THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. CA P 104 / 2020

Between

THE CENTRAL BANK OF TRINIDAD AND TOBAGO

Appellant

And

MARITIME LIFE (CARIBBEAN) LIMITED

First Respondent

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Respondent

Panel

P. Rajkumar JA
R. Boodoosingh JA
J. C. Aboud JA

Appearances:

- Mr Ian Benjamin SC leading Mr Kerwyn Garcia instructed by Ms Elena Araujo for the Appellant;

- Mr Edward Fitzgerald QC and Mr Fyard Hosein SC leading Ms Sasha Bridgemohansingh and Mr Aadam Hosein instructed by Ms Annette Mamchan for the First Respondent;
- Mr Douglas Mendes SC leading Mr Michael Quamina instructed by Mr Sean Julien for the Attorney General.

Date of Delivery: 17 February 2021

JUDGMENT

Judgment of Mr Justice Ronnie Boodoosingh JA:

1. The issue in this appeal is whether the first instance judge, Rampersad J, was wrong to grant leave to Maritime Life (Caribbean) Limited (Maritime) to pursue judicial review proceedings against the Central Bank of Trinidad and Tobago (the Central Bank). I am of the view that the judge was not wrong to do so.

2. A mixed claim was filed before the learned judge. There is a judicial review aspect in respect of the role of the Central Bank in this issue. There is also a claim for the breach of constitutional rights against the Attorney General. No leave is necessary for the filing of constitutional proceedings. Thus the nub of this appeal concerns the judge granting leave for the judicial review aspect of the claim.

3. By **Legal Notice 32 of 2009** the Central Bank assumed control over the affairs of CL Financial and its related companies, including CLICO. They also took over British American Insurance Trinidad (BAT). This was done to protect the rights of creditors, depositors and policyholders as well as to secure the financial system, as CL Financial was in serious financial crisis. The Central Bank was authorised to acquire, sell or deal with the assets, properties and shareholdings of the

companies. The Central Bank was further authorised to appoint persons to carry out these functions. It is not in dispute that the Central Bank appointed persons to oversee the activities of the companies and appointed their boards of directors.

4. The sale of the traditional insurance portfolios of CLICO and BAT (the TIPs) was part of an overall plan to be able to repay the creditors of these companies, in particular, the Government of Trinidad and Tobago. This was announced on 27 March 2015 by the Central Bank, in part with these words: "The process of selling / transferring CLICO's assets requires oversight by the Central Bank for accountability and transparency".

5. To carry forward the sale of the insurance portfolios, in 2015, the Central Bank and the Companies retained an international consultancy firm, Oliver Wyman, to assist. Initially, a two round bidding process was established. A third round of bidding was added in 2018.

6. Maritime took part in the bidding processes for the TIPs of both companies. Separate bidding processes were arranged for the bids relating to CLICO and BAT.

   Having taken part in Round 1, after eliminations and withdrawals, Maritime was left as the sole participant in Round 2. Maritime, however, was not awarded the bid. In January 2018, Oliver Wyman, as the expert implementing the bidding process, invited Maritime to proceed to a third round of bidding. One of the terms of the bidding process contained in the letter to the bidders was the

seller's right to alter or terminate the procedure and to negotiate with any one party without giving notice to any interested party. This clause was called "the privilege clause". The exercise of that right would not entitle any interested parties to raise any claim for compensation, reimbursement or damages. The seller was also not obliged to accept the highest or any offer.

7. Maritime's bid for the CLICO portfolio was approximately TT$7.86 billion and for BAT it was $516.8 million.

8. On 10 September 2018, Oliver Wyman wrote to Maritime indicating that Maritime was not the preferred bidder recommended for either portfolio, but instead asked that Maritime's bids be kept open for 6 weeks.

9. On 29 March 2019 the Honourable Minister of Finance, Mr Colm Imbert, at a press conference, indicated that the preferred bidder for CLICO bid some $300 million less than the other remaining bidder, Maritime. It was contended that no decision was made on the bids up to that point as the Minister had said he will not act as a "rubber stamp" over any recommendation or provisional decision. Maritime wrote to the Governor of the Central Bank on 10 April 2019 raising concerns following the Minister's comments. The Governor replied on 21 May 2019, but declined comment on the bidding process. On 23 July 2019 Maritime made a freedom of information request in relation to the preference of the bid of the rival bidder, SAGICOR. The Permanent Secretary of the Finance Ministry responded on 16 August 2019 indicating that there were no documents to disclose and that no conclusions had been reached. In August 2019 the Central

Bank published its Annual Report indicating that the boards of CLICO and BAT had identified a preferred bidder with Central Bank oversight. When the transfers were made to the preferred bidder, the Central Bank would be in a position to relinquish control over CLICO and BAT.

10. Maritime contended before the judge that on 20 September 2019 it received documents anonymously with information about the BAT bidding process. Among these documents was a BAT Evaluation, marked as a "Draft", for Board approval. These documents revealed certain matters which will be dealt with below. Suffice it to say, these matters contributed significantly to the present claim.

11. It is not in dispute that the relinquishing of control over CLICO and BAT under section 44 G of the **Central Bank Act, Chap 79:02** had not taken place up to the time of this claim.

12. In support of its leave application, Maritime filed an affidavit of its Chief Executive Officer, Mr Andrew Ferguson. In that affidavit he set out facts about Maritime and its involvement in the bidding process. He gave details of their participation in the three rounds. He stated the various events following the bidding process, as summarised above, including the anonymously received documents.

13. The Governor of the Central Bank, Dr Alvin Hilaire, put in a response affidavit. He gave an outline of the bidding process. He made specific reference to the role of Oliver Wyman. He also stated the various objections to the claim. These included delay, prejudice to third parties and alternative remedies. He also asserted the lack of merit of the claim. Dr Hilaire identified six criteria allegedly used to select the buyer. The bid price was one of these criteria, but the third ranked criteria. He stated that, in the third round, SAGICOR was selected based upon its relative size, experience, financial strength, regulatory attitude, future risk absorbing capacity, and ability to finance the acquisition of the portfolios without external financing. He also stated that SAGICOR's offer was not a conditional one as Mr Ferguson had contended. He also asserted, based on the legal advice he received, there was no breach of any constitutional rights.

14. To have succeeded in this appeal, the Central Bank had to show that the judge was plainly wrong to grant leave because some bar to apply for judicial review operated or that Maritime had no arguable ground for judicial review with a realistic prospect of success. As reemphasised in the *Attorney General v Ayers-Caesar* [2019] UKPC 44, the threshold for the grant of leave is "low": see para 2 of judgment. This, of course, does not mean that a proper analysis does not have to be made of the application. But it does suggest that the judge should be careful not to make firm findings on material disputed matters which is better left to a trial where a higher standard of proof applies.

15. In my view, the critical issues to determining this appeal are twofold. The first is whether it can be said that the decision in question here was one of a purely commercial character such as to prevent the court from judicially reviewing the

decision. The second issue is whether the claim of Maritime, based on what had been placed before the judge, can be said to be devoid of merit so that there is no arguable case with a realistic prospect of success. Before dealing with these issues, however, I would first address other grounds raised in this appeal. I would note that except on these two issues identified above, I am in substantial agreement with the judgment of my learned brother, Rajkumar JA, which I have had the good fortune to read. Thus, my comments on these other matters will be brief. I agree with the judgment of my learned brother, Aboud JA.

Stone Street Judgment

16. The Central Bank submitted that these proceedings are barred in light of the provisions of section 44 E (5) of the **Central Bank Act, Chap. 79:02**. In *Stone Street Capital Limited v The Attorney General***,** CV 2012 – 04383, sitting in the High Court, I declared section 44E (5) (c) of the **Central Bank Act** to be unconstitutional. That matter is under appeal and still to be determined. In my view, even if I was wrong in that decision, the section provides no bar in law to judicial review proceedings. First, there was an express concession in Stone Street that any bar to proceedings only related to private law claims. This was reflected in the judgment at paragraph 30. Second, it is well established that the public law court is not to be lightly excluded from reviewing decisions of public authorities, even by ouster clauses: see *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 and cases following from that judgment**.** Ouster clauses are construed in a narrow way and not operative where errors of law are shown. Third, any declaration of the High Court stands until reversed. A stay, if operative or effective, is only to facilitate an appeal

being determined. Fourth, there is a constitutional aspect of this claim. Section 44 E cannot bar that claim from being determined. The learned judge indicated his general agreement with the Stone Street judgment. He also noted these are public law proceedings and he accepted Maritime's submissions that the proceedings are not barred. I am of the view he was correct in his approach.

Delay

17. The next issue raised by the Central Bank was inordinate delay by Maritime in filing its claim for judicial review. The Central Bank submitted that this operated as a bar to leave being granted and prejudiced both the Central Bank and third parties. The Central Bank contended that Maritime was informed that it was not successful by September 2018 so time ran from then to file judicial review proceedings. Maritime countered that the decision by the Central Bank was only made in September 2019 and the application was filed in November 2019. Maritime contended that, at its highest, what took place in 2018 was it being informed of a recommendation of the expert or decision of the Boards. It was for the Central Bank, after consultation with the Minister of Finance, to make the decision on the sale.

18. The answer to the Central Bank's argument turns on the fact that the ultimate decision on whether the decisions of the respective Boards would be accepted was for the Central Bank: see section 44F of the **Central Bank Act**. The power to effect the sale resided in the Central Bank. In considering its decision the Central Bank was required, at the very least, to consult with the Minister of Finance:

section 44F (5). The recommendations were made in 2018 by the Boards and Oliver Wyman. It is clear that after those recommendations, the process required consideration by the Central Bank and consultation with the Minister.

19. Up to March 2019 the Minister was publicly expressing that the sale of CLICO's assets was under review. Additionally, Maritime pursued a freedom of information application in 2019. The response to that application given in July 2019 did not signal that any final decision had been made. An announcement of the sale was only formally made in September 2019. The application for leave was made on 20 November 2019.

20. Given that Maritime had to be clear that the final decision on the Sale / Purchase Agreements (SPAs) had been made before it could challenge it, realistically, time could only run against Maritime from the September 2019 announcement. Any claim brought before would have likely been met by an assertion of prematurity given the statutory framework under which this decision had to be made. The judge was, therefore, in my view, correct in determining that delay was not a factor applicable in this case.

21. Further, the judge also expressed the view that this would have been an appropriate case to extend the time for judicial review if Maritime was out of time. In my view, he would have been right to do so in accordance with the principles stated in the Privy Council judgment in *Devant Maharaj v National Energy Corporation of Trinidad and Tobago* (2019) UKPC 5.

Alternative Remedy

22. The judge found there was no viable alternative remedy to the claim. He was not wrong to do so. The Central Bank pointed to the Insurance Act as providing a mechanism for challenge of the decision. The scheme referred to in the **Insurance Act, Chap. 84:01** at section 84 does not encompass a claim where the oversight of the Central Bank of a process is called into question. Judicial review allows a party a wider remit than section 84 provides. It cannot be concluded that it would be a viable alternative remedy for Maritime in this case. Maritime was not chosen at all. The scheme for review provided under section 84 ordinarily allows the selected party, if a suitable dispute arises for adjudication, to interrogate how that scheme is being managed or proceeding. It does not provide a remedy to a party such as Maritime in these circumstances.

Privilege Clause

23. The Central Bank submitted that a privilege clause contained in the agreement between the bidders and the companies was a complete answer to this challenge. The Central Bank contended that Maritime fully well embarked on the bidding process knowing what the rules were. On this issue after reviewing the authorities submitted the judge said this:

> "60. The court has reviewed these authorities and has looked at the Supreme Court of Canada decision in M.J.B. Enterprises Ltd. V. Defence

Construction (1951) Co. et al, which is a persuasive authority for the point that privilege clauses may apply as a binding contractual term if there has been a compliant tender. In this case, however, the applicant has alleged that the SAGICOR tender was not compliant for a number of reasons. That is an allegation that must be determined after a full hearing of the facts and with mature deliberation after comprehensive argument. This case is different to the circumstances in Macquarie. That was a case that was decided after a rolled up hearing without having to determine the issue as to merit at the leave stage but after full hearing of all the facts. Further, the protagonist in that matter was itself non-compliant, which is not an allegation that has been made in these proceedings.

61. As a result, the court is of the respectful view that the validity, constitutionality and fairness of the privilege clause may have to be determined after mature deliberation and full submissions against the background of the applicant's allegation of noncompliance by SAGICOR. There is nothing at this stage that plainly determines the case one way or the other. Having regard to the authorities mentioned above, the important issue of the implied terms described in M.J.B. Enterprises, in relation to the evaluation of only complaint bids and the expectation that the lowest bid would be accepted, may well also arise for determination."

24. The judge found that there was an arguable case that this clause did not apply without making any conclusions on it. This was a correct application of the test at the leave stage of judicial review. It required determination of the position after all the evidence and legal submissions were considered.

Confidentiality

25. The parties to the bidding process were required to sign a confidentiality clause. The Central Bank contended that this confidentiality clause was breached by Maritime when they sought to make use of anonymous documents in relation to the BAT process. The clause suggested that confidentiality is owed by the bidder to the Central Bank of documents disclosed by the Central Bank, and not those disclosed by an anonymous third party. The judge considered that on preliminary examination this clause was not breached. The clause, therefore, was being considered as to whether it prima facie prevented leave being granted. He was unable to conclude a breach occurred on the evidence and law before him. He considered that a proper investigation of the meaning and effect of the clause was a matter for his determination at a substantive hearing. There is nothing that can be faulted with this approach. The issue was therefore not a matter that could have precluded the grant of leave.

Commercial Transaction

26. The first determinative issue to consider is the nature of the decision made and its impact on the jurisdiction of the judicial review court. The judge accepted that the sale of the TIPs is largely a commercial matter. The sums of money involved were substantial and many factors had to be weighed. In matters relating to commerce, the judicial review court will be reluctant to interfere. Where, however, public authorities are involved in such transactions, there will

be, in some cases, a public interest element to the transactions. Public authorities are expected to act in accordance with certain principles. Where citizens, corporate or individual, are competing against each other in a process overseen or decided by those public authorities, the court, in an appropriate case, will be entitled to review such transactions to ensure that there has been adherence to these principles. In doing so, a large measure of appreciation will be accorded to those public authorities. This measure of appreciation is meant to give significant leeway to the business principles that guide and overhang such transactions. There is no blanket exclusion of judicial review of the decision making process. It is all contextual. There are some transactions the public law court will not touch and there are some that may require the interrogation of the court.

27. In *Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22**,** at paragraph 22, the Judicial Committee of the Privy Council quoted Bereaux JA as concerning the court considering a breach of constitutional rights alleged to have occurred in the course of a contract by a public authority. In particular, reference is made to tendering decisions where there may be evidence of discrimination. There is no good reason in my view why this position should not apply with equal force to the judicial review court in circumstances where unequal or unfair treatment is alleged in the process adopted. What then is the context of the decision made here?

28. First, as a general principle, the Central Bank, being a public entity, must carry out its functions in keeping with certain principles. These include fairness, transparency, accountability, non-discrimination and rationality. These are

governing principles for any public entity. The commercial focus of any particular transaction may provide the Central Bank with a measure of leeway where the judicial review court will not intervene.

29. Second, in considering the context of the decision, the Central Bank's involvement occurred as an emergency intervention over the affairs of CLICO and BAT, under section 44 D of the **Central Bank Act**. This was done at the time due to inherent risks posed to the financial system. It took place to protect the public interest including that of taxpayers, policyholders and creditors and to ensure continued stability of the financial sector. Subsequently, the Central Bank appointed Boards to manage the companies. Overall control of the companies remained with the Central Bank. It was expected to carry out its statutory functions.

30. Third, a substantial amount of public funds was invested in these companies. This provided a plank for scrutiny of the decisions. In this case the sale was expected to realise a substantial amount. This money is a recovery of moneys invested by the government to bail out CLICO and BAT. There would be a public interest element in trying to ensure the best returns for the public benefit. Higher returns have implications for the level of services that can be provided by the State authorities, especially in lean times. While the Central Bank was entitled to rank criteria it established, as a general rule, one may have expected that if it was going to depart from a substantially higher bid, there must have been some rational reason for doing so. It must be that other factors substantially trumped this factor. If bids were essentially even in other respects, one might expect the amount of the bids to be given some significant weight in

preferring one bid over the other. It may not be a complete answer to this to say it was only the third ranked criteria. Did SAGICOR perform substantially better in the higher ranked criteria than Maritime? This, respectfully, could not have been answered at the leave stage based on the rival contentions of the main deponents.

31. Fourth, the Central Bank, in the decisions it takes, must give careful consideration to the public interest. In this context, Maritime is also a member of the public. When it bid, Maritime did so as a member of the public entitled to fair treatment from the public entity. If it was able to point to facts that reasonably informed persons in the financial sector may raise questions about, exclusion at the leave stage would not ordinarily be appropriate. It is difficult to conclude that the judge was plainly wrong to decide that this required a deeper examination at a trial.

32. Fifth, section 44 E (3) of the **Central Bank Act** clearly states that the property of an institution taken over by the Central Bank vests in the Central Bank. This is consistent with the statutory powers given to the Central Bank to sell the assets of a company over which it exercises control. Flowing from this, both the takeover and sale of the assets is the responsibility of the Central Bank and no one else. It cannot delegate that power to an expert or to a board without having oversight of the process and without a proper review of any decisions taken. The review must ensure that the Central Bank's own responsibility as a public entity is observed. This claim challenges the Central Bank's role. Its role cannot be separated from the mechanisms it puts in place to carry out its function to sell the assets of the company. This claim relates to a challenge to the manner of the

supervision and oversight of the decision making process and whether the Central Bank may have been deficient in its role. The claim is not directed at the boards or the hiring by the boards of an external entity to oversee the process. The challenge is to the oversight of the process exercised by the Central Bank and the ratification or approval of it.

33. Sixth, as noted before, there is no blanket exclusion of the judicial review court from the examination of processes used to arrive at commercial decisions. The weight of authority may lean against intervention. But it is by no means categorical that the courts are excluded. The nature of the decision maker and the process used are relevant considerations.

34. Seventh, where public contracts are concerned, it is generally accepted that fair and equal treatment of citizens, including corporate ones, will occur. Irrationality, bad faith and illegal action may be challenged. I readily observe here that establishing bad faith is not an easy task.

35. Eight, while price was one category out of six being applied, the process was also expressed to be a competitive one seeking to maximise values. The significantly lower value of the bid accepted called for some interrogation in circumstances where Maritime was ranked at least equal to SAGICOR in some respects and not significantly lower in other respects. Other bidders had withdrawn during the second round, leaving Maritime alone. At that stage it was decided to have a third round. The explanation of Dr Hilaire that the reason for this was that it was no longer a competitive process at least called for some explanation. In a

competitive process there can be withdrawals. This does not make what occurred any less of a competition.

36. The judge addressed the issue of the decision maker at paragraph 26 of his judgment when he stated:

> "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.
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> 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, government finance policy and the overall public interest of the Republic of Trinidad and Tobago."

37. The Central Bank relied on *NH International (Caribbean Limited v Urban Development Corporation of Trinidad and Tobago (UDecott) and Hafeez Karamath Limited*, Civil Appeal No. 95 of 2005, per the powerful dicta of Kangaloo JA. In that case, Kangaloo JA traced the roots of tender procedures in the common law right to contract. He noted that fairness in commercial arrangements cannot be equated with fairness of government departments such as Immigration and Inland Revenue.

38. An important difference between that case and this case is the extensive statutory underpinning of the powers exercised by the Central Bank. The powers exercised here cannot be equated with the carrying out of a tender process for a contract for the construction of a building or the paving of a road or the purchase of supplies. The bids here were aimed at the sale of an insurance portfolio worth billions of dollars for the purpose of recovering monies advanced out of public funds and undertaken as part of draconian powers exercisable by a public institution. Further, the Central Bank, by its own statements, are to be bound by principles of accountability and transparency. The nature of the statutory powers exercised is relevant.

39. In another case cited by the Central Bank, *Mass Energy Limited v Birmingham City Council* [1994] Env LR 298, the court was concerned with a tender in respect of a waste disposal contract. This too cannot be equated with the transaction here. The boards of the companies used the mechanism of a bidding process for the sale of the insurance portfolios, but the nub of the transaction remained the sale by the Central Bank of assets of companies they exercised control over under statutory powers. The nature of the decision arose out of the management of a

bidding process, but the transaction was the sale of property vested in the Central Bank by statute.

40. One of the grounds raised by Maritime is the irrationality of the decision in light of certain factual assertions. These include the following. Maritime's bid was substantially higher than that of SAGICOR, approximately 400 million more. After the second round of bidding all other bidders, except Maritime, had withdrawn. However, Maritime was not chosen. Maritime alleges that it complied with the bidding process carefully and scrupulously. This is to be contrasted with the position adopted with respect to SAGICOR's bid. SAGICOR, according to Maritime, had put in a conditional bid. This bid was accepted even though this was outside of the bidding requirements. Maritime suggested that there had been no due diligence process over the bidders, certainly not in relation to it, so there was no basis for the Central Bank to conclude that Maritime could not manage the TIPS. Maritime also suggested that there appeared to be issues with SAGICOR's ability to undertake the purchase without some form of external involvement and assistance which contrasted with Maritime's position.

41. Any one of these factors, taken alone, might not be sufficient to displace the reluctance of the court to intervene where a transaction is commercial in nature. However, taken together, they amounted to, at least, an arguable case with a realistic prospect of success. If the recommendations of the Boards were arrived at irrationally, the Central Bank's adoption of the recommendations would logically be tainted by that irrationality. It is arguable that, notwithstanding the general approach not to intervene where decisions may be of a commercial

character, these would have been suitable circumstances for further interrogation at a full trial. Thus, the judge was not plainly wrong to have granted leave in the circumstances.

42. The leave application raised the issue of whether the Central Bank took account of all the relevant factors including the need for fair and equal treatment of citizens / bidders when it approved the recommendations of the respective Boards in favour of SAGICOR over Maritime.

43. This need for fair and equal treatment was underscored in the case of *Central Tenders Board and Another v White* [2015] UKPC 39:

> "4. On behalf of the CTB, Ms Karen Reid informed the Board that the government was pursuing the appeal in order to obtain guidance about how it should proceed when confronted about issues with non-compliance with public law requirements in the area of awarding contracts, in particular, the requirement of equal treatment of tenderers. She referred in this context to the judgment of Lord Reed in Healthcare at Home Limited v The Common Services Agency [2014] UKSC 49, [2014] 4 All ER 210, para 14. That case concerned European law requirements regarding procedures for awarding public works contracts, but there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment."

44. This principle can be seen to be one of general applicability in modern public law which has developed exponentially over time and consistently with the need for transparency, accountability and objectivity in public decision making. It is applicable with even greater force where constitutional rights also accrue. It cannot be that the Constitution confers rights to equal treatment and the judicial review courts are excluded from examining decisions of public bodies, where a competitive process leads to the selection of one party over another. The extension to the constitutional dimension of breach of contracts in the public domain has been expressly acknowledged by the Privy Council in *The Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22 where Bereaux JA's dicta in a case of Boxill was approved: see para 22 of the judgment of Lord Sales. By analogy, there should be nothing to prevent the judicial review court from examining a largely commercial arrangement such as the transaction presented here if there are suitable grounds.

45. The Central Bank submitted that Maritime is essentially seeking to overturn the decisions of the Boards of BAT and CLICO not to select it. They submitted that the matter is one of substance and not process. It is correct that the Central Bank accepted the recommendations of the Boards. It is also correct that the Boards were engaged in a largely commercial decision. However, this misses the point that the ultimate decision maker was the Central Bank after receiving the recommendations of the Boards and hearing the concerns of the Minister. The Central Bank's responsibility was to ensure that public law principles guided their oversight of the process employed by the Boards. It was therefore a matter of both substance and process.

46. It is not an answer to the claim to say that the Central Bank appointed competent persons to the respective Boards, and they in turn engaged Oliver Wyman, an international expert, who conducted a process and SAGICOR was recommended. The Boards did not have the power to conclude the SPAs to SAGICOR without approval from the Central Bank. Under Legal Notice No. 32 of 2009 it was not the role of the Boards appointed by the Central Bank to dispose of the assets. It was the Central Bank's role. The Central Banks's role was not to adopt a hands-off approach. It had to be satisfied about the process. That process has to pass the test of fairness and equality because of the public interest element. The judge found that Maritime was at least entitled to question the oversight role exercised by the Central Bank.

47. The learned judge said this in his judgment:

> "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. 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."

48. I would put the position slightly differently, but with the same effect. The Boards may make commercial decisions. They, however, given their role as being appointed to carry out the Central Bank's day to day management of the companies, ought to have been cognisant of where their power came from and the ambit of the power and the restraints on the power of their appointers, the Central Bank. Under section 44 F (1) of the **Central Bank Act**, directors retained to manage the affairs of an institution taken over by the Central Bank must do so "in conformity with the directions of the Bank." The Central Bank's responsibility was to let the Boards know the principles which the ultimate decision maker were bound by.

49. Ultimately it was the Central Bank's role, after consultation with the Minister, to make or approve the final decisions on these matters and both the Central Bank and the Minister are answerable according to public law considerations. In undertaking their duties the decisions the Central Bank and the Minister make are not purely commercial in nature. If the Central Bank adopted a hands-off approach, this would not absolve them from ultimate responsibility for the processes adopted by the Boards. The Central Bank must own and take responsibility for the processes adopted by the Boards. To use the Minister's description, they were not a rubber stamp.

50. Looked at from a different angle, it fell within the Central Bank's powers to manage the companies they took over. They could use whatever appropriate mechanisms they considered efficient. This included appointing Boards. This they did. The Central Bank also had the power to sell the assets of the companies

if they considered it appropriate to do so. To do this, they were entitled to have the Boards they appointed manage the process. This did not take away from the Central Bank the power given to it by the Act and Notification made under it. This in turn did not absolve them from observing and applying public law considerations in undertaking the sale of assets. The Central Bank's role in the sale of the assets must necessarily include wider considerations than purely commercial ones as would apply if CLICO and BAT had not been taken over and were negotiating a sale of their own assets.

51. It is also arguable that the Central Bank had the option, having taken over the assets of the companies, to manage them as they saw fit. This could be, as they chose, through the device of appointing Boards. Equally, the Central Bank could have managed the companies by some other process, such as an Administrator. If the Administrator recommended a sale of assets, the Central Bank would be required to scrutinise the process used to arrive at the decision to ensure they satisfied public law principles.

52. In consequence, therefore, I am of the view that Maritime made a sufficient case at the leave stage that these transactions should be examined by a judicial review court even though the transactions were largely commercial in nature. The judge was therefore right to conclude that Maritime's case was a suitable one for examination notwithstanding the commercial aspects of it.

Devoid of Merit

53. In the majority of judicial review leave applications, the judge makes a determination on the basis of the evidence presented by the applicant only. In many cases, leave is granted without the need for a formal hearing. Essentially one side's case is put forward on which the court makes a determination. The focus of a leave application will, in most cases, be what the applicant alleges. Leave applications are a filtering process to eliminate cases that do not meet the threshold test.

54. In some cases, such as this, the proposed defendant presents evidence at the leave stage. The court, therefore, is duty bound to consider all the evidence presented. Unless, the matter is deemed to be one suited for a rolled-up hearing, however, the focus of the court's consideration has to be the substance of what is presented by the applicant. If the evidence presented by the proposed defendant knocks the contentions of the applicant out, that will usually be a suitable case to refuse the grant of leave. The evidence of the proposed defendant may clearly demonstrate that the application is misconceived. This has recently been reiterated by the Privy Council *in Attorney General v Ayers-Caesar* [2019] UKPC 44. Lord Sales stated:

> "2. The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown*-Antoine [2006] UKPC 57; [2007] 1 WLR 780, para 14. **Wider questions of the public**

> **interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage.** (Emphasis supplied)

55. It follows that the court would be wrong in principle to exclude a judicial review application where there are significant areas of contested facts, assertions or legal disputes, that is, where the legal position is not entirely clear.

56. Further, it is well established in our jurisprudence that a respondent in a judicial review claim has a duty of disclosure and a duty of candour. Where allegations are made and there is likely to be evidence in the custody or control of the respondent, the respondent will be duty bound to disclose such evidence in the course of the hearing of the substantive proceedings. While, therefore, the burden remains on the applicant to prove the case advanced, there is a duty on the defendant to ensure the court is provided with relevant documentation and evidence within the possession or control of the defendant which can assist the court to do justice between the parties.

57. In this context, I do not understand the submissions of Maritime to be that the court should grant leave and then look to see what emerges from the evidence.

Maritime is not suggesting that the disclosure process is needed to prove its case. However, disclosure may reveal evidence which would be relevant to the issues raised in the application, and this can have the effect of supporting or debunking the position of the respective parties.

58. In considering whether Maritime has reached the standard of an arguable case with a realistic prospect of success it is important for the court to understand the allegations contained in the principal affidavit filed in support in support of the application and to compare this to what was placed before the judge by the Central Bank.

59. Mr Ferguson in his affidavit deposed as follows. The sale of the CLICO and BAT portfolios were to be separate processes: para 21. Maritime was shortlisted for the second round: para 24. There was a long and unexplained delay between July 2016 and January 2018 when Oliver Wyman invited a third round of bidding. It was not revealed to Maritime that they were the only remaining bidder after Round 2: para 25. The third round reiterated the previous instructions of the earlier phases: para 26. Maritime informed Oliver Wyman that it was discharged from criminal proceedings in the Piarco No. 2 preliminary enquiry into corruption charges related to the construction of the Piarco Airport. It therefore had no pending criminal matters: para 29. Oliver Wyman, by email of 22 February 2018, wrote to Maritime that the July 2016 bids were neither accepted nor rejected. The process was "on hold for various circumstances primarily related to CLICO": para 31. The email did not explain why Maritime's second round bid for BAT, being the only remaining bid, was not accepted. Maritime submitted two explicitly unconditional bids in keeping with the requirements, unlike SAGICOR:

para 33. Maritime was informed it was not the preferred bidder but was asked to keep its bid open: para 39. The Minister's statement raised the issue of a view being expressed that the company with the higher bid (Maritime) "won't be able to manage the portfolio and there was a higher risk to policyholders. The Central Bank is concerned about selling the portfolio to a company unable to manage it": para 42. Maritime had never been told that their control of the insurance portfolios would be a higher risk to policyholders or that they were not as stable as SAGICOR. Documents were anonymously delivered to Maritime: para 58. One of the documents, the BAT Draft Evaluation, disclosed, among other things, that Maritime was the only bidder for the BAT portfolio at Round 2; SAGICOR did not complete the process. Two concerns were raised. First, it was not clear that Maritime could maintain adequate capital ratios. Maritime had provided all of the information to address this. Second, reference was made to corruption charges against Maritime and some of its officials. Maritime had been charged, but the case against it was discharged by the third round of bidding. In addition, none of its officials had been charged: paras 62 and 63. A BAT board note showed that if the bids were considered on a stand-alone basis, Maritime was ranked first: para 64. SAGICOR provided for a $73 million premium that would attach to the combined CLICO and BAT offers if both portfolios were awarded to SAGICOR. SAGICOR also failed to provide a fixed price for the CLICO and BAT portfolios, contrary to the express bid requirements: para 66. This, Maritime said, operated to its obvious disadvantage. The ultimate holder of the portfolio if the SAGICOR bid was accepted would be an unidentified nominee or a yet to be created new corporation: para 67. SAGICOR's strength, as a local entity, could not be assessed: para 68. SAGICOR was allowed to break the rules of the bidding process: paras 72 and 73. The BAT board ranked Maritime first if it was a

standalone or independent bid. However, they were ranked second if the CLICO board selected SAGICOR: para 75.

60. Dr Hilaire, asserted in his affidavit that the claim was devoid of merit. He stated the decisions were made above board and had a rational and commercial justification for them. There was a fair degree of opinion-expression in his affidavit seeking to justify the decision made. For example, he gives an opinion on whether SAGICOR's bid was conditional, whether Maritime's bid was conditional, whether the process was fair. There were also several statements relating to advice from Counsel on legal matters. These are matters to which the judge at a trial might attach such weight that is considered appropriate. In particular, Dr Hilaire replied as follows. CLICO and BAT engaged Oliver Wyman to provide consulting services and to manage the sale: paras 17 and 18. There was an intention to have two rounds of bidding: para 19. At the end of Round 2, only Maritime submitted bids for both companies: para 20. Others had withdrawn: para 21. Maritime's bid was partial. Certain concerns raised were addressed: para 22. However, these were addressed by Maritime. All four bidders were allowed to continue to a third round: para 24. There was no explanation why the bids went to a third round. SAGICOR was selected by the boards: para 27. On the devoid of merit point, the bids were evaluated on six criteria: para 55. Price was the third ranked factor: para 57. CLICO's operations were 5 times larger than Maritime. Maritime would have to expand by a factor of 5: para 58. Market concentration would have been a risk with both Maritime and SAGICOR: para 59.

61. Continuing on, in one sentence at paragraph 60, Dr Hilaire said that SAGICOR was selected because of its relative size, experience, financial strength, regulatory attitude, future risk absorbing capacity and ability to finance the acquisition without external financing. However, no details were provided on these assertions. No evidence was given in support. He stated SAGICOR's offer was not a conditional one: para 61. Maritime agreed to the bidding process, including the privilege clause: para 64. The bidders were free to structure their bids as they chose: para 65. He stated there was no discrimination: para 67. Paragraph 68 summarised why SAGICOR was preferred. SAGICOR's offer was a definite and fixed binding offer; it was not a conditional offer; it was assessed as superior; price was not the sole criteria; SAGICOR could finance from internal sources; SAGICOR's buyout by Alignvest enhanced its position.

62. Dr Hilaire's response did not address all of the matters raised by Mr Ferguson. It also demonstrated there were rival contentions on different matters. Mr Ferguson strongly disputed these opinions and presented certain facts and arguments which he asserted made a case for judicial review of the Central Bank's process. He pointed to various aspects of irrationality and asserted bad faith. Absent at this stage from Dr Hilaire's affidavit was what oversight was undertaken by the Central Bank over the process of the selection of the purchaser and what evaluation was done by the Central Bank of the recommendations. There was no explanation why they went to a third round a year and a half later. There was no explanation why Maritime was not accepted for the BAT portfolio after all of the other bids were withdrawn. There was no categorical response to what the BAT anonymous documents revealed. There was no analysis of why SAGICOR was ranked higher according to the criteria

other than to say they were ranked higher. Thus, there was no comprehensive or detailed answer to the claim. This may be understandable given the relatively "low" standard applied at the leave stage. The affidavit advanced the bars to judicial review being claimed and it gave a succinct response to the factual assertions, without supporting evidence. What was unmistakable was the existence of competing contentions between Maritime and the Central Bank. Maritime was saying something went wrong here. The Central Bank said all was above board.

63. The learned judge dealt with the competing facts, opinions and contentions like this:

> "54. 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. Both of these factors are in contention and therefore it would be premature at present for this court to come to any finding as to their respective merits without a proper analysis of the facts at the substantive stage."

64. At the leave stage, the judge could not make findings of fact on contentious issues. This was not a rolled-up hearing. There were important and substantial differences in the contentions on both sides. The judge could not give greater weight to the opinion of the Central Bank Governor over that of Maritime's chief deponent, its CEO, Mr Ferguson. What the contested matters showed was the

need for careful examination of the evidence on both sides. One example that comes readily to mind is the information about the BAT process revealed in the anonymous documents. Another example of what the judge at a trial would have to make findings about relates to whether the offer made by SAGICOR was a conditional one and whether this could have been accepted without Maritime getting a similar opportunity as SAGICOR. A third issue is the effect, if any, of the privilege clause. There may likely be the need for cross-examination for the judge to find and accept certain critical facts about these and other matters. Understandably too, the Central Bank at this stage may not likely have placed all the documents it considered before the court as it would if leave were granted. Maritime had to make the lower threshold of an arguable case with a realistic prospect of success.

65. Quite apart from the judicial review aspect was the constitutional relief claim. Given what was placed before the judge he was right not to make a determination that the claim was devoid of merit. He was simply not in a position to do so. He could not attach any greater weight at this stage to the conflicting facts and opinions of the Central Bank Governor or to Mr Ferguson. Denials alone, without supporting evidence, could not dispose of Mr Ferguson's contentions.

66. The judge could have weighed and considered undisputed facts. But there were important aspects of the evidence presented which revealed sharp differences between the Central Bank and Maritime. For example, while the parties accept what the evaluative criteria were, there was a dispute as to how these were applied and whether they were applied in a reasonable or rational way. While it

is not disputed that certain clauses existed in the tendering documents, whether these were appropriate or fair or were applied in an even-handed manner was disputed.

67. It may well be at a trial, with all of the evidence placed before the judge, he may come to the conclusion that the processes used and the application of the various criteria by the Central Bank, do not meet the standard of unreasonableness or irrationality or bad faith. But at the trial there is a significantly different standard to be applied than at the leave stage. The judge may conclude that the Central Bank oversaw the process observing its statutory obligations. However, there was enough placed before the judge by the applicant for him to determine that he could not decide these matters definitively at the leave stage. Put another way, the applicant met the threshold for leave for judicial review.

68. The Central Bank further submitted that the involvement of the international expert, Oliver Wyman, showed that the process could not effectively be questioned since the Bank adopted the recommendations. The expert involvement, however, did not diminish or eliminate the Central Bank's role and responsibility in the process. As the decision maker, if the Central Bank did no more than accept the expert's recommendations without its own careful analysis and interrogation of the process of selection and the recommendations, it is certainly arguable that it would have been failing in its duty. What the Central Bank did was more important to this claim than what the expert or the Boards did. This was not a matter that could have been decided by the judge at the leave stage in light of the matters raised by the applicant.

69. These matters related to overseeing or approval of the process under which critical decisions were made. These included: why the lower bid price was accepted; whether there was a breach in entertaining a conditional bid; was the bid in fact conditional; should Maritime have been told that its bids could similarly be restricted to one company in light of the SAGICOR offer; was it right to go to a third round of bidding when Maritime was the last one standing after round two; was SAGICOR given an advantage over Maritime; was due diligence applied to SAGICOR and to Maritime; was there a sound basis for suggesting that Maritime could not manage the insurance portfolios; the capital adequacy ratio point; the determination of the relative stability of SAGICOR and Maritime; the preference for a local company; and the matters raised by the BAT documents. When all of the evidence is in, a trial may also demonstrate if irrelevant considerations were taken into account by the decision maker.

70. The judge, echoing the Minister of Finance, expressed this need for careful analysis at paragraph 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, 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?"

71. The judge's reasons, even if briefly expressed, demonstrated grasp and consideration of the matters raised by Dr Hilaire. The Central Bank at this appeal did not demonstrate any failure on his part to analyse the rival contentions. A different view of his evaluation, even if strongly held, cannot make his assessment plainly wrong at this stage. After his review, the judge concluded that he could not on the basis of the documents and rival contentions decide between the parties at the leave stage.

72. The judge also noted that one of the challenges to the privilege clause was that it was unconstitutional so any consideration of its applicability and efficacy to deal a "knockout blow" to Maritime's case had to be looked at in that context. It was also tied to whether SAGICOR was a "compliant" tender, which also could not be determined without a full hearing: *M.J.B. Enterprises Limited v Defence Construction (1951) Co.* [1999] 232 A.R. 360 (SCC). In consequence, I respectfully do not accept the Central Bank's submission that the judge was plainly wrong in his analysis of the devoid of merit point. I also do not accept that the judge failed to carry out a proper analysis of the respective cases.

Injunctive Relief

73. The judge considered whether injunctive relief was appropriate pending the hearing of the claim and he concluded that it was. He applied the test *in Chief Fire Officer v Felix and Others (No. 1*), Civ App No. S 49 of 2013. In doing so, he noted that there was a serious issue to be tried. He summarised the contentions of both sides and pointed to the potential effects of granting or not granting an injunction. He weighed where the greater risk of prejudice lay. He found that if the injunction was not granted it was likely SAGICOR would proceed to take the portfolios without hindrance and if the claim eventually succeeded both SAGICOR and Maritime would have lost out. He determined that the public interest factor was significant in this case as it related to public tendering processes. There was nothing in his approach to this issue that can therefore be faulted. The judge classically applied the criteria in judicial review cases in determining whether to grant an injunction. There is nothing in his weighing of the factors that has been shown to be unreasonable such that his discretion should be interfered with.

74. For these reasons I am of the view that the appeal has not succeeded in demonstrating the judge was wrong in his decision to grant leave to Maritime and the appeal is therefore dismissed.

Ronnie Boodoosingh
Justice of Appeal

Judgment of Mr Justice James C Aboud JA:

[1] I have read the judgment of my learned brother Mr Justice Boodoosingh JA and I agree with his analysis and disposition of this appeal. I however wish to add some thoughts on a few issues that arise on this appeal from a contested application for leave to apply for judicial review. It has to do with the depth of understanding of particular facts, matters or allegations that is required on contested leave applications. I am talking about the understanding of Rampersad J, the judge that heard the contested application with respect to the key issue of the case: the status and role of the Central Bank in the transaction and whether it can be said that it was performing public duties in it. What level of judicial understanding is required to meet the applicant's threshold for the grant of leave, namely an arguable case with a realistic prospect of success? What is the depth of the required understanding of the underlying facts disclosed on the affidavits at the contested leave stage, and did the trial judge's written judgment disclose that level of understanding? I do not propose to restate the factual background as set out by Boodoosingh JA except where material.

[2] The transaction involved the sale of certain insurance portfolios owned by Colonial Life Insurance Company Limited ('CLICO') and British American Insurance Trinidad Limited ('BAT') (collectively 'the companies'). The companies are subsidiaries of CL Financial Ltd ('CL'). The transaction was a commercial tender process by which the two subsidiary companies would, for valuable consideration, transfer the portfolios to a successful bidder. The consideration for the sale would be used, in the main, to pay off the companies' and CL's creditors.

[3] The intercession of the Central Bank in the affairs of the companies was not an uninvited *blitzkrieg* operation. Both companies were subsidiaries of CL, a company deeply imbedded in the nation's economy and CL was on the brink of insolvency in 2009. The government of Trinidad and Tobago, attempting to avert a national financial catastrophe, entered into a Memorandum of Understanding with CL and, in exchange for certain concessions, injected $18 billion to keep CL afloat. One of the concessions, according to Mr Fitzgerald QC, lead counsel for the applicant, Maritime, was that commercial decisions in relation to the traditional life insurance portfolios would be circumscribed by the Central Bank. The Central Bank disputes that allegation of fact. I think that its resolution is best left for the substantive hearing. It would be wrong to say that it is not an arguable question of fact, and not appropriate to embark on a mini-trial and make findings at the leave stage.

[4] The resolutions of the boards of directors of the two companies to sell the portfolios to one of the bidders was, on the evidence before the trial judge, unavoidable. Apart from the Memorandum of Understanding, it was the decision of the Central Bank, exercising its powers under section 44D(1)(c)(vi) of the Central Bank Act, that these portfolios be sold. These powers were not solely created by the Memorandum of Understanding but existed independently by virtue of the material provisions of the Act. The members of the respective boards were, after all, appointed by the Central Bank after the Government intervened in 2009.

[5] I do not see on the evidence any liberty to the boards to refuse to sell to one of the bidders. The trial judge, correctly, in my view, described the Central Bank's powers and activities in the affairs of the companies as "interventionist" and thus

sufficiently involved in the decision-making to make its activities reviewable. Another competing categorisation I detect at a subterranean level of the Central Bank's submissions is that it is a noninterfering bystander, having little of consequence to do with the boards' decision-making process. For the reasons I set out below I do not accept this categorisation of the Central Bank.

[6] An important question is whether the Central Bank exercised any statutory powers over the companies to the extent that some of the powers of the boards were not exercisable either partially or wholly without the oversight of the Central Bank as a necessary prerequisite. I think that the evidence at the leave stage sufficiently discloses the existence of such oversight. I do not think that the trial judge was plainly wrong to suggest that the boards did not have a free hand. The evidence does not disclose that they were "free agents".

[7] In my view this statutory oversight introduces a sufficient public law element or flavour to take the case outside of commercial transactions entered into freely by persons utilising the normal rules applicable in business relations between ordinary individuals.

[8] In *Aston Cantlow and others v Well Bank and another* [2004] 1 AC 546 the question was whether the Church of England was a public authority within the meaning of the Human Rights Act, 1998 (UK). The answer lay, in part, on an understanding of the functions of the Church of England. "Functions of a public nature" was a criterion in the definition of a public authority in the Human Rights Act. This logically excluded acts or functions, the nature of which were private. Lord Nicholls of Birkenhead proposed that some entities might be "core public

authorities" (exercising purely public functions or acts) or "hybrid public authorities" (exercising functions or acts that were both public and private).

[9] With a view to proposing a test Lord Nicholls said this:

> *"What then is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of government functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities or is providing a public service."*

[10] The distinction raised between core and hybrid public authorities sheds an oblique light on the nature of the Central Bank's approval of and involvement in the decision to sell the companies' portfolios to SAGICOR. An analysis of the nature or character of the decision-maker (the Central Bank) is one tool to discover whether a body is involved in a purely commercial transaction.

[11] Firstly, it is clear that the Central Bank is a public authority. It is carrying out a function that is publicly funded and, in having oversight of the sale, is exercising statutory powers. For the purpose of satisfying the applicant's low threshold of an arguable case with a realistic prospect of success in the grant of leave I am satisfied that the Central Bank's involvement in the sale by the companies of their portfolios cannot be reasonably described as a purely commercial transaction between the companies and the bidders. The Central Bank is exercising its powers of sale under section 44D(iv). Prior to the exercise of these

powers, it published notices in the Official Gazette of the assumption of control over the companies, among other companies under the CL umbrella. Section 44E(3) provides that upon such publication "the property and the powers of control stated therein shall vest in the Bank". A statutory framework of such breath was felt sufficient to grant power to a court to review: *Mohit v DPP of Mauritius* [2006] 1 WLR 3343.

[12] In my view, the transaction is not so devoid of a sufficient public law element or flavour to overturn the trial judge's decision to grant leave to apply. The condonation of a state of affairs over which a body has oversight or control may amount to a decision not to interfere. It may also amount to a decision to turn a blind eye to a flawed process. These are very similar to an actual decision to sell. All of these examples involve decision-making. The substantive hearing will reveal which is which.

[13] The above explains the trial judge's understanding of the nature of the decision-maker. I think it is of sufficient breath to justify his decision. This reasoning applies equally to the second area of enquiry, namely the nature and subject matter of the decision itself. The decision can be scrutinised in two ways. Firstly, it seems clear, and the judge recognised it, that there was a statutory underpinning to the transaction in glaring contrast to the *NH* cases (*NH International (Caribbean) Ltd v UDECOTT*, Civ App, No. 95 of 2005, and *NH International (Caribbean) Ltd v NIPDEC*, Cv No 2005-00460, (both unreported). The subject matter of this transaction is a transfer of assets under the control of the Central Bank acting in conjunction with the Minister (see section 44D(vi) of the Act). The statutory underpinning is as clear as day.

[14] Secondly, there is the issue of whether the character of the specific transaction falls within the sphere of public or private law. In *Boxhill & Ors v Port Authority of Trinidad and Tobago*, HCA No. 1234 of 2004, 19 December 2007 (unreported), I made observations on this point that were approved by Bereaux JA on appeal. Bereaux JA's judgment in *Boxhill* on this point was later endorsed by the Privy Council in *The Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22. These observations bear repetition.

[15] An entity may be a public authority and still be involved in private law transactions that would oust the jurisdiction of a public law court to judicially review its decisions. For example, a supplier's claim for unpaid invoices for the supply of stationary against a core or hybrid public authority or state entity is a private law commercial claim. However, if the supplier's invoices remain unpaid because of the state entity's political, racial or other discriminatory practices against the supplier, while other suppliers' invoices are being paid, then the decision not to pay would be subject to public law challenge on the basis of a breach of natural justice or unfairness. In such a case, the *bona fides* of the decision-making process will need to be scrutinised, not at the leave stage, but at the substantive hearing. In the case before us, the transaction, because of its professed statutory/commercial wiring and circuitry, and, perhaps, possible overlapping between the two, requires such in-depth scrutiny at a substantive trial. It is possible that considerations that were not *bona fide* worked their way into the exercise of the decision-making process. This seems to be the covert slant of Maritime's arguments, especially in light of the anonymously delivered documents.

[16] I agree with my brother Boodoosingh JA that the proper place for such an interrogation of the facts is at the substantive hearing and not at the leave stage. A whole range of legitimate forensic tools exist at the substantive stage of the proceedings to excavate and reveal evidence that will reassure a trial judge one way or the other. These tools are not available at the leave stage, even when contested. A mini-trial is not suitable.

[17] The Central Bank's powers are draconian and designed for use in exceptional circumstances. Mr Fitzgerald QC is right to describe them as exercisable only in the protection of the public interest. It is the Central Bank's declared statutory duty to safeguard the interests of depositors, creditors, and policyholders. One such important creditor is the Trinidad and Tobago government, acting in pursuit of the public interest, that has invested substantial taxpayers' funds to bail out CL and avert a national economic crisis.

[18] Having regard to that factual background it would have been wrong for the judge, on the affidavits before him, to have disregarded the public or administrative law elements in the transaction and to view it as a purely commercial private law transaction. The level of understanding that is required at this stage of the proceedings will obviously be lower than at the substantive hearing. This fact, by itself, is no reason to overturn the trial judge's decision. I think that there was sufficient material before the court on the key questions of fact and law for him to arrive at his decision, and I am referring to (a) the nature of the decision-maker and (b) the nature of the decision itself.

[19] An arguable case with a realistic prospect of success for the grant of leave has been proven. I agree with the judge below and with my brother, Boodoosingh JA.

A substantive hearing will further clarify the factual underpinnings and, possibly, the motives, oblique or otherwise, that drove the decision-making process. A fuller picture will emerge. It is something that is valuable to all the litigants, and, although not a determinative factor, it is also in the public interest that such an enquiry should be undertaken.

[20] Having concurred with the other findings of Boodoosingh JA, I too agree that the appeal should be dismissed.

James Christopher Aboud
Justice of Appeal