REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-00213

BETWEEN

DAVINDRA MAHARAJ

First Claimant

THE MOTOR INSURANCE BUREAU ASSOCIATION OF TRINIDAD AND TOBAGO

Second Claimant

AND

THE MINISTER OF FINANCE

First Defendant

THE BOARD OF INLAND REVENUE

Second Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Third Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. Y. Ali, A. Hosein and R. A. Ramoutar for the Claimants

Mr. M. Quamina instructed by Ms. J. Joseph for the First Defendant

Mr. M. Quamina instructed by Ms. A. Duncan and Ms. L. Singh-Dan for the Second Defendant

Mr. C. Denbow S.C., Ms. M. Smith and Ms. T. Ramlogan instructed by Ms. J. Joseph for the Third Defendant

JUDGMENT

1. In the Republic of Trinidad and Tobago there is no legislation that provides a scheme for compensation to victims of motor vehicle collisions in the event that the culpable party is uninsured. This issue provides the backdrop for the instant claim for judicial review.

2. Both claimants seek relief by way of judicial review on different grounds. The first claimant asks for two declarations, firstly, that the decision and direction of the first defendant to permit the levy of motor insurance premium taxes from him for the purpose of compensating motor accident victims of uninsured drivers was and continues to be done contrary to the purpose and mischief for which the **Miscellaneous Taxes Act** Chap 77:01 as amended (hereinafter referred to as "the said Act") was intended and amounts to a breach of his legitimate expectation to be taxed in accordance with the said Act.

3. Secondly, he seeks a declaration that the second and/or all of the defendants have been enriched by him through payment of motor insurance premium taxes and that such enrichment was unjust, the taxes having been collected by the second defendant for the purpose set out in the said Act only.

4. He also seeks an order for the return of the sum of $5, 456.21 as restitution for the unjust enrichment of the defendants.

5. The second claimant seeks one declaration, namely, that the failure of the first defendant and/or the state to establish a Motor Insurance Bureau for the purpose of the disbursal of funds to compensate victims of motor vehicle accidents who suffer injuries caused by drivers who are insured despite having allocated funds thereto is unreasonable.

6. The second claimant also seeks an order from the court that the funds set aside thus far be paid into court to be administered and disbursed by the court at the discretion of the court for the purpose of compensating the victims of uninsured drivers.

7. The first claimant brings the claim in his private capacity as a citizen in respect of whom an Insurance Premium Tax is levied pursuant to the said Act. The second claimant is a non-incorporated, non-profit organization whose objective is that of promoting the establishment of a Motor Insurance Bureau in order to facilitate compensation to its membership and other victims of collisions in which the liable party is uninsured. They both assert that they are persons whose interests are adversely affected by the failure of the defendants to establish a Motor Insurance Bureau. In particular the second claimant avers that it is a group of persons whose claim is justifiable in the public interest. A challenge to the capacity of the second defendant to institute this claim has been made by the defendants and this issue shall be dealt with later on in this judgment.

8. The first defendant is the ministry of government responsible for facilitation of revenue collection and revenue management; budget planning, preparation and management; the formulation and promotion of national fiscal and economic policy; trade facilitation and border control; debt management; and the management of the State Enterprises sector. The annual fiscal budget is read and the finance bill for any given year piloted through the Parliament by the Minister of Finance.

9. The second defendant is the authority responsible for the collection and remittance of taxes levied pursuant to the provisions of the Miscellaneous Taxes Act.

10. The third defendant is sued pursuant to the provisions of the State Liability and Proceedings Act Chap 8:02 and is responsible for the administration of legal affairs. See section **76(2)** of the Constitution.

11. The evidence before the court consists of three affidavits of Davindra Maharaj, two in support and one in reply and an affidavit of Vishnu Dhanpaul filed on behalf of the defendants. Mr. Dhanpaul was the Permanent Secretary of the Ministry of Finance from 2007 to 2010 and July 2013 to November 2015. He resumed said duties from January 2017.

He is an economist by profession. His evidence in this claim has been invaluable and the details provided are largely unchallenged.

The uncontested facts

12. For over thirty-five years, there have been clarion calls by several persons and entities including the courts of Trinidad and Tobago, for the establishment of a scheme to compensate those victims of motor vehicle collisions who would have sustained injury through the fault of uninsured drivers. This call has been endorsed by Their Lordships of the Privy Council on several occasions. In essence, the call recognizes the unfairness and injustice which accrues to a successful claimant who, having been injured in a motor vehicle collision has no hope of obtaining the fruits of his judgment as the liable driver was uninsured at the time of the collision. The suggestion of the establishment of a Motor Vehicle Insurer's Bureau to administer a scheme of compensation is not a new one. This suggestion has found fertile ground in several quarters including but not limited to successive governments. Equally, as indicated to this court with candour by Learned Senior Counsel for the third defendants, the third defendant accepts not only that there has been a clarion call for such a scheme over many years but that such a scheme remains as relevant today as it was many years ago and that as a consequence matters have progressed some way towards its establishment. The court shall return to this later on in this decision.

13. For the sake of completeness, the court is of the view that it ought to list for the record some of the several cases in which such a call has been made or at the least discussed over the years. The list is taken from the submission of the claimants who have helpfully set out the relevant dicta in their submissions. They are as follows; ***Velma Germaine Eligon v N.E.M. (West Indies) Ltd***. HCA 686 of 1974, judgement of Edoo J; ***Capital Insurance Ltd v Rajendra Seeraj*** [1986] UKPC 42 (30th July 1986); ***Presidential Insurance Company Ltd v Resha St. Hill*** [2012] UKPC (16th August 2012); ***Presidential Insurance Company Ltd v Mohammed & Ors*** [2015] UKPC 4 (3rd February 2015). These authorities are well known and the court readily accepts that they represent a call for the institution of a structure to provide for compensation to victims who are not only victims of personal injury

but who suffer by virtue of the fact that the liable party is uninsured and so the victim remains uncompensated.

14. All parties to this claim also agree that if such a scheme is to be instituted and administered, the appropriate vehicle could only be that of legislation. So that it is a matter for Parliamentary intervention. It is for the legislature, if they so determine, to pass the relevant law to provide for the structure and implementation of such a scheme. Indeed this was the position articulated by Their Lordships of the Privy Council in the Bahamian case of ***Insurance Company of the Bahamas Ltd v Antonio*** [2015] UKPC 47 delivered on the 7th December 2015, when Lord Mance set out as follows;

"1. Whether a victim of negligent driving can look to insurers of the negligent driver can be vitally important for the victim. But it is a matter over which the victim has commonly no control. It depends upon whether insurance has been arranged by or on behalf of the driver or driver's employer, and it also depends upon the terms of that insurance, subject to limited statutory qualifications to ensure that these cannot always be relied upon as against a third party victim. There are as a result cases including the present - as the Board will humbly advise Her Majesty for reasons which will appear - in which the victim has no insurer to which to look.

2. That is a problem which could only partially be addressed by extended statutory Resha St Hill[2012] UKPC 33, para 31 and The Presidential Insurance Co Ltd v Mohammed [2015] UKPC 4. Any complete solution, covering in particular situations where no relevant insurance cover exists at all, requires more wide-ranging arrangements, such as the long-established extra-statutory Motor Insurers' Bureau in the United Kingdom and the other national insurers' bureau now required throughout the European Union under Directive 2009/103/EC of 16 September 2009.

3. The solution is not for courts to impose on insurers liabilities which they are not required to bear either under the insurance cover which they have properly issued or under current legislation. Insurance is based on an assessment of the risks undertaken and of the

premiums appropriate to cover such risks. Named driver policies are a means by which insureds and insurers identify the cover required and define and limit the premiums payable. They are permissible under current law in The Bahamas. To impose on insurers liability for accidents caused by other drivers not named on the relevant policy is to expand the risks and to undermine the purpose of named driver cover. If such liability is imposed in respect of insurances already issued, insurers will have received no premiums for such risks. In relation to future insurances, higher premiums would have to be charged across the board, and individual motorists will be unable to obtain the benefits of reduced premiums under named driver cover. Some motorists might not be able to afford the resulting increased premiums.

4. ***It is for the legislature in each country where the above problem continues to exist to consider whether and how to address it*** *(emphasis mine). The Board endorses the observations made by the President, The Hon Mrs Justice Allen, in the Court of Appeal in para 60 of her judgment in this case, commending to the relevant authorities measures to address the problem for the future."*

15. At the reading in the Parliament of the 2008 Budget Statement for the fiscal year 2008 by the Minister of Finance in September 2007, the then government in identifying road safety as one of its priorities proposed the use of part of the proceeds of the Insurance Premium Tax, levied pursuant to the Miscellaneous Taxes Act to establish a fund to compensate victims of uninsured drivers. This intention was subsequently acted upon and in 2008, money was set aside and placed in a suspense account at the Central bank of Trinidad and Tobago entitled "Accident Victims Compensation Fund Suspense Account", such money to eventually be placed in a fund when operationalized. This was done with the approval of the Cabinet and the sum so set aside amounted to One Hundred and Thirty-Eight Million, Four Hundred Thousand dollars ($**138,400,00.00**). This is the uncontested evidence of Vishnu Dhanpaul who swore to an affidavit on the part of the defendants.

16. Subsequently, upon a change of government, the new administration also committed itself to the establishment of the fund and a mechanism for dispensation. This was specifically set out in the budget statement of the Minister of Finance presented to the Parliament on the 9th September 2013 for fiscal 2014. It was proposed then that the relevant legislation would be established from the 1st January 2014 using the funds collected from a 6% tax on insurance premiums. The fund was then officially named the Motor Vehicle Accident Fund. It is the uncontested evidence that the money for the fund is taken from the consolidated fund, namely the fund into which all taxes collected by the state are remitted. The statement of account for the said fund from the 1st September 2008 to the 23rd June 2017 shows a balance of One Billion, Forty-Six Million, None Hundred and Five Thousand, Four Hundred and Seventy-Two dollars **($1,046,905,472.00**).

The capacity of the second claimant to institute the claim

17. The defendants submit that the second claimant is in fact an unincorporated association lacking in legal capacity. They argue therefore that the second claimant has no capacity to institute this claim. The claimants submit that the argument of the defendants is misconceived as both the Judicial Review Act Chap 7:08 (JRA) and the Civil Proceedings Rules (CPR) make adequate provision for its jurisdiction to bring the claim.

Finding

18. The court finds that the claim is properly brought by the second claimant in that the second claimant is vested with the relevant capacity to institute the claim for the following reasons.

19. It is not in issue that the second claimant (of which the first claimant is the Acting President) is a non-incorporated, non-profit association. In his affidavit in support if this application for leave Dave Maharaj sets out that the second claimant is an interest group whose objectives include the promotion of the establishment of a Motor Insurance Bureau in the Republic. The purpose of the Bureau, according to the deponent would be that of

enabling victims of motor vehicle collisions who suffer injury at the hands of uninsured drivers (including the dependents of such victims) to recover compensation from the State. (*See paragraph 3 of the affidavit of the 17th January 2017*).

20. The deponent also avers that the membership of the second claimant is comprised of such victims who are unable to file an application for judicial review on account of their indigence and/or their economically disadvantaged position and other citizens of the Republic. Further, that the membership is directly and adversely affected by the fact that they are unable to obtain a remedy from State compensation despite the existence of an accident victims compensation fund. (*See paragraphs 4, 5 and 6 of the affidavit of the 17th January 2017*).

21. Two evidential matters should be mentioned at this stage. Firstly, there is no evidence to the contrary of that set out by Mr. Maharaj in his affidavit of the 17th January 2017 on this issue (set out above) so that the matters narrated are deemed in law to have been accepted. Secondly, the second claimant has not condescended to particulars of the date when it came into being and the qualification for membership and the precise number of its members. Neither has it put forward any minutes of meetings or a written declaration or memorandum of objectives. Despite this however, there appears to be no issue between the parties as to the existence and objectives of the second claimant and the court therefore accepts the evidence given by Mr. Maharaj in that regard.

22. Section **5 (2)** of the **JRA** provides;

> *(2) The Court may, on an application for judicial review, grant relief in accordance with this Act—*
>
> > *(a) to a person whose interests are adversely affected by a decision; or*
> >
> > *(b) to a person or a group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case.*

23. Section **5 (6)** of the **JRA** provides;

> *(6) Where a person or group of persons aggrieved or injured by reason of any ground referred to in paragraphs (a) to (o) of subsection (3), is unable to file an application for judicial review under this Act on account of poverty, disability, or socially or economically disadvantaged position, any other person or group of persons acting bona fide can move the Court under this section for relief under this Act.*

24. Further, section **5(A)(1)** of the **JRA,** confers a discretion on the court to adjourn for the purpose of the appointment of an investigator to investigate and report to the court the details of the party making the application where such application is made pursuant to the sections of the JRA set out above. This discretion is of course one to be exercised judicially having regard to all the circumstances of the case. It is also to be noted that Part **56.2 CPR** mirrors that set out in the JRA in relation to capacity to institute the judicial review claim. There is however no need to set out the relevant rule.

25. In this case the court sees no basis for the exercise of the discretion. This is so as there has been no challenge to the matters set out on the factual or evidential issue of the existence, composition and purpose of the second claimant. Those matters therefore amount to unchallenged evidence before this court. The court therefore accepts that the second claimant is comprised of a group of persons whose interests are adversely affected by the decision. The court also accepts that the second claimant is acting bona fide in bringing the claim on behalf of its members who are incapable of so doing by reason of the matters set out in section **5(6) JRA**.

26. It is therefore the ruling of the court that the second claimant is vested with the capacity to institute this claim.

Delay

27. Section **11** of the **JRA** provides;

> ***11.*** *(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*
>
> *(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.*
>
> *(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.*

28. The defendants submit that the statements which form the basis of the challenge appear to have been made by Ministers of Finance in the years 2008 and 2014 and that there has been no explanation from the claimants as to why there has been undue delay in applying for judicial review within the prescribed period. Further they argue that to grant any relief at this stage would be detrimental to good administration having regard to that which is contained in the affidavits of the defendants.

29. The court is unable to agree with these submissions. In so saying, the court accepts that the evidence relied on by the claimants refers to two budget speeches only. However, their challenge is not one made pursuant to those two speeches only. The challenge is to the continuous decision to credit funds to the suspense account which itself is a continuing act. Whether there is undue delay in any case must depend on the nature and circumstances of the decision being challenged. While in the usual case, such a decision is readily reconcilable to a particular date, in some cases the circumstances are quite different. This is one of those cases. In fact, the evidence of the defence witnesses clearly demonstrate that the suspense fund is alive and that it continues to grow because of annual injections in keeping with the stated policy of at least two different administrations. When placed in

proper context therefore, the challenge is not one to a decision taken in 2008 or 2014 solely. The court therefore finds that there has not been undue delay in this case.

30. By virtue of section **11(2) JRA** supra, a court in determining whether to grant leave in treating with the issue of delay may deny leave if it finds that there has been undue delay and that the grant of leave would be detrimental to good administration. The defendants argue that the grant of relief would be detrimental to good administration. Having regard to the relief sought, it appears to the court that the objectives of all parties appear to coincide in that the mutual desire is the passage of legislation to give effect to the fund. In those circumstances the court does not agree with the submission of the defendants. In any event, having regard to the decision of this court on the substantive issues (set out later on), the question of whether the grant of relief would be detrimental to good administration has become merely academic. The submission therefore fails.

The substantive claim of the first claimant

Unlawfulness and illegality

31. The court understands the argument of the first claimant to be that there is no authority vested in the defendants to levy a tax in respect of a Motor Vehicle Accident Fund and that to so do by way of the provisions of the **Miscellaneous Taxes Act** which permits the collection of an Insurance Premium Tax is unlawful. He submits that the purpose of the said Act was not that of the levy of insurance premium for the purpose of compensating victims of uninsured drivers and that he held a legitimate expectation that the taxes collected from him by virtue of the Act were not to be so used in the absence of legislation permitting such a scheme.

32. His second and more oblique argument is that none of the defendants have authority to allocated money out of the Consolidated fund for a purpose for which there is no legislation. He therefore seeks a refund of the sum which has been levied thus far.

33. The court accepts the submission of the defendants that the claim of the first claimant is misconceived and has no legal basis upon which to stand.

34. Sections 54 to 60 of the said Act prescribes a tax of 6% on taxable insurance contracts called the Insurance Premium Tax. This tax is to be collected by the insurer and remitted to the Board of Inland Revenue being the relevant Tax Authority. It is to be noted that the tax applies to all categories of prescribed insurance contract other than those listed at section **54 (1) a to h**, and is not limited only to insurance contracts in relation to motor vehicles. The tax was instituted in the year 1995.

35. Sections **12** of the **Exchequer and Audit Act** Chap 69:01 establishes an "Exchequer Account" and section **13** sets out that all revenue shall be paid at such times and in such manner as the Treasury may direct into the Exchequer Account and the revenue shall form the Consolidated Fund. Section 3 provides that the Minister (the first defendant) shall, subject to the Constitution and the Act, have the management of the Consolidated Fund and the supervision, control and direction of all matters relating to the financial affairs of the State which are not by law assigned to any other Minister.

36. It follows therefore that the taxes collected are deposited into the Consolidated Fund over which the First Defendant has management and control. The purpose of the **Miscellaneous Taxes Act** being that of the collection of taxes to be deposited into the Consolidated Fund as revenue.

37. Further, the Consolidation Fund is established by section **112 (1)** to (**4)** of The Constitution of the Republic of Trinidad and Tobago Chap 1:01. Both sections 112 and 113 provide as follows;

> *112. (1) All revenues or other moneys raised or received by Trinidad and Tobago, not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose shall, unless Parliament otherwise provides, be paid into and form one Consolidated Fund.*

(2) No moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by this Constitution or any Act or where the issue of those moneys has been authorised by an Appropriation Act or an Act passed in pursuance of section 114 or in accordance with any other law.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Fund unless the issue of those moneys has been authorised by an Act.

(4) No moneys shall be withdrawn from the Consolidated Fund or any other public fund except in the manner prescribed.

113. (1) The Minister responsible for finance shall cause to be prepared and laid before the House of Representatives before or not later than thirty days after the commencement of each financial year estimates of the revenues and expenditure of Trinidad and Tobago for that year.

(2) The heads of expenditure contained in the estimates, other than expenditure charged upon the Consolidated Fund by this Constitution or any Act, shall be included in a Bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.

(3) If in respect of any financial year it is found-

(a) that the amount appropriated by the Appropriation Act for any purpose is insufficient or that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act; or

(b) that any moneys have been expended for any purpose in excess of the amount appropriated for the

purpose by the Appropriation Act or for a purpose for which no amount has been appropriated by the Act,

A supplementary estimate showing the sums required or spent shall be laid before the House of Representatives and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.

38. The evidence demonstrates that funds from the Consolidated Fund for the purpose of compensating victims of accidents of uninsured drivers have been allocated. This having occurred, the money has been placed in a suspense account to be released only when the proper Parliamentary authority is provided by way of legislation which establishes a Motor Insurance Bureau. This has however not been done and the money remains within the coffers of the state. It follows therefore and the court accepts that the purpose for which the **Miscellaneous Taxes Act** was intended was in fact achieved and that there has been no act contrary to that purpose or mischief that the said Act was designed to treat with. In so saying the court has found the evidence of Mr. Dhanpaul to be very helpful in providing not only a broad picture of the operations of the relevant legislation but also a clear picture of the specific issue of the Insurance Premium Tax collection. It is to be noted that Mr. Dhanpaul deposed that the money transferred to the suspense account is not the same money collected as Insurance Premium Tax and the court accepts this unchallenged evidence.

39. It is of utmost importance that the relevant parts of the evidence of Mr. Dhanpaul be set out despite its length.

Dhanpaul affidavit filed and sworn on the 14th July 2017

40. The following is the relevant evidence on affidavit;

"General Revenue Collection Process:

*18. Generally, all taxes that are collected on behalf of the State constitute revenue and the Insurance Premium Tax is such a tax. The **Exchequer and Audit Act, Chap. 60:01** at section 12 establishes the Exchequer Account. Pursuant to section 13 of the Exchequer and Audit Act, all revenue shall be paid, at such times and in such manner as the Treasury may direct, into the Exchequer Account and the revenue shall form the Consolidated Fund.*

*19. Treasury Division pursuant to the **Exchequer and Audit Act** and the Financial Regulations is required to issue directions to the Board of Inland Revenue (BIR) and all other receivers of revenue on the procedures that must be followed with respect to the collection and deposit of revenue. Procedures ae also set out directly in the **Exchequer and Audit Act** and Financial Regulations. Directions from the Treasury Division may also be issued from time to time by Circular Memorandum to all receivers of revenue. Over the years several such Circular Memoranda have been issued. Once a Circular Memorandum setting out a particular directive is issued by the Treasury Division, the BIR and any other receiver of revenue is required to comply with such directive. Compliance with such directives is monitored by the Auditor General.*

History of Insurance Premium Tax:

*20. The **Miscellaneous Taxes Act, Chap 77:01** was enacted on 2nd May 1963 as an Act to provide for raising revenue by the imposition of certain taxes, and for matters connected therewith. This Act is just one of several pieces of legislation by which the State collects revenue by way of taxation.*

*21. The Insurance Premium Tax was first introduced in 1995 by the then Minister of Finance, the Honourable Wendell Mottley. The Tax was introduced by amendment to the **Miscellaneous Taxes Act** in **Act No. 5 of 1995** as a tax to be collected by the Tax Authority, which is the Board of Inland Revenue (BIR). As it relates to the Insurance Premium Tax, the **miscellaneous Taxes Act** was further amended by **Act No. 2 of 2002** and **Act No. 30 of 2007**. The amendment in 2002 expanded the definition of taxable insurance contract, authorised the*

BIR to audit insurance companies to ensure that the correct taxes are paid to the BIR, and authorised the BIR to waive interest accrued in respect of outstanding taxes and penalties where it considers it just and equitable to do so. The amendment in 2007 reduced the penalty for non-payment of the tax set out section 58 from fifty percent to twenty-five percent and introduced a requirement for insurers to accompany every payment of insurance premium tax with a return in such form as may be prescribed by the BIR.

22. *The Insurance Premium Tax is governed by Part XIII sections 54 to 60A of the* ***Miscellaneous Taxes Act.*** *The tax is a charge on the receipt of a premium by an insurer where the premium is received under a taxable insurance contract and the period of cover begins on or after January, 1995 or begins before 1st January 1995 and extends to a date after 31st December 1995. The tax is charged at a rate of six (6) percent. Taxable insurance contracts are contracts of general insurance other than contracts relating to ordinary long-term business; commercial ships or aircraft; risks outside Trinidad and Tobago; governing loss or damage to goods in foreign or international transit; reinsurance; group life insurance and group health insurance. The tax is payable by the insured person but collected by the insurance company in a similar manner to the tax on financial services. Where a risk in Trinidad and Tobago is insured by a foreign insurer, the insured person is liable to pay the tax and may not claim a deduction for tax purposes unless the premium tax has been paid. The insurance premium tax is payable on motor insurance premiums.*

23. The BIR, pursuant to its mandate under the ***Miscellaneous Taxes Act,*** *routinely collects the Insurance Premium Tax from the insurer in accordance with the law and established procedures. All proceeds of Insurance Premium Tax collected, as is the case with respect to all other types of tax collected, are deposited by BIR into an account called the Treasury Suspense Account in the Central Bank. When the deposit is made a Lodgement Slip is submitted to Central Bank. The Lodgement Slip identifies the total deposit being made (cash and cheques). After Central Bank processes the deposit, two copies of the*

processed Lodgement Slip are returned to BIR. Deposit Vouchers identifying the relevant Sub items of Revenue (Votes) are prepared by the BIR to support the value on the Lodgement Slip.

24. The BIR then "brings to account" (process where the Treasury Division will update the Governments General Ledgers) the Deposit Vouchers and processed Lodgment Slips to the Treasury Division. Thereafter the Treasury Division would tally the amounts deposited and then issue directions to the Central Bank to transfer the funds deposited in the Treasury Suspense Account to the Exchequer Bank Account (the bank account of the Consolidated Fund) or any other accounts related to a Fund established by law. The reconciliation and transfer from the Treasury Suspense Account to the Exchequer Account and other Funds is done on a daily basis by Treasury Division.

25. For fiscal years 2008 to 2015 inclusive, the Insurance Premium Tax Actual Receipts were as follows:

Year	**Estimated Receipts** **$**	**Actual Receipts** **$**
2008	138,360,726	141,022,843
2009	149,709,000	153,521,235
2010	146,094,000	166,722,062
2011	167,840,000	171,548,818
2012	169,000,000	174,412,432
2012	158,268,500	190,757,435
2014	194,370,000	197,307,752
2015	200,000,000	191,365,416
Total	**1,323,642,226**	**1,386,657,993**

26. ***All*** *proceeds of the Insurance Premium Tax collected since the inception of the tax from 1995 to present, including the period 2008 to 2015 have been deposited into the Exchequer Account and thereafter formed part of the Consolidated Fund. It is therefore not accurate to say that the proceeds of the Insurance Premium Tax were used for a purpose other than prescribed by law. The proceeds of the Insurance Premium Tax once collected became revenue and were treated in the same manner as all other revenue collected by the State, that is, it is deposited into the Consolidated Fund.*

History of "Accident Victims Compensation Fund"

27. In order for a Fund to be established as separate from the Consolidated Fund with its own account in the Central Bank, it must be established by written law.

28. Further to the first stated intention in 2008 to establish a Fund, for fiscal years 2008 to2015 inclusive in each year an allocation from the Consolidated Fund was made under Head 18 to the Vote established for the proposed Fund, that is the Vote titled "Accident Victims Compensation Fund" in the Budget Estimates of Expenditure as follows:

Year	**Allocation** **$**	**Actual Expenditure** **$**
2008	138,400,000	138,400,000
2009	137,500,000	137,500,000
2010	138,300,000	138,300,000
2011	167,840,000	147,168,472
2012	169,000,000	169,000,000
2013	158,268,500	158,268,500

2014	158,268,500	158,268,500
2015	158,268,500	NIL

29. *At the end of each fiscal year between 2008 and 2014, since the Fund still had not been established by law or operationalized, the monies appropriated were transferred to the Accident Victims Compensation Fund Suspense Account so that the monies appropriated would not be recorded as savings, and recommitted to the Consolidated Fund. The funds transferred to the Suspense Account were recorded as expenditure.*

30. The monies transferred to the Accident Victims Compensation Fund Suspense Account are still held in that account to date. The Statement of Account for the Accident Victims Compensation Fund Suspense Account from the Central Bank for the period 01 September 2008 to 23 June 2017 shows a balance of $1,046,905,472.00.

31. It should be noted that at the end of fiscal year 2015, Cabinet had already been apprised of the estimated operating costs of the proposed Motor Vehicle Accident Fund for an initial five (5) year period, which was $312,563,702.00. In light of the fact that there was already a balance of $1.046 million set aside for the operation of the Fund in the Accident Victims Compensation Fund Suspense Account, from a budgetary perspective there was and is no need to set aside any additional sums for that purpose in the immediate future. Further to this, no allocation was made from the Consolidated Fund to the Vote titled Accident Victims Compensation Fund in fiscal year 2016 or 2017.

32. It is important to understand that although the allocations to the Vote titled Accident Victims Compensation Fund were stated to be based and are in the main based on an estimate of revenue take from the Insurance Premium Tax, the monies that were transferred to the Accident Victims Compensation Fund Suspense Account are not the same monies collected by BIR as proceeds from the payment of Insurance Premium Tax. As stated above, by law (section 13 of

the Exchequer and Audit Act) all revenue collected must be deposited into the Exchequer Account (which is the Consolidated Fund) unless otherwise directed by written law. Therefore, the proceeds of Insurance Premium Tax collected for fiscal years 2008 to 2015 inclusive are deposited into the Exchequer Account in accordance with established procedure discussed above and would thereafter automatically form part of the Consolidated Fund.

33. Conversely, in order for money to be spent, there must be an allocation in the annual Appropriation Act the details of which are set out in the annual Details of Estimates of Recurrent Expenditure. Therefore, the monies collected as a revenue are all channeled into the Consolidated Fund unless an Act of Parliament directs otherwise, and any monies to be spent must be allocated in the Estimates of Expenditure and appropriated in the Appropriation Act in order for it to be spent.

34. With respect to the proposed Fund to be established for the compensation of accident victims, the monies appropriated for the purposes of that Fund annually were taken out of the Consolidated Fund, as is the case for all appropriations, in accordance with the budgeted Estimates of Expenditure for each fiscal year. Thereafter, the transfer of the unexpended sum allocated to the Accident Victims Compensation Fund Suspense Account would be requested by Budgets Division and processed by the Treasury Division. BIR, therefore, played no role in the use or transfer of the monies appropriated for the Fund or in the transfer of the monies to the Suspense Account."

41. So that several matters become clear after a reading of the relevant parts of the Dhanpaul affidavit. Firstly, the money collected as Insurance Premium Tax is not the same as that transferred from the Consolidated Fund by authority of Parliament and direction of the first defendant in acting pursuant to his duty as manager of the Consolidated Fund.

42. Secondly, it is the case that the purpose of levying Insurance Premium Tax is **not that of** compensating victims of uninsured drivers. In so saying the court is cognizant of the fact

that the budget statement of 2008 proposed that the proceeds of the Insurance Premium Tax be used to establish the fund. But the evidence of Dhanpaul demonstrates that while this may have been the proposal, there is no evidence that the revenue collected as Insurance Premium Tax annually is in fact the amount transferred from the Consolidated Fund into the suspense account annually.

43. The first claimant annexed excerpts from several Annual Reports of the Auditor General to his first affidavit. These reports were for the financial years 2010, 2011, 2012, 2013, 2014 and 2015. The reports demonstrate that particular sums were allocated from the Consolidated Fund. Those sums appear to be estimates of the tax collected under that head but the reports do not show (at least the parts relied on by the claimants), that the sum so allocated was in fact the very sum collected as Insurance Premium Tax. To that end it is the evidence of Dhanpaul that the money allocated from the Consolidated fund is in fact an estimate and not the very sum of money collected as revenue. This evidence is accepted by the court and much weight is accorded to it.

44. Thirdly, as stated before, it appears to the court that the purpose of the **Miscellaneous Taxes Act** is the collection of taxes and the deposit into the Consolidated Fund as revenue. Taxes so collected, when deposited becomes part of the revenue pot from which allocations may lawfully be made. To that extent the purpose of the Act and mischief which the Act was intended to cure, comes to an end upon deposit of the revenue so collected into the Consolidated Fund.

45. Fourthly, the conjoint effect of the evidence of Dhanpaul and section **112(2)** of the Constitution is that an appropriation from the Consolidated Fund may occur inter alia by way of an Appropriation Act, and in this case the annual Appropriation Acts which accompanied the reading of the budget statements would have been the authority for the withdrawals for the purpose of the intended fund. To that extent the court finds there to be no demonstrable unlawful appropriation or illegality.

Legitimate Expectation

46. Justice J. Charles in the case of **Buddie Gordon Miller & Ors v The Minister of the Environment and Water Resources & Ors** CV2013-04146 set out the definition of legitimate expectation at page 14, paragraphs 23 and 24 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 practices) must entitle the party to whom it is addressed to expect, legitimately one of two things, namely; 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. (*See also the dicta of Their Lordships of the Court of Appeal in the case of the* ***AG of Trinidad and Tobago v The United Policy Holders Group*** *Civ Appeal 82 of 2013 wherein the court adopted the dicta of Lord Bingham LJ that in order for a promise to form the basis of a successful claim of legitimate expectation the promise had to be clear unambiguous and devoid of relevant qualification).*

47. The court must therefore determine what is the clear unambiguous representation, devoid of relevant qualification upon which gives the first claimant a reasonable basis for an expectation. Quite simply there is none beyond the collection of taxes and its deposit as revenue into the Consolidated Fund. If any legitimate expectation does exist in this case it stops there.

48. This is particularly so as the evidence discloses that the money transferred from the fund to the suspense account is not the same as that collected under the said Act and further, that in any event, the authority lies with the Parliament to appropriate the money from the Consolidated Fund. That appropriation is of course done by way of an Act of Parliament. So that the authority to appropriate would have come from the annual Appropriation Acts passed in the Parliament which themselves are enacted pursuant to the policy statement on the particular issue made at the budget statement presentation prior to the passage of the Act. In so finding the court is of the view that the particular statement made in the budget

statement in this case does not amount to more than a policy decision which declares an intention to establish the Motor Vehicle Accident Fund. It does not give rise to a legitimate expectation. In so saying it is not the court's finding such a statement made in Parliament may never give rise to legitimate expectation. That would be too broad a finding and would go against the grain of the principle that each case is to be judged on its own merits. Neither should it be interpreted that this court is laying down a general principle that a policy cannot form fertile ground for a successful legitimate expectation argument. The present case therefore turns on its own facts.

49. Additionally, the court has found much assistance from the Scottish case of ***DM Petitioner and Reclaimer v Secretary of State for the Home Office*** 2014 Scot (D) 13/3, although that decision is not binding on this court. The dicta of Lord Drummond Young at paragraph 14, finds fertile ground with this court. In that case, the Reclaimer was a citizen of Algeria who claimed asylum in the UK. Eventually his application was refused and a removal order was made. He subsequently married a British citizen and was granted leave to remain on that basis. However, his marriage broke down in the year 2002 and his leave expired in December 2002. He lived under the radar as it were until some seven years later when in 2009, his lawyers applied for discretionary leave to remain. By that time, the Home Secretary had since the year 2006 articulated a change in policy so as to resolve long standing claims for asylum and leave to remain in the UK. Discretionary leave was granted to the Reclaimer by the Home Secretary for three years. In challenging the decision of the Home Secretary by way of Judicial Review, the Reclaimer argued that he was entitled to indefinite leave having regard to several statements made by the Home Secretary in the Parliament which articulated a change in policy resulting in a legitimate expectation on his part that he would be so entitled.

50. In treating with the issue of legitimate expectation, the court stated the following;

"Nature of the Parliamentary statements

[12] The reclaimer's central claim is that he had a legitimate expectation based on the Parliamentary and other statements that his application to remain in the United Kingdom

would be decided by July 2011, as part of the 'legacy', and that the application would be dealt with in accordance with the law and practice that was then in force. The requirements for the existence of a legitimate expectation based on a statement are well established. The expectation must arise out of a statement made by or on behalf of a minister or public body, and that statement must contain a promise that is clear and unambiguous and devoid of any relevant qualification; and such promise must be made to a class including the petitioner. For reasons discussed below (as paragraphs [18]-[20], we are of opinion that it is also essential that any person who seeks to rely on the promise must have knowledge of the promise. The basic requirements are stated in many cases; recent examples include R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2), [2009] AC 453, at paragraph 60, and Paponette v Attorney-General of Trinidad and Tobago, [2012] AC 1, at paragraphs 28-30. In considering whether a ministerial or other statement satisfies the foregoing test, it is of course essential to consider it in context. It is also clearly established that such statements must be construed objectively: Paponette, at paragraph 30; R (Geraldo) v Home Secretary, [2013] EWHC 2703 (Admin), at paragraph 83.

[13] In our opinion none of the statements made by the Home Secretary or by any official or in the report published in July 2006 comes anywhere near satisfying the test of a promise that is clear, unambiguous and devoid of relevant qualification. We consider that the statements in question and aspirational at best, and that read in context they do not constitute promises that may be relied on as giving rise to legitimate expectations. We reach this conclusion for three principal reasons. First, the statements related to a very large number of individual cases; the number of such cases was not known, but was thought to be in excess of 400,000. In view of the number of cases, there was bound to be some doubt as to what might in fact happen. Secondly, the time frame referred to in the statements is relatively long, five years. It is obvious that over such a period circumstances might change, possibly radically, in a manner that was quite unforeseen at the outset. In the light of the large number of cases, that might call for major changes in policy. Thirdly, the policy in question involved a significant commitment of government resources. Changing circumstances might alter government priorities, and that might require the diversion of resources away from the Casework Resolution Directorate to other areas of

activity, either within the Home Office or elsewhere. In the light of these factors, it seems improbable in the extreme that the statements in question could reasonably be construed as promises to deal with the legacy within the fixed period of five years.

[14] Furthermore, the statements relied on by the reclaimer fall in our opinion very clearly within what has been described in a number of cases as the 'macro-political field'. This expression originates in the opinion of Laws LJ in R v Secretary of State for Education and Employment, ex p Begbie, [2000] 1 WLR 115, at 1130G-1131D, but the concept is followed in subsequent cases, including Bancoult, supra, at paragraph 63, and Paponette, supra, at paragraph 28. What this expression means is that in some cases where a legitimate expectation is invoked questions of general policy arise, affecting the public at large or a significant section of the public. In such a case it is not appropriate for a court to assume the role of policy maker, that should be left to the appropriate public authority, which will frequently be at the level of national government. Whether a case fails within this category depends upon circumstances, and a spectrum exists between cases that are clearly 'macro-political' in nature and others that affect a relatively limited class of persons. In our opinion factors that point in favour of the 'macro-political' end of the spectrum include the number of persons affected by a ministerial or official statement, the time frame to which the statement relates, and the budgetary implications that the stated policy may have; these are the three factors referred to in the last paragraph. Yet a further element that will typically be present in the 'macro-political' statement is the public importance of the statement, in the sense that the policy described may affect persons other than those directly affected by it, or may affect other areas of government policy. It is most unlikely that a statement made by one minister in one particular context could reasonably be regarded as typing the hands of other ministers in other areas of policy. That makes it inherently unlikely that any 'macro-political' statement could ever give rise to legitimate expectations on the part of the individual affected.

[15] In the present case, the ministerial and official statements dealt with government policy towards a backlog of immigration cases affecting more than 400,000 individuals. Any policy applying on that scale clearly has implications for government policy in areas other than immigration, including most obviously housing, education, employment and

social security. In view of the numbers involved, the consequences for those other areas of policy could be significant. All of this tends strongly to suggest that the statements invoked by the reclaimer are 'macro-political', and cannot reasonably be construed as giving rise to legitimate expectations on the part of individuals whose cases fall within the 'legacy'."

51. This court considers the various statements in this case, likewise to those made within the "macro political" field. Firstly, the statements represent the stated intention of the government of the day as far as revue and expenditure are concerned. These matters are matters of macro-economic considerations and whether the intention stated is realized is often times dependent on several factors which themselves touch and concern general expected revenue, expenditure, recurrent and otherwise, level of debt, priority of policies and several other factors. It contains a political component as whether or not a particular policy is implemented may be directly linked to campaign promises of the governing party along with consideration of the welfare needs of the citizenry at any given time. It follows as night follows day that these are all very fluid matters which may undergo dynamic change from year to year. Secondly, no evidence has been led as to the number of litigants who may fall into the affected category. When one considers that the number of persons is yet unascertained but that the number is in any event likely to be a considerable one having regard to the many cases which have been heard and determined over many years, the extent to which compensation will be paid and the quantum of that compensation are matters that may have financial implications for other sectors and other policies.

52. In these circumstances, a court ought not to assume the role of policy maker. That is a matter for the relevant public authority within the government and is dependent on widely varying factors at any given time.

<u>Unjust enrichment</u>

53. The court accepts wholly the submissions of the defendants that in the facts and circumstances of this case there is no evidence that the defendants have been unjustly enriched at the expense of the first claimant. In any event the issue no longer arises having regard to the decision of the court above. For the general principle of unjust enrichment see the dicta of Lord Hoffman in ***Banque Financiera de la Cite v Parc (Battersea) Ltd*** (1998) 1 AC 221. The money collected overtime as revenue is held in a suspense account for use for the stated purpose when the relevant legislation is passed in Parliament.

The substantive claim of the second claimant

54. The claims of both claimants on the issues of unlawfulness, illegality, legitimate expectation and unjust enrichment are the same so that for the very reasons set out above the court finds that the second claimant must likewise fail on these issues.

Unreasonableness

55. The second claimant seeks a declaration that the failure of state to establish a Motor Vehicle Insurance Bureau for the disbursement of funds to victims of accidents caused by uninsured drivers, having actively allocated funds there for is unreasonable. In his oral submissions before the court, Mr. Hosein for the claimants submits that the state, having produced a white paper on the issue of the establishment of a Motor Insurance Bureau since the year 2004, and having allocated money for the fund every financial year beginning with 2008 to the year 2017 (except that of 2009), the delay in establishing the said Bureau and the failure to so establish are both unreasonable.

56. The second claimant has specifically highlighted by way of example the position of its member Mr. Timothy Lewis, a claimant in CV2011-02148 who obtained judgment on the 26th November 2013 for substantial damages arising out of a motor vehicle collision in which he was a victim and in which the driver was uninsured and indigent. To date Mr. Lewis has been unable to obtain the fruits of his judgement. It is the case for the second claimant that the failure of the state to establish the Bureau has unreasonably deprived Mr.

Lewis and similarly circumstanced members of the second claimant from accessing compensation.

57. The first and most obvious concern with the submission is that the only way in which a Motor Vehicle Bureau or any similar entity may lawfully operate to assist the members of the second claimant is by way of establishment by Act of Parliament. This was accepted by the second claimant's attorney in oral arguments. It follows that the challenge is one to the failure of the state to lay the required Bill before the Parliament. In this regard the explanation provided by the defendants must be examined. In so doing however, it is to be noted that the laying of the relevant Bill in the Parliament is not by itself a guarantee that the Bill will be made law and assented to.

58. It is the evidence of Dhanpaul that in the year 2008 when the fund was first conceived, after the budget presentation, a committee was established and tasked with implementation. The committee consisted of representatives appointed by the Ministry of Finance, the Central Bank of Trinidad and Tobago, the Association of Trinidad and Tobago Insurance Companies and the Office of the Financial Services Ombudsman. The evidence continues from paragraph 11 of his affidavit;

> *"11. The Committee produced a Proposal for the Establishment of a Motor Vehicle Accident Fund in Trinidad and Tobago (the Proposal). The Proposal was first produced in August 2008 and revised in September 2014 and December 2014. The Proposal included recommendations for the administration of the proposed Fund, such as the establishment of the Fund as a statutory body through legislation, corporate governance and board structure, as well as the management of claims and compensation. It was further recommended that the legislation effecting the establishment of the motor Vehicle Accident Fund be administered by the CBTT acting through the OFSO.*
>
> *12. Along with the Proposal, the Committee produced an Assumption of Pro Form Cash Flow for the operations of the Motor Vehicle Accident Fund for an initial five (5) year period. The estimated funds required from net claims for the entire initial five (5) year period was $312,563,702.00. The assumptions were*

based on an initial estimate of 4,208 cases of bodily injury and fatalities per year, with an initial estimate of 30% resulting from uninsured vehicles/drivers with an average claim of $40,000.00

13. Cabinet on March 19th 2015 noted the Proposal and the Assumptions of Pro Forma Cash Flow and agreed that the Ministry of Finance in collaboration with the Central Bank of Trinidad and Tobago should take steps to establish, through legislation, the Motor Vehicle Accident Fund as a body corporate with a governance structure as set out in the Proposal. Cabinet further agreed that the Attorney General cause to be prepared the necessary legislation to give effect to the Motor Vehicle Accident Fund.

14. Following Cabinet's directive being transmitted to the Chief Parliamentary Counsel for drafting of the relevant legislation, further instructions and clarification have been sought from the Ministry of Finance by the Chief Parliamentary Counsel with respect to the establishment of the Motor Vehicle Accident Fund and the legislation intended to govern same.

*15. The Instructions and clarification sought by the Chief Parliamentary Counsel has had the effect of requiring further meetings of the Committee, facilitated by the Strategic Management and Execution Office of the Ministry of Finance, in order to consider the matters raised by the Chief Parliamentary Counsel, arrive at a consensus, and respond. A matrix addressing the issues raised by the Chief Parliamentary Counsel was completed in April 2017, and submitted to that office by mine on May 4th 2017. A true copy of the said matrix is now shown to me, exhibited and marked as **"V.D.1"."***

59. The evidence does not disclose a reason for the delay in action between the period 2008 to 2014. Suffice it to say that it is a matter of record in respect of which the court can take judicial notice that by way of democratically held elections, the government changed completely in the year 2010 and once again in the year 2015. What is however clear, is that during the period 2008 to 2014, money was in fact being estimated and lawfully appropriated for the establishment of the fund by both administrations.

60. A decision is unreasonable or irrational if it is so unreasonable that no reasonable person acting reasonably could have made it (***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** (1948) 1 KB 223). The test is a higher test than merely showing that the decision was unreasonable.

61. To the extent that there is no explanation for inaction between the period 2008 to 2014, this by itself does not entitle the second claimant to relief unless it is demonstrated that the period of delay is so unreasonable that no reasonable person acted reasonably could have made it. This is a standard that the second claimant has failed to meet. Whether the period of delay is unreasonable must be considered within the context of the particular facts. In these particular circumstances, the delay between 2008 and 2014 cannot be considered as being unreasonable in the ***Wednesbury*** sense because it is clear that money was being allocated all with a manifest intention to establish the relevant vehicle for distribution. So that action was in fact reasonably taken over the period.

62. Further and in any event, the evidence demonstrates that despite the delay during which there was a change in administration, work resumed from 2014 with considerable headway being made resulting in a matrix being drafted to address several issues being raised by the office of the Chief Parliamentary Counsel (the state's draftsman), which was delivered to that office in May 2017. Whether or not this was an indirect consequence of the filing of this claim in January 2017, the fact remains that the period of delay has been somewhat assuaged by the progress which has since occurred. The evidence also demonstrates that the state intends to continue the process of the establishment of the Motor Vehicle Accident Fund as a body corporate with a governance structure, which is of course subject to approval by the Parliament of the Republic.

63. Finally, the court finds that contrary to the submission of the claimant, the act of setting aside funds annually for the purpose of having a fund from which to draw when the Fund is eventually established is not so unreasonable that no reasonable person acting reasonably could have made it. In fact, it may be prudent that such sums are set aside annually in an oil based economy where oil prices have virtually plummeted in the last two years thereby

ensuring that the victims who are entitled to compensation under the fund are not deprived therefore due to the unavailability of funds upon establishment. This of course is a matter for those who are charged with the responsibility of governing and not the courts.

64. Finally, it is clear to the court that all parties to this claim whether directly or indirectly appear to hold steadfast to the same laudable goal namely the lawful establishment of an entity with responsibility and structure for the distribution of compensation to those victims who fall within the relevant category. To that end the parties are not all far apart and they all appear to have been acting in the interest of the public of Trinidad and Tobago. It therefore lies with those who are charged with the responsibility for the establishment of such an entity to move with due dispatch on the issue in the interest of the public at large.

65. The claims of both claimants shall be dismissed and the parties shall be heard on costs.

Dated the 14th day of March, 2018

Ricky Rahim

Judge