THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2016-02608

BETWEEN

THEMA YAKAENA WILLIAMS

Claimant

AND

TRINIDAD AND TOBAGO GYMNASTICS FEDERATION

1st Defendant

DAVID MARQUEZ

2nd Defendant

AKIL WATTLEY

3rd Defendant

RICARDO LUE SHUE

4th Defendant

DONNA LUE SHUE

5th Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: November 26, 2018

Appearances:

1. Martin Daly SC, Keith Scotland instructed by Reza Ramjohn for the Claimant.

2. Justin Junkere for 1st Defendant.
3. Ramesh L. Maharaj SC, Ronnie Bissessar instructed by Varin Gopaul-Gosine for the 2nd - 5th Defendants.

DECISION

INTRODUCTION

1. In this matter the Court is tasked with the mandate of determining whether the Defendants should be held accountable and liable for the decision taken on April 15, 2016 to withdraw the Claimant as the selected athlete to participate in the 2016 Rio Olympic Test Event (OTE) and to replace her with the alternate athlete.

2. It is a matter which has captured the attention of the nation and strong expressions have been made in the public domain since April 2016 as concerns of ethnicity, class and social status have been advanced as the reasons which catalysed the aforesaid decision.

3. This country's premiere on the Olympic gymnastics stage was overshadowed by conspiracy theories of alleged bias. The resultant effect was that the lives of two elite gymnasts, the Claimant and the alternate were fundamentally altered and they were both subjected to ridicule.

4. The matter focused attention upon the accountability of sports administrators and the 1st Defendant's obligations to the Claimant and all citizens, in whom the fire of patriotism burns when a citizen performs on the international stage and its overriding obligation to objectively ensure that the most viable candidate was selected to represent the people of this Republic.

The selection process and the regulatory framework

5. The Claimant was selected pursuant to a selection procedure outlined by the 1st Defendant in its selection process (SP). Marisa Dick was named as the alternate athlete and their selection was based on their performance at a competition in Glasgow in 2015.

6. The selection process provided, inter alia, that the selected athlete's coach was required to contact the 1st Defendant's President and the Women's Artistic Gymnastics Chairperson within 24 hours of the occurrence of any injury which could affect the athlete's ability to perform and/or any desire to withdraw.

7. The 1st Defendant's general responsibility under the selection process was to ensure that its Council Members complied with the provisions thereof in accordance with established principles of contractual construction and to adhere to the selection criteria imposed therein. Before this Court, the 1st Defendant accepted that in the discharge of its obligations it had a duty of fidelity, fairness and good faith in its course of dealings with the Claimant under the selection process.

8. Subsequent to her selection, the Claimant on or about January 25, 2016 entered into an athlete's agreement (AA) with the 1st Defendant which governed their relationship. The Claimant undertook to engage in training, to compete and under clause 13 to notify the 1st Defendant if she suffered any illness or injury which may have militated against her ability to fulfil her obligations as the selected athlete for the Olympic Test Event and clause 5 provided that the alternate athlete would replace the selected athlete in the event of her inability to participate in the Olympic Test Event.

9. The 1st Defendant, (TTGF), is a non-profit organisation comprised of individuals and its mandate is to ensure, *inter alia*, the growth and development of the

sport of gymnastics in Trinidad and Tobago. The 2nd to 5th Defendants were all elected in accordance with the 1st Defendant's constitution as members but received no remuneration and they are all individuals who are either, past gymnasts or the parents of past or aspiring gymnasts.

10. The 1st Defendant was required to monitor the fitness levels and performance of both the selected and alternate athletes and this exercise was to be engaged pursuant to clause 5 by their review of the following:

    1) Video submissions of skills/routine;

    2) Coach's email submissions of full, current completion routines and Federation Internationale Gymnastique (FIG) start values of same: 3 months and 1 month prior to the Test Event;

    3) Coach's report on the current physical condition of the athlete: 3 months and 1 month prior to the Test Event; and

    4) In the case of illness or injury sustained in the 6 months preceding the Games, a detailed Physician's Report detailing all injuries and/or illnesses with a statement on the athlete's ability to compete at her full, physical potential at the Test Event.

UNDISPUTED FACTS

11. The Claimant, her coach John Geddert and Nicole Fuentes, the Claimant's massage therapist who was de facto Head of the Delegation for Trinidad and Tobago Olympics Committee, all travelled to Rio for the Claimant's participation in the test event. On the evening of April 15, 2016, an email from

the Claimant's coach Geddert was forwarded at approximately 8:21pm to the Defendants.

12. This email catalysed a sequence of events which culminated in a decision made before midnight on April 15, 2016 to substitute the Claimant. This decision was communicated via email sent by the 2nd Defendant to Geddert which informed him that the Claimant was to be replaced at the test event by the alternate athlete.

THE ISSUES

13. As it relates to liability, the issues which fall to be determined by the Court are as follows:

    i. Whether the 1st Defendant breached its contractual obligations with the Claimant under the selection process and athlete's agreement, to treat with her fairly, in good faith and with a duty of fidelity.

    ii. Whether the 1st Defendant was in breach of its duty towards the Claimant by taking a decision to replace her as the selected athlete without giving her, her coach or her head of delegation an opportunity to be heard or to make representations.

    iii. Whether the 2nd to 5th Defendants individually owed a fiduciary duty to the Claimant which was breached.

    iv. Whether the 2nd to 5th Defendants are individually liable for procuring a breach of the athlete's agreement and whether they acted with a common design to withdraw the Claimant and replace her with the alternate athlete.

v. Whether the 2nd to 5th Defendants engaged in an unlawful means conspiracy to replace the Claimant which should render them personally liable to her for damages.

ANALYSIS AND ASSESSMENT OF THE EVIDENCE

14. The parties and several other witnesses testified before the Court.

15. The Claimant stated that the 1st Defendant could not in law make a decision to withdraw her without first giving her and/or her coach and/or relevant medical personnel an opportunity to make representations before it made the substitution decision. The Claimant urged that although the term was not an express term of the AA, it was a term which the Court ought to imply in the AA.

16. There is no pleading or evidence on behalf of the Claimant that at any time she objected to the terms of the SP or the AA or requested that any term be inserted to the effect that if she had to be withdrawn from the OTE, she would have a right to be heard either through herself or her coach or through medical doctors on her behalf. Both the AA and the SP made no provision for such a hearing.

17. The Claimant's pleaded case outlined that the contract terms between herself and the TTGF is contained in both the AA and the SP and she admitted in cross examination that she is bound by these two documents.

18. The Claimant in cross examination agreed that after she was selected she had to demonstrate the potential required to compete for Trinidad and Tobago based on an assessment by the TTGF by video submission and coach's reports.

19. The Claimant also admitted in cross-examination that at an event in Texas, USA in March, 2016, she shocked her ankle. The evidence established that it was her left ankle but a subsequent medical report of Dr. Nasser made no mention of any injury to the Claimant's ankle.

20. After her replacement, the Claimant was examined on April 16, 2016 by Dr. Figueirado and a medical assessment form (MAF) was subsequently generated.

21. The Claimant was not aware of the Geddert email which was forwarded on April 15, 2016. She was also not aware of an email dated April 11, 2016, which her coach Geddert sent to Frances Dow of the 1st Defendant. In that email he wrote "*Does Marisa have a visa and tickets to Rio…just wondering?* The email of April 15, 2016 was in the following terms:

> "Please pass on to whoever is interested. I thought Nicole was delivering updates but these are posts from my Facebook page.
>
> Day one of the Test event in Rio almost complete (a Padron family reserve on the Baja beach will cap it off). First impression… There is a heap load of "we will not be ready in time" around here. Infrastructure (roads) is the main concern but it seems venues are incomplete also… 3 months out! But it is 85! Rumors are that Brazil looks incredible and is sure to advance. Romania will have to get by on guts and tradition (and let's hope they do)… More later as I am being distracted by a quarter moon over the ocean.
>
> Day 2 complete: training went well today with Thema doing some good work on beam and bars. Her foot seems a bit tender so we are limiting the pounding. Podium tomorrow (basically the dress rehearsal for the big show Sunday). Numbers indicate that most athletes should advance (but it ain't over till it's over. But then again what is "most". I'd rather not be a part of

the “al-most” group. Right now all sights are on doing whatever it takes to advance. Saw Germany and Korea today and both were doing good stuff. Korea was a bit inconsistent but who knows what that means. US men are well represented with John Orozco and Jake Dalton (ladies sigh).

Got a glimpse of the incomplete gym arena (isn’t the purpose of a test event to do a dry run at the official venue?). Someone joked that they forgot to put doors in that are big enough to get the mats through.. Had to be joking right? As bad as the traffic is (45 minutes to one hour to go 5km) the smog is worse. There is a constant haze covering what I know to be gorgeous mountains in the distance.

Day 3 note so Rosie! Thema forgot to inform me h

That she was headed to the bus…I waited for her at the hotel…Search until I missed the last possible bus and then grabbed a cab…Worried about where she could be. She didn’t answer texts, calls or Facebook. Ugh! But we move on.

Podium was a disaster with 6 falls on 3 events. She has been dealing with a sore ankle to the point that I asked her to withdraw last week. She assured me she can do this. We have been limiting all pounding and landings yet today she showed little signs of being able to perform well. We will rest tomorrow and rely on heart.

I will be constantly checking with my sources as to whether or not there are any scratches because at last report 1-2 athletes may not advance.

Goodly a Bree report tomorrow”

22. At paragraph 77 of her witness statement the Claimant testified that she recalled that her coach did on April 12, 2016 ask her *"Do you think you can do this or do you want to pull out?"*

23. The Claimant in cross-examination maintained that the complaint with her ankle was partly due to the long travel to get to Rio though on the MAF it was endorsed that she told Dr. Figueirado that her issue started when she shocked her ankle on March 29, 2016.

24. The Claimant accepted that on Day 1 in Rio on April 13, 2016 her ankle did not respond to massage treatment or taping and she agreed that she experienced discomfort.

25. On Day 2 (April 14, 2016), she agreed that she complained to Fuentes about discomfort at the front of her left ankle while walking together and she had slight swelling which required a 'regular tape job'. She also received suction cupping treatment and Fuentes wanted to re-evaluate on April 15, 2016.

26. On Friday April 15, 2016 the Claimant attempted vault for the very first time in Brazil and had six (6) falls on three (3) events. The Claimant conceded that her discomfort to the front of the left ankle increased after training.

27. The Claimant also agreed that during training between 6:00 p.m. and 6:30 p.m., she needed to remove the taping as she felt severe discomfort to the area of complaint. She said she could not feel her toes and it was very uncomfortable. The taping was removed but with difficulty. Her evidence was that the podium was a dress rehearsal for the OTE and it comprised vault, bars, beam and floor exercises and that some of the judges were present and it was the first time that athletes would use the equipment for the OTE.

28. The Claimant agreed that podium puts a strain on the body and if any one of the parts of a person's body is not functioning well or is injured in any way, it can adversely affect a gymnast performing to the gymnast's full potential. She also agreed with Geddert's email opinion that her performance at the podium on April 15, 2016 was a disaster and she admitted that his assessment that six falls on three events was definitely not the best day.

29. The Claimant also admitted that Geddert was correct when he said in his email on April 15, 2016 that "*she was limiting all pounding and landings in her training".*

30. The Claimant, however, did not agree that in his email sent on April 15, 2016 that Geddert said she was not ready to compete but she conceded that the assessment as to her readiness to compete had to come from the coach and not her.

31. The Claimant explained how *pounding* placed great stress on her body. She told the Court that there were certain events which had a greater tendency to cause her discomfort in her left ankle and she referenced situations where she had to punch i.e. where she had to push off the floor to get height or elevation.

32. Given that the vault was the event which was the most likely to require the greatest pounding, Geddert's decision to limit all pounding and landings on Days 1 and 2 and to rest on Saturday, April 16, 2016 was one which the Claimant felt was correct as a precautionary measure because of the discomfort in her sore ankle.

33. The Claimant accepted that her discomfort was moderate to severe by Day 3 and agreed with the subjective objective assessment and plan (SOAP) notes which were generated by Fuentes on April 15, 2016.

34. The evidence suggests that the Claimant sought to minimalize the issues with her ankle and it is evident that as of April 15 she was experiencing unusual discomfort and a decision was taken by Geddert for her to rest on April 16, 2016.

35. In the email of April 15, 2016 Geddert referenced the Claimant as "relying on heart" and the Claimant explained what she thought he meant: "relying on the preparations that you would have done but also the general confidence in oneself to perform."

36. In her witness statement, the Claimant said that podium training took place on April 15, 2016 and was a practice run for the OTE using real equipment to be used at the OTE.

37. In her witness statement the Claimant gave three (3) reasons for her podium performance on April 15, 2016, namely:

    (i) Pre-competition nerves;

    (ii) The pressure of the OTE judges looking on and

    (iii) Her first time on the new equipment.

38. The Claimant did not call her coach as a witness and she testified that on Saturday, April 16, 2016 after receiving news of her substitution:

    "I immediately went to John's room…and he was already on the phone making calls. Nicole [Fuentes] came down to meet us, and we sat in the hallway while John tried to figure what procedures the [TTGF] could have taken to be capable of replacing me."

39. By an email sent on Saturday, April 16, 2016 at 8:21 a.m., Geddert requested the TTGF to arrange for him to return home because of the sudden death of

his daughter's boyfriend and by an email in response sent on Saturday, April 16, 2016 at 9:12 a.m., Dow confirmed that she had made the travel arrangements.

40. In his email at 12:51 p.m. Geddert said:

> *"As I write I get the report from the medical staff here at the Olympic test event and in their assessment she is cleared to participate fully based on her decision to do so."*

41. In a second email on Saturday, April 16, 2016 at 5:17 p.m., Geddert complained that the 1st Defendant had blown portions of his report *out of control* and its response was exaggerated. In this email he said:

> *"I now confirm that the doctor has cleared Thema to compete in the circumstances using her good judgment as the determining factor.*"

42. The Defendants invited the Court to hold that the Claimant deliberately misrepresented the circumstances surrounding her ankle.

43. There was no definitive information before the Court to the effect that the Claimant was unable to perform due to injury and the critical issue for the Court's consideration was not whether the Claimant was, by virtue of an ankle injury, unfit to perform but whether at the time the Defendants made the decision to substitute her, they had the required information based on the Geddert email of April 15, to effect such a decision.

44. The Court was generally impressed with the Claimant and found her to be a forthright and credible witness but the Court formed the view that the discomfort in her ankle was more significant than she alluded to. The Court felt, however, that her ankle issues had to be counterbalanced by taking into

account her immense training as an elite athlete as well as her unbridled desire to represent her country at the Olympic Games.

45. Given the factual matrix of this case, the Court drew no adverse inference against the Claimant in relation to her failure to call Geddert as a witness and noted that given the position adopted by the Defendants in relation to the email on April 15, 2016, that it was also open to them to call him as a witness. In addition, the Court drew no adverse inference against the Claimant for her failure to call Clifton Mc Dowell as a witness and found that this evidence was unlikely to assist the Court having regard to the issues which fell to be determined.

46. As it relates to the MAF, for the reasons which are outlined below and also having regard to the issues for determination, the Court drew no adverse inference against the Claimant in relation to her resistance to have the MAF admitted into evidence.

47. The Court ultimately critically assessed the case of the Defendants to determine whether the decision to replace the Claimant was effected under circumstances which were characterised by the requested degree of fairness, good faith and fidelity.

48. Telephone records were requested by the Claimant and these were disclosed pursuant to an order for specific disclosure in relation to the period 15th to 17th April 2016. As stated previously, the material events were triggered by the receipt of an email from Geddert which was sent to Dow and forwarded by her to the Defendants.

49. The contents of Geddert email of April 15, 2016, in the words of the 2nd Defendant, Marquez, the President of the 1st Defendant, suggested that

Thema was carrying an injury which would adversely affect her performance at the Olympic test event.

50. The gist of the Defendants' case was that;

1) Clause 7 of the SP specified that if the selected athlete was injured or was potentially unable to fill the Trinidad and Tobago Olympic ("TTO") position at the OTE, Geddert was required to contact the TTGF President and the Women's Artistic Gymnastics ("WAG") Chairperson by email and Clause 13 of the AA signed by the Claimant specified that if the Claimant suffered any injury or illness which may have prevented her from fulfilling her responsibilities as the named athlete for the OTE, she had to promptly notify the TTGF.

2) The Defendants treated Geddert's email as a notification under Clause 7 and formed the view that the email stated in clear and unambiguous terms that the Claimant was unfit to compete at the OTE and that she was potentially unable to fill the TTO position at the OTE because her sore ankle.

3) The Defendants also advanced that the email made it clear that the Claimant had six falls in three events and that she was dealing with a sore ankle which was so bad that Geddert had asked her to withdraw a week earlier.

4) It was argued that Geddert's email also showed that he accepted the Claimant's assurances that she could compete and he did not take steps to have her withdrawn. On April 15, 2016, however, because of the condition of her left ankle, he had to limit her pounding and landings during her training. Despite this, the

Claimant showed little signs of being able to perform well and Geddert considered the situation so bad that he said that he would rest her on the Saturday before the OTE and on Sunday she would rely on heart.

51. The Court had to consider whether the Geddert email of April 15, was in fact a Clause 7 or Clause 13 notification and whether it contained definitive information about the Claimant's capacity to perform at the Olympic Test Event.

52. In the Defence filed on behalf of the Defendants and at paragraph 80 of the 2nd Defendant's witness statement, Mr Marquez accepted that it was agreed after reading the Geddert email, as between the Council Members, that he would make *"enquiries directly from the Claimant's coach for an updated position on the Claimant's injury".*

53. The other Defendants in their respective witness statements spoke to the need for an updated position on the Claimant's fitness. Sarah Lambert who testified for the Defendants indicated that a 'sore ankle' was an injury but Carynn Chen who was also a Council Member and chairperson of the Women's Artistic Gymnastics Committee (WAG) said that soreness of limbs was not an issue.

54. In paragraph 32 of her witness statement she stated: "*I wanted to get a full understanding of the situation as I do not consider a sore ankle as an injury to prevent performance. Athletes, especially gymnasts, always have sore parts and can more than compete at their best despite their soreness. The details provided in the email were enough for concern but without further discussion with either John or Nicole, it did not meet the threshold to necessitate the withdrawal of the said athlete*".

55. The Defences and Witness Statements of the Defendants outlined that a meeting was convened in the form of a teleconference to consider the information contained in the Geddert's email, certain preliminary steps were agreed upon and only thereafter were steps were taken to replace the Claimant with the alternate.

56. Geddert did not, as required under Clause 7 of the section process, send this email to the 2nd Defendant as the President of the TTGF nor was the email directed to the WAG Chairperson Caryn Chen. The email also made no reference to Clause 13 of the athlete's agreement.

57. Frances Dow forwarded the Geddert email to the Defendants and to Nicole Fuentes at around 8:21pm on November 15, 2016 and Ms Fuentes responded by her own email at 9:21pm. In the email, Fuentes expressed the view that Geddert's words were harsh. Around 12:27am, the 2nd Defendant emailed Geddert and wrote *inter alia*:

    a. *"What this says to us John is that Thema will not perform well at this competition due to her injury. This is a country place and as a federation we must do what is best for the country, i.e, ensuring the best athlete represents the country."*

    b. *"The facts are clear. She is just not at her best due to an injury that should have been reported to the federation earlier."*

58. Despite the finality with which these conclusions were set out at 12:27am on April 16, 2016, there was no such finality when the Geddert email was received in the early evening of April 15, 2016. The Defendants' position at that time, was that further information was required from Geddert about the Claimant's condition. The Defendants did not obtain that information and proceeded without it.

59. The Defences outlined that the Defendants had engaged in an orderly collective decision-making process. It was alleged that the first part of the collective decision-making process was an initial teleconference of the 1st Defendant's Council ("the Council"). The Defences all stated that: the 1st Defendant's "elected members therefore convened an emergency *quorate* teleconference of its council that night (Friday, April 15, 2016) in which they solicited the views of the Council. The Council expressed the view that enquiries should be made directly to the Claimant's coach for an updated position on the Claimant's injury as well as to the alternate's availability to travel and participate at the Olympic Test Event if required and whether her coaches would also be able to attend.

60. No time was given for the alleged teleconference in the Defences, but in his witness statement the Second Defendant put the time of his alleged solicitation of the views of the Council members at 10:00pm on April 15, 2016.

61. A second alleged event in the collective decision-making process was said to be a vote on whether the Claimant should be replaced by the alternate. The Defences stated that: "thereafter, the quorate TTGF's [the 1st Defendant] council with the exception of its two (2) trustees voted on whether the claimant should be replaced by the alternate for the Olympic Test Event: This was just before or around midnight on Friday 15th April 2016".

62. The Defences outlined that the substitution decision was taken after the following factors were considered and/or pursued:

    a. Unsuccessful attempts to contact Geddert by phone.

    b. Contact by telephone with the alternate and/or her connections, "when it was unable to contact the Claimant's coach", one of the

alternate's coaches Obiu Serban enquired as to alternate's fitness and readiness to compete.

c. Contact with "the Local Organising Committee in Rio de Janeiro to enquire as to the process for the substitution of the alternate for the Claimant if required".

d. Enquiry of the alternate's mother whether the alternate was prepared to travel to Brazil at short notice.

63. This narrative was not accurate and unravelled when one considered the first set of telephone records which were made available to the Claimant under cover of a letter from the attorneys for the 2nd to 5th Defendants. The telephone records demonstrated that contact with the alternate and/or her connections began long before midnight and indeed long before the time of the alleged teleconference put at 10:00pm on Friday, April 15, 2016. The telephone records showed no simultaneous contact between the several members of Council.

64. The telephone records of Marquez revealed that his telephone contact was with three members of the Council, namely the 3rd, 4th and 5th Defendants and the vast majority of his time was spent talking to Ricardo Lue Shue. It was clear from the telephone records and the testimony of the witnesses that the solicitation of views that did take place was done by way of various phone calls to and from individual members of the Council.

65. The 1st Defendant's witness Sarah Lambert expressly conceded that she was not involved in any teleconference as she was not part of a phone call with other people on the same call. She stated that there was "a round robin". Her calls were with Elicia Peters-Charles, at that time the General Secretary of the 1st Defendant. Ms. Lambert said she was polled after 10pm and despite

thinking it “very important” that Geddert be contacted she had no updated information as to the Claimant’s status when she was polled.

66. Ms. Peters-Charles said “I did not take part in a teleconference” but pointed out that the definition of “teleconference” included what would be regarded as a regular phone conversation. In cross-examination she remarked: “I would have made a call to my President at the time, David Marquez; that was a teleconference. I then spoke to Donna Lue Shue; that was a teleconference. I spoke to Sarah Lambert; that was a teleconference. I spoke to Ricardo Lue Shue; that was a teleconference.”

67. The case outlined that the 1st Defendant took “a quorate decision” to withdraw the Claimant. At paragraph 86 of his witness statement, the 2nd Defendant said that he recorded eight “yes” votes on a poll just before midnight but there was no singular poll according to the phone records.

68. There was broad agreement among the 2nd to 5th Defendants in their witness statements that in treating with Geddert’s email that there was need for two lines of enquiry namely: one to Geddert concerning the Claimant and one concerning the alternate’s availability.

69. Both the Lue Shues stated that the contact with Geddert was to be made immediately. The Defendant Ricardo Lue Shue, himself a coach, confirmed in cross-examination that it was the general view that contact with Geddert should be immediate.

70. The Lue Shues also stated that it was the 2nd Defendant Marquez who had to contact Geddert and Marquez accepted that making the contact was his responsibility.

71. In his witness statement, the 2nd Defendant said as follows: "On Friday 15th April 2016 between 11:00 pm and 11:30 pm I unsuccessfully attempted to contact Thema's coach John Geddert on at least three (3) occasions on his mobile phone and on the hotel's telephone in an effort to obtain additional information on Thema's condition and all telephone calls went unanswered".

72. Marquez's telephone records showed that he was first in touch with the 4th Defendant Ricardo Lue Shue at 8:57 pm. He said: "I called Ricardo to discuss John Geddert's email sent on Friday April 15 2016." He also made a call at 9:24pm. Based on these times there was a delay of approximately 1½ to 2 hours before his attempt to call Geddert.

73. Such a delay cannot be viewed as a circumstance where the 2nd Defendant attempted to contact Geddert with any degree of urgency or promptitude. An explanation was sought of Marquez in cross-examination as to why he delayed calling Geddert but he was unable to give one other than to say that "a lot of things were going on". It appears that he did not call Geddert until after Lue Shue had updated him on the replacement arrangements. The timeline which emerged from the phone records was not consistent with the narrative that the Defendants were first awaiting contact with Geddert before proceeding to effect any decision. The phone records of Marquez also showed that in contrast to the Lue Shues, he had little contact going on by way of calls and during this time he could have called Geddert. In cross-examination he stated that he spent the evening of April 15, 2016 "awaiting on word from others".

74. Given the accepted fact that Rio was one hour ahead of Trinidad, the lateness of the hour should have been considered by the 2nd Defendant and his attempts to contact Geddert should have been expedited so as to ensure that contact was made before Geddert retired to bed. The phone records curiously

did not reflect that any calls to Geddert were made from the 2nd Defendant's phone and he said in cross-examination that he may have used another phone.

75. According to the Defences, time was of the essence and although no time was lost in contacting the alternate, there was an inordinate and unexplained delay in contacting Geddert.

76. The 3rd, 4th and 5th Defendants as well as Ms. Lambert and Ms. Peters- Charles all acted on the information that the 2nd Defendant was unable to contact Geddert.

77. The evidence suggested that there was a lack of diligence in contacting Geddert to obtain further information. The 4th and 5th Defendants gave disproportionate priority to contacting the alternate and her connections and they leapt into action in that regard even before the alleged consensus was effected.

78. After receiving Geddert's email at 7:24pm, both Ricardo and Donna Lue Shue sprang into action and Donna called the alternate's coach on two occasions at 8:53pm and 9:47pm. Ricardo Lue Shue called Steve Butcher at 8:31pm and consulted him regarding the mechanisms that could be engaged in order to replace the Claimant. He also called the alternate's mother at 9:14pm.

79. Nicole Fuentes, the Head of Delegation was in Geddert's hotel that evening and she testified that she was never contacted in relation to getting any message to Geddert. Ms. Fuentes had issued an earlier email in relation to a bus incident and all the Council Members would have been aware that she would have had direct access to Geddert. Ms. Fuentes, during cross-examination indicated that had she been contacted, she would have had helpful information about the situation of the Claimant on April 15, 2016. She stated as follows: "I would have preferred communication to me before any

decision was made. The information they would have received from the coach, at least asked (sic) another opinion what was actually happening in Rio".

80. At the time the decision was effected on April 15, 2016 the Council Members did not have the benefit of the SOAP notes or the MAF nor did they have the benefit of the emails generated by Geddert on April 16, 2016. Hindsight usually brings with it clarity of vision, but the Court felt it necessary to confine its review to the material which was available to the Council Members at the material time. The Court also felt that little weight could be attached to the MAF for the following reasons:

    1) Nothing in Ms. Fuentes' evidence supported the ground on which the Claimant was purportedly withdrawn namely that she "will not perform well at this competition due to her injury" or that she was "just not at her best due to an injury".

    2) The Court considered the circumstances in which the Claimant, accompanied by Ms. Fuentes to the medical office in Rio on the morning of April 16, 2016 as well as the fact that the Claimant was not present when Fuentes collected a Medical Attention Form Rio 2016-TEV which was written in Portuguese.

    3) Ms. Fuentes gave evidence in relation to the MAF. Her evidence before the Court contradicted what was said at paragraph 5 of her witness statement and also conflicted with her contemporaneous SOAP note. She said under cross examination that she had formed her view about the Claimant upon hearing the conversation with the doctor and the classification of the Claimant's discomfort as "chronic" but there was no mention of any such occurrence in her contemporaneous SOAP

note. She said she was handed the form in Portuguese and was told it was translated but only saw the English version in the witness box.

4) At paragraph 5 of her witness statement Fuentes said as follows: "*I noticed that from the aforementioned Medical Attention Form, the Claimant's response to the enquiry regarding the date she first experienced discomfort in her ankle was 29 March, 2016. I also noticed that the discomfort was classified as 'chronic' on the report. This was inconsistent with the information provided to me, and explains the persistence of the Claimant's complaints of discomfort in that particular ankle*."

5) Fuentes was in constant contact with the Claimant in her capacity as physical therapist. In her own words she went "to all the practices and stuff". She said in answer to Counsel for the 2nd to 5th Defendants that she was present at all training sessions and was present at the podium training when "she would have not stick her landing, yes, and fall at some of the vault trials she had". She was referred to the Geddert email and, in response to whether the Claimant had six falls she said she was not keeping track.

6) None of Ms. Fuentes' contemporaneous notes suggested that the Claimant was injured or not likely to perform well or that Ms. Fuentes was in any way unduly concerned with the Claimant's fitness. In her SOAP note report on the Claimant prepared on the April 15, 2016 at 8.30 pm entitled "Podium Training and Post Training" she stated inter alia: "Active range of motion: Within normal limit of an elite gymnast". The SOAP note referred to various discomforts of the Claimant but noted that nothing more than taping was required: "*Kinesio taping was*

done. Patient was asked to make a few steps and jumps to give feedback on the discomfort. Patient responded positively that the discomfort was minimized". Ms. Fuentes in her evidence clearly stated that taping is a normal practice and that it is common to see athletes, even top stars competing with their various limbs taped.

7) In Ms. Fuentes' SOAP note prepared on April 16, 2016 at 11.30am on the subject: Medical visit to LOC Medical Department, Fuentes made no reference to the word "chronic" being uttered by the doctor or heard by her and expressed no reservation about the Claimant's condition on that morning.

81. Several of the Defendants had unique relationships with the alternate. The Lue Shues introduced her locally; Mrs. Lue Shue referenced her as "my gymnast from Canada" and she had publicly solicited support for the alternate at the People's Choice Awards. The evidence demonstrated that there was a friendship which existed between the 4th and 5th Defendants, the alternate athlete, her mother, Francis Dow and Dow's daughter. This view was formed when the Court considered the social media evidence which was adduced by the Claimant.

82. The 2nd Defendant was unhappy with the decision to use the World Championship in Glasgow in November 2015, as the qualifying event under the SP. His displeasure was gleaned from the following pieces of evidence:

1) He had expressly stated that Glasgow would be the Claimant's last competition.

2) Attempts were made to pre-empt the selection processes at meetings of the 1st Defendant and the Council sought to interfere with the work

of the WAG Committee. Carynn Chen described this situation in her principal Witness Statement.

3) In the case of the Rio Test Event 2016 selection process, this document was circulated by Carynn Chen before the event in Glasgow. However, once the results of this event confirmed that the Claimant would represent Trinidad and Tobago in the Rio Test Event 2016, Mr. Marquez castigated Ms. Chen at a meeting which was convened in a coffee shop in Movietowne and he shouted at her for circulating the selection process by email, stating that she had done so without being given the final authority to do so.

83. On the evening of April 15, the 3rd Defendant had expressed strong and adverse words in relation to the Claimant in relation to her absence on a bus and stated that she was doing her own thing and enquired whether she was an adult or child and whether Rio was another paid vacation for her and her coach. He also expressed his displeasure that the Claimant's mother had given a radio interview and indicated that her daughter had been selected to represent the country at the Olympics before any official announcement was made.

84. Mrs. Peters-Charles who also participated in the decision made on April 15, 2016, in an email which was annexed as C.C.2 to Chen's witness statement, written on April 16, 2016, described the Claimant as self-centred, egotistical and willing to risk her health and break her foot for her cause.

85. In this case, the Court had to adopt an approach where it considered the contractual obligations of the parties, the matters that were considered by the 1st Defendant and the antecedent circumstances to determine whether the 1st Defendant engaged in a fair and informed process and was justified in making the substitution decision.

86. In matters of public law, a public body, even where there is owed a duty of fairness to an individual, may relax the observance of those rules. The learned authors in **De Smiths Judicial Review 8th edition** paragraph 8-039 noted:

> "*Urgency may warrant relaxing the requirements of fairness even where there is no legislation under which this is expressly permitted…. In general whether the need for urgent action outweigh the importance of following fair procedures depends on an assessment of the circumstances of each case on which opinions can differ*".

87. In **De Verteuil v Knaggs (1918) A.C. 557 (P.C.)** Lord Parmoor delivering the judgment of the Board gave an instance of a special circumstance which might justify a public body taking action without giving the person affected an opportunity to be heard in an emergency situation when promptitude was of importance.

88. At page 560 -561 His Lordship stated:

> "*The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the persons affected*

89. Another case in which it is shown that even a public authority in public law can dispense with the duty of fairness in an urgent and emergency situation is **R v Life Assurance and Unit Trust Regulatory Organisation Ltd, ex parte Ross [1993] 1 All ER 545** where Glidewell LJ in the Court of Appeal cited with approval at page 559 to the High Court decision of Mann LJ in ([1992] 1 All ER 422 at 434) where he stated:

> *'The purpose of an exercise of intervention powers under the Lautro Rules 88, or an exercise under Pt I of the 1986 Act, is the protection of investors.*
>
> *The achievement of that purpose must on occasion require action which has urgently to be taken, and the entertainment of representations may not be compatible with the urgency. Mr Collins recognised that this could be so, but said that at least there must be a duty to consider whether time admits of the receipt of representations and in this case there was no such consideration by Lautro.*

90. **The Geddert email of April 15 was in the nature of a travel log as he had accounted for the Claimant's performance after their arrival in Rio. This email was forwarded to Dow as part of a casual conversation between them and nothing contained therein signalled his intent to invoke clause 7 of the SP or Clause 13 of the AA.**

91. **Having reviewed the evidence the Court found that the Geddert email was not a clause 7 or clause 13 notification and was not reflective of a clear and definitive view that the Claimant was suffering from an injury which may have prevented her from taking part in the Olympic Test Event. There existed a heightened duty to be fair. The Council Members erroneously adopted the view that they were exercising a power under clause 7 or clause 13 and that**

they had an obligation to consider the issue of the replacement of the selected athlete but no such jurisdiction was invoked by the Geddert email.

92. **Well before 10pm, a decision was taken by the Defendants that they would obtain updated confirmation as to the Claimant's condition of fitness but there was no effective attempt to contact Geddert. No email was sent, nor was there any attempt to make contact with Fuentes for her to convey an urgent message to Geddert although it was critical to obtain an updated status in relation to the Claimant's fitness.**

93. **The 2nd Defendant failed to adequately discharge his obligation to communicate with Geddert. On a balance of probabilities, the Court is of the view that he may have preferred the alternate athlete over the Claimant, to be this country's representative at the Olympics Test Event and the process adopted was characterised by a degree of arbitrariness.**

94. **The consensus which was arrived at on April 15, 2015 was flawed in so far as a decision was effected without all the relevant information as to the Claimant's fitness status and there was no proper attempt to seek clarification from Geddert. The decision was not characterised by the required degree of fairness and was made prematurely. The 2nd and 3rd Defendants each had issues with the Claimant and the Lue Shues had a personal relationship with the alternate athlete. These were the Council Members who drove the process on the night of April 15 and this process was ultimately manned by the 2nd Defendant who himself had issues involving the selection process which produced the Claimant as the selected athlete. The Court formed the view that these Defendants allowed their entrenched biases to cloud their judgment and they acted with undue haste, deprived themselves of the benefit of relevant information and ultimately effected a flawed decision.**

95. **Far too often, at every level of this society, persons charged with decision-making authority allow their personal views and biases to cloud and affect the exercise of their discretion. In adopting such a toxic approach to the discharge of decision making responsibility, grave injustice is usually occasioned, as the best possible decision may not be effected. Persons in positions of authority must always be acutely aware of their entrenched and/or inherent biases and they must conscientiously endeavour to exclude bias from the decision-making process. Decisions must always be made objectively, in accordance with the evidence and by the impartial application of all the relevant criteria and considerations.**

96. **There existed a contractual relationship between the Claimant and the 1st Defendant, which gave rise to a duty to treat the Claimant fairly and/or reasonably and/or in good faith and/or to maintain impartiality and/or to avoid a partisan approach. This duty to act fairly had to be performed in circumstances in which the 1st Defendant had regulatory, disciplinary and coercive powers over gymnasts, including the Claimant. The TTGF also exercised exclusive and/or substantial control over the career and future of the Claimant as a participant in national and international events and in particular, her participation in the 2016 Olympics Test Event.**

97. **The decision effected by and on behalf of the 1st Defendant on April 15, 2016 was characterised by a degree of Wednesbury unreasonableness and was a decision which should have never been taken.**

98. **The 2nd to 5th Defendants in their capacity as Council Members made a flawed collective decision on behalf of the 1st Defendant and in doing so, the contractual relationship which existed as between the Claimant and the 1st Defendant was breached without justification.**

99. **The Court next considered the second issue and found as a fact that the 1st Defendant did not have any duty either express or implied, to consult with the Claimant or Fuentes prior to the making of any decision under the selection process or in the making of any decisions under the athlete's agreement. The Claimant was required to communicate to the Federation, any injury or other circumstance that may have prevented her from fulfilling her responsibilities as the selected athlete. If the parties intended that this reporting obligation was to be reciprocal, such a term could have been provided for.**

100. To establish that there was any implied duty on the part of the Federation to consult with the selected athlete, the Claimant would have to satisfy the following conditions outlined in the case of **BP Refinery v Shire of Hastings 1977 WL 165288** where Lord Simon at p 26 stated as follows**:**

> "For a term to be implied the following conditions (which may overlap) must be satisfied:
>
> 1. It must be reasonable and equitable.
>
> 2. It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
>
> 3. It must be so obvious that it goes without saying.
>
> 4. It must be capable of clear expression.
>
> 5. It must not contradict any express term of the contract."

101. The position under the athlete's agreement was mirrored under clause 5D and 7 of the selection process. This Court can exercise no power to unilaterally elect to improve upon the said documents so as to introduce conditions or

terms to achieve any outcome which can be viewed as being more reasonable or fair.

102. In the **Interpretation of Contracts by Lewison 6th Edition (2015)** at Chapter 6, page 293, the learned authors dealt with the nature of implied terms in a contract. They said that implied terms fall broadly into two classes. The first class consists of default rules brought into operation where the parties enter into a particular kind of contractual relationship and the second class consists of elucidating what a particular contract must mean, read in the light of purpose and the admissible background.

103. The learned authors in *Lewison* at page 293 referred to what Lady Hale stated at **Societe Generale, London Branch v Geys [2013] 1 AC 523** where Her Ladyship stated that:

> *"[…] it is important to distinguish between two different kind of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question.*
>
> *Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned unless the parties have expressly excluded it."*

104. The learned authors at page 294 also referred to Lord Cross of Chelsea where His Lordship said that:

"When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type – sale of goods, master and servant, landlord and tenant, and so on- some provision is to be implied unless the parties have expressly excluded it.

In deciding whether or not to lay down such a prima facie rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however there is no question of laying down any prima facie rule applicable to all cases of a divine type but what the court is being in effect asked to do is to rectify a particular – often a very detailed – contract by inserting in it a term which the parties have not expressed.

Here it is not enough for the court to say that the suggested term is one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give – as it is put – business efficacy to the contract and that if its absence had been pointed out at the time both parties assuming them to have been reasonable men would have agreed without hesitation to its insertion".

105. In **Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another [2015] UKSC 72**, their Lordships at paragraph 19 stated:

"*The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.*

[They then quoted the observations of Scrutton LJ in Reigate, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

106. The Judicial Committee of the Privy Council in **Nazir Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2** set out the circumstances in which terms are to be implied into a contract. Lord Hughes in addressing implied terms made the following observation:

> "*7. It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been restated by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742.*
>
> *It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy.*

Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

107. It is settled law that the Courts are not permitted to re-write the contract or to read words into contractual provisions which contradicts its express terms or the parties' intention. In the case of the **Attorney General of Belize & Ors v Belize Telecom Ltd & Anor [2009] UKPC 10**, Lord Hoffman at paragraph 16 said:

"The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. ***It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means****."*

108. Consequently, there is no merit in the Claimant's contention that she or Fuentes should have been consulted by virtue of any implied term in either the selection process or in the athlete's agreement.

109. **The Court proceeded to address the third issue as to whether the 2nd to 5th Defendants owed to the Claimant a fiduciary duty.**

110. The 2nd to 5th Defendants each owed a fiduciary duty to the 1st Defendant to act honestly and in good faith and they were obligated to advance the best interest of the TTGF and to exercise care, diligence and skill.

111. The Claimant stated that she was in a contractual relationship with the TTGF because she was a TTGF member and she referred to this as a *membership contract* by which the TTGF had:

> *"… an equitable and/or fiduciary duty and/or contractual duty (implied as a matter of law) of fidelity and/or has a duty to treat with her fairly and/or reasonably and/or in good faith."*

112. The Claimant as previously outlined, accepted that she was in a contractual relationship with the TTGF by virtue of the selection process and athlete's agreement.

113. In the parties' clauses of the AA, the Claimant is referred to as an *athlete member* of the TTGF and in the first recital she certified that *I am a member in good standing.*

114. Article 5 of the Constitution makes it clear that as a member, the Claimant must abide by the TTGF rules:

> *"Acceptance of membership implies a commitment to abide by the Constitution and the rules of [the TTGF]."*

115. The 1st Defendant at paragraph 25 of its Defence admitted that the Claimant was a member of the TTGF but did not agree a membership contract as averred by the Claimant and outlined that it had a contractual relationship with the Claimant solely by virtue of the AA and SP.

116. Having pleaded that the 1st Defendant acted in breach of its equitable and/or fiduciary duties to her, it was incumbent on the Claimant to plead the equitable and/or fiduciary duties owed, the reasons why they were owed and how, if at all, they were breached. This obligation was not discharged.

117. In **Peskin v Anderson [2001] 1 BCLC 372 at paragraph 33**, Mummery LJ said that while fiduciary duties are owed by directors to the company, *a special factual relationship* is required to be proven in order to establish that the directors of a company owe a fiduciary duty to its members; he said that:

> *"They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities , which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders."*

118. Mummery LJ distinguished between, on the one hand, fiduciary duties owed by directors to the company by virtue of their legal relationship with the company and, on the other hand, fiduciary duties owed by directors to shareholders, which only arise from establishing a *special factual relationship* between director and shareholder.

119. The Privy Council in **Kelly v Cooper (1992) 41 WIR 80** at page 88 considered the scope of a fiduciary duty and made it clear that assuming it is proven to exist, it does not create a wider or more generous duty than the contractual relationship between the parties.

120. In ***Bristol and West Building Society v Mothew* [1998] Ch. 1** at page 18 letters A to C and F and at letter H on page 19 the Court said as follows:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation*

of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary".

"Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty".

"Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other.... If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability".

121. **On the evidence, the Court found that the 2nd Defendant by his failure to contact Geddert and his lack of diligent effort in seeking clarification as to the Claimant's fitness, misled the other Council Members into believing that his best efforts to contact Geddert were unsuccessful.**

122. **At the material time, all the Defendants were performing their bona fide functions as Council Members but they did not discharge their obligations towards the 1st Defendant properly. Although each of the Defendants had his or her peculiar issue with the Claimant, it cannot be said that they acted outside the scope of their authority. At the material time the Court found on a balance of probabilities that they all erroneously believed (as their views were clouded by their individual bias) that they were acting in the best**

interest of the 1st Defendant and the country and many of them may have strongly felt that the alternate was a better candidate for the OTE.

123. **The Court formed the view that their actions did not reflect a separate identity or interest from that of the 1st Defendant so as to make the conduct their own.**

124. **Although the Council Members while acting in the discharge of their obligations towards the 1st Defendant exercised coercive powers over the Claimant and their decision to replace her impacted upon her career, no fiduciary duty existed towards the Claimant. The 2nd to 5th Defendants as sport administrators were entrusted with the power to execute decisions for and on behalf of the 1st Defendant and their decisions impacted upon the lives of athletes under their remit who had contractual relationships with the 1st Defendant.**

125. **The said administrators breached their duty towards the 1st Defendant by arriving at a decision by virtue of a process which was flawed or unfair. That breach resulted in a breach of contract between the 1st Defendant and the Claimant but there existed no individual or independent fiduciary duty by the Council Members towards the Claimant.**

126. **The Court next moved to consider whether the 2nd to 5th Defendants are liable to the Claimant in tort.**

127. Having considered the Claimant's case, the Court formed the view that she premised her claim in tort under the following heads:

1) That Council Members procured or induced a breach of contract by the 1st Defendant ("*procuring a breach of contract*");
2) That Council Members conspired to use unlawful means to injure her ("*the unlawful means conspiracy*").

128. In relation to the procuring a breach of contract, as a pre-requisite the Claimant had to prove that there was a breach of contract by the TTGF in making the substitution decision and this burden was discharged.

129. The tort was established by **Lumley v Gye [1843-60] All ER Rep 208** and requires direct inducement to breach the contract.

130. In respect of procurement, the tort requires a direct element of inducement, persuasion or other form of procurement. It was necessary therefore for a Claimant to plead all the material facts relevant to establish procurement, as well as the acts of encouragement, threat and persuasion to show there existed a sufficient causal link with the breach by the contract party. In relation to this issue, the Claimant's case was not properly pleaded and the mere vote at a meeting to effect a decision cannot suffice to establish liability.

131. The tort also requires that a Defendant must have known of the existence of the contract and the Defendant caused a breach of that contract and there must have been an intentional invasion of the Claimant's contract rights.

132. To establish liability under the tort of procuring or inducing a breach of contract, proof of the following elements would be required:

1) Each Council Member knew that she/he was inducing a breach of contract.

2) They must have intended to procure a breach.

3) There was in fact a breach of contract and positive act of inducement or procurement.

4) The Claimant suffered loss and damage subject to the ordinary principles of remoteness.

133. **There was however, no evidence to suggest that each Council Member knew that he/she was inducing a breach of contract or that they intended to procure a breach.**

134. **Senior Counsel for the Claimant did not cross-examine the TTGF's witnesses/Council Members on their knowledge of the SP/AA nor was it put (or suggested) to them that they intended to procure a breach of contract.**

135. **The *onus* was on the Claimant to show that there was an intentional invasion of her contractual rights and not merely that the breach of contract was a natural consequence of the Council Members' conduct. The Council Members' actual knowledge of the contractual obligation in question was mandatory and constructive knowledge cannot suffice.**

136. **Accordingly, the claim under this head is devoid of merit.**

THE TORT OF UNLAWFUL MEANS CONSPIRACY

137. The tort of lawful means conspiracy involves liability for an agreement to do acts which are lawful by themselves, but which acts are undertaken for the purpose of causing injury to the Claimant.

138. The tort of unlawful means conspiracy has developed and is still expanding to protect victims of conspiracy. From the decisions of the UK Court of Appeal in *Kuwait Oil Tanker Co v Al Bader [2000] 2 All ER (Comm)* 271, at paragraphs 106 to 121, and confirmed by by the House of Lords in *HMRC v Total Network v* [2008] 2 All ER 413 at paragraphs 40 to 45, 56, 89-95 and 115 to 122 and 221 and the U.K. Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 paragraphs 8 to 12, it is well established as follows:

(1) It is necessary to establish an intention to injure the claimant but not a predominant purpose to or intention to do so.

(2) The intention to injure can be inferred from the facts.

(3) It is not necessary to show that there is anything in the nature of an express agreement whether formal or informal.

(4) It is sufficient if two or more persons combine with a common intention; or, in other words that they deliberately combine, albeit tacitly, to achieve a common end.

(5) Participation in a conspiracy is infinitely variable: it can be active or passive. Adherence to an agreement can be inferred by proving that a person knew what was going on.

(6) An intention to participate in a conspiracy can be established by failure to stop an unlawful activity.

(7) The tort of unlawful means conspiracy is not confined to a class of case where the claimant is injured in his or her trade or business.

(8) Consent, that is agreement or adherence to the agreement can be inferred if it is proved that a conspirator knew what was going on and the intention to participate can be established by failure to stop the unlawful act.

(9) Unlawful means can include, amongst other wrongs, tort, breach of fiduciary duty, breach of contract.

(10) Unlawful means can also include means not independently actionable as a suit of the claimant and therefore may include criminal conduct as in *HMRC v Total Network* (supra) and a contempt of Court as in *JSC BTA Bank v Khrapunov* (2018) (supra). In *Total Network* at paragraph 40, Lord Hope in discussing whether in an unlawful means conspiracy, the unlawful needs need not be independently actionable, and referring to the conspiracy to cheat Her Majesty's Revenue and Customs Commissioners (HMRC) in the

case before the Court, agreed "that an allegation of conspiracy to cheat the Commissioners was sufficient, provided there was an intention to injure the Claimant, albeit not a predominant intention."

(11) The cause of action becomes complete when the conspiracy is acted upon and loss is caused.

139. In an **Analysis of Economic Torts Second Edition by Hazel Carty**, it was outlined that the tort requires an agreement and concerted action causing intentional harm. The tort does not require unlawful means, it bases liability on malice and illegitimate purpose. Lawful means conspiracy should in fact apply only to most extreme cases of oppressive combination. This is because of the need to prove that the combination was motivated by an illegitimate purpose.

140. The alleged conspirators must act with the intention to injure the Claimant. Where one only has an illegitimate motive, it would appear that there can be no liability.

141. **The Claimant did not plead and prove the essential ingredients of the tort. The pleading did not identify the persons involved in the alleged agreement and/or the concerted action nor did it identify the facts on which the Claimant sought to establish that the concerted action caused the intentional harm and the knowledge of the persons who she alleged had the intention to harm her. No evidence was adduced to establish these ingredients of the tort.**

142. In **Clerk and Lindsell on Torts (28thEdn) at 24-91** the commentators made the point that both the unlawful means conspiracy and the conspiracy to injure torts are really a single tort:

> *"The tort requires an agreement, combination, understanding, or concert to injure, involving two or more persons."*

143. The parties to the conspiracy *must know the facts or the basis of which it is unlawful* and it was held in **Stratford & Son Ltd -v- Lindley [1965] AC 269** that:

> *"…a genuinely held belief is sufficient to establish a genuine interest, even if damage to the employee is known to be inevitable and is even intended."*

144. **On the facts, upon receipt of the Geddert email, there was concern among council members and they were principally motivated by their interest in ensuring that Trinidad and Tobago would be represented at the OTE by a gymnast who was fit and capable of performing at her fullest potential. This was a legitimate interest which was genuinely held. Their motivation was however, driven in part by their bias against the Claimant and in favour of the alternate and their views may have been reinforced by the fact that the 2nd, 4th and 5th Defendants may have felt that the alternate athlete was better suited to take part in the OTE.**

145. In assessing whether the Council Members had a genuine held belief, the Court considered the contents of Marquez's email sent to Geddert on Saturday, April 16, 2016 at 12:27 a.m. which explained the reasons for the substitution decision.

146. In this email, the Council Members described their distress at Geddert's delay in notifying them of the Claimant's injury and noted that he had previously

asked her to withdraw. The Council Members were concerned that it was not enough to rely on *heart* alone if the Claimant carried an injury to her left ankle.

147. **The Court formed the view that the Council Members' had no intention to injure the Claimant and it is difficult to find on the facts that there was a conspiracy. It appears that their predominant motive was to ensure that the country had effective representation in the OTE and given their view as to the availability and state of readiness of the alternate, they proceeded to effect an unadvised decision to replace the Claimant. Consequently, this Court is of the view that there exists no merit under this head of the complaint.**

DAMAGES

148. Having resolved the issues as to liability and having determined that liability for breach of contract vests only upon the 1st Defendant, the Court proceeded to consider the nature and extent of the remedies which should be given to the Claimant.

149. Damages for breach of contract are designed to compensate for the damage, loss or injury a claimant has suffered through that breach.

150. In **Alfred McAlpine Construction v Panatown Ltd [2000] 3 WLR 946** at pages 973 and 1011-1012, the House of Lords affirmed the general principle that damages may only be recovered for a loss which the Claimant has suffered.

151. Difficulty in assessing damages does not disentitle a Claimant from having an attempt made to assess them, unless they depend altogether on remote and hypothetical possibilities.

152. What must, however, be shown is a real and measurable loss and not merely a speculative chance which cannot be supported by evidence. Damages for breach of contract are generally given by way of compensation for loss suffered.

153. Contractual damages may be recovered for substantial physical inconvenience or discomfort arising from a breach. Damages are not generally recoverable for any *distress, frustration, anxiety, displeasure, vexation, tension or aggravation* caused by the breach even where it was in the contemplation of the parties that the breach would expose the parties to distress nor will damages be recovered in a contractual action for injury to reputation.

154. The object of an award of damages for breach of contract is to place the Claimant, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed. Claimants are thus entitled to recover damages in respect of the loss of gains of which they have been deprived by the breach.

155. An alternative basis for the assessment of damages is that the Claimant should recover *reliance loss*, that is, expenses incurred in preparing to perform or in part performance of the contract and which have been rendered futile by the breach. Expenses incurred prior to and in anticipation of the making of the contract are recoverable, provided it was reasonably in the contemplation of the parties that they would be wasted if the contract was broken.

Causation

156. In order to establish a right to damages the claimant must show that the breach of contract caused loss.

Remoteness of Damage

157. Where the test of causation is satisfied, the law does not however, compel the Defendant to assume liability for all the losses which the Claimant may have suffered as a consequence of the breach. Certain losses may be too remote for the Claimant to be entitled to compensation.

158. In the judgment of Alderson B. in the case of **Hadley v Baxendale (1854) 9 Exch 341,** the Court stated that where the parties have made a contract which one of them has broken damages are recoverable: (1) when they are *such as may fairly and reasonably be considered arising naturally i.e., according to the usual course of things* from the breach, or (2) when they are *such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract*, provided that in both cases, they are the probable result of the breach. The effect of this rule was explained as follows:

> *"[I]f the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.*
>
> *But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by*

special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them"

159. Liability under the second branch of the rule will depend upon the special circumstances made known to the party in default at the time the contract was made.

160. Although there are two branches of the rule in **Hadley v Baxendale (supra)**, in essence they both form a part of a single general principle. This general principle which governs both branches of the rule is that the aggrieved party is only entitled to recover such part of the loss actually resulting from the breach as was at the time of the contract reasonable foreseeable as liable to result from the breach. What was at that time *reasonably foreseeable* depends on the knowledge then possessed by the parties or by the party who later commits the breach. For this purpose, knowledge *possessed* is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the *ordinary course of things* and consequently what loss is liable to result from a breach of contract in that ordinary course.

APPLYING THE PRINCIPLES OF LAW TO THE FACTS OF THE CASE

161. In her statement of case, the Claimant claimed special damages of TT$1,385,384.00 from the loss of the opportunity to proceed with an offer for the award of a four-year gymnastics scholarship at the prestigious Michigan State University to fill an open spot immediately for the fall semester 2014. At paragraph 104 of her witness statement filed on February 29, the Claimant said as follows:

"104. Owing to the undivided attention that needs to be put into training, it was a direct result of pursuing my dream of being an Olympian that I began University many years later than usual.

I have only now, at the age of 21, commenced University studies, this has displaced me from my peers and has also brought rise to the significant loss of the likely opportunity of studying at a renowned institution, Michigan State University, on a gymnastics scholarship.

This full scholarship was worth a significant sum. I am now enrolled in university, where I have to pay registration fees and for books and transportation.

I would not have incurred these significant expenses had I taken this scholarship to Michigan State University.

Michigan's interest in me was shown when a scout Nicole Curler, approached me at Twistars Gymnastics Camp 2013 and she was impressed by me.

I went to the Michigan State University on a visit. My coach in Trinidad, Clifton Mc Dowell was in Michigan for the gymnastics camp. He informed me that they wanted to offer me a full scholarship to Michigan State University.

He also told me that they wanted to show us all of the University's facilities, including a gym as well as their academic buildings.

Clifton Mc Dowell and I accepted their invitation and we toured Michigan State University. At the end of the tour, Nicole Curler said to me that she "hopes that I think about the offer". They wanted to stay in contact. Nicole asked me whether I wanted to commit. I avoided the question, as my parents were not present in order for

me to make a fully guided decision and I really wanted to go to the Rio Olympics and focus only on that."

162. In respect of the scholarship offer from Michigan State University (MSU) the Claimant gave no evidence that she requested Nicole Curler (who is the MSU scout) to give evidence on her behalf that MSU had made an offer in 2013 to her for a four (4) year gymnastic scholarship. In cross-examination she said she did not attempt to get written confirmation of the offer.

163. MSU's alleged offer was made in 2013 but the Claimant's selection as the selected athlete was made in late October 2015 and the Claimant did not present evidence that the MSU offer was made to her because she was a prospective Olympian.

164. The Claimant's claim for loss of an MSU scholarship valued at $1, 385,384.00 was not supported by any evidence and having failed to specifically prove this aspect of her claim for special damages, the Court can make no award in relation to the said sum.

165. The Claimant stated in her witness statement that she declined an Olympic advertisement from FLOW Television because its theme concerned competing in the Rio Olympics.

166. The Claimant did not provide any support for her claim nor is there any evidence as to the value of the advertisement.

167. Her evidence outlined that she received monies for ads and promotions during the period 2016-2017 as follows:

1) Visit to Gymnastic Explorers Club $500.00 (May 23, 2016)
2) Tribe Band Launch $500.00 (July 17, 2016)

3) B-mobile advertisement Olympic Games $3,000.00 (July 7, 2016)
4) Christian Boucaud Designs $1,500.00(October 6, 2016)
5) Mac Farlane Photoshop $500.00 (October 16, 2016)
6) Appearance at Decibel 2017 $300.00 (May 5, 2017)

168. No documentary evidence was adduced to support and prove the aforesaid sums.

169. **As a young, talented, elite gymnast who had been selected to participate in the OTE with the possibility of becoming Trinidad and Tobago's first Olympian involved in gymnastics, the Claimant stood to benefit from promotions and endorsements leading up to the Olympic Games and thereafter.**

170. **While no documentation to this effect was adduced, the Court formed the view that such a circumstance was natural, logical and plausible. Although she is still involved in gymnastics and earns money monthly, her earning potential would have been affected and the loss of promotional opportunity must be viewed as inherently plausible in the circumstances.**

171. **The Claimant did not adduce any evidence in relation to loss of salary. No evidence was adduced as to the promotional earnings of other local Olympians but given her status as an elite gymnast it is inherently plausible that her ability to earn in the future may have been affected by the fact that she is now, not an Olympian.**

172. **The Court considered her earning potential given her heightened level of accomplishment and considered the opportunities clothed with economic**

value, which were likely to befall her if she was successful at the OTE. The Court therefore addressed its mind to her earning potential range.

173. **Given her status, she would have been in a middle earning range as it relates to employment, earnings and endorsement income. This would have been plausible when one considers the sentimental attraction which would have attached to her, if she had made history by representing this Republic at the Olympics. The Court also addressed the doctrine of loss of chance/opportunity and formed the view that the Claimant should be allowed a measure of recovery equal to the extent that the 1st Defendant's decision resulted in a reduction of her chance to benefit from endorsements as an Olympian.**

174. **The Court considered the approach adopted in Chaplin v Hicks [1911] 2 KB 786. Like in *Hicks*, the Claimant could not prove that she would have qualified at the OTE, but she was denied the opportunity to participate in the OTE and to receive the accolades that would have accompanied such an achievement.**

175. **Having found that the Claimant would have earned increased promotional income absent the 1st Defendant's decision, the Court considered the endorsements she received immediately preceding and subsequent to the 1st Defendant's actions and took into account the Claimant's skills, intangible attributes, status as an elite gymnast and the historical impact, if she had gone to the Olympic Stage and found that these factors would have positively impacted upon her potential to earn promotional income in the future.**

176. **Given that she is now not an Olympian, the Court formed the view that her promotional earning potential reduced by at least 60%. Having noted that**

she earned approximately $6,500.00 between May 2016 and May 2017, the Court formed the view that if she was an Olympian or had performed at the OTE, her endorsement income may have been at least $20,000.00 annually and she would have earned promotional income at least up to the next Olympic Games in 2020.

177. **Consequently, the Court hereby awards to the Claimant the sum of $50,000.00 as damages on account of the loss of income namely promotional income.**

Aggravated Damages

178. The law with respect to the award of aggravated damages in contract cases is fairly settled. Though, there has been some argument to the contrary, the position is that damages for mental distress and aggravation which is a result of a breach of contract are not recoverable unless the object of the contract was for the purposes of pleasure, peace of mind and relaxation. The exceptions to this rule are indeed deliberately narrow to protect the commercial intention of contracts as a policy consideration. Lord Bingham summarised the rule in **Watts v Morrow [1991] 1 W.L.R. 1421 CA** thus:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be

awarded if the fruit of the contract is not provided or if the contrary result is procured instead."

179. This Court previously recognized that aggravated damages is an appropriate award for mental distress in a matter which involved a breach of confidence. In **Ho v Simmons Cv2014-01949** this Court awarded aggravated damages and stated as follows:

> "*Under the common law, aggravated damages can also be awarded to compensate a litigant when the harm occasioned by the wrongful act has been aggravated by the manner in which the act was done. There is on the facts of this case a distinct element of aggravation and the Defendant demonstrated a clear and unshakeable determination to make the Claimant pay and to expose her in the literal sense of the word. The Defendant's conduct was unacceptable and the Court found as a fact that significant distress and embarrassment was inflicted upon the Claimant. The Court is of the view that the breach of confidence was occasioned with the deliberate intent of causing embarrassment, distress and humiliation to the Claimant and was therefore necessary to include in the award of compensation an appropriate quantum for aggravation."*

180. Notwithstanding the invitation by Senior Counsel to apply the rationale it adopted in Ho (supra) to the facts of this case, this Court must operate within the confines of the law and it is patently clear that aggravated damages are not available in cases involving breach of contract.

181. Therefore, there is no basis upon which an award can be made under this head of damage.

Exemplary Damages

182. Exemplary damages is an award which is punitive in nature. The rationale for the award was stated in **A v Bottrill Privy Council Appeal No. 10 of 2002**, where Lord Nicholls explained that:

> "In the ordinary course the appropriate response of a court to the commission of a tort is to require the wrongdoer to make good the wronged person's loss, so far as a payment of money can achieve this. In appropriate circumstances this may include aggravated damages. Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court to demonstrate that such conduct is altogether unacceptable to society. Then the wrong doer may be ordered to make a further payment by way of condemnation and punishment".

183. In **Rookes v Barnard [1964] AC 1129**, Lord Devlin outlined three categories of conduct which may warrant an award of exemplary damages. These were:

1) Oppressive, arbitrary or unconstitutional action by servants of the government;

2) Cases in which the Defendant's conduct had been calculated to make a profit for himself which might well exceed any compensation payable to the Claimant; and

3) Situations where statute permitted it.

184. In **Aron Torres v Point Lisas Industrial Port Development Limited Civ. App. No. 84 of 2005**, Mendonca JA at paragraph 17 described the object of the award in the following terms:

"[…] An award of exemplary damages is therefore directed at the conduct of the wrongdoer. It is conduct that has been described in a variety of ways such as harsh, vindictive, reprehensible, malicious, wanton, wilful, arrogant, cynical, oppressive, as being in contempt of the plaintiff's rights, contumelious, as offending the ordinary standards of morality or decent conduct in the community and outrageous."

185. In the Court's mind, this case falls within the first category identified in *Rookes* as the actions of the Committee Members were oppressive and arbitrary. The Court is required to look at the conduct of the 1st Defendant and ask itself if the flawed decision was exceptional in nature, having specific regard to the adverse consequences which befell the Claimant as a result.

186. In this jurisdiction, it must be noted that until the case of *Torres (supra)*, exemplary damages were not available in contract cases for the same policy reasons that aggravated damages were not available. Mendonca JA however recognised that:

"(47) It has been said that the theory is only one "possible moral conception among a sea of many competing moral conceptions" (see Andrew Phang and Pey-Woan Lee, **Restitutionary and Exemplary Damages** (2003) 19 Journal of Contract Law 1, 27). If it comes to a choice between the doctrine of efficient breach and the "moral conception of promise keeping" I prefer the latter. I see nothing in the doctrine of efficient breach that would persuade me that the courts should not award exemplary damages in the appropriate contract case.

(48) In tort, cases do arise where compensatory damages are inadequate to achieve a just result between the parties. The defendant's conduct demands

a further response from the courts in the form of exemplary damages. So too in contract, cases can arise from time to time where by reason of the defendant's outrageous conduct the normal measure of damages may be perceived to be an inadequate response to achieve justice between the parties. In such cases the courts should be in a position to grant an award of exemplary damages. One such example is ***Nantel v Parisien*** (1981), 18 C.C.L.T. 79, a case out of Ontario, Canada. Exemplary damages were awarded for breach of a lease when the defendants were found to have acted in a "high handed and shockingly contemptuous manner" and used their superior power to steam roll the plaintiff to acquiesce and surrender her legal rights to the lease. In that case the defendants broke the lease by breaking into the plaintiff's premises, removing her belongings and then demolishing the building even when the plaintiff attempted to occupy the premises as she was legally entitled to do. Galligan J. noted that on the facts of that case compensatory damages would be an inadequate response. He stated:

"If this Court were to sanction the conduct of the defendants by awarding the plaintiff for actual monetary loss plus nominal damages, then in my opinion the law would say to the rich and powerful, "Do what you like, you will only have to make good the plaintiff's actual financial loss, which compared to your budget is negligible." The law would say to such person as the defendants "Trample on the smaller person's rights, the sanction of that trampling will only be a relatively minor part of the cost of doing business."

187. In her witness statement the Claimant described the injury to her dignity at paragraphs 100 and 103. She said as follows:

"100. On the day of the Test event, my love for the sport carried me to the competition. I couldn't take the athlete's bus and had to resort to public transportation. I had to pay ($25RLs) to enter the competition venue in which I had been set to perform and sit in the audience with the crowd that was supposed to watch me compete. I was now merely a paying spectator. This added to my humiliation. I even had to pay my own bus fare, however the driver knew me from prior interaction, and he offered me a complimentary ride on the bus.

103. My entire childhood and early adult life was dedicated to gymnastics. The dream that I had worked tirelessly for and had actually achieved was taken from me before my very eyes."

188. In making an award, the Court must have some level of restraint so that the punitive awards are proportionate to the wrong occasioned. Mendonca JA in *Torres* reiterated:

"A proper award must therefore look at proportionality in several dimensions. Some of these which can impact on the quantum of the award were identified to be: (1) proportionate to the blame worthiness of the Defendant's conduct; (2) proportionate to the degree of vulnerability of the claimant; (3) proportionate to the harm or potential harm directed specifically at the claimant; (4) proportionate to the need for deterrence; (5) proportionate even after taking into account the other penalties both civil and criminal which have been or are likely to be inflicted on the Defendant for the same conduct; and (6) proportionate to the advantage wrongfully gained by the Defendant from the misconduct.

189. **It is evident that the Claimant suffered mental distress, hurt and humiliation when she was replaced and her sense of disappointment would have been immeasurable. The joy of Olympic representation which should**

have resonated within the hearts of every citizen, was curtailed as many citizens were shocked, upset and disappointed with the Claimant's sudden removal.

190. **The important functions which the Council Members discharged on behalf of the TTGF cannot be minimalized. Their premature, unfair and Wednesbury unreasonable decision to substitute the Claimant at the eve of the OTE materially affected the Claimant's welfare as an athlete and will forever be etched in the national consciousness. Positions of leadership and responsibility mandate fairness, fearlessness, forthright thinking, fortitude and freedom from bias. While the hands of time cannot be rewound, there must be a renewed commitment by all who are entrusted with decision-making power to conscientiously discharge their obligations in an objective manner which recognises and rewards competence.**

191. **The Claimant's evidence as aforementioned was not challenged, she was brought down from the pinnacle of her ambition.**

192. **The decision made on April 15, 2016 eviscerated the Claimant's lifelong commitment towards the achievement of Olympic status. Before effecting the decision to substitute her the 2nd to 5th Defendants disregarded the impact that a substitution decision would have upon the Claimant and her career. They acted in a manner which was characterized by a degree of blameworthiness as their biases affected their judgment and they failed to factor into their deliberations the vulnerability of the Claimant or the potential harm that a substitution decision could have occasioned.**

193. In Owen Goring CV2010-03643, Rajkumar J (as he then was) awarded the sum of $100,000.00 in a situation of assault and battery.

194. **This Court is resolute in its view that there exists a need to unequivocally signal its condemnation for the manner in which the substitution decision was effected and to deter the recurrence of the adoption of any flawed and or unreasonable decision making process. The apodictic approach to accountability must govern and direct the manner in which all decision-makers, at every level operate, as the power with which they are entrusted is not sacrosanct.**

195. **The decision in Goring is over seven years old and the Court considered the dramatic reduction in the purchasing power of the TT dollar over the last three years. Unlike an act of violence, the physical effects of which would wane with time, the Claimant was deprived of a once in a lifetime opportunity, her future was materially altered when the flawed decision to substitute her was made and her missed Olympic opportunity is likely to weigh upon her for the rest of her life.**

196. **The unique circumstances of this case warrant an award of exemplary damages and accordingly, this Court is of the view that the sum of $150,000.00 is an appropriate award under this head.**

197. For the reasons which have been outlined the order of the Court is as follows:

1) There should be judgment in favour of the Claimant against the 1st Defendant for breach of contract.

2) The 1st Defendant shall pay to the Claimant the sum of $50,000.00 on account of loss of opportunity to earn promotional income as well as the sum of $150,000.00 as exemplary damages.

3) There shall be a stay of execution on the payment of the aforesaid sums of 28 days and interest shall accrue at the statutory rate of interest from the date of this judgment until payment.

4) The claim against the 2nd to 5th named Defendants is dismissed.

5) The parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE