**[32] Mendonça JA at **paragraph 7** of the judgment explained how a defence should be drafted pursuant to **Part 10.5 of the CPR** as follows:

"In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. ***Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version****. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5 (4) (a) without a specific statement of the reasons for denying the allegation. Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5 (5)). The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."*

And at **paragraph 10** Mendonça JA went on to explain:

[32]Civil Appeal No 244 of 2008

> *"Where a defence does not comply with Rule 10.5(4) and set out the reasons for denying the allegation or a different version of events from which the reasons for denying the allegation will be evidence,* ***the Court is entitled to treat the allegation in the Claim form or statement of case as undisputed or the defence as containing no reasonable defence to the allegation."*** [Emphasis mine]

[188] Effectively, therefore, the affidavit evidence of Jaikissoon and Laquis quoted above in paragraphs [178] – [182] not having been challenged by the Madray and/or Deyalsingh affidavits is deemed to be admitted in accordance with the combined effect of **Part 56.11** and **Part 10.5 of the CPR**.

[189] At the meeting on 18 October 2016, "*the Contractor was assured by the NCRHA's representatives that Cabinet approval had been sought by it and NCRHA was assured that Cabinet approval would be given within two (2) weeks*." In the Court's view, it is clear from the evidence that the assurance given to the Contractor (CNSL and BTL) was that Cabinet's approval had been sought by NCRHA and that it would be given within 2 weeks. And further that approval was already given in principle and that it was now awaited only as a matter of formality.

[190] At the meeting on 8 November 2016, "*Both Ministers in unison responded with a resounding "no way" and the Minister of Health reminded us that this was an* ***important national project***." This was in response to whether the Contractor should demobilize at the EWMSC building site and stop the contract works until such time that the Cabinet gives its approval for the NCRHA to execute the various agreements and thereafter the deeds of licence. In the Court's view, these statements *"no way"* and *"this was an important national project"* are clear and unambiguous assurances. On a fair reading of what was said by the Ministers, the meaning and effect of these statements were that the Contractor should continue with the contract works since it was an important national project and that there is no way that Cabinet will not grant the approval sought. These assurances also corroborated the representations made on the 18 October 2016 by the NCRHA's representatives in a very comforting way as deposed to by Dr. Laquis.

[191] In this regard, I do not accept Mr. Mendes' proposition that the statements made were not clear and unambiguous that any or any favourable decision would be made by the Cabinet. It is true that a favourable decision need not be made by the Cabinet, but it certainly cannot be that no decision is made at all. This would be a complete disrespect to the Claimants and by extension the citizens of this country if Cabinet could sit back and have decisions that affect the health and lives of citizens in perpetual abeyance or simply refuse to make a decision on a live issue affecting citizens' lives.

[192] I find Mr. Mendes' supposition that Minister Deyalsingh, the Minister of Health, had no actual or ostensible authority to make any representation on behalf of Cabinet to be grossly troubling. If this were to be true, one can quite reasonably ask, what then is the purpose of a Minister and what was his purpose at the meeting? A Minister's duty is directly linked to his portfolio and he is the designated person to advise on matters relating to his Ministry. The Cabinet is concerned with policy decisions. Even if the Minister cannot say exactly what the decision of Cabinet would be, he is the person to advise the Cabinet so that they can make policy decisions relating to whatever issue he may raise and for which approval is sought.

[193] It is difficult to envisage that a Minister, who was selected for the purposes of heading a Ministry representing a portfolio, is not in the plainest of terms to be described as the agent of the seat of representation for that specific portfolio. While he may desire to receive Cabinet approval for certain decisions, this does not in my opinion remove the fact that the Claimants were entitled to assume that he had the requisite authority. The Minister of Health is best suited to inform Cabinet of what is needed for him to achieve his Ministry's goals and by extension the goals for the betterment of the people. Various Ministers of Health have been directly involved in this project, and to hold that the Claimants are wrong to assume they acted with authority seems quite injudicious. In fact, this rationale is in keeping with the judgment of Denning J in **Robertson v Minister of Pensions**[33] as highlighted in paragraph [158] above part of which is repeated here for easy reference:

> *"In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is*

[33] [1949] 1 KB 227 at 232

concerned, ***he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments, for they also are but agents of the Crown.***
[Emphasis added]

[194] Taking all the circumstances into account and the course of dealings regarding this project, it is reasonable for the Claimants to assume that the NCRHA must have had resort to its line Minister in seeking Cabinet approval. Therefore, this is not solely an issue of whether the NCRHA had the authority but whether the place from where its general and/or specific guidance and directions came had the authority. Based on the facts in this case, the NCRHA was not acting on its sole accord, but with and under the guidance and directions of the Minister of Health in accordance with **sections 5(1), 6 and 16(1) of the RHA Act**. In other words, the NCHRA and the Minster seemed to be acting as a unit, with one accord.

[195] At its most basic, a legitimate expectation claim is based on the assumption that, where a public body states that it will or will not do something, a person who has reasonably relied on that statement should, in the absence of good reasons, be entitled to enforce it; if necessary, through the courts: per Laws LJ in **Nadarajah**[34] (supra) and per Lord Neuberger in **United Policy Holders**[35] (supra).

[196] In this regard, even if there was no promise that approval would be received within 2 weeks, the Claimant Contractors were entitled to have a *procedural* legitimate expectation that a decision would be made within a short time afterwards or within a reasonable time. It is now more than 4 years later and no decision has been given. Without doubt, this cannot amount to good governance and ought to be condemned for failure to adhere to the basic principles of fundamental justice, which demand that decisions be given within a reasonable time.

[34] [2005] EWCA Civ 1363
[35] [2016] UKPC17

[197] There is a plethora of decisions given by our local Courts wherein public bodies have failed to act and make decisions within what was deemed a reasonable time. Each case often depends on its own circumstances, and this case is no different.

[198] It would be profoundly unfair to the Claimant Contractors to have their time, work, and efforts be disregarded owing to the very intimate relationship the Minister of Health has had with this project. It seems to me that all the requirements of establishing a legitimate expectation as set out in the Court of Appeal case of Paul Lai[36] (supra) by Moosai JA would have been established. Accordingly, I find that CNSL and BTL were the beneficiaries of both a procedural and substantive legitimate expectation: *procedural*, in the sense that a decision on whether to grant the approvals was expected within 2 weeks or at least within a reasonable time thereafter; *substantive*, in the sense that the approvals would actually be granted.

Issue 5: If the answer to the above question (Issue 4) is in the affirmative, was there a frustration of that legitimate expectation? If so, was there a sufficient overriding public interest which justified the frustration?

[199] Given the fact that **Issue 4** and **Issue 8** are in many respects inter-related, and considering that consequentially **Issue 5** will cover substantially the same ground as **Issue 9**, both in fact and law, it appears wise and convenient to deal with **Issue 5 together with Issue 9**. Accordingly, these questions raised in Issue 5 are reserved and will be considered together with Issue 9.

Issue 6: Does the failure of Cabinet to make a decision on the approval of the Cabinet Note amount to unreasonable delay?

Submissions

[200] Mr. Maharaj submitted that the Minister of Health and Cabinet delayed unreasonably and unlawfully in reaching a decision on whether or not to give the approval such as to entitle the Claimants now, at least, to a decision on whether to grant the approvals. Mr. Maharaj further submitted that by virtue of the current project, the NCRHA has already embarked on the function of providing an efficient system for the delivery of health care within **section 6(a) of the RHA Act** and of equipping its property within **section 6(d) of the Act**. However, the NCRHA is being prevented from continuing the project and

[36] Civil Appeal No P129 of 2012

therefore from carrying out its functions because it is awaiting a decision from Cabinet or more properly, the Minister, as to whether or not to give the necessary approval. For this reason, the Minister and Cabinet came under a duty within **section 15 of the JRA** owed to the NCRHA not to delay unreasonably in coming to the decision. The request for approval was for a specific direction within **section 5(1) of the RHA Act** and although that request was made to Cabinet, the only entity to whom it could have been made and by whom the approval could be given was the Minister of Health.

[201] Nonetheless, both the Minister and Cabinet were bound to treat that request as one made to the Minister under the Act, that is, **section 5(1) RHA Act**. The Minister and the Cabinet (to whom he appears to have delegated the decision), having received the request, came under a public law duty to consider it and at some point, make a decision upon it. Therefore, to make no decision at all on a request for approval for an agreed plan would frustrate that purpose and would prevent the NCRHA from carrying out the function it wishes to carry out. Counsel relied on the authority of **R v Home Secretary ex parte Fire Brigades Union**[37].

[202] Mr. Maharaj further contended that the delay in making a decision on the approval has been unreasonable delay within **section 15(1) of the JRA** for the following reasons: (i) the Minister or at least the NCRHA asked Cabinet for urgent approval; (ii) the changes the Cabinet is being asked to approve have already been approved by the NCRHA and the Minister; (iii) its effect is to stall a project of great national importance which is already under way; (iv) lives are being lost as a result; (v) it is inconsistent with the assurances given to CNSL and BTL and ignores their reliance thereon; and (vi) the reasons given by Mr. Madray do not begin to justify a delay of two years (now over 4 years) or anything like that.

[203] Mr. Mendes' contribution to this issue merely followed his argument on the issue as to whether this Claim was amenable to judicial review. He said that the obligation imposed by **section 15(1) of the JRA** is premised upon the existence of a duty to make a decision to which the Act applies. The duty on which the Claimants rely is the duty under section **5(1) of the RHA Act** to decide whether to give a special direction. He argued that if

[37] [1995] 2 AC 513 at 551H to 553A

section 5(1) is not engaged, as he submitted earlier, then the Claimants' case fails. That was His earlier submission was to the effect that there is no evidence that the Minister of Health gave the NCRHA any direction under **section 5(1)** with regard to the variation of the contract. Furthermore, there is no evidence that the NCRHA made a request to Cabinet for a specific direction under **section 5(1)**. That submission was rejected by the Court. It appears therefore that there is no fallback position on which the Defendants could rely in relation to whether the delay was unreasonable.

Law and Analysis

[204] Delay, where it arises, does not accord with good administration and is justifiably recognised as a legitimate ground to warrant judicial review. Administrative decisions by administrative bodies directly impact upon the rights of citizens and must therefore be exercised in a way that is fair, just, and proportionate[38]. In **Richard Ramnarace v Public Service Commission and another**[39], Dean-Armorer J (as she then was) stated:

> *"Unreasonable delay in the instant context must therefore revert to the Wednesbury definition of unreasonableness that is, delay, which no reasonable Commission would incur."*

[205] To treat with this issue, the Court has to decide whether a time period for making such a decision is prescribed in law or not, and if not, it must then identify the starting point for the reckoning of a reasonable time.

[206] **Section 23 of the Interpretation Act, Chap 3:01** reads as follows*:*

> *"Where a written law requires or authorizes something to be done but does not prescribe the time within which it shall or may be done the law shall be construed as requiring or authorizing the thing to be done without unreasonable delay having regard to the circumstances and as often as due occasion arises."*

[38] Seepersad J in **CV2016-01690 Seesahai v The Defence Council**
[39] CV2007-00218

[207] Accordingly, by virtue of **section 23 of the Interpretation Act**, a duty is imposed upon a public authority to act without unreasonable delay. Further, **section 15(1) of the JRA** provides as follows:

"*15. (1) Where –*

(a) a person has a duty to make a decision to which this Act applies;

(b) there is no law that prescribes a period within which the person is required to make that decision; and

(c) the person has failed to make that decision,

a person who is adversely affected by such failure may file an application for judicial review in respect of that failure on the ground that there has been unreasonable delay in making that decision."

(2). Where—

(a) a person has a duty to make a decision to which this Act applies;

(b) a law prescribes a period within which the person is required to make that decision; and;

(c) the person has failed to make that decision before the expiration of that period,

a person who is adversely affected by such failure may file an application for judicial review in respect of that failure on the ground that the decision-maker has a duty to make that decision, notwithstanding the expiration of that period.

(3). Without prejudice to section 8, on an application for judicial review under this section, the Court may make all or any of the following orders:

(a) an order directing the making of the decision;

(b) an order declaring the rights of the parties in relation to the making of the decision;

(c) an order directing any of the parties to do, or to refrain from doing, any act or thing, the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties."

[208] In **Andrew Seesahai v The Defence Council**[40], Seepersad J, considering a range of authorities on this issue, set out the factors which ought to be considered in determining

[40] CV2016-01690

whether there had been unreasonable delay for the purpose of **section 15 of the JRA** as follows:

> *"(i) The importance of the issues to be determined to the person whose interest is at stake, per* ***Elias J in R v Secretary of State for the Home Department ex parte Mersin [2000] QBD 522****.*
> *(ii) The volume of matters that the public authority has to deal with, per Carnwath J in* ***R v Secretary of State for the Home Department ex parte S [2007] EWCA Civil****.*
> *(iii) Any policy of the Defendant public authority in relation to timing* ***(R v Secretary of State for the Housing Department ex parte Jawad [2010] EWHC 1800 (Admin) paragraphs 27-28 and 47 per Wyn Williams J)****.*
> *(iv) The nature and complexity of the issues that the tribunal is required to determine.*
> *(v) The prejudice that is being suffered by the Claimant as a result of the delay* ***(R v Secretary of State for the Home Department ex parte Jawad (supra) paragraphs 43-47 per Wyn Williams J)****.*
> *(vi) The reasons advanced for the delay.*
> *(vii) The need to ensure fairness (R v Secretary of State for the Home Department ex parte S (supra)).*
> *(viii) The nature of the statutory provision that imposes the duty to make a decision."*

[209] The Claim for Judicial Review targets the alleged delay of Cabinet in giving its decision on the Cabinet Note concerning the execution of the further variation agreement.

[210] It is the Defendants' evidence that approval has been delayed having regard to the change in economic circumstances in the country since the Master Contract was signed in 2010. Cabinet therefore requested further clarification from the Ministry of Health with respect to the overall costs associated therewith versus current expenditures on renal dialysis care, bearing in mind that once construction is completed, there will be an obligation to pay significant sums for the services.

[211] In applying the factors conveniently set out by Seepersad J in **Seesahai**[41] (supra) to the facts of this case, it can be seen that the Claimant Contractors took numerous steps from the beginning to ensure they owned up to their obligations. The resolution of this matter is therefore of importance to them and to a class of people who require urgent dialysis and renal care. It cannot be that they sit and wait for a decision to be given whenever the Cabinet thinks appropriate. No doubt the Cabinet has a steady and huge workload. However, the delay in this instance seems to be beyond what can satisfactorily be entertained. The policy of the Ministry of Health was to continue with this project and no indication that they wished to stop has been given to this Court. Of course, the nature and complexity as well as economics play an integral role in the decision to be arrived at by the Cabinet, but this is not an excuse for the period of inaction that has already been shown. The Claimant Contractors have continuously been cognizant of their duties and have attempted to maintain their role and keep abreast of this project. The delay by the Cabinet continues to pose a real risk of prejudice to the Claimant Contractors as they have incurred their own expenses and resources in pursuing this project thus far. The reason for the delay is also unacceptable.

[212] Lapses in time in such a project may occasion considerable individual and social costs. Increase in costs to citizens who may require these services is a serious concern. Failure to arrive at a decision has undoubtedly resulted in the institution of this matter, which has created increased expenses by way of lawyers' fees, which is a direct consequence of the delay in arriving at a decision, whatever that decision might be. The lengthy period has resulted in stalling of a beneficial public project and has created uncertainty in the Claimant Contractors' ability to plan. This is not a case where the passage of time is a requisite to the effective functioning of the administrative process.

[213] This Court has already established that CNSL and BTL were the beneficiaries of a legitimate expectation both procedural and substantive. The delay in making a decision is therefore unreasonable for the two main reasons advanced by the Claimants: (i) the delay, which is now over 4 years, breaches CNSL's and BTL's legitimate expectation that a decision on the approvals would be given at least within a reasonable time; and (ii) the delay for so long amounts to a misuse of the Minister's statutory powers under

[41] CV2016-01690

section 5(1) RHA Act and the Cabinet's constitutional powers under **section 75(1) of the Constitution**.

Issue 7: Is Cabinet's failure to make a decision on the Cabinet Note unreasonable, irregular or improper?

[214] CNSL and BTL submitted that the Minister of Health and the Cabinet delayed unreasonably and unlawfully in reaching a decision on whether or not to give the approvals such as to entitle the Claimants now, at least, to a decision on whether to grant the approvals. CNSL and BTL contended even if they did not have a legitimate expectation, the Minister's and Cabinet's conduct in delaying the actual grant of approval was unreasonable, irregular or improper within the meaning of **section 5(3)(e) of the JRA**. Further, that they exercised their power in such a manner that was unfair and so unreasonable that no reasonable person would have so exercised it: **section 5(3)(o) of the JRA**. That there has been unreasonable delay in making a decision and it is so unreasonable as to amount to a misuse of the Minister's statutory powers and the Cabinet's constitutional powers.

[215] Mr. Maharaj submitted that the modern authorities on unreasonableness as a ground of review have made clear that the level of scrutiny in a reasonable view depends on the context and the effects of the decision or conduct under challenge: **Kennedy v Charity Commission**[42]. Therefore, the question for the court remains as posed by Sir Thomas Bingham MR in **R (Smith) v Ministry of Defence**[43], whether the public body's response was beyond the range of responses open to a reasonable decision-maker or as recently articulated by Lord Sumption in **R (Gallaher Group Ltd) v Competition and Market Authority**[44], whether the decision was rationally based on relevant considerations. Mr. Maharaj contended that the answer to the question entails considering whether the decision-maker has equipped itself with all the information reasonably required to make a properly informed decision and whether it has made sure that it has taken into account all material considerations and not taken into account any irrelevant considerations.

[42] [2015] AC 455 paras [51] and [54]
[43] [1996] QB 517
[44] [2018] 2 WLR 1583

[216] Mr. Maharaj further submitted that the Minister's and Cabinet's conduct in not giving the approvals sought was irrational and unfair by reason of all the same matters relied on above in support of the argument that there was unreasonable delay in coming to a decision as to whether to give them.

[217] Mr. Mendes, on the other hand, submitted that it is not entirely clear whether the Claimants are saying that Cabinet has acted unfairly and irrationally in failing to give a timely decision and therefore should be ordered to make a decision or that the failure to give a decision at all granting approval is irrational and therefore Cabinet should be ordered to grant the approval. If it is the latter, it would be wrong for this Court to anticipate what reasons Cabinet might give if it decided to refuse approval. Therefore, the Court should await Cabinet's decision before pronouncing on the irrationality of it and limit any relief to an order that a decision be made within a reasonable time. Otherwise, the Court would be led unconstitutionally to usurp the powers of the executive to make a decision in an area reserved exclusively for the executive.

Law and Analysis

[218] From the submissions made by Mr. Maharaj, it is clear that this issue is, in many respects, linked to the issue of unreasonable delay dealt with above and therefore the same arguments can be adopted here.

[219] Further arguments, however, concern relevant considerations of provisions to which the legislation expressly or implicitly requires the decision-making body to have regard[45]. Lord Greene in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[46] stated as follows:

> *"If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion, it must have regard to those matters."*

[45] Jonathan Auburn et al. Oxford University Press (2013). Judicial Review Principles and Procedure. Para. 14.10
[46] [1947] 2 All ER 680

[220] Whether something is a relevant consideration is a matter for this Court to decide. Lord Keith in the House of Lords case of **Tesco Stores Ltd v Secretary of State for the Environment**[47] stated:

> *"…it is for the courts, if the matter is brought before them, to decide what a relevant consideration is. If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard for it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense."*

[221] In **Kennedy v Charity Commission**[48] Lord Mance stated at paragraph [51] of his judgment:

> *"The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle: see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223****. The nature of judicial review in every case depends on the context."*

[222] And at paragraph [54] Lord Mance further illustrates:

> *"More recently, the same process was carried further by emphasizing that the remedy of judicial review is in appropriate cases apt to cover issues of fact as well as law…. both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and weight to be given to any primary decision maker's view depending on the context."*

[223] A conjoint effect of the above authorities under this issue is that decision makers must take into account all relevant considerations and must dis-apply their mind from all

[47] (1995) 1 WLR 759 HL
[48] [2015] AC 455

irrelevant considerations: **Re Duffy**[49]. Factors which must be taken into account can either be derived from the relevant statutory provisions or fact but must be construed in line with weight, balance, proportionality and context. The rigid test of irrationality known as the *"Wednesbury principle"* has been softened somewhat to accommodate greater consideration to context.

[224] Bearing all this mind and construing all the facts of this case which have been traversed throughout this judgment, the relevant considerations for the decision maker (Cabinet) to keep in mind are: (i) the request was made for urgent approval of changes which were already sanctioned by the NCRHA and by implication the Minister of Health; (ii) it is a project of national importance spawned out of government policy; (iii) realization of this project could save lives as alluded to and promised by different government Ministers; (iv) assurances have been given to the Claimants who have placed reliance on them; (v) large sums of money have already been spent on the project by CNSL and BTL; (vi) the delay in granting approval has caused the project to be put on hold with tremendous uncertainty to those who have invested time and resources and for those who are expecting relief in terms of the health care promised; and (vii) there is evidence that lives are being lost.

[225] Applying all the arguments and findings under the preceding issue of "unreasonable delay" and bearing in mind all the factors mentioned in para [222] above, I am of the view that no reasonable decision maker being seised of all the facts of this case and taking account of the considerations set out in para [222] above, which in the overall context of this case were bound to be taken into account, would have failed to render a decision on whether to grant approvals to the variation sought. The failure by the Cabinet to render a decision in the context of this case is therefore unreasonable, irrational and improper.

Issue 8: Was CKDS the beneficiary of a legitimate expectation of a substantive benefit which it hoped to retain?

Submissions

[49] [2008] UKHL 4

[226] Mr. Maharaj submitted that the Third Claimant, CKDS, adopts *mutatis mutandis* and relies on the submissions of CNSL and BTL and in particular adopts the arguments that the Defendants have –

(a) unreasonably delayed making a decision;

(b) without justification frustrated the Claimants' legitimate expectations that approval would be granted for the proposed arrangements for the establishment of the Centres; and

(c) not put forward any reasonable basis for refusing to grant approval.

Accordingly, these additional submissions are complementary to the submissions of CNSL and BTL but also intended to address further factors specific to CKDS and set out arguments on the specific grounds it pursues for relief, particularly in relation to the constitutional right to life and on the particular legitimate expectations claimed by CKDS' members.

[227] Mr. Maharaj submitted that CKDS's members had a legitimate expectation, arising from the public promises made by Government Ministers that the Government would construct and operate the Centres so that the public, including CKDS's members would receive adequate renal services. It was submitted that public promises are capable of engendering legitimate expectations, particularly if addressed to a specific class of people: **United Policyholders Group v Attorney General**[50] (supra). It was further submitted that the legitimate expectation was engendered by representations that were clear, unambiguous and devoid of relevant qualifications and were addressed in particular to a specific class of people, namely, kidney patients and potential kidney patients in Trinidad and Tobago. The relevant promises were made by Ministers of Government who plainly were speaking with the authority of the Government.

[228] Mr. Maharaj contended that the representations relied on by CKDS were as follows:

1) The Minister of Finance in a budget presentation on 7 September 2009 announced that the government had **committed to building the Centres**, which would **each treat approximately 200 patients per week**. This statement, made as part of

[50] [2016] UKPC17

budget presentation, plainly implied that a future budget had been allocated to implement the decision.

2) On 6 May 2010, the government ministers attended the signing of the Master Contract and the Minister of Health gave an address in which he affirmed the government's commitment to the Centres. The Minister said that the plans then agreed would provide two fully equipped functional dialysis centres with the most current equipment. The Minister said that **"*the two new dialysis centres will thus bring relief to the many patients who require or will require dialysis treatment*".** This was a promise directed to people suffering from kidney disease or potential kidney patients.

3) On 19 March 2015, after a Cabinet meeting, the Minister of Health announced the government's renewed commitment to the Centres saying that the **Cabinet had approved their construction**.

4) On 2 September 2015, **at the sod-turning ceremony to start construction**, the Minister of Health repeated the promise that the Centres would be built. [Emphasis added]

[229] Mr. Maharaj submitted that the context of all these statements indicates that they were to be taken seriously and that listeners could reasonably take them as being real commitment to building and operating the Centres. These statements were of the greatest importance to CKDS's members, many of whom have suffered miserably as a result of inadequate and inconsistent renal services in Trinidad and Tobago. CKDS's members placed their hopes in the construction of the Centres. It was reasonable for them to believe that the government intended to build them and they were elated. Some even incurred concrete detriment by planning as though the Centres would be built. Mr. Maharaj further submitted that it is not necessary for there to be concrete detriment, in the form of financial loss, for an expectation to be legitimate. Reliance, in the form of

credence and moral detriment, in the faith placed in the promise, is sufficient: **R (Bibi) v Newham**[51] and **R (Bancoult) v Foreign Secretary**[52].

[230] In response, Mr. Mendes submitted that it is impermissible for CKDS to rely on statements made in Parliament to found a cause of action. This would constitute an infringement of the freedom of speech of members of Parliament: **Prebble v New Zealand Television Limited**[53]. Additionally, statements made by the Minister to the public at large as to the Government's intention to construct the facilities cannot give rise to an enforceable legitimate expectation: **R v Secretary for Wales ex p Emery**[54]. Accordingly, the statements on which the CKDS relies were not made merely to persons with the particular ailments from which the CKDS's members suffer; they were made to the public at large, that is to say, to any and everyone who might one day be in need of the particular medical treatment which the Centres would provide.

[231] Mr. Mendes further submitted that in any event, even if this Court were to find that a legitimate expectation was created, it has not yet been frustrated. There is still a contract for the construction of the Centres in existence. A variation has been proposed and this is under consideration. There is no evidence that a refusal to approve would result in the scrapping of the project. Counsel surmised that there may be a legitimate expectation that the Centres would be built but CKDS does not rely on a legitimate expectation that approval will be given to the variation.

Law and Analysis

[232] Lord Carnwath in **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago**[55] **(supra)** stated:

> *"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*

[51] [2001] 1 WLR 237
[52] [2009] AC 453
[53] [1995] 1 AC 321
[54] (1998) 4 All ER 367
[55] [2016] UKPC17

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."

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

Promises and assurances made to the members of CKDS

[234] The then Minister of Finance, Ms. Karen Nunez-Tesheira, in the budget statement for 2009 stated as follows:

"Mr. Speaker, over the last four years we have increased the number of dialysis machines at the public health institutions from 21 to 36. In addition, we intend to increase the complement of dialysis machines at the Port of Spain General Hospital from 4 to 24 within the next three years. ***Two Renal Dialysis Centres have been earmarked for the North Central Regional Health Authority. Each of the Centres will treat approximately 200 patients per week. The completion of the dialysis centres is scheduled for October 2009****. In order to increase access to dialysis treatment in the short term, we have formalized partnership agreements with the John Hayes Memorial Foundation, the Maj Terrance Dialysis Centre, the Seventh Day Adventist Hospital and other private health institutions. Some 577 patients are now being dialyzed an increase of 32% over the last year."* [Emphasis added]

[235] On 6 May 2010, at the ceremony to celebrate the signing of the Master Contract, the then Minister of Health, Mr. Jerry Narace, stated:

*"**This signing today is representative of the government's continued commitment to empowering the nation to live long, healthy and productive lives as stated in our vision 20/20 for health**…*

The number of people needing transplants in Trinidad and Tobago continues to rise faster than the number of donors. Right now, there are approximately 400 people in Trinidad and Tobago who are in need of kidney transplants and the number grows by 40 each year.

…the agreed services to be provided by Fresenius and Biomedical at each dialysis centre will indeed represent superior quality of care…

Ladies and gentlemen, the people of Trinidad and Tobago can look forward to numerous clinical benefits and improved health outcomes as a result of this program…

In the end, we shall be receiving two fully equipped functional dialysis centres with the most current equipment at no additional costs to the Ministry of Health after ten years… The two new dialysis centres will thus bring relief to the many patients who require or will require dialysis treatment." [Emphasis added]

[236] On 15 March 2015, the then Minister of Health, Dr. Fuad Khan, made an announcement to the media at a post-Cabinet briefing where he stated, among other things, that **construction is set to begin immediately as Cabinet has given its approval for the construction of the Centres**. The Minister's statements were printed in the electronic and print media as follows:

*"Khan said these dialysis centres have been negotiated for the last five years and legal requirements were ironed out to facilitate the programme moving forward. He said persons would apply through the External Patient Programme (EPP) for dialysis services and **what used to take six months, would take about five days in order to obtain dialysis services**. He said there was an increased need for dialysis in this country because of the ageing population and unhealthy lifestyles people lead which fueled an epidemic of non-communicable diseases."* [Emphasis added]

[237] On 2 September 2015, the then Minister of Health, Dr. Fuad Khan, **turned the sod to mark the construction** of one of the Centres at the EWMSC. The members of the media covered the ceremony. He stated:

> *"The other Dialysis Centres in Trinidad and Tobago do only what we call chemo dialysis and the fistula approaches and other medical approaches have to be done at another site.* ***This will be a stand alone Centre*** *but the beauty of this Centre, believe it or not, is not only the dialysis approach and the approach to kidney failure and kidney diseases, it is one of the first Public/Private Partnerships ever started in Trinidad and Tobago."*

[238] In his affidavit evidence dated 6 November 2017, Mr. Ramkumar, at paragraphs 30 and 31 stated:

> *"30. The statements made by the Ministers referred to above when taken separately or together represented to CKDS and its members that Government was committed to improving the health of kidney patients and it was taking steps to construct two dialysis centres which would make a great difference to kidney patients and potential kidney patients.*
>
> *31. In the statements made by Minister Jerry Narace and Minister Fuad Khan, the following representations were made to CKDS and its members, by the government to members of the public, to kidney patients and to potential kidney patients:*
>
> *(i) that there would be an increase in the number of dialysis machines;*
>
> *(ii) that the full service dialysis Centres would be constructed and would be operational. These two Centres would provide adequate renal services for the public;*
>
> *(iii) that for the first time kidney patients would benefit from non-clinical services including patient management, access to proper vascular services and isolation bays;*
>
> *(iv) that the turn-around time for patients receiving dialysis treatment would be from six months to five days; and*

(v) for the first time end stage kidney patients would be able to have their health managed to have access to emergency treatment to improve their life expectancy and the quality of their health care."

[239] Sedley LJ in **R (Begbie) v Secretary of State for Education and Employment**[56] stated:

> "***I have no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it. The legitimate expectation in such a case is that government will behave towards its citizens as it says it will.*** *But where the basis of the claim is, as it is here, that a pupil-specific discretion should be exercised in certain pupil's favour,* ***I find it difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all. A hope no doubt, but not an expectation****."* [Emphasis mine]

[240] This project was to benefit those in need of the care and attention and promised to significantly improve their lives. Quite possibly, the decision of the Court may have been different had there been one statement in Parliament about the decision to embark on this project. However, that was not the case. There were numerous public statements by the various Ministers of Health, meetings and decisions, which go towards proving the nature of the promise to not only the immediate group of kidney patients but all future kidney patients in this regard.

[241] The statements made are easily attributable to the CKDS and the class of people it represents. It was clear from the numerous statements that this was a project to which there was a commitment to the improvement of citizens' lives, particularly those suffering with kidney problems requiring dialysis and overall renal treatment, many of whom have suffered miserably as a result of inadequate and inconsistent renal services in this country. No doubt this would have prompted the then Minister of Health, Dr. Fuad Khan, to claim publicly that the Centres intended to be built were to be ***"stand***

[56] [2000] 1 WLR 1115, 1133

alone" Centres, meaning that they were to be equipped to provide full range of renal services so that patients will not have to move around from one location to another to access different services complementary to each other.

[242] The several statements highlighted above were made in the following circumstances: the first, as part of a budget presentation by Minister Nunez-Tesheira; the second, by Minister Jerry Narace at the signing of the Master Contract committing the State to the building and operating the Centres; the third, by Minister Fuad Khan, at a post-Cabinet meeting media-briefing approving the construction of the Centres; the fourth, by Minister Fuad Khan, at an open sod-turning ceremony to mark the beginning of construction of one of the Centres. These statements, to my mind, were clear, unambiguous and devoid of relevant qualification. They went a step beyond mere statements of hope and into the realm of conduct intended to create real commitment to building and operating the Centres.

[243] It was reasonable for CKDS' members to believe and expect that the Government will complete these Centres and that relief in terms of better renal care services for them and others were soon to be a reality. CKDS and its members were thus the beneficiaries of a legitimate expectation of a substantive benefit which they hoped to realise and retain.

[244] Where government has made known how it intends to exercise powers, which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it: **R (Begbie)**[57] (supra). The legitimate expectation in such a case is that government will behave towards its citizens as it says it will. While circumstances change and finances over time change, which will inevitably affect the projects to be undertaken by the government, the persons relying on the promises already made in this specific project ought to have an answer as to whether their government will be behaving towards them as it says it will. And if it can no longer commit to the promises made, then those to whom the promises have publicly and continuously been made, are entitled to know.

[57] [2000] 1 WLR 1115, 1133

[245] The Court must now consider whether by its unreasonable delay Cabinet has frustrated the legitimate expectation of CKDS and its members and whether there is justification for such frustration.

Issues 5 and 9: Was there frustration of the legitimate expectations of which CNSL, BTL and CKDS were the beneficiaries? If so, was there a sufficient overriding public interest which justified the frustration?

[246] As signalled earlier in this judgment, Issue No. 5 will be dealt with together with Issue No. 9 on the basis that to a great extent they cover the same ground and material. For ease of reference, a simple recapping of the evidence and analyses above shows that the Court has found the Claimants to be the beneficiaries of the following legitimate expectations, namely:

(1) The First and Second Claimants, CNSL and BTL, are the beneficiaries of a ***procedural*** legitimate expectation that a decision on whether to grant approvals to the variations in question would be made at least within a reasonable time;

(2) CNSL and BTL are the beneficiaries of a ***substantive*** legitimate expectation that the NCRHA would execute the requisite instruments so that CNSL and BTL would be able to secure financing for the construction and operation of the Centres; and

(3) The Third Defendant, CKDS, and its members, are the beneficiaries of a ***substantive*** legitimate expectation created by the representations and assurances made to them by Ministers of Government and by extension the Cabinet to the effect that the 2 Centres would be constructed and operational within a reasonable time and that CKDS' members, kidney patients, would receive adequate dialysis and other renal care services.

[247] The questions to be addressed now are:

(1) whether those legitimate expectations have been frustrated; and

(2) if so, whether the Defendants have justified the frustration.

[248] On the question as to whether there has been frustration of these legitimate expectations, the findings of the Court above that the delay in making a decision was unreasonable and that the failure to grant approval on the proposed variation was unreasonable,

irregular and improper and amounted to a misuse of executive power, clearly steer the answer in the affirmative. I consider it too repetitive to re-state all the factors taken into account in arriving at these findings but suffice to say that the effect of the delay and failure to approve has been to stall a project which Minister Deyalsingh said (at the 8 November 2016 meeting) was of great national importance. It was a project on which construction work was already in progress with a lot of money (millions of dollars) and other resources having been spent by the Contractors pursuant to assurances given. In relation to the Third Claimant, CKDS, the delay in constructing and having the Centres operational is and has been, according to the evidence, causing tremendous hardship for its members and other kidney patients to access adequate dialysis and other renal care services which in turn places patients' lives at risk and in fact causes pre-mature deaths.

[249] The principles of law which govern the frustration of a legitimate expectation of a substantive benefit were extensively reviewed by the Privy Council in **Francis Paponette and Others v The Attorney General of Trinidad and Tobago**[58] (supra). Their Lordships pointed out that where an authority considered whether to act inconsistently with a representation or promise which it had made and which had given rise to a legitimate expectation of a benefit which was substantive, not merely procedural, good administration as well as elementary fairness demanded that it should take into account the fact that the proposed act would amount to a breach of the promise. In terms of public law, the promise and the fact that the proposed act would amount to a breach of it, were relevant factors which had to be taken into account. The initial burden of proof lay on an applicant to prove the legitimacy of his expectation and that any promise on which it was based was clear, unambiguous and unqualified; the onus then shifted to the authority to justify the frustration of the expectation, identifying any overriding public interest on which it relied to justify that frustration. It will then be a matter for the Court to weigh the requirements of fairness against that interest.

[250] If the authority does not place material before the Court to justify its frustration of the expectation, it runs the risk that the Court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of

[58] [2010] UKPC 32; [2012] 1 AC 1

power. Laws LJ in **R (on the application of Nadarajah) v Secretary of State for the Home Department** at [68] stated:[59]

> *'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."*

[251] It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified: **Paponette** (supra).

[252] At paragraph 41 of **Paponette**, the Board rejected the proposition that the Court can (still less, should) infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. So expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding public interest.

[253] The Board continued at paragraph 42:

> *"[42] It follows that, **unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation**. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. 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***

[59] [2005] EWCA 1363 Civ

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 (on the application of Bibi) v Newham London Borough Council [2001] EWCA Civ 607, [2002] 1 WLR 237 at [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**'. Once again it must be noted the length of time that has since passed with no decision. It must also be stated that this project was started but was since stopped."*

And at paragraph 46, the Board stated:

"[46] The Board agrees. Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account."

[254] By applying the law as espoused in **Nadarajah**[60] and **Paponette**[61] to the facts as found by the Court, it is clear that the Claimants have been able to establish frustration of their legitimate expectation. The onus now shifts to the Defendants to identify any overriding public interest on which it relied to justify that frustration. It will then be a matter for the Court to weigh the requirements of fairness as against that interest relied on by the Defendants to determine whether it was a proportionate response in the circumstances. The Court must therefore look to the Defendants' case to ascertain whether any reasons have been put forward to justify the frustration.

[60] [2005] EWCA 1363 Civ
[61] [2010] UKPC 32; [2012] 1 AC 1

[255] Mr. Mendes submitted that **on the assumption** that the Claimants were the beneficiaries of the substantive legitimate expectations claimed, it would be premature to grant any relief in advance of a decision by Cabinet as to whether it will approve the variation. He pointed out that the permanent secretary, Mr. Richard Madray, had set out in his affidavit several factors that are sufficiently serious to warrant the frustration of any legitimate expectation. Those factors were: (i) to diminish the role or form of the primary partner of the joint venture and the only partner with the necessary experience in the provision and operation of the services (the "Fresenius issue"), is sufficiently serious to warrant a refusal to comply with the promise; and (ii) the change in economic circumstances simply cannot be ignored. Mr. Mendes concluded by making the point that when Cabinet eventually makes a decision whether to grant approval there may prima facie be ample and proportionate justification for frustrating the Claimants' alleged substantive legitimate expectations, if this Court finds that any such legitimate expectation was created.

[256] In keeping with the principles enunciated in **Nadarajah** and **Paponette** and followed in **United Policy Holders**, I am of the view that the evidence of Mr. Madray at paragraphs 39 and 40 of his affidavit and the submissions by Mr. Mendes thereon, fall far short of the evidence required by an authority to justify its departure from honouring its promises which amounted to a legitimate expectation. First of all, the Defendants' argument is premised on an **assumption** that the Claimants are entitled to claim the benefit of a substantive legitimate expectation but then goes on to advocate that there "*may*" be some proportionate justification for the frustration but the Court can only "*assess the proportionality*" "*when Cabinet eventually does make a decision whether to grant approval*." This seems to me to be suggesting that even though the Defendants are aware that CNSL and BTL have relied on assurances and have expended millions of dollars to their detriment and that CKDS' members are receiving sub-standard renal services leading in many instances to premature deaths (evidence which has not been challenged), that it is okay to wait for years until Cabinet eventually makes a decision on whether to grant approval. In the meantime, even though, on the Defendants' assumption, that the Claimants are the beneficiaries of a substantive legitimate expectation, it is reasonable for them to await Cabinet's decision while their rights are held in perpetual abeyance. This argument, to my mind, borders on the absurdity and strengthens Mr. Maharaj's submission that such delay, with full knowledge of the

Claimants' right to a substantive legitimate expectation, highlights the unreasonableness and misuse of executive power.

[257] On the Fresenius and economic issues raised in the Madray affidavit, the Claimants submitted that at no time at the pre-action stage or at the stage before the pre-action stage when the meetings were held between the Defendants and First and Second Claimants, did the Defendants give any reasons that it was frustrating their legitimate expectation. At no stage did they allege to those Claimants that the change in the economic circumstances since the contract was signed in 2010 prevented the Defendants from keeping its promise to those Claimants. On the contrary, at the meetings of 18 October 2018 and 8 November 2016, the Defendants made it clear that the project of the government was to continue, and they did not want the project to be halted because it was a matter of national importance.

[258] It was also submitted that at no time before the Defendants filed affidavits in this case did they contend that the Centres would not be built because of economic reasons since 2010 or any other year. The Defendants, at no time before they filed their affidavits in these proceedings, made any public statements to inform the country that it had changed its policy to construct and operate these Centres because of economic reasons.

[259] Even if time was needed by the Minster and Cabinet to make a decision, this was since October 2016. No substantial reason was given for the excessive delay. The Defendants' case was absent of any documentary evidence showing why delay was necessary or the process it was engaging in to arrive at a decision. No such evidence was submitted to this Court.

[260] I agree with the Claimants' submission that no explanation was given as to why it made any difference to the project that Fresenius's role was taken over by Fresenius Brazil, since both are subsidiaries of the German head company. The contractual arrangements were not materially different from those in the Master Contract and the Variation as Fresenius Brazil was still to provide the services in place of Fresenius with NCRHA being granted a collateral warranty. In fact, it is undisputed that these changes or variations that Cabinet was asked to approve were already approved by the experts in the NCRHA. Why then did NCRHA agree to the terms of the Varied Contract? In this Court's opinion it had to be satisfied with the advice of their experts of the competence

of the Brazilian subsidiary. In fact at paragraph 122 of the Jaikissoon affidavit, it was deposed that the substitution of the Brazilian subsidiary had been discussed among the parties since early 2015 and the NCRHA, no doubt having carried out its due diligence, approved the substitution as there could be no other basis for its execution of the Varied Contract. He further stated this substitution would have been approved by the Minister since it is unlikely that the Ministry of Health and the NCRHA would have convened the execution meeting on 18 October 2016 had this not been approved. I note that there has been no challenge to this evidence and therefore in accordance with **Part 56.11 and Part 10.5 of the CPR**, the learning in **Zuckerman on Civil Procedure**[62] and the decision of Mendonça JA in the appeal case of **M.I.5 Investigations**[63] (supra), as expounded in paragraphs [185] – [188] above, I hold that the evidence deposed to in paragraph 122 of the Jaikissoon affidavit is taken to be undisputed.

[261] It is also important to note that no specific concerns about the replacement arrangements have been identified by the Cabinet or the Minister in relation to Fresenius or any other aspects of the proposed arrangements. Neither has put any further questions or proposals to CNSL or BTL in an attempt to satisfy such concerns as they have.

[262] As noted by the Claimants' there is no time frame provided for when the Cabinet Note was prepared. Mr. Madray's affidavit is silent on this and also silent on why it has taken so long. Mr. Madray's affidavit was sworn in 2018, but this Court cannot assume that was when the Cabinet Note was prepared. Without more, this Court is left to conclude that there simply was no evidence or explanation provided from which one can justify the delay, and thus the frustration.

[263] Mr. Madray has stated in his affidavit that he believes that the Cabinet has delayed its approval because of the change in economic circumstances. As submitted by the Claimants that was the first time that reason was provided. Further, Mr. Madray provided no evidence by way of Minutes or statement from the relevant Secretary of Cabinet to prove that this was actually a valid consideration. In fact, Mr. Maharaj submitted that there is unchallenged evidence deposed to in paragraph 143 of the Jaikissoon affidavit filed on 26 June 2018 to the effect that the Leader of Government

[62] **Zuckerman on Civil Procedure Principles of Practice Third Ed at page 301, para 7.27**
[63] Civil Appeal No 244 of 2008

Business, Senator Franklin Khan, on 24 April 2018, told the Senate that government had paid $170,691,658.00 for dialysis services between September 2015 and February 2018. This, Jaikissoon said, works out to be approximately TT$70M per annum for dialysis services only to private health care institutions who provide an extremely poor service and which does not include the costs to the government of providing dialysis in the public health care institutions. Further, the Jaikissoon affidavit at paragraph 147 had alluded to a statement by the Minister of Health on the 14 December 2017 at a post-Cabinet meeting to the effect that government was planning to scrap the system of private medical institutions providing dialysis treatment and instead to introduce *patient oriented haemodialysis suites in public hospitals* rather than transfer dialysis patients to private hospitals.

[264] Mr. Maharaj submitted that there is no evidence from these Ministers that their statements have been misquoted and therefore the evidence of Jaikissoon is unchallenged. This being so, he argued, makes a nonsense of the economic argument for the reasons outlined in paragraph 148 of the Jaikissoon affidavit which states:

> *"148. It makes no sense for the government to spend millions of dollars to set up patient oriented haemodialysis suites in public hospitals when the Centre at the EWMSC can be shortly completed, commissioned and serve the public. Moreover, the public health care institutions have and continue to fail the public and their infrastructure and amenities are not conducive to a system of renal care which I have referred to in my principal affidavit and which Dr. Laquis has underscored in his affidavit."*

[265] In considering the economic argument, I recall the undisputed evidence that this project was borne out of government policy whereby Cabinet decided to proceed on a design, build, operate and transfer model so that the **Contractor would *bear all the costs* of designing, constructing, outfitting and operating the Centres before transferring and handing back to the Government to operate. By adopting this model, there would be *no costs* incurred by the Government in the construction and initial operation of the Centres. All financing and operating risks were to be borne solely by the Contractor**. As was stated by Minister Fuad Khan at the sod-turning ceremony

on 2 September 2015, the Government was **to provide only land and patients** at the outset of the project.

[266] The Defendants have not put before this Court, any substantial evidence to justify breaching the promise. The duty was on the Defendants to provide the necessary evidence and they have undoubtedly failed to do so. The Defendants, not having put before this Court any satisfactory evidence to explain why it acted in breach of the representation, failed to establish any overriding public interest to defeat the Claimants' legitimate expectation. Accordingly, the Court in conducting its balancing exercise, weighing the requirements of fairness as against the reasons put forward by the Defendants has found that the delay and inaction, constituted a disproportionate response in the circumstances and therefore the frustration of the Claimants' legitimate expectation has not been justified.

[267] Further, the case for the Defendants was that there was no legitimate expectation of a substantive nature, and accordingly it is safe for this Court to conclude that the Defendants did not take into consideration the promise and the fact that the proposed act (or omission to act) will amount to a breach of it. I am compelled, however, to take judicial notice of the fact that the entire world is in a pandemic plagued by the catastrophic effects of the deadly Novel Coronavirus (2019-nCoV) ("Covid-19") which to date has caused over 4 million deaths and has infected 187.6 million people worldwide. Economies the world over are bound to be affected or compromised to a significant measure. I also take judicial notice that the experts throughout the world and of course in this jurisdiction have consistently warned that the people who are most at risk of dying from the Covid-19 are those with comorbidities. An article written by Claire Gillespie on 17 February 2021 published in Health website found at https://www.health.com/condition/infectious-diseases/coronavirus/comorbidities-meaning-covid highlighted the fact that the **Centres for Disease Control and Prevention (CDC)** has reported that 90% of the people hospitalised for Covid-19 have **underlying conditions**. In its website found at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html the CDC has identified **chronic kidney disease** as very high (3rd) on the list of comorbid conditions in Covid-19 patients. Statistics or not, we are informed on a daily basis that the majority of those who die are those with underlying conditions. In this regard, it appears even more important for

kidney patients and those requiring renal services to be able to access adequate health care services. So much more, therefore, the expectations of the members of CKDS would be frustrated by the delay in having these Centres operational. Even when these facts are mixed in the Court's balancing exercise, the frustration of the legitimate expectation of the CKDS' members are not justified.

[268] In this regard, the Court must conclude that the legitimate expectation of the Claimants have been frustrated by the failure of the Cabinet to arrive at a decision, and no sufficient overriding public interest has been proved to justifiably frustrate that legitimate expectation. The delay serves only to continue to unjustifiably frustrate that legitimate expectation that was created.

Issue 10: Did the Cabinet infringe on the right to life guaranteed in section 4(a) of the Constitution of CKDS' members?

[269] Mr. Maharaj submitted that as result of the failures of the present system of renal care in Trinidad and Tobago, some kidney patients go from facility to facility receiving different treatments not consistent with their stage of disease and that very few of the facilities employ sufficient qualified staff. Moreover, most lack the programmes to properly care for kidney patients and many kidney patients are dying from infections which arise because of the inconsistent and inadequate level of care presently provided but which would not arise if adequate care was provided.

[270] Mr. Maharaj submitted that the evidence of Mr. Ramkumar concerning CKDS's members is that several of its members have died since 2014 as a result of their inability to access adequate renal services and five CKDS's members have died of kidney failure since the date of his first affidavit in November 2017. Moreover, Martin Charles Lawrence explained that he is 56 year old kidney patient who receives dialysis treatment 3 times a week and has described his experiences in the public health care facilities so that he was forced in 2002 to travel to Pakistan for a kidney transplant which failed in 2011. Additionally, the evidence of Dr. Laquis is that officials of government and the NCRHA acknowledged the deficiencies in the public and private facilities providing renal services. They also accepted that the present facilities are inadequate and saw the establishment of the Centres as a means of addressing these deficiencies and providing adequate renal services.

[271] Mr. Maharaj contended that the effect of this evidence is that the decision whether or not to cancel the establishment of the Centres engages the constitutional protection of kidney patients' right to life. It was submitted that the right to life imposes positive obligations on the State to have in place, laws and systems to protect life. This obligation, while it does not generally provide for a specified level of health care, does extend to the public provision of health care and the laws and regulations that govern the health care system.

[272] Mr. Maharaj submitted that the **European Court of Human Rights (ECtHR)** has held on a number of occasions that an issue may arise under **Article 2 of the European Convention on Human Rights (ECHR)**, that is, the right to life, where it is shown that the authorities put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally. Counsel relied on the authority of **Senturk v Turkey**[64] where the ECtHR held that a public authority charged with the care of a patient has an obligation, at least so far as it is reasonably able, to protect the patient's physical integrity, particularly through the administration of appropriate medical treatment. Thus, if a patient's life is put at risk because the health systems supposed to protect life do not function as they should, then that may be a breach of the right to life. So too a failure by a hospital department to provide treatment which puts a patient's life in danger.

[273] Mr. Maharaj further submitted that the Court has found in relation to a patient in the care of the public health authorities that the right to life imposes a positive obligation to give life-sustaining treatment in circumstances where, according to responsible medical opinion, such treatment is in the best interests of the patient: **NHS Trust A v M**[65].

[274] It was submitted that the unreasonable delay in approving the arrangements to proceed with the construction of the Centres infringed the right to life of the CKDS's members for the following reasons: (i) it is undisputed that the present system of renal care is inadequate and leads to premature and preventable deaths; (ii) the present inadequate system itself has infringed and will continue to infringe the right to life of kidney patients; (iii) to continue with the present system involves likely infringements of the

[64] [2013] 60 EHRR 4; Application No. 13423/09
[65] [2001] Fam 348

right to life of CKDS's members; (iv) the government has acknowledged the inadequacy of the present system; (v) the Cabinet delegated to expert bodies (the Ministry of Health and the NCRHA as the responsible statutory authority) the decision as to how to implement a plan to provide adequate renal care through the Centres; (vi) the NCRHA and the Ministry have, after careful consideration, agreed on a plan for the construction and operation of the Centres, with a carefully and comprehensively designed infrastructure and scope of service, and have vetted and approved the parties who are to provide that service; and (vii) the NCRHA and its contractual partners are ready to proceed with the agreed arrangements to provide that service.

Accordingly, the NCRHA stands ready to proceed with measures which would mitigate the present and continuing infringements of the right to life and would make available life-saving and life-sustaining treatment which have been deemed to be appropriate by the NCRHA and the Ministry as the responsible authorities.

[275] It was submitted that in particular, if a specific measure or decision is likely to infringe a fundamental right, the Court reviewing the reasonableness of a decision will not equate unreasonableness with extremes such as absurdity or perversity but will apply a stricter standard of review. Where infringement of a fundamental right is concerned, the law requires that any infringement of a fundamental right to be justified as a proportionate measure in service of a countervailing objective in the public interest: **R v Home Secretary ex p Daly**[66].

[276] Mr. Mendes, however, submitted that the right not to be deprived of life is aimed at protecting the individual from positive action taken by the State to endanger life. A person who has contracted a disease which is life threatening is in danger of being deprived of his or her life, not by the State, but by the disease which he or she may have contracted as a consequence, *inter alia*, of lifestyle choices, heredity influences or exposure to communicable diseases: **NHS Trust A v M**.[67] Nevertheless, even employing the usual generous approach to the construction of constitutional rights, this

[66] [2001] 2 AC 532
[67] [2001] 1 All ER 801, 809 per Dame Butler Sloss P

Court would be hard-pressed to read **section 4(1)(a)** ***(sic)***[68] as imposing on the State an obligation to provide CKDS with the level of health care which they claim would be provided if the variation to the contract is approved.

[277] Mr. Mendes submitted that all of the cases relied on by the Third Claimant concern the content of the right guaranteed by **Article 2** of the **European Convention on Human Rights**. This right has been interpreted as enjoining the State *"not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction"*: **Senturk v Turkey** (supra); **Genc v Turkey**[69]. That obligation has been interpreted in turn as imposing a positive obligation on the State to set up a regulatory structure *"requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected"*. **Senturk v Turkey** (supra).

[278] Mr. Mendes submitted that this line of authority is not applicable to the Constitution of Trinidad and Tobago. The authorities are all based upon a right to life expressed in terms which expressly impose a positive obligation on the State to protect life by law. There is, however, no such positive obligation imposed on the State by **section 4(a)**. In any event, none of the authorities cited by the Third Claimant concerns allegations that the standard of health care provided by the State to the general public infringed the Article 2 right to life. They all concerned an alleged failure to provide adequate medical treatment in individual circumstances. Nevertheless, to the extent that the right to have one's life protected by virtue of Article 2 extends to the provision of a particular standard of public health care, it is clear that any such right would not be absolute.

[279] It was further submitted that even if there was an obligation imposed on the State by **section 4(a) of the Constitution**, it would be impossible for this Court to find in this case that the right has been infringed. As the evidence indicates, there is a system of health care already provided to persons in need of dialysis and renal replacement therapy, even if there may be room for improvement. This is not a case where no medical treatment is available at all. Additionally, the State has taken steps to improve the

[68] There is **no section 4(1)(a)** of the Constitution as cited in the Defendants' submissions. It should read **section 4(a)**. Accordingly, all other references to **s.4(1)(a)** would be corrected to **s.4(a)**
[69] ECHR 2015/11; Application No. 24109/07 Judgment of 27 January 2015

available medical treatment by the NCRHA contracting with the Claimants to construct new Centres at which state of the art treatment is to be provided. Therefore, it cannot be said that the State has been ignoring its positive obligation under **section 4(a) of the Constitution**, if there is one, to provide an adequate standard of health care. To hold that the State is in violation of that obligation because Cabinet has not yet approved the variation would be testament to saying that (i) the constitutional obligation to provide adequate health care can only be satisfied if this particular variation is put in place and/or (ii) that only the standard of health care which the completed project will provide will suffice to satisfy the constitutional obligation.

[280] In reply submissions Mr. Maharaj posits that Mr. Mendes is asking the Court to apply a restrictive and narrow interpretation of the guarantee of the right to life in **section 4(a) of the Constitution**. This, he said, is totally inconsistent with the law governing the interpretation of a written constitution which protects and guarantees human and fundamental rights as clearly shown in **Charles Matthew v The State**[70] where 4 Law Lords, Lord Bingham, Lord Nicholls, Lord Steyn and Lord Walker stated:

> *"In recent years the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal. It has of course recognised that the provisions of any constitution must be interpreted with care and respect, paying close attention to the terms of the constitution in question.* ***But it has also brought to its task of constitutional adjudication a broader vision, recognizing that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to rights, values and standards expressed in a constitution as these evolve over time****. It is such an approach which Lord Wilberforce stigmatized, in the phrase of Professor de Smith which he made famous, as* ***"the austerity of tabulated legalism"****: de Smith, The New Commonwealth and its Constitutions (1964), p 194; Minister of Home Affairs v Fisher [1980] AC 319, 328."* [Emphasis added]

[70] [2004] UKPC 33

[281] In **Charles Matthew** the Board of the Privy Council sat 9 Law Lords and a majority decision was given by 5, the above-named 4 Law Lords dissenting. However, the majority did not disagree with the above-quoted approach. Their Lordships went on to consider the case of **Attorney-General of Trinidad and Tobago v Whiteman**[71] where Lord Keith of Kinkel, giving the judgment of the Board, said:

> *"The language of a Constitution falls to be construed,* ***not in a narrow and legalistic way, but broadly and purposively****, so as to* ***give effect to its spirit****, and this is particularly true of those provisions which are concerned with the* ***protection of human rights****."* [Emphasis added]

[282] In applying the principles of a generous and purposive approach to interpretation the guarantee of the right to life in **section 4(a) of the Constitution** would include the following components:

(a) The positive obligation on the State to have laws and systems to protect human life.

(b) Where the existing system puts an individual's life at risk through the denial of health care and the State has acknowledged that risks exist, but the State has delayed and/or frustrated implementing plans to reduce and/or remove that risk, the right to life as guaranteed in section 4(a) is engaged.

(c) A State authority charged with the responsibility of providing health care to individuals has a positive obligation to take steps to protect the physical health and/or integrity of patients and individuals through the administration of appropriate medical systems and treatment.

(d) If an individual's life is put at risk because the health systems and measures supplied to protect that individual's life do not function as they should, then the right to life guaranteed in **section 4(a)** is engaged and that is likely to be a breach to the right to life.

(e) The right to life is engaged by the failure of the State through its health and hospital institutions to provide medical treatment to individuals which put their lives in danger.

[71] [1991] 2 AC 240, 247

(f) If the life of an individual becomes at risk because access to treatment provided by the State malfunctions, that situation is analogous to a denial of medical care, and contravenes the right to life.

(g) The right to life imposes a positive obligation on the State to give life sustaining treatment to individuals and also to provide Centres and systems for such life sustaining treatment to be given in circumstances where, according to medical opinion, such treatment is necessary to protect and save human life and is in the best interests of the patient.

[283] Mr Maharaj submitted that it is for the above reasons that he holds the conviction that the constitutional right to life (both in relation to CKDS' members and kidney patients generally) is being infringed by the impugned action (or inaction) of the State because-

(i) patients are denied lifesaving treatment as a result of deficient or malfunctioning systems of public health provision; and

(ii) the government committed to providing renal replacement therapy to patients at public expense but because of the vagaries of the system, some patients are denied appropriate life-saving or life-sustaining treatment.

[284] Although no decision has been taken on whether services would be provided, that is, whether the variation would be approved for the project to continue, does not prevent the Court from holding that the lack of decision-making by the Cabinet is inadequate and faulty.

[285] On the issue raised by Mr. Mendes that all cases relied on by CKDS concern the content of the right to life guaranteed by Article 2 of the European Convention on Human Rights, Mr. Maharaj submitted that this argument is again steering one in the direction of giving a restrictive and narrow interpretation on the right to life provision in our Constitution and is plainly wrong in law. He submitted that Trinidad and Tobago, by entering into several International Treaties and Conventions, has committed itself to providing to the people of this country efficient and effective systems of health care in order to promote human life and to enhance the quality of health care. Counsel alluded to the case of **Darrin Thomas v Cipriani Baptiste**[72] where the Privy Council made the

[72] Darrin Thomas and another v Cipriani Baptiste and others [1999] UKPC 13

point that by ratifying an International Treaty the government made the process of the law stated in that Treaty for the time being part of the domestic law and thereby temporarily at least extended the scope of the due process of law clause in the Constitution.

[286] Mr. Maharaj also cited the case of **Maurice Tomlinson v The State of Belize; Maurice Tomlinson v The State of Trinidad and Tobago**[73] where the Caribbean Court of Justice (CCJ) strengthened the point that common law jurisdictions such as Trinidad and Tobago must interpret domestic or municipal law, as far as possible, consistent with international law obligations specifically as it relates to the **Revised Treaty of Chaguaramas (RTC)**, repeating what the Court said in the landmark case of **Myrie v State of Barbados**[74] that domestic courts *"are constrained to interpret domestic laws so as, if possible, to render them consistent with international treaties such as the RTC."*

[287] Mr. Maharaj went on to say that the CCJ further stated in **Tomlinson** at para 47 of the judgment that the **Caribbean Community Act Chap. 81:11** of the Laws of Trinidad and Tobago gives the RTC the force of law in Trinidad and Tobago which means that domestic courts are required to do whatever lies within their jurisdiction to ensure that the RTC is fully given effect. Significantly, therefore, in addition to its obligations to the United Nations, Trinidad and Tobago, as a Member State of CARICOM and a signatory to the RTC, is bound by the following declarations, initiatives and commitments:

(1) **The Caribbean Charter for Health Promotion** signed in Port of Spain at the 1st Caribbean Conference on Health Promotion held in June 1993;

(2) The **Declaration of Port of Spain**: Uniting to Stop the Epidemic of Chronic Non-Communicable Diseases signed in Port of Spain on 15th September 2007 as part of the CARICOM Initiative;

(3) **Caribbean Public Health Agency (CARPHA)** established by CARICOM in June 2010 with its headquarters in Trinidad and Tobago; and

[73] CCJ Application Nos. OA 1, 2 of 2013 at paras 43 and 44
[74] [2013] CCJ 3 (OJ); [2013] 83 WIR 104

(4) The **Caribbean Co-operation in Health** signed by Trinidad and Tobago in 2016.

[288] And as a **Member State of the Organisation of American States (OAS)** and the **United Nations (UN)**, Trinidad and Tobago has human rights obligations at an international level by virtue of its ratification of inter alia (1) **the International Covenant on Economics, Social and Cultural Rights (ICESCR)**; and (2) the **Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases ("the NCD Protocol")**.

[289] All of these initiatives were to promote and advocate policies and programmes to protect health and prevent diseases and included the implantation and delivery of an improved public health infrastructure. In this regard, Mr. Maharaj submitted that in 2008-2009 the **Cabinet, in accordance with the Caribbean Charter and the CARICOM Initiative, facilitated the commissioning of the Centres to screen and manage kidney diseases and to promote an efficient and effective system of renal care for kidney patients**. He highlighted that this commitment was evident in the recitals to the Master Contract, in particular, C, where the Minister of Health gave specific directions to the NCRHA ***to provide efficient systems for the delivery of health care and to facilitate new systems of health care*** by facilitating the construction and operation of the Centres.

[290] Having regard to Trinidad and Tobago's international treaty obligations, Mr. Maharaj concluded that the Courts are required to interpret the right to life provision in **section 4(a) of the Constitution** purposively and in generous terms which are consistent with international obligations.

[291] In reply submissions, Mr. Mendes accepted that fundamental rights and freedoms are to be given a generous and purposive construction and added that the Constitution is to be interpreted as a living instrument. However, he added, judges are not free to give the Constitution any interpretation that might meet their fancy and relied on the statement of Kentridge J (Acting) of the Constitutional Court of South Africa in **State v Zuma and Others**[75]:

[75] [1995] 1 LRC 145, 156

> *"While we must always be conscious of the values underlying the Constitution, it is none the less our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected.* ***If the language used by the lawgiver is ignored in favour of general resort to "values" the result is not interpretation but divination****."*

[292] However, the learned judge went on to say *"If I may again quote A-G v Moagi 1982 (2) BLR 124 at 184, I would say that a constitution* ***'embodying fundamental rights should as far as its language permits be given a broad construction****."*

[293] Mr. Mendes contended that section 4(a) protects the right to life and the right not to be deprived thereof except by due process of the law, but it does not create a right to have one's life protected by measures taken by the State, as much as one would value the imposition of such an obligation on the State. Counsel reiterated that apart from the decisions of the ECtHR which has interpreted a differently worded provision, the Claimants have not cited any authority in support of the construction it asks this Court to put on section 4(a).

[294] He contested that the principle that domestic law, including the Constitution, is to be interpreted in such a way as to comply with international obligations does not give the judiciary the license to enact treaty law wholesale as part of domestic law. He relied on **Darrin Thomas v Baptiste**[76] where the Privy Council reasserted the **"dualist"** principle that a treaty is not a self-executing instrument and only becomes part of domestic law when expressly incorporated by statute. He quoted Lord Millet at p. 23 of the judgment:

> *"Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The*

[76] [2000] 2 AC 1

making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case.

In their Lordships' view, however, the applicants' claim does not infringe the principle which the government invoke. The right for which they contend is not the particular right to petition the commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by execution action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution."

[295] Mr. Mendes then contended that the statement made by the CCJ in **Tomlinson v The State of Belize** and relied on by the Claimants has been taken wholly out of context. The statement that Trinidad and Tobago must take all necessary measures to ensure the

carrying out of Community obligations resulting from a decision taken by the Conference Heads of Government or another Organ or Body, relates only to the obligations undertaken under the RTC. He stressed that this must be so because the CCJ only has jurisdiction over Trinidad and Tobago in relation to the RTC, not in relation to other regional treaties which Trinidad and Tobago may have entered into.

[296] Counsel sought support for this argument in the case of **Attorney General of Barbados v Joseph and Boyce**[77] a case in which he said the CCJ affirmed the "dualist' principle:

> *"[55] In states that international lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. See: J H Rayner (Mincing Lane) Ltd v Dept of Trade & Industry. Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law. See: The Parlement Belge*[78]*.*
>
> *[56] It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of*

[77] CCJ Appeal No. CV 2 of 2005
[78] [1879] 4 PD 129

Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity. See: R v Home Secretary, ex parte Brind and R v Chief Immigration Officer, ex parte Salamat Bibi.

[297] Counsel emphasised his point that while Trinidad and Tobago may have bound itself in international law to provide an efficient and effective health care service does not entitle the Court to impose on the State as a matter of domestic law an obligation which the State has only undertaken at the international level. To interpret the Constitution as imposing that obligation when there are no words used in the Constitution to that effect, is to enact treaty obligations as part of domestic law, which in effect is inviting the Court to engage in an act of legislation, not interpretation.

[298] Mr. Mendes surmised, however, that even if an obligation to provide health care can be found in **section 4(a) of the Constitution**, there is no basis upon which the Constitution can be interpreted as imposing on the State an obligation to provide health care on the very same terms contained in the very same contract containing the very same variations which the Claimants seek. If the Court finds that there is a constitutional obligation to provide health care, that obligation has been fulfilled by the State since the State through the Regional Health Authorities provide health care for persons suffering from kidney diseases. In this regard, Trinidad and Tobago has complied with its treaty obligations.

[299] In analyzing the submissions of both counsel I start by reminding myself that I have already found that (i) CKDS' members were the beneficiaries of a legitimate expectation of a substantive benefit, that is, that government will construct and operate the Centres so that they would receive a much enhanced standard of care; (ii) by the delay in granting approval the legitimate expectation has been frustrated; and (iii) no overriding public interest has been established to justify the frustration.

[300] The main question raised therefore from the submissions is: ***Can the right to life in section 4(a) of the Constitution be construed as creating a right to have one's life protected by measures taken by the State?*** Mr. Maharaj has advanced very powerful arguments in favour of such a construction by demonstrating from the authorities cited that a positive obligation is imposed on the State to implement laws and systems to

protect human life. But where the existing system puts an individual's life at risk because of the denial or inadequacy of the health care services and the State has acknowledged that such risk exists but has delayed or frustrated plans to implement measures to remove or reduce that risk, it would be proper for the Court to hold that the right to life has been engaged.

[301] Mr. Mendes, however, is strongly contending that the wording of section 4(a) does not lend itself to that construction since there is no imposition of such an obligation on the State to provide an efficient and effective health care system. He pointed out that apart from the decisions of the ECtHR, the Claimants have not cited any binding authority in support of such a construction. The begging question therefore is: ***Is the Court required to interpret the right to life provision in section 4(a) of the Constitution in generous terms which are consistent with international treaty and convention obligations?***

[302] To answer these two questions it must be noted that there is now no dispute that provisions of a Constitution and in particular, fundamental rights and freedoms provisions, are to be given a broad, generous and purposive interpretation. Also well established and widely recognised is the constitutional principle that international treaty and convention obligations do not alter domestic law except to the extent that they are incorporated into domestic legislation. Both Mr. Maharaj and Mr. Mendes are in agreement with these principles. A third principle which is of major significance in this issue is the principle that domestic law, including the Constitution, is to be interpreted in such way as to comply, as far as possible, with international obligations.

[303] It is with this latter principle Mr. Mendes appears to have a difficulty on the basis, as he asserted, that it does not give the Court a license to enact treaty law wholesale as part of domestic law. On this point he relied on the speech of Lord Millet at p. 23 **Thomas v Baptiste** (supra) quoted above in paragraph [291] in this judgment.

[304] However, it appears that the "dualist" principle seems to take on a different complexion when it comes to **construing human rights provisions**. As Lord Millet himself alluded to in the said case of **Thomas v Baptiste** at p. 23:

> *"It is sometimes argued that **human rights treaties** form an **exception** to this principle. It is also sometimes argued that a principle which is*

intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case."

[305] It appears that the 5 Law Lords constituting the panel of the Board had no quarrel with this exception to the principle since human rights provisions, as far as possible, ought to be uniform in keeping with the concept of human dignity. In **Charles Matthew v The State** (supra), their Lordships referring to **Attorney General v Whiteman** (supra) quoted Lord Keith who gave the judgment of the Board:

*"The language of the Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the **protection of human rights**."*

At para 55 the Privy Council further stated:

"55. It is common ground between the parties to this appeal that an obligation binding on a state in international law but not forming part of its domestic laws cannot override or even influence the construction and application of a clear and unambiguous provision of domestic law.

***It is also common ground that if a provision of a State's domestic law is ambiguous and permits of two interpretations, one of which will accord with the State's international obligations and the other of which will involve a violation of those obligations, a court will so far as possible, adopt that interpretation which will accord with the state's international obligations**. We accept both propositions which are supported by authorities……it is in our view relevant to explore the international obligations of Trinidad and Tobago in relation to the issue before the Board. We also think it important to do so, **since human rights treaties have a special character,** as explained by the Inter-American Court of*

Human Rights in Advisory Opinion OC-2/82 of 24 September 1982[Emphasis added]

[306] Similar pronouncements were made by the CCJ in **Tomlinson v The State of Belize**; **Tomlinson v The State of Trinidad and Tobago** (supra) at paras 43, 44 and 47:

> *"43…**that in common law jurisdictions such as Trinidad and Tobago, there is a sacrosanct rule that statutory provisions should if at all possible be interpreted as compliant with the State's treaty obligations rather than in breach of those obligation: Salomon -v- Commissioner of Customs and Excise [1967] 2 QB 116."***
>
> *…the rule of construction is not confined only to statutes which are directed at implementation of an international convention but is directed at all statutes, as a general canon of statutory interpretation*
>
> ***…The domestic courts are constrained to interpret domestic laws so as, if possible, to render them consistent with international treaties such as the Revised Treaty of Chaguaramas (RTC)…***
>
> ***44. International human rights which have crystallised into customary international law form part of the common law of Trinidad and Tobago**.* [Emphasis added]

[307] In light of the above authorities, I do not agree with Mr. Mendes' assertion that the statements of the CCJ quoted above were taken wholly out of context. In fact the CCJ has been consistent in stating this principle as can be seen in ***Myrie*** and at paragraph [56] of the judgment in **Attorney General of Barbados v Joseph and Boyce** CCJ Appeal No. CV 2 of 2005:

[308] All the authorities relied upon by Mr. Maharaj and even those by Mr. Mendes as well, provide compelling force that constitutional provisions: (1) must be given a broad and purposive construction; (2) must be construed, as far as possible, consistent with international obligations particularly provisions which are concerned with the ***protection of human rights***; and (3) where there is ambiguity in the language and interpretation, the ambiguity must be resolved in a favourable interpretation consistent

with the international obligation. All of the decisions emanate from the two Apex Courts: the Board of the Privy Council and the Caribbean Court of Justice. The constitutional provision to be construed in **section 4(a)** is a **human rights one**: the protection of the right to life. Applying a broad, generous and purposive construction to the provision I find that the weight of the decisions cited above heavily tilts in favour of construing the right to life provision consistent with Trinidad and Tobago's international obligations cited in para [287] in this judgment. In this regard the right to life would be construed as imposing a positive obligation on the State to promote, advocate and implement efficient and effective systems to protect health care and preserve life.

[309] The question which now arises is whether there is a breach of this obligation which engages the right to life or whether the State has complied with its treaty obligations? On this point, Mr. Mendes had submitted that even if an obligation to provide health care can be found in section 4(a), there is no basis upon which the Constitution can be interpreted as imposing on the State an obligation to provide health care on the very same terms contained in the contract. In fact, he stated, that the State has complied with its international treaty obligations since it already has in place a fairly comprehensive health care system criss-crossing the entire twin island State.

[310] This in turn therefore raises the question as to what standard of health care is required to be put in place by the State to meet its obligations. Is it that the obligation under its treaty obligations has already been fulfilled by the standard of care offered in the existing system as emphasized by Mr. Mendes? I should think not. Why then would several Government Ministers spanning different administrations openly and publicly allude to the deficiencies and shortcomings of the existing health care services with intensified promises followed with concrete action to put in place an improved system to address the deficiencies? I should think it was because of the recognition that the standard of health care meted out to kidney patients requiring dialysis and overall renal care was not in harmony with its promises entered into in several Declarations and Initiatives of regional and international accord. Those public statements made by the Ministers were also an acknowledgment of the sufferings of kidney patients in this country on account of the inadequate treatment and services provided by the State leading to preventable premature deaths.

[311] In support of this finding I have considered all the affidavit evidence of Dr. George Laquis, Mr. David Jaikissoon, Mr. Krishna Ramkumar and Mr. Martin Charles Lawrence, filed in support of the Claimants' Claim, the contents of which, in my view, demonstrate cogent and compelling evidence that the failure of the Defendants to establish and have operational the proposed Centres, continues to cause kidney patients to suffer and die owing to the lack of adequate required treatment. In particular, Dr. Laquis deposed in his affidavit filed 6 November 2017:

> *"18. This means that at any time here in Trinidad and Tobago there is in excess of 400 persons who need and have applied for kidney transplants, but while they await transplants or when their kidneys begin to fail, they must undergo renal replacement therapy to eliminate waste products and excess fluids from their blood otherwise they will die…*
>
> *19. Based on data from the Ministry of Health it is estimated that currently 1,600 patients in Trinidad and Tobago require renal replacement therapy and this is increasing annually by 150 persons and the number of patients who need kidney transplants is greater than the number of donors at an increasing rate.*
>
> *20. The Ministry of Health's statistics are supported by data supplied by the World Health Organisation (WHO) ….. identified kidney disease as the 8th highest cause of deaths locally accounting for 1.9% of deaths with an increasing upward trend…..*
>
> *22. At present it is generally estimated that there are over 750 persons in Trinidad and Tobago undergoing weekly dialysis treatment…..*
>
> *23. The availability of dialysis machines, however, is extremely limited and dialysis treatment is very costly for individuals if not state funded or subsidised. As a result, many patients who require dialysis are unable to obtain adequate renal services and the quality of their lives deteriorates as they become less mobile and dependant on family and friends for day to day needs; their life expectancy is consequentially reduced and they suffer greatly from steadily increasing pain and discomfort with a concomitant loss of independence and dignity.*

24. I have seen for myself the suffering of kidney patients which increases as the disease progresses in stages…"

[312] At paragraph 26, he gave evidence of the limited treatment available for kidney patients, the inadequate physical infrastructure, the insufficient qualified and trained dialysis nurses and the not well-defined vascular and maintenance programmes.

[313] I have also considered the affidavits of Richard Madray and Terrence Deyalsingh both filed on 23 May 2018 in support of the Defendants and I am satisfied that the evidence deposed by the Claimants' witnesses, as outlined above, has not been challenged on the question of the deficiencies of the system and the risk posed to the lives of kidney patients. But this is not surprising since the statements made publicly and openly by the various Ministers of Government would have confirmed the state and standard of health care in relation to kidney patients. In this regard, in accordance with Rules of the Court as established earlier in this judgment the Defendants are deemed to have admitted the evidence of the Claimants' witnesses.

[314] Accordingly I find that the decision to delay or withhold the approval to proceed with the construction and operation of the Centres for the purposes of improving the health care systems for kidney patients has unjustifiably frustrated the legitimate expectation of the CKDS' members and has consequentially engaged and infringed upon their constitutional right to life in **section 4(a) of the Constitution**.

Issue 11: To what reliefs are the Claimants entitled?

[315] At the heart of this judgment was the consideration of the failure of the Minister of Health and/or the Cabinet to approve, or even make a decision as to whether to approve, the execution by the NCRHA of the variation agreements entered into with CNSL and BTL and of which the NCRHA had committed itself in the implementation of government policy. Having found that such failure has frustrated the substantive legitimate expectation of a substantive benefit of all 3 Claimants and in relation to the CKDS has infringed upon the constitutional right to life of its members, and that the Defendants have not shown any overriding public interest to justify the frustration, the question now arises as to what relief(s) the Claimants are entitled and what corresponding order(s) is this Court empowered to make.

[316] In relation to the reliefs sought in the Fixed Date Claim which are recited in paragraph [6] of this judgment, in addition to the common law principles of legitimate expectation developed by the Courts, it is clear that by virtue of **section 8(1)(b) of the JRA** the Court is empowered to grant the **declarations sought in (i) – (vii)** on the basis of the findings of the Court. I propose to do so. The burning question then becomes whether the Court can also go on to grant the orders sought in **relief (viii)(a) and/or (b)**, that is, an order pursuant to **section 15(3) (a) of the JRA** directing the Defendants to make the requisite decision within a specified time; and/or a prerogative order of ***mandamus*** pursuant to **section 8(1)(a) of the JRA** directing that the Defendants within a specified time to grant the required approval. It is this latter question which requires further interrogation.

[317] Can the Court, seised of all the relevant facts and findings as traversed throughout this judgment, order the Minister and/or Cabinet to make a decision within a specified time, and further yet, can the Court order Cabinet to grant the required approval? In accordance with the common law decisions in: (i) **Robertson v Minister of Pensions**[79] per Denning J; (ii) **Council of Civil Service Unions v Minister for the Civil Service**[80] per Lord Roskill; and (iii) **C.O. Williams Construction Ltd v Blackman and another**[81] per Lord Bridge, the answer is clearly ***yes***! [See paragraphs [157], [127] and [128] above, respectively].

[318] This view is fortified by the decision in **Central Broadcasting Services Limited and Another v The Attorney General of Trinidad and Tobago**[82] where the Privy Council held that it was inappropriate and unrealistic to simply make yet another order for the cabinet to reconsider the application, given the long history of the matter, the inequality of treatment that had been established on the basis of granting an application to C, and the Cabinet's uncommunicated consideration of the application and its decision to refuse a licence on the basis of insufficient financial information. Accordingly, ***a mandatory order*** was made to compel the Attorney-General to do all that was necessary to procure and ensure the issue to X of a radio broadcasting licence. Lord Mance, delivering the

[79] [1949] 1 KB 227 at 232
[80] [1985] A.C. 374
[81] (1994) 45 WIR 94, [1994] 4 LRC 216
[82] [2006] UKPC 35

judgment of the Board which included Lord Hoffman, Lord Hope, Lord Hutton and Lord Brown, stated:

> *"[27] Mr Knox conceded that the position was "unusual and unsatisfactory". That is an understatement. Mr Knox went on to argue valiantly that, in the light of the facts disclosed in the letter dated 17 May 2005, the appropriate course would now be for CBSL to take fresh proceedings for judicial review of the Cabinet's refusal, or (secondly) for the Board simply to make yet a further order for the Cabinet to re-consider the application, or (as a third possibility) for CSBL to avoid any Cabinet involvement by making a new application to the Telecommunications Authority. In the Board's view, neither the first nor the third of those possible courses could be an appropriate response to the course of events which has become apparent since the Court of Appeal was allowed to deal with the matter under a misapprehension as it did. They do not take appropriate account of the long history of this matter, the inequality of treatment established independently of the new matters now known, or the Cabinet's uncommunicated consideration and decision to refuse a licence in June 2004 on a ground that the Attorney General had been refused permission to raise by the Judge. All these matters relate closely to the course of and issues in the present proceedings. Any suggestion that CBSL should have to commence yet further proceedings or begin with a fresh application to the Telecommunications Authority is in the Board's view unrealistic. The same matters also bear strongly, in the Board's view, on the question whether the second course would, as matters now appear, afford appropriate relief in these proceedings."*
>
> *"[36]As in* ***Observer Publications Ltd v Matthew****, so here the Board considers that* ***the only appropriate order is a mandatory order****, in this case ordering the Attorney General to do all that is necessary to procure and ensure the issue forthwith to the Appellant, Central Broadcasting Systems Ltd (CBSL), of a FM radio broadcasting licence, as applied for on 1 September 2000, on an appropriate frequency to be agreed with CBSL or, in default of agreement, to be determined by the High Court on application by either party.*

The Attorney General must pay the Appellants' costs in the courts below and before the Board." {Emphasis added]

[See also the decision of the Privy Council in **Observer Publications Limited -v- Campbell "Mickey" Matthew, the Commissioner of Police and the Attorney General [2001] UKPC 11** judgment of Lord Cooke at paragraph 54, which was followed with approval in **Central Broadcasting**].

[319] Additionally, **section 15(3)(c) of the JRA** vests the Court with the power to make ***"an order directing any of the parties to do, or to refrain from doing, any act or thing, the doing, or refraining from the doing, of which the Court considers necessary to do justice between the parties."*** So, there is no doubt that the Court has the power to make an order directing the Minister and/or the Cabinet to approve the variation. Mr. Mendes, however, submitted that *"given that it is accepted that Cabinet has not made any decision to approve or not to approve the variation"*, even if the Court were to find that the Claimants are the beneficiaries of a substantive legitimate expectation of a substantive benefit which has been frustrated, ***"the most this Court can do is to order Cabinet to make a decision"***. He went on the say that the Court cannot put itself ***"in the invidious position of making a decision on behalf of Cabinet and violate the separation of powers doctrine which underpins the entire constitution."***

[320] This Court is not oblivious to the functional doctrine of the separation of powers and is aware of its duty to act with judicial restraint. In **Kalpana Mehta and Others v. Union of India and Others**[83] Dipak Misra, CJ observed:

"42. When we speak about judicial review, it is also necessary to be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary is not unfettered; it comes within the conception of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases while being within their defined limits of power. Judges are expected to interpret any law or any provision of the Constitution as per the limits laid down by the Constitution."

[83] Writ Petitions (Civil) No. 558 of 2012 with No. 921 of 2013, decided on May 9, 2018

Earlier in the judgment, Dipak Misra, CJ had observed:

> *"39. From the above authorities, it is quite vivid that the concept of constitutional limitation is a facet of the doctrine of separation of powers.* ***At this stage, we may clearly state that there can really be no straitjacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election.*** *There can be many an example where this Court has issued directions to the executive and also formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualisation and fructification of statutory rights."* [Emphasis mine]

Referring to the functional doctrine, D.Y. Chandrachud, J., in a separate judgment cited the following judgment:

> *"249.* ***In State of U.P. v. Jeet S. Bisht (2007) 6 SCC 586****, the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of Government. However,* ***even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs.*** *The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning. S.B. Sinha, J. addressed the need for the doctrine to evolve, as administrative bodies are involved in the dispensation of socio-economic entitlements: (SCC p.619, para 83)."*

> *"83. If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But* ***in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction.*** *Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation."* [Emphasis mine]

[321] I find myself in agreement with the Indian Supreme Court. The fact is that this project was in the pipeline since 2008. In 2016, a decision was made to remove FMCHL by the Board of the NCHRA, which then sought approval of the Cabinet, one would expect by way of its line Minister. The Minister of Health at the time is also the Minster of Health today. Therefore, while some concession ought to be allowed for changes in Government and Ministers, this is not the case in the instant matter. The Minister of Health is aware and has been involved in this process for a number of years. I am acutely aware that the Minister of Health may not be in a position to force any decision of the Cabinet, however it is not even the Defendants' case that the Minster of Health has taken any initiative or action to seek to have this matter dealt with whether as a matter of urgency or simply as a follow-up exercise with the relevant Cabinet Secretariat.

[322] It has been over 12 years since the project came to life, and almost 5 years since awaiting Cabinet approval.

[323] Mr. Mendes' contention then that the Court can do no more than to direct Cabinet to make a decision, appears to be totally misplaced. As the analysis above shows, there exists a rich body of law, both at common law and in statute, regionally and internationally, and of Apex Courts, giving and/or rationalising the Courts power to not only review but to grant mandatory orders for positive action. So, even in the confines of the constitutional doctrine of the separation of powers, balanced with the Court's observance of its duty of judicial restraint of venturing outside its constitutional remit and jurisdiction, in cases where the appropriate circumstances exist, there is no doubt that the Court has the power and indeed the duty to impose mandatory orders on the

Cabinet. For the Court to agree with Mr. Mendes' submission would be tantamount to endorsing the misplaced view that Cabinet is beyond the reach of the Court's judicial review powers. In this country, as in any other established democracy, predicated upon a Constitution in which the rule of law is a foundational pillar, no governance lies above the Constitution and no entrustment of power is absolute even where the doctrine of separation of powers is also a foundational pillar, the Courts being the guardian and protector, interpreter and final arbiter of the Constitution.

[324] Having said all of this, and even though the Court has the power, and this case seems to be one in which it is appropriate to exercise that power, out of intense respect for the doctrine of the separation of powers and the dutiful exercise of judicial restraint, I do not propose to go so far as to order the Cabinet to approve the variation. I have taken into account that the Cabinet has not said that it will not approve the variation. I propose to allow it the opportunity to make that decision. However, I shall, pursuant to **section 15(3)(a) of the JRA**, order that within a specified time the Minister and Cabinet shall make the decision on whether to approve the variation. It is also appropriate for this Court to make an order pursuant to **section 15(3)(b) of the JRA** declaring the rights of the Claimants in accordance with the findings of the Court which said rights the Minister and Cabinet must take into account when making the decision. Further, in accordance with the House of Lords decision in **Re Duffy [2008] UKHL 4**, there are certain factors which this Court has found to be relevant considerations and which this Court directs must be taken into account when making the decision. These factors are:

(1) the NCRHA through the Minister has made a request for urgent approval of the variations proposed to the Master Contract;

(2) these variations submitted to Cabinet for approval have already been agreed upon by the experts in NCRHA including the Minister and CNSL and BTL;

(3) that this project concerns a matter of great national importance;

(4) based on assurances given by NCRHA and the Minister, CNSL and BTL have already expended millions of dollars on the project which is now stalled;

(5) the assurances given by the NCRHA and Ministers created legitimate expectations of a substantive benefit of which the Claimants are the beneficiaries;

(6) that lives have been and are being lost, and the withholding of approval only serves to continue a sub-standard system of health care for kidney patients and increases the risks of premature but preventable deaths;

(7) that the constitutional right to life of the CKDS and its members has been engaged; and

(8) from the reasons advanced on behalf of the Defendants, the Court has found no justification for the frustration of the legitimate expectations of all 3 Claimants.

[325] This Court is of the view that having regard to the length of time which has already elapsed, a reasonable time within which a decision should be arrived at is a period of **42 days**. The Court is also of the view that once all these declarations of the Claimants' rights as well as all relevant factors identified are taken into account, no reasonable body would refuse to grant approval. By this order I have accorded due respect to the Cabinet and the functions it performs and have demonstrated judicial restraint in recognition of the sacred constitutional doctrine of the separation of powers. I hope, therefore, that this Court, by its judgment, will be accorded the same respect.

VI. Disposition

[326] **In light of the above analyses and findings, the following DECLARATIONS and ORDERS are hereby made:**

1. **IT IS DECLARED that the decision of the Cabinet of the Republic of Trinidad and Tobago made after 8 August 2017 and continuing in failing to take the necessary action for the NCRHA to do what was necessary to facilitate the construction and operation of the two (2) Full Service Renal Dialysis Centres at EWMSC and SFGH is unlawful.**

2. **IT IS DECLARED that the decision of the Second Defendant (the Minister of Health) ("the Minister") made after 8 August 2017 and continuing in failing to give the requisite specific or general directions to the NCRHA pursuant to section 5(1) of the Regional Health Authorities Act Chap 29:05 to do all things necessary to facilitate the construction and operation of the Centres is unlawful.**

3. **IT IS DECLARED that the decision of the Third Defendant (the NCRHA) made after the 8 August 2017 and continuing in failing to do all things necessary to facilitate the construction and operation of the Centres is unlawful.**

4. **IT IS DECLARED that the First and Second Claimants (Comprehensive Nephrology Services Limited and Biomedical Technologies Limited) are the beneficiaries of a legitimate expectation of a substantive benefit that the Third Defendant (the NCRHA) would execute the requisite documents so that the First and Second Claimants will obtain financing for the construction and operation of the Centres.**

5. **IT IS DECLARED that the Third Defendant (the NCRHA) after 8 August 2017 and continuing unlawfully frustrated the said legitimate expectation of a substantive benefit in failing to take steps to execute the requisite documents so that the First and Second Claimants will obtain financing for the construction and operation of the Centres.**

6. **IT IS DECLARED that the Third Claimant (Caribbean Kidney Disease Society) ("CKDS") and its members are the beneficiaries of a legitimate expectation of the substantive benefit created by the representations made to them by the Cabinet and Ministers of Government acting on behalf of the government that the government would construct and operate the Centres so that the Third Claimant and its members and other members of the public would receive adequate dialysis and renal services.**

7. **IT IS DECLARED that the Defendants after 8 August 2017 and continuing by their decisions and/or actions or inactions unlawfully frustrated the said legitimate expectation of a substantive benefit in favour of the Third Claimant (CKDS) and its members.**

8. **IT IS DECLARED that the delay from 1 September 2015 to 8 August 2017 and continuing and/or the failure by the Defendants to make the relevant decisions during this period to give effect to and to implement the Cabinet's said decision and policy for the construction and operation of the Centres**

constitute unreasonable delay pursuant to section 15(1) of the Judicial Review Act Chap 7:08 ("the JRA") and is also unlawful.

9. **IT IS DECLARED in favour of the Third Claimant (CKDS) and its members that the impugned decisions and/or action and/or inaction of the Defendants referred to hereinabove to have the Centres constructed and operational also amount to a contravention of their right to life guaranteed in section4(a) of the Constitution of Trinidad and Tobago Chap 1:01.**

10. **An Order be and is hereby made pursuant to section 15(3)(a) of the JRA directing the First and Second Defendants to make a decision within 42 days of this order on whether to approve the variation of the Master Contract proposed by the Third Defendant and the First and Second Claimants in substantially the same terms that were before the parties for execution at their meeting on 18 October 2016.**

11. **An Order be and is hereby made pursuant to section 15(3) (b) and (c) of the JRA directing that in making the decision as directed in clause 10 of this order as to whether to grant approval, the First and Second Defendants must take into account the declarations made in this order in clauses 1– 9 declaring the rights of the Claimants and must further take into account the factors adumbrated as (1) to (8) in paragraph [324] of this judgment.**

12. **Pursuant to Parts 56.14(4) and 66.6(1) of the CPR, the Defendants shall pay to the Claimants costs of their substantive claim as well as their application for leave to apply for judicial review, to be assessed by the Court pursuant to Parts 56.14(5) and 67.12(2) of the CPR, in default of agreement, certified fit for Senior and Junior Counsel.**

Robin N. Mohammed
Judge