THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. CA P 104/2020

CIVIL NO. CV 2019 – 04772

BETWEEN

THE CENTRAL BANK OF TRINIDAD AND TOBAGO

Appellant

AND

MARITIME LIFE (CARIBBEAN) LIMITED

First Respondent

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Respondent

APPEARANCES:
Mr. I. Benjamin S.C. leads Mr. K. Garcia inst. by Ms. E. Araujo

Mr. E. Fitzgerald Q.C. and Mr. F. Hosein S.C. lead Ms. S. Bridgemohan and Mr. A. Hosein inst. by Ms. A. Mamchan for the 1st Respondent

Mr. D. Mendes S.C leads Mr. M. Quamina inst. by Mr. S. Julien for the 2nd Respondent

DATE OF DELIVERY: 17 February 2021

PANEL:

P. Rajkumar JA

R. Boodoosingh JA

J. Aboud JA

JUDGMENT

Delivered by Peter A. Rajkumar JA

Background

1. The appellant appeals against the order of the Honourable Justice Rampersad dated April 6th 2020 by which:-

   i. he granted leave to apply for certain administrative orders challenging the appellant's decision to sell, or direct or authorize, Colonial Life Insurance Company Trinidad Limited (CLICO) and British American Insurance Company Trinidad Limited (BAT) to enter into sale and purchase agreements (SPAs) for the transfer of their respective traditional insurance portfolios (TIPS) to SAGICOR Life Inc (SAGICOR) on September 30th 2019,

   ii. he granted at the same time an interim injunction ordering the appellant not to take any steps to provide regulatory approval or to otherwise progress or finalise the transfer of the CLICO portfolio and BAT portfolio to SAGICOR pending the hearing and final determination of this matter. (The terms of that injunction were subsequently modified before the Honourable Soo Hon JA on July 1st 2020 to permit the process of due diligence to continue).

2. The agreed sale came **at the end of a tender and evaluation process carried out by the international consultancy firm Oliver Wyman Ltd retained by the Boards of Directors of CLICO and BAT**. As a result of **this process**, and the **alleged later decisions** made by the respondents below, (the Central Bank, (CB) and the Minister of Finance (the Minister) SAGICOR was chosen as the preferred bidder and sale purchase agreements (SPA) were entered into on 30 September 2019.

3. The Appellant objected unsuccessfully to the grant of leave on various grounds as follows:

   *5.1. The claim against the first respondent and its officers etc. is **barred** by virtue of the provisions of the **Central Bank (Amendment) Act 2011 section 44E(5) (c)**; (the CB Act)*

   ***5.2.** The subject matter of the proposed challenge is a **commercial transaction** which is **not amenable** to judicial review;*

*5.3. There has been **undue delay** in making the Application and the grant of relief would cause substantial hardship to or substantially prejudice the rights of third parties and would be detrimental to good administration;*

*5.4. There are **alternative remedies** pursuant to Sections 84 and 205 of the Insurance Act which are available to the Applicant;*

***5.5.** The grounds on which the proposed application for judicial review and constitutional relief are based are devoid of merit and have **no realistic prospect of success**; and*

*5.6. There has been **material non-disclosure** by the Applicant as to the fact that it is a party to valid and subsisting Non-Disclosure Agreements between itself and CLICO and BAT respectively.*

Issue

4. Whether leave to apply for judicial review should be refused at this stage notwithstanding that it was granted by the trial judge on the basis of any of the reasons set out above namely;

   i. Section 44E (5) (c) of the CB Act

   ii. Undue delay

   iii. Existence of alternative remedies

   iv. Material Non-disclosure

   v. The commercial nature of the decision rendering it not amenable to judicial review.

Conclusion

5.

   i. At the leave stage the issue of whether **section 44E (5) (c) of the CB** Act even applied to bar the claim required detailed analysis for the reasons set out hereinafter. Its non-applicability was arguable. A determination could not be made at that stage that the claim could be barred on that basis as not presenting an arguable ground with a realistic prospect of success. Therefore leave could not have been refused on that basis. The trial judge could not be faulted for not accepting this as a ground for refusing leave.

ii. The issue as to whether there had been **undue delay** from the date of the decision to the date of filing proceedings was arguable for the reasons set out hereunder. As the trial judge had exercised his discretion in favour of granting leave, and indicated that if necessary he would have been prepared to extend the time for the application, there is no basis for considering that discretion was wrongly exercised as he was not plainly wrong to do so.

iii. The alleged **alternative remedies** are not equally effective or applicable to the applicant's complaint. For the reasons given by the trial judge their existence could not constitute a bar to the application.

iv. The trial judge's reasoning that there was no **material non-disclosure** was sound and has not been demonstrated to have been plainly wrong.

v. However, the decision was based on the outcome of a purely commercial bidding and evaluation **process** by an expert international firm in which the first respondent participated.

a. Despite a statutory underpinning which required the **subsequent** approval of the Central Bank and the Minister of Finance (the Minister), **the actual process conducted by an international expert firm**, which produced Sagicor as the preferred bidder was **purely commercial**.

b. The evidence presented did not establish **deviation** from the outcome of that commercial evaluative process **occasioned by the involvement** of either the CB or the Minister.

c. Examination of that expert **commercial** evaluation process, whether in the circumstances complained of, or on the evidence placed before the trial judge, could not be revisited or reconsidered by a court solely under the guise of public law unreasonableness. This is especially so because that exercise would involve re-examination of the weighting and assessment of the commercial evaluative criteria.

d. The applicant must demonstrate arguability at the leave stage. It cannot plead potential arguability to justify the grant of leave on a speculative basis which it is

hoped the interlocutory processes of the court may strengthen. (See **Sharma v Browne Antoine** below at paragraph 14, citing **Matalulu v D.P.P**)

e. Different bids and bid structures by different bidders cannot claim to be similarly circumstanced. Weighting of evaluative criteria in a commercial process is designed by its nature to produce unequal results from inception and produce a preferred bid and bidder. This by itself cannot render a commercial tender evaluative process unfair or discriminatory. The trial judge therefore erred in not appreciating that the evidence before him did not, on the basis of the allegation of unfairness or discrimination, disclose an arguable ground for judicial review having a realistic prospect of success.

f. Further, on the evidence before him, even of the respondent/applicant alone, the **decisions** being reviewed were the outcome of a purely commercial process. They were not therefore amenable to judicial review under the guise of public law unreasonableness.

g. Further, and in any event, examination of the evidence before the trial judge even accepting that of the respondent/applicant, would have revealed that the respondent's complaints were not borne out on its own evidence. It would therefore have been appropriate to dispose of the application at that stage. (See **AG v Ayers Caesar** [2019] UKPC 44 at paragraph 2).

6. The reasons why I am unable to agree with the majority (as embodied in the judgment of the Honourable Boodoosingh JA), are comprehensively set out in the analysis hereinafter. They include, but are not limited to the following:

   i. It is not correct that the question of the privilege clause and its constitutionality need to be addressed at all on the application such that its unconstitutionality would be determinative or even relevant to the application before the court. To the extent that the majority had ignored this fact, (paragraph 24 of that judgment), I respectfully consider them to have erred in understanding the context of the application. The constitutionality of the privilege clause is irrelevant

given that it is not being relied upon by the appellant, and that the decisions being challenged were not based thereon and are being justified on bases quite separate and distinct from the construction of that clause.

ii. The majority[1] appear to be of the view that because many allegations had been made that these in combination permit the applicant to cross the threshold of arguability for judicial review. I would respectfully disagree. Matters which individually have no basis of arguability do not attain a level of arguability simply because many unarguable matters have been thrown at a court. This argument also ignores the clear requirement of a court to consider the material before it when considering whether that material has attained a threshold of arguability to satisfy it that leave should be granted. Both the trial judge, and the majority, have failed to take into account that the material that was put before the trial judge, despite the several allegations made in relation thereto, did not when examined, **even on the evidence of the applicant alone**, attain any level of arguability. The matters raised by the majority do not, for the reasons set out in this judgment, demonstrate grounds that attain the threshold of arguability. The majority have failed to appreciate that the trial court could not ignore the requirement, and in fact the duty, to **examine the evidence** that **the applicant had** placed before it to justify the grant of leave.

iii. No one is contending that the fact that a matter may be commercial in nature by itself precludes reviewing the role of statutory or public bodies in a decision-making process which is primarily commercial. In this case, there was as set out hereunder, a statutory underpinning for the role of the Central Bank and the Minister. However, as the majority have accepted, the context of the evidence is important. The majority in my respectful view have erred in not considering that that context when properly examined, does not disclose any sufficiently arguable

[1] At paragraph 41

material or ground for the grant of leave. They have failed to appreciate that analysis of the material before the trial court would not have revealed significant areas of contested facts, assertions, or legal disputes (see paragraph 55 of the judgment of the majority).

iv. The majority also failed to take into account the additional principle that the application must itself disclose grounds of review before leave is granted. If allegations which are unsubstantiated on the evidence are placed before the court, the interlocutory process of discovery cannot supplement and provide grounds for review where, on the evidence submitted on the initial application, none exist. (See paragraph 68 of that judgment). The majority have failed to address the material that was before the trial judge on the application, and in so doing have fallen into the same error as the trial judge.

v. The question of construction of the criterion relating to conditional bids was not a matter upon which the evidence of the parties at the hearing of the substantive application was likely to shed any additional light. As a matter of law the subjective intentions of parties, and their subjective interpretation of words in a document, are not admissible. In my respectful view, the majority have erred at paragraphs 63 and 68 of that judgment in considering that on this issue the evidence of any witness upon cross-examination could have produced any further admissible evidence beyond that which was available to the trial judge at the leave stage. See **Arnold v Britton [2015] A.C. 1619** (applied by this court in **Water and Sewage Authority of Trinidad and Tobago v Waterworks** Civ Appeal P151/2014 in particular paragraphs 14 – 23).

vi. It cannot be disputed that the concepts of fairness, equality of treatment and non-discrimination, accountability, reasonableness/rationality, legality, and transparency (paragraph 26 of judgment of majority) are matters that are applicable to discretions exercisable in a decision-making process conducted by

public authorities, especially in a case such as this where there is statutory underpinning for the exercise of those discretions. However nominally invoking these concepts is no substitute for examining the evidence on an application to determine whether there has been any breach at all of these concepts. It is not sufficient to merely assert them without providing evidence that they have been breached. In this regard, the trial judge and the majority have failed to appreciate, that the evidence does not disclose, even at a prima facie level, any breach of these or any other relevant judicially reviewable matters.

vii. The fact that constitutional relief in the form of declarations is sought in the application for judicial review can in no way alter the test applicable for the grant of leave. The majority have erred in not appreciating that the claim to constitutional **relief** can in no way affect the analysis. This is an application for judicial review. There is no exoneration from this test simply because of the invocation of a claim to constitutional **relief**. The applicant for leave must still demonstrate an arguable ground for judicial review with a realistic prospect of success.

viii. Fundamentally, the majority (at paragraph 65 and 68 of that judgment), have failed to appreciate that the allegations with respect to irrationality are all based upon the application of criterion and weighting thereof in an evaluative process by an international expert appointed for this very purpose, and that no reviewable matter has been demonstrated by the subsequent involvement of either the Central Bank or the Minister.

Order

7. In the circumstances, the orders of the trial judge must be set aside. The appeal would have been allowed.

Analysis

8. The factual background appears in the first five paragraphs of his judgment, (all emphasis added).

> 1. *The applicant has made the subject application for leave to commence Judicial Review proceedings to contest the decision made to sell the Traditional Insurance Portfolio (TIP) in Colonial Life Insurance Company (Trinidad) Ltd (CLICO) and British American Insurance (Trinidad) Ltd (BAT) to Sagicor Life Inc.(SAGICOR)/*
>
> *2. The agreed sale came **at the end of a tender and evaluation process carried out by the international consultancy firm Oliver Wyman Ltd retained by the Boards of Directors of CLICO and BAT**. As a result of **this process**, and the **alleged later decision** made by the respondents, SAGICOR was chosen as the preferred bidder and sale purchase agreements (SPA) were entered into on 30 September 2019.*
>
> *3. The applicant says that this decision to sell to SAGICOR is objectionable for a number of reasons.*
>
> *3.1. The first respondent's decision(s) to sell or to direct or authorize CLICO and BAT to enter into SPAS for the sale of the portfolios and or to select or approve SAGICOR as the preferred bidder were **unconstitutional**, **illegal**, null and void.*
>
> *3.2. The decisions were vitiated by the conferral of an unequal and **discriminatory advantage to SAGICOR** contrary to section 4 (D) of the Constitution and the requirements that public authorities exercise their public powers in good faith and in a manner which affords fair and equal treatment to individuals;*
>
> *3.3. **The conduct of the sales procedure** showed a **deliberate intention** to bypass the applicant's **higher**, compliant and more favourable bids in favor of SAGICOR **without any clear and objective reasons** for doing so;*
>
> *3.4. **The privilege clause** referred to later on in this ruling, which formed a part of the tender documents, is contrary to section 4(b) of the Constitution in that it seeks to displace the court's review of the bidding process conducted by a public authority which review is necessary to ensure that public bodies are held accountable for unfairness, bad faith and improper conduct. It is also contrary to the principles of equality and transparency enshrined in section 4 (d) of the Constitution. In any event,*

*it cannot be used **as a basis** to invoke a means of **justifying discriminatory** and **arbitrary exercises of public power** by a public authority;*

*3.5. The said decisions were **irrational** and/or made in bad faith. This includes the criticism that there was no **rational basis** for supposing that the applicant was **unable to manage** the portfolios and no basis was put forward for that claim. There was also no rational basis for supposing that the transfer of the portfolios to the applicant would pose **a higher risk to policyholders**. Also, **no due diligence** was undertaken in relation to the applicant to ensure that the applicant did in fact have the capacity to complete the purchase or was a stable and profitable company. Instead, **the decision to bypass the applicant** was made on unsubstantiated grounds;*

*3.6. The suggestion that **overconcentration of insurance business** in one company or conglomerate was a relevant consideration was also an **irrational one** in light of the fact that SAGICOR is acquiring other insurance portfolios in Jamaica and Trinidad and Tobago;*

*3.7. The first respondent unlawfully **implemented** or **authorized** a **manifestly unfair procedure** for choosing the preferred bidder contrary to part VA of the Central Bank Act and, in particular, section 44D thereof;*

*3.8. The first respondent **failed to assess** or to ensure that **the assessment of the evaluative criteria** was **conducted on an objective and rational basis** which resulted in the failure to **conduct a due diligence** in relation to the **applicant** which would have shown that the **Minister's concerns** mentioned above were **unfounded**;*

*3.9. The first respondent **irrationally failed to take into account** that SACICOR was selected as the preferred bidder **at a time** when it did not have the **financial capability** to acquire the portfolios giving SAGICOR an unfair advantage;*

*3.10. The first respondent's conduct was unlawful as it acted in breach of the bidders' **legitimate expectation that it would conduct or oversee the bidding process in good faith** and that it would provide oversight for accountability and transparency;*

3.11. As a result, the applicant suffered loss and damage;

*3.12. The applicant **reserved the right to add further reasons** in the light of any matters or information advanced by the first respondent in defending its claim.*

5. The first respondent opposes the application; it was submitted that leave to apply for judicial review should be refused because:

5.1. The claim against the first respondent and its officers etc. is ***barred*** *by virtue of the provisions of the* ***Central Bank (Amendment) Act 2011 section 44E(5) (c)****; (the CB Act)*

5.2. *The subject matter of the proposed challenge is a* ***commercial transaction*** *which is* ***not amenable*** *to judicial review;*

5.3. There has been ***undue delay*** *in making the Application and the grant of relief would cause substantial hardship to or substantially prejudice the rights of third parties and would be detrimental to good administration;*

5.4. There are ***alternative remedies*** *pursuant to Sections 84 and 205 of the Insurance Act which are available to the Applicant;*

5.5. *The grounds on which the proposed application for judicial review and constitutional relief are based are devoid of merit and have* ***no realistic prospect of success****; and*

5.6. There has been ***material non-disclosure*** *by the Applicant as to the fact that it is a party to valid and subsisting Non-Disclosure Agreements between itself and CLICO and BAT respectively.*

9. The test which the court must apply on an application for leave for judicial review is that stated in **Sharma v Browne Antoine [2006] UKPC 57 at paragraph 14**[2] That test is set out as follows:

(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is ***an arguable ground for judicial review having a realistic prospect of success*** *and not subject to a discretionary bar such as delay or an alternative remedy: see* R v Legal Aid Board, Ex p Hughes *(1992) 5 Admin LR 623, 628 and* Fordham, Judicial Review Handbook *4th ed (2004), p 426. But* ***arguability cannot be judged without reference to the nature and gravity of the issue to be argued****. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in* R (N) v Mental Health Review Tribunal (Northern

[2] And repeated in later decisions such as Maharaj v Petroleum Company of Trinidad and Tobago [2019] UKPC 21 and AG v Ayers Caesar [2019] UKPC 44.

Region) *[2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:*

"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

***It is not enough that a case is potentially arguable**: **an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen"**:* Matalulu v Director of Public Prosecutions *[2003] 4 LRC 712, 733.*

Paragraphs 22 and 25 are also relevant as follows:-

22.** It is convenient to begin, as the courts below did, by considering the grant of leave to the Chief Justice to seek to challenge the Deputy Director's decision to prosecute. It is clear, on the authority of Chinoy 4 Admin LR 457, that the **leave previously granted should not have been set aside unless the court was satisfied on inter partes argument that the leave should plainly not have been granted.

***25.** Secondly, **the judge was wrong to assume, for the purpose of ascertaining whether there was an arguable case, that the facts as raised by the Chief Justice were true.** This was not a demurrer, but **an application for exceptional relief**, **to be judged on all the evidence** (and it is perhaps surprising that the matter was ever thought suitable for decision ex parte)….* (All emphasis added)

10. While the respondent contends that the threshold to be satisfied is low the Privy Council in **Sharma v Brown Antoine and AG v Ayers Caesar** has established that even if the threshold is low it is not nonexistent, and leave may properly be refused if the threshold is not met.

Whether Section 44E (5) (c) of the CB Act excludes review of decisions of the CB

11. ***44E. (1) Where the Bank proposes to exercise powers under section 44D (1) (ii), it shall publish in the Gazette and in such newspapers as it thinks appropriate a notification to that effect.***
(5) On and after the publication of a notification under subsection (1)—
(c) no creditor, shareholder, depositor, policyholder or any other person shall commence or continue any claim, action, execution or other proceedings or seek to enforce in any way whatsoever without limitation in Trinidad and Tobago, any judgment or order obtained in Trinidad and Tobago or any other jurisdiction, against the Bank, its directors, officers, employees or any person acting on behalf of the Bank or appointed by the Bank under section 44D in respect of any act, omission, claim, fact or matter connected with or arising out of the acts or omissions of the Bank in respect of the institution, until the publication of a notification under section 44G(1) in relation to the institution;

12. The appellant contends that the Trial Judge erred in law in finding that Section 44E (5) (c) of the Central Bank Act did not apply. It contends that the Trial Judge erred in not considering the decision of Rahim J in **Myron Rudder (trading as "Myron Rudder Agencies"); Barbara Kanhai (trading as "St. Clair Financial Services") v The Attorney General of Trinidad and Tobago, H.C.5129/2012, CV.2012-05129** that any unconstitutionality in relation to the Central Bank Amendment Act related only to matters existing at the time of the passing of that Act and not matters such as the instant one filed subsequently. As far as that contention is concerned the respondent contends that the Trial Judge referred to paragraph 30 of the decision of the Honourable Boodoosingh J (as he then was) in **Stone Street Capital v The Attorney General H.C. 4383/2012, CV.2012-04383** and in particular to an alleged concession that Section 44E (5) (c) of the CBA did not apply to judicial review actions. The appellant contends that that concession bound no one since **Stone Street** itself did not involve a judicial review. The issue is whether or not it is arguable that Section 44E (5) (c) applied to debar the instant action.

13. Whether the alleged concession was binding or not, or whether it was obiter, or whether it was even relevant in the **Stone Street** matter to the decision before Boodoosingh J, it was indicative of the possibility of an argument that i. section 44E (5) (c) on its proper

construction did not apply to actions for judicial review and therefore ii. did not exclude them.

14. In the instant case therefore,

i. the issue of whether the Honourable Boodoosingh J as he then was, was in error when he failed to consider **Myron Rudder,** (another decision by the High Court), and its implications,

ii. the fact that the decision of Boodoosingh J in **Stone Street** is under appeal,

iii. the effect of the alleged concession,

iv. the fact that there had been no definitive decision by the Court of Appeal or any higher court on the constitutionality of Section 44E (5) (c) or the CB Amendment Act as a whole at the time of his decision; and

v. the applicability of Section 44E (5) (c) specifically to actions for judicial review, (even assuming the constitutionality of the Central Bank Amendment Act),

are all matters that remained arguable. Consequently, the arguability of this issue is one which could not have been determined at that stage to be without a realistic prospect of success. Leave for judicial review would not have been precluded on the basis of that section.

Undue Delay

15. **Fishermen and Friends of the Sea v Environmental Management Authority & Ors [2018] UKPC 24 delivered 1 October 2018**

Issue (i) - Delay

21. Section 11 of the Judicial Review Act, headed "Delay in applying for relief" provides:

*"(1) An application for judicial review shall be made **promptly** and in any event **within three months** from the date when grounds for the application first arose **unless** the Court considers that there is **good reason** for extending the period within which the application shall be made.*

*(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been **undue delay** in making the application, **and** that the grant of*

*any relief **would cause substantial hardship** to, or substantially **prejudice the rights** of any person, or would be **detrimental to good administration**.*
*(3) In forming an **opinion** for the purpose of this section, the Court shall have regard to the time when **the applicant became aware** of the **making of the decision**, and may have regard to such other matters as it considers relevant.*
*(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other **decision**, the date when the **ground** for the application **first arose** shall be taken to be the date of that judgment, order, conviction or decision."*

*22. Rule 56.5 of the Civil Proceedings Rules ("Delay") lays down a similar set of tests, but with a somewhat different emphasis. Mr Knox QC for the Authority sought to explain the differences by reference to the history of the respective provisions. The Board finds it unnecessary to consider those points. It is clear that, in so far as there are differences, the Judicial Review Act must prevail over the Rules. It is important to emphasise that there is a duty to act "promptly" regardless of the three-month limit. It seems also that the purpose of that specific limit is to provide a degree of certainty to those affected, and accordingly that strong reasons are needed to justify extending it where other interests, public or private, are involved. It is also clear that the **discretion** under section 11(1) **is that of the trial judge**, with which an **appellate court will only interfere** if it finds some **flaw in his reasoning** (see Fishermen and Friends of the Sea v Environmental Management Authority [2005] UKPC 32).*

26. There is no doubt that the application for leave was out of time, even if by only a few days, as the judge rightly held (para 31). Section 11(4) makes clear that time runs from the date of the relevant decision itself, whether or not that has been publicised or the applicant has notice of it. Section 11(3) indicates that such matters may be relevant to the exercise of discretion in deciding whether there is good reason to extend time.

*32. The Board doubts that it is appropriate to apply stricter standards to public interest litigators than to others, and it recognises the need to take account of the limited resources that may be available to them. However, it agrees that full weight must be given to all aspects of the public interest, that respect must be paid to the time-limits laid down by the rules, and that **the real substance of the complaint should be identified** with reasonable precision at an early stage. The latter is important both for the court, and in fairness to the respondent who is entitled to know the case against him so that he can respond to it.* (All emphasis added)

16. The appellant contends at ground 2 of the grounds of appeal that on a proper construction of the CB Act, the Judge ought to have found that the appellant with the agreement of the Minister of Finance, had since 2015 directed the sale of the CLICO and

BAT portfolios and that the Board of Directors of CLICO and BAT had the power to manage their affairs in conformity with directions of the appellant and the Minister of Finance. In fact, the trial judge's analysis of the structure of the CB Act confirms the possibility of an alternative construction, namely that the Minister's approval was required.

17. The trial judge found that a statutory basis existed for the exercise by the Central Bank of its power to recommend the transfer of the TIPs to SAGICOR, as well as for Ministerial approval of that recommendation. The statements by the Minister at the press conference which the trial judge referred to also contemplated Ministerial approval and that he would not function as a mere rubber stamp. It was therefore arguable on the material before the trial judge at that stage that Ministerial involvement was a precursor to the signing of the SPAs.

18. The Minister's public statement in October 2019 was to the effect that he issued no special directions. No special directions were required to deviate from the outcome of the commercial evaluative process conducted by OW when what was happening was that the evaluation made by OW, and reviewed by the Boards of CLICO and BAT, were accepted by the Central Bank, whose decision had to be approved and was then approved by the Minister after independent consideration.

19. The appellant contends, (at ground 6 of its grounds of appeal), that the matters giving rise to this challenge were known well before 30 September 2019.

20. It contends that the decision of the Central Bank to enter into SPAs with SAGICOR was made since August 2018 and made known to Maritime since September 2018. It therefore could have challenged the decision since that time and was guilty of undue delay in not so doing.

21. The respondent contends i. that it was not out of time in its application because it had been filed in November 2019, within weeks of the decision of the Minister,

ii. that the Central Bank's/OWs notification to it in September 2018 was only a provisional decision which could not be given effect until the Minister's approval had been obtained,

iii. that if it had attempted to apply for judicial review before the Minister's approval had been obtained it would have been met with an argument that any such application was premature,

iv. that the trial judge properly exercised his discretion in rejecting that argument as a bar to judicial review and further properly considered that even if the time for filing judicial review had needed to be extended he would have extended it.

22. The trial judge on the evidence before him concluded in effect that it was arguable that the Minister's approval was being awaited prior to the announcement of the signing of the sale purchase agreements in contention. There being no date on the evidence as to the exact date when the Minister's approval had been obtained, it could be inferred that his approval was obtained subsequent to the Press Conference in March and that the date of the Minister's decision affirming the decision of the CB would have been sometime shortly before the signing of the SPAs in September 2019. In those circumstances the application by the respondent, MARITIME, for judicial review was not out of time because it was within three months of the most likely date of the Minister's decision[3].

23. This is supported by the evidence. At the date of the Minister's press conference, it was clear that no approval had yet been given by him to the sale. In a newspaper report dated September 25 2019 in the Daily Express it was reported the Central Bank had indicated that it had held discussions with the Minister and that there were no outstanding issues. The Daily Express article referred to the first respondent's deep concern at the continued delay in the sale of CLICO and BAT portfolios. This suggested that the cause of the delay

[3] Paragraph 39 of the judgment

from the perspective of the first respondent lay with the Minister. This suggested that as at 25 September no decision had been made by the Minister. However, given that the SPAs were executed on 30th of September 2019 and that the execution of the SPAs required the approval of the Minister, it suggests that somewhere between the 25th and the 30th of September the Minister's approval had been obtained.

24. The decision of the Central Bank to enter into the SPAs was made by the Central Bank since August/September 2018 since the respondent was the only other bidder and it had been notified that its bid was not accepted. It is however also clear that that decision could not be given effect unless it were approved by the Minister. The possibility of an effective veto of that decision therefore remained until approval from the Minister had been received. It was reasonable to infer from the chronology above that the Minister's approval had been received shortly before the SPAs were executed.

25. In any event the trial judge himself indicated that as a matter of discretion he would have extended the time for the filing of such an application. There is no basis for concluding that if he had made such a decision that it would be plainly wrong such as to be reviewable by an appellate court on this basis.

26. While the Central Bank made a provisional decision in August/September 2018 there was evidence before the trial judge that a **final** reviewable decision came into existence shortly before the execution of the SPAs in September 2019. Accordingly on the issue of delay the trial judge's analysis and conclusion, which mirrored that set out above, could not be faulted.

Alternative Remedies

27. At Ground 7 of its grounds of appeal the appellant contends that the Trial Judge disregarded the fact that the applicant MARITIME had an alternative remedy under Section 84 (2) of the Insurance Act and Section 205 thereof.

> *84. (1) A company shall not transfer or amalgamate any class of its insurance business, either in whole or in part, to or with the insurance business of any other company, except in pursuance of a scheme— (a) prepared in accordance with this section and with sections 85 to 87; and (b) confirmed by the Central Bank.*
> *(2)* ***An application for the confirmation of a scheme*** *shall be made to the Central Bank by or on behalf of any company engaged in the transfer or amalgamation, and an application with respect to any matter connected with a scheme or a proposed scheme may be made at any time before it is confirmed,* ***by any person*** *who, in the opinion of the Bank, is* ***likely to be affected*** *by the scheme or the* ***proposed scheme****.*
> *(3) Where an application is made under subsection (2) the Central Bank shall set a date not less than two months from the date of the application for the hearing thereof.*
> *(4) At the hearing of the application the company is entitled to appear and to be heard either through one of its officers or through an Attorney-at-law; the Central Bank may hear such other evidence as the Bank considers necessary and any person who, in the opinion of the Bank, is likely to be affected by the scheme is entitled to be heard.*
> *(5) A company which is aggrieved by the refusal of the Bank to confirm a scheme may appeal against the decision in the manner specified in section 205.*
> *(6) On an appeal the Court of Appeal or the Judge in Chambers may— (a) confirm or reverse the decision of the Bank, or (b) confirm the scheme subject to such directions and conditions as may be considered necessary.*
> *(7) In the case of a foreign company the provisions of this section shall apply only to the transfer or amalgamation of insurance business relating to its policies in Trinidad and Tobago.*
>
> ***205.*** *(1) Except where otherwise provided by this Act or the Regulations****, an appeal shall lie*** *to a Judge in Chambers from* ***any decision****, direction, refusal, ruling or order* ***of the Central Bank*** *given or made under this Act.*
> *(2) An appellant may, within fifteen days of the receipt of the notification of the decision, direction, refusal, ruling or order of the Central Bank, file with the Registrar of the Supreme Court, an appeal against such decision, direction, refusal, ruling or order, setting forth the ground of appeal.*
> *(2A) Notwithstanding that an appeal lies under this Act or under the Regulations from any decision, direction, refusal, ruling or order of the Central Bank, such decision, direction, refusal, ruling or order shall be binding upon the appellant unless, on an* ***application*** *made to a* ***Judge in Chambers*** *for the grant of an injunction before the determination of the appeal, the Judge is satisfied that circumstances exist that warrant the stay of any further action by the Bank and grants an injunction to the appellant on such terms and conditions as the Judge may direct.*

(3) Where a Judge grants an injunction under subsection (2A)—
(a) no further action may be taken by the Central Bank in respect of any decision, direction, refusal, ruling or order to which the injunction relates; and
(b) the injunction shall have effect—
(i) unless otherwise revoked, varied or suspended by the Court, before any proceedings to which the appeal relates, are concluded; or
(ii) until the Court determines the appeal, whichever is earlier.
(4) On an appeal the appellant and the Central Bank as respondent may appear personally or be represented by an Attorney-at-law or by any other person.
(5) ***An appeal*** *from the determination by a Judge in Chambers shall be to the* ***Court of Appeal*** *the decision of which shall be final.*
(6) On an appeal a Judge in Chambers or the Court of Appeal, as the case may be, may confirm, reverse or vary any decision, direction, refusal, ruling or order made or given by the Central Bank. (All emphasis added)

28. The respondent contends that those sections do not apply to MARITIME in that MARITIME is not a person affected by any proposed scheme under section 84 (2). Rather it was a person who is contending that it was not afforded the opportunity to participate in a process that would have resulted in the vesting in it of the TIPs of BAT and CLICO. Any proposed schemes by SAGICOR could therefore affect it only in the most indirect manner. In any event those sections would not provide an effective remedy to it in that the very party who would be determining the objection to it of a proposed scheme would be the Central Bank which in this case is seeking to strike out its claim as being one with no realistic prospect of success. It contends that Central Bank being the decision maker whose decision it is challenging, could not realistically and logically be considered to be a party in respect of whom it could secure effective relief under Sections 84 or Sections 205. The trial judge upheld the respondent's contentions at paragraph 46- 48 of the judgment concluding that they did not extend to or address a re-evaluation of the bidding process and the approval process by the CB or the Minister. This construction of those sections was clearly correct.

Material non-disclosure

Non-disclosure agreement

29. Reference was made to anonymously delivered documents. While the applicant contends that those documents were in breach of the non-disclosure agreement signed by MARITIME, and therefore reference to them should not be permitted, the trial judge rejected that submission. He considered that those documents were not documents that were provided to MARITIME by the Central Bank or through the tender process or in the course of discussions, and therefore the Non-Disclosure Agreement (NDA) would not have been breached. That was not an illogical construction of the NDA.

30. The only issue of substance that remains therefore is whether the decision, despite its commercial nature, was one which was amenable to judicial review at all.

Whether the commercial nature of the decision rendered it not amenable to judicial review

31. Because all of the appellant's procedural objections diminished in significance, the issue that is determinative of this appeal is whether, given its commercial nature, the decision which the applicant sought to impugn was amenable to judicial review at all such that it could be concluded that it had raised an arguable ground for judicial review with a realistic prospect of success.

Chronology

32. As identified in the factual background set out by the trial judge and reproduced above an international firm OW had been retained to conduct the sale process[4] (including the evaluation of bids by both SAGICOR and Maritime. In August 2018 OW had provided its recommendations to the Boards of CLICO and BAT. The CB approved the choice of those Boards that SAGICOR be selected as the preferred bidder[5]. By letter dated 10 September 2018 OW informed Maritime that its bid had not been selected but requested it to keep

[4] in October 14th 2015 – affidavit of Andrew Ferguson filed November 20th 2019 paragraph 18 page 63 core bundle)
[5] (Paragraph 32 of the affidavit of Hillaire filed January 10th 2020 page 99 core bundle).

its bid open for six weeks in the event that negotiations with the preferred bidder were unsuccessful.

33. In the Central Bank's Court report for the quarter ending 30 September 2018, it stated that a preferred bidder had been selected. In its annual report dated 26 August 2019, it stated that, "in the upcoming fiscal year SPAs are expected to be signed"[6], (Exhibit AH3).

34. The Central Bank Governor deposed at paragraph 38 of his affidavit that;

> *"Thus, it became a matter of public record and was duly brought to the Applicant's attention that the SPAs were approved by the First respondent since the last quarter of 2018, as set out in the First respondent's Court Report for the quarter ending 31st December 2018 in the following terms:*
>
> *"CLICO and BAT received a number of updated bids from interested parties based on the more recent assumptions and data. These bids were evaluated having regard to updated independent valuations and a **preferred bidder** was **identified** and informed. The legal teams of the respective parties have reached a consensus on the terms of the **Sale and Purchase Agreements** and, pursuant to section 44F (5) of the Act, consultations between Central Bank and the Minister of Finance on this issue are ongoing".* [All emphasis added]

35. The respondent contends that notwithstanding that it knew that it was not the successful bidder it would have had no reason to believe that anything had gone wrong with the bidding process. It first became aware of a large disparity between the price offered by the preferred bidder for the portfolios, and the price offered by it, when the Minister of Finance at a press conference on 29 March 2019 revealed that the preferred bid was $300 million dollars less than the only other bid. It issued a letter on 10th April 2019[7] identifying potential grounds of challenge.

The Central Bank Act

[6] (page 74 core bundle, paragraph 50 of the first Ferguson affidavit

[7] Exhibit AF 32

36. It is necessary to consider the chronology of the matter and the nature of the **decision** that the respondent has sought to challenge. It is particularly necessary that this be done in the context of the statutory framework of the Central Bank Act. This exercise was conducted by the trial judge at paragraphs 20 to 28 of his judgment.

> "20. Section 44D of the Act statutorily gives the Central Bank the following powers in the following circumstances, which apply in this case as a result of and consequent to the MOU:
>
> *"44D. (1) Where the bank is of the opinion-*
> *(a) That the interests of depositors, creditors, policy holders or members of an institution are threatened;*
> *(b) That an institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment; or*
> *(c) That an institution is not maintaining high standards of financial probity or sound business practices,*
> *the Bank shall, in addition to any other powers conferred on it by any other law, have power-*
> *(i) to investigate the affairs of the institution concerned and any of its affiliated institutions and to appoint a person or persons for that purpose.*
>
> *(ii) to such extent as it thinks fit, to assume control of and carry on the affairs of the institution and, if necessary, to take over the property and undertaking of the institution;*
>
> *(iii) to take all steps it considers necessary to protect the interests, and to preserve the rights of depositors and creditors of the institution;*
>
> *(iv) to restructure the business or undertaking of the institution or to reconstruct its capital base;*
>
> *(v) to provide such financial assistance to companies which carry on the business of banking or business of a financial nature as licensed under the Financial Institutions Act, as it considers necessary to prevent the collapse of the institution, other than an insurance company regulated under the Insurance Act or a society registered under the Co-operative Societies Act;*
>
> ***(vi) to acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the institution, at a price to be determined by an independent valuer;***
>
> *(vii) to appoint such persons as it considers necessary to assist in the performance of the functions conferred by paragraphs (i) to (vi);*

(viii) to ensure that each member of the Fund established under Part VB maintains high standards of financial probity and sound business practices and for that purpose to examine and supervise the operations of all member institutions and stipulate prudential criteria to be followed by the institutions as it may deem necessary.

(2) The powers of the Bank under subsection (1) shall not be exercised unless the bank is also of the opinion that the financial system of Trinidad and Tobago is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers." [Emphasis added]

21. Once a decision is made to exercise these powers, Notice must be given pursuant to section 44 E as follows:

"44E. (1) Where the Bank proposes to exercise powers under section 44D (i)(ii), it shall publish in the Gazette and in such newspapers as it thinks appropriate a notification to that effect.

(2) The notification shall state-

(a) the property and undertaking it proposes to take over;

(b) the powers to control it proposes to exercise, and shall give such particulars as the Bank considers necessary for the information of persons having business dealings with the institution.

(3) Upon the publication of the notification the property and the powers of control stated therein shall vest in the Bank.

…

(7) The Bank shall report quarterly to the High Court and to Parliament on-

(a) the proposals to restructure an institution in relation to which a notification has been published under subsection (1); and

(b) the progress of the proposals referred to in paragraph (a),

until a notification under subsection (5) (b) or section 44G (1) has been published in relation to that institution.

22. Notices were issued and gazetted in respect of CLICO and BAT on 13 February 2009[6]. Clearly, therefore, the property, powers and control of these two financial entities now vest in the Central Bank which also now has the statutory reporting duties referred to above.

23. Section 44F prescribes how the powers are to be exercised:

"44F. (1) Where the Bank has under section 44D assumed control of an institution, it may terminate or retain the services of any or all of the directors,

> *officers and employees of the institution and* ***the directors so retained shall manage*** *the affairs of the institution* ***subject****, however, to any* ***directions of the Bank****;* ***and no acts done or resolution, rules, bye-laws or decisions made or conveyances, transfers, assignments or instruments executed during such period relating to the business affairs, property, undertaking or management of the institution shall have effect unless they are approved by or are in conformity with the directions of the Bank.***
> *…*
> ***(5) In the performance of its functions and in the exercise of its powers under section 44D <u>the Bank shall comply with</u> any general or special directions of the Minister <u>and shall act only after</u> due consultation with the Minister.*** *[Emphasis added]*

37. The trial judge therefore concluded from those provisions that:

> *24. It is therefore plainly obvious that the Board of Directors of CLICO and BAT* ***are not free to make decisions on a purely commercial basis*** *but they answer to the Central Bank who, in turn, can only act after due consultation with the Minister[7]. (All emphasis added)*

38. The more accurate position however is that nothing in the CB Act precluded decisions taken by the Boards of CLICO and BAT from being made on a purely commercial basis if in conformity with directions of the CB. However any such acts or decisions were subject to approval by the CB. In turn the CB could only act after consultation with the Minister and its own decisions were therefore subject to his approval.

39. The trial judge recognised that (in that same paragraph), '*Obviously, the Minister represents the GORTT and his ambit extends beyond the commercial decision making process into the realm of government policy and objectives. In like manner, the Central Bank's role is not purely a commercial one. It carries out the function prescribed under the Central Bank Act and does not have to answer to the financial institution's Board of Directors or shareholders but, instead, to the High Court and to Parliament.'*

40. However, he failed to fully consider whether there was anything on the evidence before him that suggested either a. that the evaluative process conducted by the international firm of OW which produced SAGICOR, as the preferred bidder was not a purely

commercial one, or b. that the role of either the Minister or Central Bank in this specific case extended beyond that commercial evaluative process.

41. Because his further reasoning on this matter goes to the heart of the appeal it is set out in full hereunder:

> *25. Of course, it must be expected that decisions taken by the Board of Directors of these companies would have a commercial impact upon the shareholders and the company itself but the duty of the Central Bank is to balance that commercial enterprise against the bigger picture of the* ***financial stability of the national community*** *and the* ***financial policy of the government*** *of the day. That was the reason for its involvement and intervention in the first place.*
>
> *26. The question that the court has to consider, at the end of the day, is who is actually making the decision – is it the Board of Directors of these companies or the Central Bank upon consultation with the Minister or, at the end of the day, is it the Minister alone?* ***If it is the Board of Directors, then it would be difficult to entertain a public law remedy against them.*** *However, quite clearly, their decision in relation to the tender process can only amount to a recommendation since the property and control of the two companies in question vest in the Central Bank. Therefore, the* ***decision-maker*** *cannot be the Board of Directors.*
>
> *27. Obviously, these different levels of decisions – by the Central Bank and by the Minister, with whom it must consult – involve decisions amenable to public law and public law scrutiny under the judicial review process. The decisions and considerations involve matters which exceed the commercial interests of the companies. The considerations are of a wider breadth, involving* ***systemic risk concerns****,* ***governmental finance policy*** *and the* ***overall public interest*** *in the Republic of Trinidad and Tobago.*
>
> *28. Consequently the court* ***rejects*** *the suggestion that the decision at hand is* ***a purely commercial one****. Instead, the court sees the several avenues for scrutiny which are open to it under the Judicial Review Act.* (Emphasis added)

42. The issue of whether judicial review is available in respect of decisions with a commercial element has engaged the attention of the local Court of Appeal in the cases of **N.H. International (Caribbean) Limited v Urban Development Corporation of Trinidad and**

Tobago Limited and Hafeez Karamath Limited[8] (NH) and most recently in **BK Holdings Limited; Central Equipment Rentals Limited; Bartholomew Transport Company Limited; Waste Disposals (2003) Limited v The Mayor, Aldermen, Councillors and Citizens of the City of Port of Spain; The Mayor, Aldermen, Councillors and Citizens of the City of San Fernando & Ors CA Civ P348/2019**.

43. At paragraph 47, 48 of **BK Holdings**[9] the Honourable Chief Justice considered earlier dicta (albeit obiter), of the Honourable Kangaloo JA in **NH** and agreed that a (commercial) tender process with no statutory underpinning would not give rise to public law rights. It would not therefore be amenable to judicial review. However even if a commercial process of decision-making did contain a statutory underpinning that would not necessarily make it amenable to judicial review.

44. The statutory underpinning and authority for the process for the sale of the TIPs and execution of the SPAs was clearly set out in section 44D of the CB Act. As analysed by the trial judge the intervention in that process by the CB was on the basis of the powers conferred by section 44. The engagement of OW and the formulation of the plan for the realization of CLICO assets commenced on the basis of sections 44D, E, and F. Its

[8] Civ. Appeal No. 95 of 2005

[9] *47. The leading Court of Appeal authority in this jurisdiction (upon which the Respondents relied) is **N.H. International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited and Hafeez Karamath Limited** ("N.H. International). In his very lucid and thorough analysis of the law, Kangaloo J.A. distilled the following guiding principles that still remain valid:*
a. A tender process without statutory underpinning does not give rise to public law rights;
b. The nature of a tender process undertaken by a governmental body is not changed by the governmental nature of the body. It is no different from the procedure adopted in ordinary commercial situations;
*c. **If the obligation breached in tender procedures is fairness**, that obligation **cannot be equated to the obligation of fairness of government departments** such as immigration and Inland Revenue to give rise to public law relief, because **tender procedures are rooted in the common law right to contract**.*

*48. In that case, Kangaloo J.A. opined that there was strong persuasive authority for the proposition that the lack of a statutory underpinning of the tender procedure deprived the appellant of a remedy in judicial review to challenge what was essentially a commercial dispute between the appellant and the intervenor.16 **The converse is not necessarily true, that is, statutory underpinning, by itself, is not dispositive of the question whether the tender process is amenable to judicial review.*** (All emphasis added)

authority to oversee the boards of CLICO and BAT, and to approve decisions/recommendations from those boards in relation to OW's recommendations, was also based on statute. Section 44 F (1) authorized its approval of the decision of those boards that SAGICOR be the preferred bidder. The necessity for approval by the Minister was derived from section 44F (5) of the CB Act.

45. Section 44F (5) enabled the involvement of the Minister from inception, requiring compliance with any general and special directions by him. It is therefore indisputable that statute required that the general process of inviting bids, evaluating those bids and selecting a preferred bidder, and approval of the preferred bidder, was subject to approval by the Central Bank. The execution of the SPAs was also subject to approval by the Minister. It therefore cannot be contended that there was no statutory underpinning to the selection process given the statutorily required approvals of the CB and the Minister.

46. The trial judge correctly recognised that under the legislation both the Central Bank and the Minister had macroeconomic responsibilities which extended beyond those more limited responsibilities of the Boards of BAT and CLICO.

47. However he failed to appreciate that though the CB and the Minister had important statutory roles in approving the recommendations of the Boards of CLICO and BAT:
    i. the process by which those recommendations had been arrived at were based on a commercial evaluation of **several** criteria;
    ii. that commercial evaluation was by an international **expert** retained for that very purpose;
    iii. that allegations of unreasonableness in a commercial tender process were not necessarily equivalent to unreasonableness in public law, the latter of which may be amenable to judicial review, but not the former;

iv. there was no evidence that either the CB or the Minister had departed from the recommendations generated by that commercial tender evaluation process;

v. a purely commercial evaluative process for selecting the preferred bidder was not necessarily incompatible with those wider responsibilities which could have been catered for and built in to the evaluative criteria and the terms of reference for the bid itself;

vi. he had before him undisputed evidence of the evaluative criteria which did in fact cater for matters beyond merely the price bid for the portfolio. Therefore the considerations that the trial judge reasoned would be taken into account by the CB and the Minister, and which he believed exceeded the commercial interests of CLICO and BAT, were in fact catered for in the evaluative criteria which were the basis of the commercial evaluative process by OW. For example the second evaluative criterion was "avoid undue financial system risk".

Whether the decisions of the CB or the Minister are amenable to Judicial Review

48. The appellant contends however, that despite that statutory underpinning, the selection of SAGICOR as preferred bidder was a purely commercial decision based upon expert evaluation undertaken by independent experts OW after a valuation had been commissioned by another international expert TW. It therefore contended that despite their statutory roles in approving the expert commercially derived recommendations of OW, neither the Central Bank nor the Minister took any decision reviewable on Judicial Review.

49. The respondent contends that the exercise of emergency powers by the Central Bank was the subject without challenge of an appeal to the Privy Council in the case of **Gulf Insurance Limited v The Central Bank of Trinidad and Tobago [2005] UKPC 10** which similarly dealt with the intervention by the Central Bank under emergency powers which predated those in the CB Act in the instant case. However, in Gulf Insurance there was no interposition of a purely commercial process. The Central Bank had itself taken action

directly and had breached the statute by not obtaining a valuation before deciding to acquire shares in TCB at a price of $1 per share.

50. At issue therefore is whether **on the evidence** before the trial judge there was any prima facie basis for concluding either:

ii. that the statutory involvement of the CB was reviewable on the basis of illegality, irrationality, procedural impropriety, or unfairness.

ii. that the statutory involvement of the Minister was reviewable on the basis of illegality, irrationality, procedural impropriety, or unfairness.

The CB

51. The complaint against the CB was that it approved an unfair and discriminatory evaluation process which led to the selection of Sagicor as the preferred bidder. The allegation of unfairness and discrimination is based on a reconstruction that "*something must have gone wrong with the bidding process*", based on the discovery that its cash bid was $408M higher and its contention that anonymously supplied material revealed flaws in the evaluation process. In relation to that process conducted by OW the evidence is that the applicant participated and was given an opportunity to structure and submit its bid. In relation to its submission to OW procedural impropriety cannot be alleged on the evidence, as it had an opportunity to present its evidence.

52. The complaints by the applicant in this regard center around i. alleged flaws in the selection process and ii. allegations that evaluative criteria were not evenly applied to it which resulted in its compliant, and higher bid in monetary terms, not being selected.

53. Examination of these matters **as set out hereunder in detail**, based on allegedly unsolicited material supplied to the applicant anonymously, reveals that they are matters for the evaluator- and that their weighting was within its discretion. The application of those criteria and the reasonableness of those weightings is a matter of specialist

commercial expertise. An international expert firm was selected for the specific purpose of the evaluation process. The matters complained of in the commercial evaluative process conducted by OW were the outcomes of purely commercial evaluation and weightings based on expert discretions. They would be not reviewable as a matter of public law, even under the guise of public law unreasonableness. To paraphrase the dicta of the Honourable Chief Justice in **BK Holdings**[10], allegations of unreasonableness in a commercial tender process, based on contract, are not to be equated with unreasonableness in public law so as to give rise to any entitlement to public law remedies.

54. As recognised by the trial judge, the adoption by the Boards of CLICO and BAT of the OW recommendation of Sagicor as the preferred bidder, without more, would not alter the fact that it was the outcome of a commercial evaluative expert process and it would be difficult to have entertained a public law remedy against them. Without more, the involvement of the CB in adopting that very recommendation could not be reviewable as a matter of public law.

The Minister

55. Similarly, the acceptance by the Minister of such a commercially derived recommendation without more, could not be reviewable as a matter of public law.

56. In the case of the Minister, it is contended that he took into account matters revealed by him at a press conference in March 2019, in relation to which the applicant was not afforded an opportunity to respond. However the evidence on the application before the trial judge was that the Minister had not in fact taken any decision as at the date of that press conference but was simply putting forward the arguments against, as well as in favour of the applicant's bid. In fact, the evidence suggests that no decision was taken by

[10] Civil Appeal No. P348 of 2019

him until September 2019 and this was the basis on which the claim was found not to have been barred by undue delay.

Matters that could be revealed on discovery

57. It was also contended that:

i. until discovery had been provided in the JR process one could not say that there was in fact no ground of challenge directly attributable to the actions of the Central Bank or the Minister, and,

ii. that it was enough to show at this stage that prima facie something had gone wrong that required explanation.

58. The applicant submitted that the material that it put forward raised sufficient questions that required explanation as to why its higher, compliant bid had not been accepted. It reserved the right to add to its grounds based upon material supplied in the further course of proceedings. However, it first had to cross the threshold of arguability on the evidence it presented to the Court in order to obtain leave. If it did not then it could not rely on the speculative possibility that such material would be unearthed in the course of further proceedings. (See **Sharma v Brown Antoine)**.

59. i. On the evidence and material before the trial judge there was **no basis** to challenge the decision of the CB or the Minister to adopt the recommendations of OW arrived at in an expert commercial evaluative process in which MARITIME had participated. Matters of weight and interpretation of the criteria were a matter for the expertise of the expert appointed. It would be inappropriate and beyond the expertise of a court to review those matters.

ii. It would also be impermissible to allow a judicial review public law challenge to a tender evaluation by an international expert, - a private law contractual matter.

iii. It would also be wrong as a matter of law to grant leave for such a challenge in the speculative expectation that the basis for a public law challenge may be unearthed in the course of proceedings.

For those reasons the trial judge was wrong to grant leave and leave should have been refused.

60. The issues of unreasonableness that were raised in relation to the evaluation of the bids were not matters directly attributable to the Central Bank except insofar as it may have approved recommendations from OW. The respondent contends that those recommendations were tainted by unfairness, inequality of treatment, or unreasonableness. Upon examination of the material presented as set out hereunder those allegations are simply not supported, even on a prima facie basis, and do not pass the required threshold of arguability.

Tender/ Evaluative Process – Whether tainted by alleged irregularities

61. The matters which it is alleged demonstrate, on a prima facie basis, that something went wrong with the bid evaluation process include inter alia:

i. **the disparity in the price bid** for the TIPS. Maritime's bid was allegedly $400 million dollars more than that of the preferred bidder.

ii. the suggestion was made that based on anonymously supplied information **conditional bids** for part of the portfolio were received from SAGICOR although MARITIME had been allegedly informed that **no conditional bids** would be entertained. If it had been told this it might have structured its bid differently[11]. This allegedly amounted to discriminatory treatment.

iii. Maritime raised issues of **ability** by the preferred bidder to **finance acquisition** at the time the bid had been submitted. This was based on its contention that the TIPS were to be invested in a newly incorporated local company which by definition could not have satisfied any **prior** due diligence criteria as it would not have existed.

iv. No prior due diligence had been required with respect to SAGICOR or its intended locally incorporated subsidiary.

[11] See paragraph 17 Affidavit of Ferguson page 35-core bundle.

v. No due diligence was performed on MARITIME to allow it the opportunity to satisfy any concerns that the Minister may have had.

62. The matters identified arose in the process of a commercial evaluation of bids by an independent expert. That independent expert notified MARITIME that it was not the preferred bidder. It was hardly likely that it would have notified MARITIME of that fact if its own recommendation had been to the contrary. The evidence of Dr. Hilaire was to the effect that the intervention of the Central Bank in the restructuring of CLICO and BAT arose out of a significant threat to the financial system of this country which required government support to the extent of billions of dollars[12]. The management of this crisis extended over several years and the sale of the TIPS was an important element in that management. The decision as to the preferred bidder had to be made carefully. The appointment of international expert OW was intended to address the need for transparency and expert involvement in that important decision making process.

63. When the evidence proffered on the complaints is examined to determine what is the precise complaint being made about the Central Bank's decision-making process it reveals that the arguments in relation to the bid evaluation process attempt to question the commercial evaluative exercise conducted by OW in which MARITIME fully participated. There is no assertion that the Central Bank did anything other than accept the recommendation of OW that SAGICOR, despite the disparity in price bid, be the preferred bidder for both the BAT and CLICO TIPs.

64. The evidence was that price was one of several factors that had to be considered. A court can address unfairness in procedures by a public body in the case of illegality, irrationality or procedural impropriety or where there is a breach of duty of fairness. The adoption by the Central Bank of OW's commercial evaluation of SAGICOR as the preferred bidder

[12] (Twenty Three Billion dollars according to the Minister at the press conference, over 2 billion pounds, - a significant portion of this country's GDP and a very sizeable amount in relation to this country's average annual budget.).

does not by itself raise any arguable grounds for judicial review. It is not sufficient to allege that there may be further reviewable grounds in relation to that approval by the Central Bank if leave were to be granted. There must first be a prima facie ground of reviewable action on the part of the CB - an arguable ground with a realistic prospect of success. In relation to the CB it had to be demonstrated that the process was actually flawed resulting in discrimination and unfairness to MARITIME.

The Criticisms of the Tender/Evaluation Process

The evidence with respect to these allegations is set out hereunder:-

65. The respondent from paragraph 32 of the affidavit of Ferguson described its bid for the TIPs. It contends that its combined bid for the portfolios came **to four hundred and eight million dollars** more than SAGICOR'S. At paragraph 33, it indicates that its bids were expressly **unconditional** in accordance with the express bidding requirements. At paragraph 34 it indicates that it targeted a **capital adequacy ratio** of one hundred and seventy five percent which was above the proposed minimum requirement of one hundred and fifty percent in the Insurance bill. At paragraph 35, it indicates that in its bid it detailed its sources of capital and in the event of a successful bid it would submit the necessary filings. At paragraph 36 it indicates that it had been confirmed to it by Mrs. Chong Tai Bell that **once the best bid was selected** due diligence relating to the bidders' financial and other capabilities will then be carried out. It complains that that process of confirming capital adequacy, insofar as it was supposed to take place after the selection of the preferred bid, was inadequate in that any choice of bid based upon capital adequacy, (which had not been confirmed by due diligence), would have been reached in an uninformed and unfair way. It complains that at the end of the second round of bidding it had been the only remaining bidder but yet bidding proceeded to a third round.

Capital Adequacy Ratios

66. Even if these were matters upon which MARITIME'S bid had been ranked lower than that of SAGICOR, assessment of price and **capital adequacy ratios** required within the tender

process was a matter for commercial weighting within the expertise of the evaluator Oliver Wyman. It is not a matter the reasonableness of which can or should be pronounced upon by a court.

Due Diligence

67. The stage at which these would be confirmed by due diligence was also a matter of commercial determination. Saving the expense of prior due diligence with respect to several bidders, all but one of whom was destined to be unsuccessful, is not on its face irrational.

The anonymously supplied documents

Unfairness – whether any requirement that bids be unconditional unevenly applied

68. At paragraph 65 of the Ferguson affidavit he refers to document AF43. The applicant contends that SAGICOR's **Binding Offer** letter of 30 April 2018 was their third round bid for the BAT portfolio. The letter allegedly revealed that their offer was **not unconditional** despite the express prohibition of conditional bids in the bidding requirements. The respondent seeks to rely upon the statements in the letter as follows: "SAGICOR Life undertakes to act in a timely manner. In addition to the conditions of the Mandatory Approvals and acceptance of the attached SPA, our BO [**Binding Offer**] for the BAT portfolio is subject to winning the CLICO portfolio. Should we not be successful in winning the CLICO portfolio we would not be interested in the BAT portfolio. It also refers to statements made on the following page of the letter under the heading, "Other Matters". *"Although the seller views the bids for the CLICO and BAT portfolios as being distinct, we are interested in both portfolios and would not proceed with the bid for the BAT portfolio if we were not successful with the CLICO bid. The combined assets to be transferred from the seller to us would reduce by TT $73,000,000 million dollars. Specifically if we were awarded both portfolios the combined release of assets to the Seller would increase from $277million to $350 million."*

69. He contends at paragraph 66 that this letter provided a **binding** but **conditional** offer of *$527 million dollars* for BAT. This meant that SAGICOR Life not only imposed conditions on its BAT offer but also failed to provide a fixed price for the CLICO and BAT portfolios and instead provided offers that were flexible up to the limit of $73 million dollars. He contends that this was contrary to the express bidding requirements and it operated to the unfair disadvantage of the applicant.

70. It appears that its bid for BAT was structured on the basis of its acquiring both portfolios were it to have secured approval of its bid for **both** the CLICO and BAT portfolios. However, its binding offer, so structured, was not subject to any additional conditions other than the mandatory approvals.

71. The issue of whether the **bid was unconditional** and whether that was a **requirement of the process** was responded to by Dr. Hilaire at Paragraph 61 of Affidavit sworn 10th January 2020 (page 106 core bundle) as follows: "the condition" referred to in the "instructions to bidders" referred to conditions that affected the **operationalization** of the offer. He suggests that the word "*conditional*" referred not to a party's **ability to structure its bid** by linking its price to whether or not it received both portfolios, but rather to the issue of whether a bid was made **subject to an additional completion requirement** stipulated by the bidder, in other words, whether the bidder was not in fact making an actual final bid. The former was simply a matter of structuring the bid. The question of whether SAGICOR was permitted to make a conditional bid, but MARITIME was not, therefore depends upon the very specific and limited interpretation of the word "conditional bid" propounded by MARITIME. It depends upon acceptance of MARITIME's own subjective interpretation of "conditional bid" as meaning that it could not **structure** a bid that did take into account its desire to acquire both portfolios at the same time.

72. Dr. Hilaire's suggestion is supported by paragraph 26 (3) of the Ferguson[13] sworn 20th November 2019 which indicates that the third round bidding instructions required an explicit statement that the **binding offers** were **not subject to any condition other than** obtaining the necessary authorizations and approvals from the competent authorities as required by Law (**the Mandatory Approvals**). To attempt to restrict the word condition so as to preclude a party from structuring its bid in the way that SAGICOR did is not borne out by the language of the instructions to bidders.

73. There is absolutely no reason on the evidence to believe that SAGICOR's bid did not contain that explicit statement. Further, that explicit statement does not relate to the **structuring** of the bids, so as to as to absolutely exclude the use of the word condition. Rather what was mandated was that the offers were not subject to any condition other than obtaining the necessary authorizations and approvals from the competent authorities, (**the Mandatory Approvals**).

74. He draws a distinction between a condition that prevented a binding offer from being implemented or "operationalized", and the simple use of the word "condition" in describing the offer that was being made. The bid by SAGICOR was **structured** to make it clear that it wished to acquire both the BAT and CLICO portfolios and that unless it acquired the CLICO portfolio it was not interested in acquiring the BAT portfolio. However there was no evidence presented that its bid for the CLICO and BAT portfolios was subject to any **conditions** which prevented that offer **so structured** from being accepted and given effect, or any conditions other than the Mandatory Approvals. What would be prohibited were any such additional conditions imposed by SAGICOR on the implementation of its offer.

75. Dr. Hilaire even suggests that the applicant itself chose to include a two-pronged proposal, namely a full bid proposal and a partial bid proposal, and that this was not

[13] Page 67 core bundle

construed as a conditional offer, making the point that the structuring of a bid was not precluded in the way suggested by MARITIME. Therefore any argument that the prohibition against a conditional offer related to not only the imposing of any **additional conditions prior to an offer coming into effect**, but also to any **structure** of the bid that was **conditional upon both portfolios being awarded** is i. simply not borne out on the evidence and ii. is too tenuous a basis for an overall review of the bidding evaluative commercial process adopted by Oliver Wyman.

76. The trial judge recognized at paragraph 54 of his judgment that essentially, the criticism of the merit of the applicant's case came down to what Dr. Hilaire described as a **sound bidding procedure and evaluation,** and the refutation of the applicant's allegation that SAGICOR's bid was a **conditional** one. He concluded that "Both of those factors are in contention and therefore it would be premature at present for this court to come to any finding as to the respective merits without a proper analysis of the facts at the substantive stage." However the trial judge ought to have equally recognized that the question of whether a **sound bidding process** and **evaluation** was contradicted by any of the material before the court even at that stage was an important aspect to be considered in determining the test of whether there was an arguable ground with a realistic prospect of success.

77. With respect to the question of whether the SAGICOR's bid was a conditional one it was not sufficient to simply consider that that was a factor "in contention" and therefore it would be premature for the court to come to any finding prior to a proper analysis of the facts of the substantive stage. The material that was available to the Trial Judge was sufficient for him to consider this argument.

78. That material was:

i) the instruction to bidders;

ii) the interpretation of that instruction;

iii) the terms of the SAGICOR bid, which were allegedly not in compliance with that instruction;

iv) Dr. Hilaire's alternative construction of the term conditional bid; and

v) Dr. Hilaire's example of MARITIME's own bid which on MARITIME's purported, propounded construction may equally have fallen afoul of the rigid and restrictive interpretation of "condition" put forward by it.

79. The question therefore of it being premature to come to any finding on the respective merits was erroneous. It was a matter that went directly towards arguability. It was a matter in respect of which the Trial Judge had fully appreciated and assessed the material that he had up to that point. However he erred in not considering:

i. that the resolution of those issues went directly to the heart of the issue of whether the complaints being made were in respect of a commercial decision making process with no public law element, (and therefore not amenable to judicial review at all), and further,

ii. that he was as well positioned at that stage to address those issues as he would be at the substantive hearing, (were he to grant leave), and,

iii. in not considering whether the complaints of unfairness and discrimination being made were even supported by the evidence presented so as to cross the threshold of arguability.

80. i. With respect to the allegation of unfairness in applying any requirement that bids be unconditional the evidence presented did not support this.

ii. The matters relied upon by the respondent all involved purely commercial matters outwith the ambit of judicial review.

iii. On the material presented there was no evidence that a sound bidding process had not been adopted and, in fact,

iv. The evidence presented suggested that one had been.

Evaluative Criteria - Price

81. From paragraph 53 of his affidavit Dr. Hilaire refers to the bidding procedure and evaluation. He sets out the 6 evaluative criteria at paragraph 55 as follow:

a) maintain the financial strength of the balance sheet backing policy holder benefits;

b) avoid undue financial system risk;

c) provide for sufficient ease of transition;

d) demonstrate credible commitment to bid and ease of completion of the bid;

e) achieve a competitive, fair transfer price that balances CBTT and policyholder interests, and;

f) preserve policyholder service levels.

82. He explains at paragraph 56 that while **price** was one of the six evaluation criteria upon which bids were holistically assessed there were other matters which he referred to that bidders were required to demonstrate, **including financial strength** to fulfil contractual obligations to CLICO and BAT policyholders. In fact, at paragraph 57 he confirms that price was the third consideration and other factors were rated higher. At paragraph 58, he notes that the CLICO portfolio was five times larger than the applicant's existing business and therefore it would require the applicant to expand its operations by a factor of five. At paragraph 59 he explained that with respect to market concentration this would be a risk with both MARITIME and SAGICOR because an award of the CLICO portfolio to SAGICOR would result in it having 43% of the market while an award to MARITIME would result in it having 37%. On his evidence, therefore market over concentration would not have been a distinguishing factor between the two bids.

83. Given the history of the matters which led up to the need for intervention, and the Minister's concern that the twenty-three billion dollars that was expended by the Government be recovered, MARITIME cannot contend that the fact of its higher bid was not being given appropriate consideration. It was expressly referred to by the Minister in his press conference and it was evaluative criterion (e). However there were six

evaluative criteria. Price was simply one. According to Dr. Hilaire it was not even the highest ranked criterion. It was the third. As to the issue of the ability of a company to manage the portfolio this was clearly being assessed in relative terms within a competitive evaluation process.

84. MARITIME itself had been invited to submit a bid. It was the only remaining bidder at the end of the second round. The fact that a third round was invited was explained by Dr. Hilaire at paragraph 21 of his affidavit. The reason included that the data used in the models had been based on 2014 year end data.

Minister's Decision

85. The evaluative process required a judgment call based on the tension between simply accepting the highest bid, and the assessment of the relative strengths, and abilities of the respective bidders to manage the portfolio and preserve policy holder service levels. The Minister himself made clear as of March 2019 no decision had been made.

86. On the evidence put forward by the respondent the concerns therefore expressed up to that point, based upon alleged inequality of treatment, related to the evaluative process and matters which were addressed under the six evaluative criteria. The evidence was that the Minister's decision confirmed the outcome of that commercial evaluative process.

87. Insofar as the March 2019 press conference was alleged to be indicative of factors that were taken into account by the Minister in approving SAGICOR as the preferred bidder,

i. it fails to recognize that SAGICOR was chosen as the preferred bidder on the basis of a selection process conducted after consideration of several evaluative criteria, by Oliver Wyman;

ii. that the recommendations arising out of that process were the result of the weighting of the evaluative criteria, a matter which was strictly commercial;

iii. that as at the date of the press conference no decision had been taken by the Minister;

iv. In any event that evidence demonstrated no basis for considering that the Minister had replaced the evaluative criteria utilized by Oliver Wyman and adopted his own irrelevant considerations; or that the Central Bank itself had done so;

v. The suggestion that even if no such matters were demonstrated at the stage of application for leave, upon discovery further irrelevant considerations might be revealed, is one that is simply not compatible with the authority of **Sharma v Brown Antoine**.

87. While a public authority is required to place all its cards on the table, and while a prima facie case of unreasonableness on the part of a public authority **sufficient to ground leave being granted**, may in the discovery process produce further material supportive of its claim, this is entirely different from a claim which **on the face of it** does not establish prima facie grounds of unfairness or unreasonableness which were arguable with a realistic prospect of success.

88. The prospect of further material becoming available upon discovery and the examination of the Minister's reasons upon the hearing of the substantive matter was therefore misconceived. On the material that was before the Trial Judge there was no evidence which stood up to scrutiny which revealed a prima facie arguable ground which had any realistic prospect of success.

The Anonymously Supplied Documents

89. Mr. Ferguson referred to these in paragraph 57 of his affidavit as supposedly supporting the respondent's contentions of unfairness and discrimination in the evaluative process.

90. At paragraph 60, he indicates that at least 3 of the above documents are pertinent to the applicant's claim for the reasons set out below. However, upon examination they demonstrate no such thing.

91. At Paragraph 61, he indicates that the draft BAT evaluation is undated and provides an analysis of the applicant's **second round bid** for the BAT portfolio submitted in July 2016. It revealed that the applicant was the only bidder to complete the second round bidding process for BAT portfolio and that of the four finalists chosen three companies withdrew from the final bidding. With respect to the draft BAT evaluation referred to this refers to the **second round bid** and not **the third round bid**.

92. The second concern arose from "*the corruption charges against the company and some of its officials, page 8*". Those charges had been dismissed by the time of the third round bid, and OW indicated that they had not even been aware of that matter.

Whether local entity

93. The question of whether SAGICOR is a local entity was raised at paragraph 68 of the Ferguson affidavit. However, he also notes that the entity holding the portfolios will be a local entity. While he contends that its financial strength was not and could not be assessed as part of the bidding process because it did not exist, the fact is that the bidding process was designed to evaluate that very matter. As he himself indicates, **SAGICOR Life** which was the bidder, was to incorporate the local subsidiary. It would be naïve to assume that an international expert evaluating bids would not have taken the financial strength of the parent and subsidiary into account and to assume that it ignored their importance, or to read into the limited selection of documents provided by Mr. Ferguson via the anonymous source, the deficiencies that he attempts to portray.

The Documents – BAT Board Note - Price

94. At paragraph 69 he refers to an undated board note exhibited at AF48. It addresses third round bids. That note apparently confirms that three bidders submitted third round bids, the applicant, SAGICOR Life and a third company. He quotes paragraph 2 of the Board note as follows:

> "*the evaluation criteria were assessed and <u>weights were assigned</u> to the ability to **maintain financial strength**, to provide **continued security to policy holders***

*and **the Bid Purchase price**, sufficient ease of transition and the **ability to complete** the bid were determined as the key factors in the evaluation. The aspect of avoiding undue financial risk was not assessed as the main consideration due to the size of the **BAT's portfolio**, but its importance was acknowledged and was weighted accordingly*". (emphasis added)

The Board Note therefore emphasizes that **weights** were being assigned to the respective evaluation criteria.

95. At paragraph 71, he quotes the Board Note as follows: - "competitive, **fair transfer price** that **balances** CBTT and policyholder interests was the most important criterion with a weighting of 3 points". Avoidance of undue financial system risk is given the lowest weighting of one point, and the four remaining criteria carried an equal weighting of two points.

96. It cannot be contended therefore that MARITIME's **bid price** was not considered. However, it was not the only factor. Therefore this being so, its higher bid price by itself could not demonstrate a basis for judicial review by a court.

97. Paragraph 72 of his affidavit is as follows:

"*Paragraph 5 sets out the board's own ranking of the bids. This was preceded by an indication that there was in fact a twofold evaluation; a standalone or independent evaluation and a separate evaluation on the assumption that CLICO accepted SAGICOR Life's bid*". This was because: *1) SAGICOR is not interested in acquiring the BAT portfolio unless they obtain the CLICO portfolio as stated in their **binding** offer dated April 30 2018 and 2) SAGICOR's bid price is improved by $73 million dollars if both portfolios go to SAGICOR.*

98. He contends that the fact that SAGICOR Life had **breached the bidding requirements** in this **fundamental** way and that the sellers and the first respondent were nonetheless willing to entertain this breach, was not disclosed to the applicant until it saw this document. His argument at paragraph 73, that by adopting the latter of the twofold evaluations, (separate evaluations on the assumption that CLICO accepted SAGICOR Life's bid), covert breaking of the rules in the bidding process occurred in favour of

SAGICOR. He contends at paragraph 74 that if the applicant had known that it could adopt a similar approach it would have framed its offer differently in order to ensure that the most competitive offers were put forward on its part.

99. As indicated above far too much emphasis was being placed by Mr. Ferguson on this alleged breach of the bidding requirements. On the material that he provides the prohibitive and restrictive interpretation of the word "*conditional",* tenuous as it is, would not be sufficient to justify a wide ranging search for alleged irregularities in the commercial evaluative process by an independent expert.

100. At paragraph 75 he notes that paragraph 5 of the Board Note sets out *"the results of the evaluation are:*

> *1)* ***standalone****/independent; MLCL (first) SAGICOR Life (second)*
>
> *2) Assuming CLICO goes with SAGICOR Life; SAGICOR Life (first) MLCL (second)…in assessing the three final bidders independently the Offer Price together with the bidders ranking in the other criteria, made MARITIME's bid most favourable as compared to that of SAGICOR and …(expressly here omitted). In the event that CLICO select SAGICOR Life as its preferred bidder, SAGICOR is recommended as BAT preferred bidder with MLCL coming in second…)"*

101. Clearly even from the limited material referred to, BAT's board considered that if CLICO selected SAGICOR Life as its preferred bidder, SAGICOR was recommended as BAT's preferred bidder with MLCL coming in second. It was only on a standalone basis that MLCL would be ranked first.

102. At paragraph 76 of the Ferguson affidavit he refers to appendix 2 of the Board note which set out **OWs evaluation** of the bids. He indicates that on their analysis *i. SAGICOR Life scored higher than the applicant on one criterion and lower on another*, ii. if SAGICOR Life's bid were successful further due diligence would be needed but iii. on the issue of fair transfer **price** MARITIME came out ahead. Tellingly, he does report that OWs

evaluation was that "SAGICOR's offer was "conditionally higher" but only if they also secured the CLICO portfolio.

103. The issue therefore of second-guessing the commercial evaluation by OW or the BAT Board is not an appropriate exercise for a court to conduct. The BAT board note does not establish unfairness. MARITIME's contention that the criterion relating to **conditional bids** was ignored to permit this and favour SAGICOR's bid was not borne out. As examined above there was no evidence that there was any pre-condition placed on the operationalization of SAGICOR's final bid for **both** portfolios so as to run afoul of the criterion. In fact, the evidence of Dr. Hilaire was that if MARITIME's restrictive interpretation was applied, MARITIME's own bid could have been precluded.

104. On its own evidence SAGICOR's offer was a **binding** offer, but **structured** to reflect the fact that it wanted to acquire both portfolios. However once its bid - so structured for both portfolios - was accepted, apart from Mandatory Approvals that had to be obtained, there were no additional impediments to its offer being considered final and implemented. Oliver Wyman itself confirmed to MARITIME that it was not the preferred bidder. As an expert international firm retained specifically for the process of evaluating bids it is hardly likely that it would have acquiesced in informing MARITIME that it was not the preferred bidder if this were a flagrant disregarding and disrespect of its own recommendations.

105. The Board of BAT is not a statutory body. Further as stated by the Honourable Archie CJ in ***BK Holdings,*** even unfairness in that process, (though not borne out on the evidence before the trial judge), is different from public law unfairness. The alleged breach by the Central Bank approving a flawed process must rely first upon establishing that the process adopted is in fact flawed. Nothing in those documents described establishes that the commercial process of evaluation by OW or the BAT board was flawed. Further, there is nothing to establish that the commercial process of evaluation by the CLICO Board was

flawed. The choices of those boards were approved by the Central Bank and there was no evidence otherwise, (see paragraph 32 of the affidavit of Dr. Hilaire in this regard).

106. It is clear that an examination of those materials would have revealed, confirmed and demonstrated that MARITIME was simply challenging a commercial evaluative process at the end of which it had not been successful. Any weighting of the evaluative criteria was a commercial decision. Such weighting cannot on the evidence be equated with any deliberate alteration of the evaluative criteria to the disadvantage of MARITIME. The reasonableness of their commercial evaluation is not a matter for judicial review.

107. Further, these matters were in evidence before the trial judge. Their examination was necessary to ascertain an arguable ground with a realistic prospect of success before proceeding to grant leave for judicial review. The approval of that process by the Central Bank, upon analysis, does not reveal any interference with that evaluative process. If the material put forward on the application for leave had been evaluated the trial judge would have recognised that it did not contain in substance any basis for a public law review of the contractually based commercial evaluation in a tender process conducted by OW, such as to render the choice by the Boards of CLICO and BAT, based on the OW recommendations, or the adoption of those choices by the Central Bank, reviewable in public law.

108. All that those documents, whether in breach of the NDA or not, revealed was i) a commercial decision making process, ii) a partial snapshot of the evaluative process, iii) SAGICOR being ranked as the preferred bidder once it had been equally selected by the CLICO Board as the preferred bidder, iv) MARITIME's higher bid being recognized as a competitive fair transfer price, but, v) that being only one of several other evaluative criteria. While MARITIME's attempts to suggest that the **bid evaluation** should have been more favourable to it, this is obviously a matter for expert commercial evaluation.

109. Mr. Ferguson complains of unfair and irrational conduct in the bidding process. However, the material that he supplied does not demonstrate any such unfair or irrational conduct of the bidding process. The evidence properly assessed without that misconception demonstrates simply **a competitive bidding process** with evaluative criteria which were evaluated by that international expert retained for this purpose by the boards of CLICO and BAT whose recommendations were considered by the Boards of **CLICO** and **BAT** and whose choices based thereon were **approved by the Central Bank** and subsequently **approved by the Minister of Finance.**

110. OW's recommendations did require i. endorsement and approval by the boards of CLICO and BAT ii. subsequent approval by the Central Bank, (which was required to report to the court on the process, and which it did at the end of 2018), and iii. the ultimate approval of the Minister. However, there was nothing to displace the assertion by the appellant that the decisions were the product of a commercial evaluative process conducted by OW concluded in September 2018. Upon examination, the statutory underpinning in this case is **separate** and **distinct** from the **commercial process** employed. The matters which it is alleged reflect **unreasonableness** in the process of evaluating the respective bids are commercial matters involving expert judgments as the respective weights to be attributed to the application of the evaluative criteria are not suited to judicial review.

111. It is clear therefore that the decision to enter into the SPAs with the preferred bidder is actually a challenge to the allegedly flawed process that produced the preferred bidder. It involved the sale of the traditional insurance portfolios of the two entities CLICO and BAT which were of substantial value. That process was a process engaged in by Oliver Wyman. It was a commercial process designed and/or administered by an international expert firm retained for that very purpose.

112. The concerns raised by the respondent as allegedly arising from the anonymously supplied documents all raised a suspicion that commercial matters in a commercial process undertaken by independent international experts are being challenged on public law grounds of irrationality and possibly procedural impropriety.

113. Such an examination of a commercial process, and evaluation by an expert which is a non-public body, resembles the situation adverted to, albeit obiter, by both the Honourable CJ and Justice of Appeal Kangaloo in **BK** and **NH,** respectively referred to previously. This concern is reinforced by paragraph 62 of the judgment of the trial judge.

114. The expertise involved in applying the appropriate weight to each of those factors resided in the appointed expert. The weighting of evaluative criteria in a commercial process cannot be second-guessed by a court which simply does not have equivalent expertise. While it can review processes in public law and examine them for unfairness it must be careful to recognise, (as in **NH** and **BK**), that unfairness in a commercial context must not be assumed to be the same as unfairness in a public law context. That fact is demonstrated by the need to have appointed international experts with the specialist knowledge required to evaluate bids for such an extensive portfolio. The need for expertise, independence, and transparency, was addressed by such an appointment. In this case, where the apprehended breach of a duty of fairness emanates from the commercial evaluative process of an international expert it would be inappropriate to import the public law concept of unreasonableness or unfairness into that process. The argument that the disparity in the bid price between Maritime and the preferred bidder raises the spectre of unreasonableness does not stand up to scrutiny on the evidence when that is but one of six evaluative criteria, and not even the highest weighted.

115. Further, upon examination of the complaint against the Central Bank it therefore resolves into a complaint of unreasonableness in the application of evaluative criteria, a matter of commercial weighting and assessment in a commercial contractual process by

an international expert. This is almost by definition not amenable to the public law remedy of judicial review.

116. Separate and apart from the fact that the decision is not one reviewable in public law the complaints made were not supported, even on a prima facie basis, by the evidence presented. In relation to the role of the Central Bank the evidence presented simply did not attain the threshold of arguability because no arguable ground of unfairness, illegality, irrationality, or procedural impropriety, with a realistic prospect of success had been raised. The evidence presented was not evaluated and addressed by the trial judge. If it had been then it would have been revealed that it did not support the complaints.

The Minister

117. In relation to the Minister it was also contended that his reported statements in the March 2019 press conference suggest that he took into consideration matters which rendered his decision to approve SAGICOR's bid reviewable as a matter of public law. However there is nothing in the evidence to suggest either the Central Bank or the Minister departed from the recommendations which had been made by Oliver Wyman or the choices made by the Boards of CLICO and BAT. For the reasons set out above the recommendations of OW and the process which gave rise to them are not amenable to the public law remedy of judicial review. The criticism was made that the Minister's own role in approving those recommendations was reviewable. The evidence presented of this needed to be examined to ascertain whether this was borne out on the evidence presented to the trial judge and/or whether it crossed the threshold of arguability.

Whether evidence that the Minister made a decision reviewable on judicial review

118. At paragraph 41 of the Ferguson affidavit he indicates that on the 29th of March 2019 the Minister of Finance at a press conference revealed that the preferred bid for the CLICO portfolio was three hundred million dollars less than the only other remaining bid. Because the statements reportedly made therein are being relied upon as allegedly

demonstrating matters taken into account by the Minster which render the decision by him to approve the preferred bidder reviewable as a matter of public law, they need to be set out in their entirety (from paragraph 34 to 37 judgment of trial judge)

The Minister's Press Conference on 29 March 2019

The Minister's Press Conference

On 29 March 2019, the Minister held a press conference that was reported in the Express newspaper on 30 March 2019[9] and the Newsday newspaper on 31 March 2019[10].35. The Express newspaper quoted the Minister as follows: "Asked what is the status of the sale of CLICO's traditional portfolio, Imbert said: That is under review. The traditional portfolio was offered to the local insurance industry and we have had a little glitch, whereby the company being recommended is the one that offered the lowest amount for the shares. And the thing is, I don't think people understand the role of a minister. As a minister, I have to protect the public interest."

"Although he said he did not want to say any more on the issue, when Imbert was asked if it would not be possible for the Government or the Central Bank to negotiate a higher price with preferred bidder SAGICOR, he said: "I must tell you that the difference between the low bid and the high bid is substantial, it's very large, $300 million. So I have to be very careful. And I mean, I don't know what my predecessors did, but I don't play with those things"…"No decision has been made by the Ministry of finance but a recommendation has been made by the Central Bank."

Asked if the Ministry of Finance was required to sign off on the transfer of the CLICO traditional portfolio to a third party, Imbert said: "There is also this mythology outside there – and I will go to that with the NCB matter – that the Minister of Finance and the Ministry of Finance has no role in all of this. We should just sit back and let everybody do what they want to do. That is not the case, especially when shares in financial institutions are being sold to foreign investors. The Minister of Finance has to issue a foreign investor's license (sic), has to approve it.

There is also the question of competition and monopoly and we have to look at what will happen in the market, where there is an over-concentration of insurance business of banking business in one company or conglomerate."

In the Newsday newspaper report, the Minister is reported as going on to say:

"So we in finance have to be very careful so even if we get recommendations from the Central Bank, my job is to protect the public interest. I am not a rubberstamp. I am very careful about what I do."

In response to a Freedom of Information Act application for information dated 23 July 2019 and accompanied by a letter from the applicant's attorney-at-law dated the same date, the Permanent Secretary in the Ministry of Finance confirmed that the minister never expressed his own preference for any bid but was expressing the views of others. He, however, confirmed that the Minister did in fact say that no decision had been made by his Ministry, his job was to protect the public interest; and he was not a rubber stamp.

119. At paragraph 42 Mr. Ferguson indicates that the MARITIME bid was actually closer to four hundred million dollars rather than the three hundred million dollars referred to by the Minister. He repeats the Minister's reported statements from an article in the Newsday newspaper dated the 30th of March 2019 which was exhibited to his affidavit and which was similarly reported in the Saturday Express on the same day.

120. At paragraph 44 of his affidavit he states that the Minister had confirmed that **as of the date of his statements no decision** by his Ministry **had yet been made** as to either of the sales. The reported statements are as follows:

> "*as a Minister I have to protect the public interest. **The argument** being made is the company that made the lower bid is a strong, substantial company and the risk of that company failing in the future is lower and the view is that we should go with the lower bid because it is being assigned to a very stable local company. The other view is that the other company is not as stable as the first one and won't be able to manage the portfolio and there would be a higher risk to policy holders. The Central bank (which has responsibility for the portfolio) is concerned about selling the portfolio to a company unable to manage it. I as the Minister have to be very careful. I have to protect the public interest and (get) maximum return for the country to make sure as much of that twenty-three billion dollars that was put out (is recovered). I won't want to say any more except that **no decision** has been made by this Ministry with respect to that matter.* (emphasis in bold)

121. From those reported statements it is clear that the Minister was simply confirming that i) as at that date **no decision** had been taken, ii) that there were arguments and counter arguments. The argument in favour of MARITIME was its three hundred million dollar higher bid. The counter argument that was being made, but on which he had made no

decision, was that the company which had made the lower bid was a strong substantial company and therefore the risk of that company failing in the future was lower. The view that was being expressed in favour of the lower bid is that the portfolio was being assigned to a very stable local company.

122. The statement referred to the view being expressed, (but clearly not by him because no decision had been taken), i. that the other company was not as stable as the first one and ii. that it would not be able to manage the portfolio, and there would be a higher risk to policy holders. The Central Bank was concerned about selling the portfolio to a company unable to manage it. **Financial strength** and **preserving policy holders' service levels** (terms which encompass stability, financial capability, and the ability to manage the portfolio), were among the **evaluative criteria**. With respect to the question of risk, **relative** assessments of the bidders in terms of their strength and their substantial nature were clearly commercial decisions given the evaluation criteria. It is also the very purpose for which evaluation criteria were being applied – to evaluate bidders who were able to manage the portfolio going forward without the risk of the need for Central Bank intervention under emergency powers at a future time.

123. That disparity in price was recognised and addressed by the Minister in his press conference in March 2019. The delay between the approval of the SPAs between March 2019 and September 2019 is consistent with i. the Minister's position that his approval would not merely be a rubber stamp, and ii. that the period between March and September 2019 was being utilized to carefully consider that tension between the highest possible price, and the need to ensure maximum stability in the management of the portfolio by the preferred bidder going forward.

124. A subsidiary argument was raised that insofar as the Minister may have raised in his press conference the issue of financial stability that this may have been a factor which informed the decision making process and subsequent decision and in respect of which

MARITIME should have been provided an opportunity to respond or be heard. It is clear that at the time of the press conference in March 2019, the recommendation of OW and the CB had not been fully considered by the Minister, who was then signalling his intention to do so. The evidence is that the Minister was indicating that he intended to examine matters including financial stability of MARITME, ability to manage the portfolio, and price, before giving his approval for any recommendation.

125. The evidence is that the evaluations and recommendation of OW were approved by the Boards of CLICO and BAT and approved in turn by the Central Bank and eventually approved by the Minister. There is no evidence of any special direction given by the Minister directing a departure from the recommendations of the Central Bank.

126. Apart from this being set out in the press release of the Minister in October 2019 the evidence is that any approval by him for the execution of the SPAs with SAGICOR simply accepted the Central Bank's own recommendations, disclosed since its report to the court for the last quarter of 2018.

127. The suggestion was made that the question of **financial stability** had been raised at that press conference and that Maritime had not had an opportunity to respond.

128. The trial judge treated with that material at paragraph 62 of the judgment.

> *62. The court has also taken note of the concerns raised by the Minister and his reasons for choosing SAGICOR as the preferred bidder based on its alleged greater stability. Of course, this is based on his judgment call which can only really arise out of an analysis and comparison of the financial and other standings of both bidders. The court would have to deeply consider these statements and the rationale given by the Hon. Minister for the override under the **privilege clause**, the **source and veracity** of the information upon which he relied to come to that decision and the obvious **procedural fairness** factors which arise as a result of that reliance. For example, since such an important emphasis was being placed on this issue of **stability**, was the applicant given an **opportunity to be heard** in relation to that particular element of the decision making process?*

129. The trial judge at paragraph 62 of his judgment appeared to take into account the concerns raised by the Minister and his reasons for choosing SAGICOR as the preferred bidder based on its alleged greater stability. This appears to be a reference to the Minister's statements in the press conference on the 29th March 2019, and in particular his reported statements at paragraph 42 of the affidavit of Andrew Ferguson filed 20th November 2019. (referred to at paragraph 119 above).

130. That assertion must be evaluated in light of the fact that i. no decision had been made at that time, ii. that the Minister himself was not advocating for either position but merely setting out the competing arguments being put forward to counter the fact that MARITIME's bid was on the face of it a higher one, and iii. even if they were subsequently considered by him prior to his actual decision, as addressed in detail hereafter, these were matters that were already addressed in the evaluative criteria utilised by OW in the commercial process it conducted, and in which MARITIME had participated.

131. To the extent that it was recognized that the Minister's judgment would be based upon his judgment call and that it could only really arise out of an analysis and comparison of the financial and other standings of both bidders, (i) there was no evidence to suggest that would have been based on any material other than that supplied by the applicant itself to OW as part of the evaluative process. It had the opportunity to put forward its own material on the matters being evaluated in the bid including financial strength and stability, (ii) it could not therefore complain about the **source or veracity** of that information,(iii.) on this appeal the **privilege clause** was not being relied upon as the basis of the recommendations or decisions.

132. The reference to the fact that the court would have to deeply consider these statements therefore overlooks the fact that:

i. all the necessary materials on the arguments to justify leave were before the court;

ii. if the court had looked at those statements by the Minister and the materials in support and properly analyzed them it would have appreciated that at the time that they were made a) no decision had been taken by him and b) that those statements did not reflect the Minister's own concerns;

iii. the rationale given by the Honourable Minister for the override under **the privilege clause** was not an issue being relied upon on the evidence; (and in any event on this appeal),

iv. Further as to the question of the **source and veracity** of the information upon which the Minister allegedly relied to come to that decision, there was no reason on evidence to believe, and in fact no evidence that the Minister utilized any material other than the recommendation of the Central Bank and the material that it was based upon.

v. Further the obvious **procedural fairness** factors which arise as a result of that reliance ignores the fact that 1) there is no evidence that any material other than the Oliver Wyman report was utilized and 2) there is no evidence that the material being utilized was other than that supplied by the bidders themselves, subject to subsequent due diligence to be conducted. (In fact Mr. Ferguson complains that the due diligence to be conducted was to occur subsequently), and that the evaluative process relied simply upon representations being made by the bidders). There is no evidence therefore that MARITIME can rely upon to demonstrate that it was not provided with an **opportunity to be heard** on the matters that went into Oliver Wyman's report. In fact it was required to make a submission which was evaluated on those very matters and it did so. The question of procedural fairness does not arise in relation to matters that were considered by Oliver Wyman and further considered by the boards of CLICO, BAT and the Central Bank. It does not arise in relation to this situation where there was no evidence that any additional matters or material were being considered. Even if the matters referred to by the Minister in his press conference were being considered, in fact questions of **financial stability** and **ability to manage the portfolios**, were all matters that were directly being addressed by the material required by Oliver Wyman, and which was evaluated by it.

vi. there is no evidence that the Minister utilized the privilege clause to override or overlook matters required as part of the bidding process.

133. It is not disputed, even by Mr. Ferguson, that as at the date of that press conference the Minister had not made a decision. It was therefore a misconstruction of the evidence that he had chosen SAGICOR as the preferred bidder based on its alleged greater stability. Consideration of the statements then made would have actually revealed that the Minister was signalling that he would not be prepared to rubber stamp a recommendation that a significantly lower bid be accepted without fuller consideration by his Ministry. The trial judge accepted that this was a matter for his judgment call.

Stability

134. The Trial Judge referrred to the question of **stability** and queried whether, since such an important emphasis was being placed on this issue of stability, the applicant was given an opportunity to be heard in relation to that particular element in relation to that decision making process. It may be argued that an inference can be drawn that the Minister did consider MARITIME's financial stability when he eventually came to approve the Central Bank's recommendation given that he had referred to this as an argument for not accepting MARITIME's bid. If he did so MARITIME contends, and the judge agreed, that it was arguable that MARITIME would have had the right to be heard before the Minister's decision was made to approve the sale.

135. However, the six evaluative criteria utilised by OW were identified by Dr. Hilaire at paragraph 55 of his affidavit. Those evaluative criteria which were applicable to the bids of MARITIME and SAGICOR included maintaining the financial strength of the balance sheet backing policy holder benefits and avoiding undue financial system risk, (See page 104 of the core bundle). It would be unrealistic therefore to fail to appreciate that the entire process was designed to consider the **relative** merits of the respective bidders.

136. The proposed transfer of the portfolio recognized the possibility, (since price was only the third highest rated factor), that the highest bidder may not necessarily have been the most appropriate bidder. The Trial Judge failed to recognize that at all stages therefore this being the very issue being considered in the evaluative process, that MARITIME throughout had the opportunity to be heard on this issue. A further opportunity to be heard at the end of that commercial evaluative process by each of the parties who had to consider Oliver Wyman's recommendation, (namely the Board of CLICO, the Board of BAT, Central Bank and the Minister), did not need to be imported into the statutory framework **in addition to** the initial opportunity to be heard. Unfortunately, the Trial Judge fell into error in considering that these matters would be appropriately deferred for consideration at a substantive hearing after leave for judicial review had been granted. He failed to appreciate that all that had been disclosed at that point in time was a commercial decision making process based upon the evaluation by an international expert in respect of which MARITIME had always received the opportunity to make representations in the form of its bids, and that the weighting of those evaluative criteria were a matter for pure commercial judgment not amenable to the judicial review.

137. Price was the third consideration and other factors were rated higher. The question of financial stability was inherent in the evaluation exercise conducted by OW from inception and the opportunity of MARITIME to address this matter arose at the time that it submitted its bid which was evaluated together with that of SAGICOR.

138. It is speculative therefore to contend that some additional criterion "*financial stability*" (different in some way from financial strength), was introduced by either the Central Bank or the Minister, which constituted either an irrelevant consideration or a new matter in respect of which MARITIME required an opportunity to be heard. Despite a slightly different phrasing, "financial stability" is inherent in at least those two evaluative criteria and arguably the third, ("that is, preserve policy holder service levels"). It would be surprising if this were not a consideration in any expert assessment of competing bids

for an insurance portfolio in the context of the history which required Central Bank's involvement and intervention under its emergency powers in the first place.

139. The Court's indication that it intended to deeply consider those statements and the issues of procedural fairness which would arise was predicated on the erroneous assumption that:

a. the Minister had made a decision in March 2019;

b. that that decision was based upon a perception by him of Maritime's financial stability when in fact, (as the trial judge himself found in considering the aspect of delay), no decision had yet been made;

c. further, the Minster was not referring to arguments of his own in favour of the SAGICOR bid. If anything, he was highlighting that when he came to make the decision, the additional $300 million offered by MARITIME would not be overlooked.

140. In fact, the very exercise contemplated by the trial judge at paragraph 62 of his judgment emphasizes the undesirability of a court's review of the commercial process in this case under the guise of judicial review. The court erred in considering that it was even permissible on a judicial review of this decision to examine any analysis and comparison of the financial and other standings of both bidders. Even if the court were only referring to the procedural aspect of the Minister's decision, it erred in i. failing to appreciate that the Minister's statement specifically clarified that at the time the statement was made that no choice of SAGICOR as the preferred bidder had been made, ii. further no such choice had been made based on alleged greater stability iii. that there was no evidence that such an important emphasis was being placed on this issue of stability, iv. in failing to appreciate that even if it were to be inferred that this was an issue which featured in the Minister's subsequent decision making process to approve the sale to SAGICOR, that this matter had already been addressed in the bid process conducted by OW. The opportunity to satisfy any concerns in this regard was inherent in item (ii) and possibly item (iii) of the evaluative criteria. This concern had already been catered for and

addressed in the commercial process designed by the international expert retained for this purpose.

141. The trial judge erred in not appreciating that the substance of the decision being reviewed was purely commercial and that there was no evidence otherwise. Despite a statutory framework which required overarching oversight by the Central Bank and by the Minister the evaluative process which produced SAGICOR as the preferred bidder was purely commercial. Being purely commercial it was not susceptible to being second guessed by a Court under the guise of public law unreasonableness. Even if it were, a court's intervention on the ground of public law unreasonableness would have to be on the basis that no decision maker properly directed could have arrived at the decision which he did. Even on that basis there was, on the evidence before the trial judge, no arguable ground for judicial review which crossed the threshold.

142. The respondent contends that until discovery one does not know what extraneous considerations may have informed those decisions and that such discovery may fortify their suspicions generated on a prima facie basis by a. the disparity in bids of which it became aware in March 2019 and b. several matters revealed in the leaked documents referred to above.

143. There are two major difficulties to this approach. The first is that there is no evidence on the affidavit of action of the Central Bank or the Minister based on anything other than the recommendation of Oliver Wyman. In fact counsel for the respondent at one stage characterized the complaint against the Central Bank as being directed to its approval of a tainted or flawed process. That process of course is the evaluation process conducted by OW. The second major difficulty is that the suggested approach of detecting impropriety on the basis of discovery is wrong in law and was rejected in Sharma v Browne-Antoine (citing **Matalulu v DPP)**.

144. Both the ***Fishermen*** and ***Sharma*** cases illustrate the requirement that a court, even at the application for leave stage, consider all the evidence and address the fundamental merits of the application. As in the ***Sharma*** case, any suggestion that either the Central Bank or the Minister took into account irrelevant considerations, or any additional matters, in respect of which MARITIME had a right to be heard, is unfounded on the evidence and would be speculative. Leave for judicial review cannot be granted on the speculative basis that either the CB or the Minister took into account irrelevant considerations in considering the report of OW and accepting its recommendations.

145. The approval of the product of that process by the Central Bank and by the Minister demonstrates i. no departure from the process, ii. no unfairness on the part of either, iii. no taking into account of irrelevant considerations by the CB or the Minister, and, iv. no taking into account of any matters which were not the subject of the evaluative criteria and process. MARITIME participated in that process and therefore had an opportunity to present for consideration any relevant material.

The Privilege Clause

146. The bidding process engaged in by both MARITIME and SAGICOR was subject to a clause hereinafter referred to as the privilege clause.

147. MARITME contends that the privilege clause itself if applied by a public body would be unconstitutional. The argument appears to be that a contractual clause even in a commercial process cannot justify inequality of treatment.

148. The appellant contends however that in the evaluative process, there was no need to have recourse to that clause and it was not applied. Bidders were free to structure their bids in any way they wished. Bids therefore differently structured could not be considered for equality of treatment.

149. The trial judge at paragraph 61 considered that the validity, constitutionality and fairness of the privilege clause may have had to be determined after mature deliberation and full submissions against the background of the applicant's allegation of non-compliance by SAGICOR. Counsel indicated that it was not relying upon the privilege clause at the hearing of this appeal and that the privilege clause itself formed no part of the evaluation process. Accordingly the question of the privilege clause was not being relied upon as providing any justification for the evaluation of SAGICOR's bid. Therefore its validity or otherwise is not relevant.

150. Given that the applicant's position is that the privilege clause was not invoked in the evaluative process and it does seek to rely upon it, it is not necessary to consider this argument further.

Conclusion

151.

i. At the leave stage the issue of whether **section 44E (5) (c) of the CB** Act even applied to bar the claim required detailed analysis for the reasons set out hereinafter. Its non-applicability was arguable. A determination could not be made at that stage that the claim could be barred on that basis as not presenting an arguable ground with a realistic prospect of success. Therefore leave could not have been refused on that basis. The trial judge could not be faulted for not accepting this as a ground for refusing leave.

ii. The issue as to whether there had been **undue delay** from the date of the decision to the date of filing proceedings was arguable for the reasons set out hereunder. As the trial judge had exercised his discretion in favour of granting leave, and indicated that if necessary that he would have been prepared to extend the time for the application, there is no basis for considering that discretion was wrongly exercised as he was not plainly wrong to do so.

iii. The alleged **alternative remedies** are not equally effective or applicable to the applicant's complaint. For the reasons given by the trial judge their existence could not constitute a bar to the application.

iv. The trial judge's reasoning that there was no **material non-disclosure** was sound and has not been demonstrated to have been plainly wrong.

v. However the decision was based on the outcome of a purely commercial bidding and evaluation **process** by an expert international firm in which the first respondent participated.

a. Despite a statutory underpinning which required the approval of the Central Bank and the Minister of Finance (the Minister), **the actual process**, which produced Sagicor as the preferred bidder was **purely commercial**.

b. The evidence presented did not establish **deviation** from the outcome of that commercial evaluative process **occasioned by the involvement** of either the CB or the Minister.

c. Examination of that expert **commercial** evaluation process, whether in the circumstances complained of, or on the evidence placed before the trial judge, could not be revisited or reconsidered by a court solely under the guise of public law unreasonableness. This is especially so because that exercise would involve re-examination of the weighting and assessment of the commercial evaluative criteria.

d. The applicant must demonstrate arguability at the leave stage. It cannot plead potential arguability to justify the grant of leave on a speculative basis which it is hoped the interlocutory processes of the court may strengthen. (See **Sharma v Browne Antoine** below at paragraph 14, citing **Matalulu v D.P.P**)

e. Different bids and bid structures by different bidders cannot claim to be similarly circumstanced. Weighting of evaluative criteria in a commercial process is designed by its nature to produce unequal results from inception and produce a preferred bid and bidder. This by itself cannot render a commercial tender evaluative process unfair or discriminatory. The trial judge therefore erred in not appreciating that the evidence before him did not, on the basis of the allegation of unfairness or

discrimination, disclose an arguable ground for judicial review having a realistic prospect of success.

f. Further, on the evidence before him, even of the respondent/applicant alone, the **decisions** being reviewed were the outcome of a purely commercial process. They were not therefore amenable to judicial review under the guise of public law unreasonableness.

g. Further, and in any event, examination of the evidence before the trial judge even accepting that of the respondent/applicant, would have revealed that the respondent's complaints were not borne out on its own evidence. It would therefore have been appropriate to dispose of the application at that stage. (See **AG v Ayers Caesar** [2019] UKPC 44 at paragraph 2).

152. The reasons why I am unable to agree with the majority (as embodied in the judgment of the Honourable Boodoosingh JA), are comprehensively set out in the analysis hereinafter. They include, but are not limited to the following:

i. It is not correct that the question of the privilege clause and its constitutionality need to be addressed at all on the application such that its unconstitutionality would be determinative or even relevant to the application before the court. To the extent that the majority had ignored this fact, (paragraph 24 of that judgment), I respectfully consider them to have erred in understanding the context of the application. The constitutionality of the privilege clause is irrelevant given that it is not being relied upon by the appellant, and that the decisions being challenged were not based thereon and are being justified on bases quite separate and distinct from the construction of that clause.

ii. The majority[14] appear to be of the view that because many allegations had been made that these in combination permit the applicant to cross the threshold of arguability for judicial review. I would respectfully disagree. Matters which

[14] At paragraph 41

individually have no basis of arguability do not attain a level of arguability simply because many unarguable matters have been thrown at a court. This argument also ignores the clear requirement of a court to consider the material before it when considering whether that material has attained a threshold of arguability to satisfy it that leave should be granted. Both the trial judge, and the majority, have failed to take into account that the material that was put before the trial judge, despite the several allegations made in relation thereto, did not when examined, **even on the evidence of the applicant alone**, attain any level of arguability. The matters raised by the majority do not, for the reasons set out in this judgment, demonstrate grounds that attain the threshold of arguability. The majority have failed to appreciate that the trial court could not ignore the requirement, and in fact the duty, to **examine the evidence** that **the applicant had** placed before it to justify the grant of leave.

iii. No one is contending that the fact that a matter may be commercial in nature by itself precludes reviewing the role of statutory or public bodies in a decision-making process which is primarily commercial. In this case, there was as set out hereunder, a statutory underpinning for the role of the Central Bank and the Minister. However, as the majority have accepted, the context of the evidence is important. The majority in my respectful view have erred in not considering that that context when properly examined, does not disclose any sufficiently arguable material or ground for the grant of leave. They have failed to appreciate that analysis of the material before the trial court would not have revealed significant areas of contested facts, assertions, or legal disputes (see paragraph 55 of the judgment of the majority).

iv. The majority also failed to take into account the additional principle that the application must itself disclose grounds of review before leave is granted. If allegations which are unsubstantiated on the evidence are placed before the court, the interlocutory process of discovery cannot supplement and provide grounds for review where, on the evidence submitted on the initial application, none exist. (See

paragraph 68 of that judgment). The majority have failed to address the material that was before the trial judge on the application, and in so doing have fallen into the same error as the trial judge.

v. The question of construction of the criterion relating to conditional bids was not a matter upon which the evidence of the parties at the hearing of the substantive application was likely to shed any additional light. As a matter of law the subjective intentions of parties, and their subjective interpretation of words in a document, are not admissible. In my respectful view, the majority have erred at paragraphs 63 and 68 of that judgment in considering that on this issue the evidence of any witness upon cross-examination could have produced any further admissible evidence beyond that which was available to the trial judge at the leave stage. See **Arnold v Britton [2015] A.C. 1619** applied by this court in **Waterworks (loc cit)** in particular paragraphs 14 – 23[15].

[15] Arnold v Britton [2015] AC 1619 paragraphs14-23 (All emphasis added) INTERPRETATION OF CONTRACTUAL PROVISIONS [14] Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900. [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14, [2009] 4 All ER 677. And it does so by focussing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384 – 1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 3 All ER 570, [1976] 2 Lloyd's Rep 621, [1976] 1 WLR 989, 995 – 997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2001] UKHL 8, [2002] 1 AC 251, para 8, [2001] 1 All ER 961, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21 – 30. [16] For present purposes, I think it is important to emphasise seven factors.

[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook, paras 16 – 26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case,

vi. It cannot be disputed that the concepts of fairness, equality of treatment and non-discrimination, accountability, reasonableness/rationality, legality, and transparency (paragraph 26 of judgment of majority) are matters that are applicable to discretions

---

the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251, [1973] 2 All ER 39, [1973] 2 WLR 683 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, [1984] 3 All ER 229, [1984] 3 WLR 592, quoted by Lord Carnwath at para 110, [1984] 3 All ER 229, [1984] 3 WLR 592, have to be read and applied bearing that important point in mind.

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

[21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

[22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, [2011] 50 EG 58 (CS), where the court concluded that “any . . . approach” other than that which was adopted “would defeat the parties' clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract (see paras 17 and 22).

exercisable in a decision-making process conducted by public authorities, especially in a case such as this where there is statutory underpinning for the exercise of those discretions. However nominally invoking these concepts is no substitute for examining the evidence on an application to determine whether there has been any breach at all of these concepts. It is not sufficient to merely assert them without providing evidence that they have been breached. In this regard, the trial judge and the majority have failed to appreciate, that the evidence does not disclose, even at a prima facie level, any breach of these or any other relevant judicially reviewable matters.

vii. The fact that constitutional relief in the form of declarations is sought in the application for judicial review can in no way alter the test applicable for the grant of leave. The majority have erred in not appreciating that the claim to constitutional **relief** can in no way affect the analysis. This is an application for judicial review. There is no exoneration from this test simply because of the invocation of a claim to constitutional **relief**. The applicant for leave must still demonstrate an arguable ground for judicial review with a realistic prospect of success.

viii. Fundamentally, the majority (at paragraph 65 and 68 of that judgment), have failed to appreciate that the allegations with respect to irrationality are all based upon the application of criterion and weighting ~~of~~ thereof in an evaluative process by an international expert appointed for this very purpose, and that no reviewable matter has been demonstrated by the subsequent involvement of either the Central Bank or the Minister.

Order

153. In the circumstances, the orders of the trial judge must be set aside. The appeal would have been allowed.

……

Peter A Rajkumar

Justice of Appeal