IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CIVIL

CLAIM NO: ANUHCV 2007/717

BETWEEN:

ANTIGUA POWER COMPANY LIMITED

Claimant

and

THE ATTORNEY GENERAL

First Defendant

HON. BALDWIN SPENCER

(AS MINISTER OF APUA AND ENERGY)

Second Defendant

ANTIGUA PUBLIC UTILITIES AUTHORITY

Third Defendant

COMMISSIONER OF POLICE

Fourth Defendant

Appearances:

Mr. Jeffrey Robinson, Q.C. and Mr. Dane Hamilton, Q.C. and with them Mr. Raimon Hamilton for the claimant

Mr. Douglas Mendes, S.C. and with him Mr. George Lake and Mr. Hendrickson Kentish for the first, second and fourth defendants

Sir Gerald Watt, Q.C. and with him Dr. David Dorset for the third defendant.

2008: September 29, 30; October 01, 02; November 11;

2009: February 23

JUDGMENT

[1] **Thomas J (Ag.):** Pursuant to leave of the Court granted on the 7th December 2007, the claimant, by way of a fixed date claim, filed on 21st December 2007, seeks judicial review with respect to the actions of the defendants being the Attorney General, the Hon. Baldwin Spencer (as Minister of APUA and Energy), the Antigua Public Utilities Authority and the Commissioner of Police.

[2] The remedies sought by the claimant include: declarations, administrative orders, damages for breach of contract and injunctions jointly and/or severally under the provisions of Part 56 of CPR 2000. A number of grounds which are detailed below; but in essence they concern entitlement to the benefit of a joint venture contract; legitimate expectation of substantial benefit of the contract aforesaid; damages for breach of an agreement between the claimant and the third defendant; entitlement for damages against the second and third defendants; exemplary and or aggravated damages against the second defendant; acts of obstruction by the second defendant against the claimant; failure by the second defendant to exercise his powers fairly, quashing of the second defendant's decision regarding the three engines made on 4th December 2007; the claimant's entitlement to a lease; and an injunction restraining the second and third defendants from acting unlawfully.

[3] In the Fixed Date Claim filed on 21st December 2007, the claimant indicates that reliance will placed on the affidavit in support of the application for leave sworn to by Calid Hassad on 7th December 2007 and filed on the same date. And by an order of the Court dated 18th January 2008, the defendants/respondents were required to file and serve affidavits within 28 days of the said order. The order also required the claimant to file and serve an affidavit, if necessary within 14 days of the defendants' affidavit.

[4] Pursuant to that order affidavits were filed by Mr. Justin Simon, Q.C.[1], Mr. Lyndon Francis[2], Mr. Esworth Lenroy Martin[3] and Mr. Clarvis Joseph[4] on behalf of the defendants; while Mr. Francis Hadeed[5] filed an affidavit in reply on behalf of the claimant. Additionally, Mr. Justin Simon, Q.C., filed a further affidavit on behalf of the first and second defendants. The affiants all attended trial and were cross-examined. It is against this background that the evidence must be addressed.

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[1] Core Bundle No. 1 ("CB1) Tab 13, filed February 2008
[2] CB1 Tab 14, filed 4 April 2008
[3] CB1 Tab 15, filed 4 April 2008
[4] CB1 Tab 16, filed 17 April 2008
[5] CB1 Tab 17, filed 22 April 2008

The Evidence

Calid Hassad

[5] At paragraphs 3 to 8 of his affidavit, Mr. Calid Hassad outlines the circumstances surrounding the landing of the three remaining engines for what he termed "the 50.9 megawatt joint venture." In particular, he speaks of correspondence in this regard to Hon. Trevor Walker, Minister for APUA and the responses received and of certain events regarding the landing of the said engines.

[6] At paragraph 10 the affidavit says that the genesis of the events started in April/May 2006 when the Government and the third defendant began treating with the claimant regarding needed electricity generation and a proposed joint venture for this purpose. The essence of which was the installation and commissioning of a 17 MW gen set by December 2006 in time for the World Cup and a further 34 MW: 23 MW by December 2007 11 MW by December 2009.

[7] According to Hassad, after several negotiations between the management of the third defendant and the claimant, the Cabinet authorized the Hon. Wilmoth Daniel to proceed immediately to make all necessary arrangements for the purchase of one 17 MW generator from Wartsila. He says further that the sequel to this event was the conclusion of what was labelled, "Joint Venture Electricity Supply Proposed APUA/APCL" involving the third defendant and the claimant.

[8] At paragraphs 16 and 17 of his affidavit, Calid Hassad elaborates on the Joint Venture proposal as follows:

> "16. That amongst other things it provided a joint Venture for a 50.9 megawatt project utilizing or phased approach to ensure effective preparation and implementation of the Joint Venture Phase I contemplated the installation, commissioning and maintenance of the above 17MW Gen set with associated auxiliaries and substation facility by 31st January 2007 to be 100% financed by the claimant.
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> 17. Phase II contemplated the installation, commissioning and maintenance of 33.9 megawatts generators with associated auxiliaries and substation facilities to meet growing consumer demands by December 2007. Also included was a substation facility on the southern side of the island financed solely by the claimant in an amount not exceeding US $1 million. The entire project was to be financed by the claimant. In both instances, the signed proposal provided that it will be subject to the approval of Cabinet."

[9] The next significant event identified by Mr. Hassad is the matter of the attendance of representatives of the third defendant and of the claimant at a meeting of Cabinet on 15th May 2006 at which time the Joint Venture Proposal was discussed and certain decisions were made by Cabinet in this connection. And it is further deposed by Hassad that, "In the result, the claimant

entered into a Turnkey Contract with Wartsila Finland O.Y in the amount of US $49,319,000.00 for the 51 M HFO Diesel Power Plant with a requirement for an initial payment of US $4,931,900.00 being 10% of the Turnkey Contract price."

[10] At paragraphs 26 to 31 of his affidavit, Hassad makes mention of the following events: 1. The delivery of the 17 MW 18V 16 Wartsila engine to the plant at Crabb's Peninsula in November 2006. 2. The sending of a draft of the proposed Joint Venture Agreement to the third defendant for their consideration, with mention being made in the accompanying letter of a company, Energen Limited being incorporated. 3. The claimant being reliably informed that the Chinese Beijing Construction Engineering Group was invited by the second defendant, sometime in October/November 2006, to supply the second phase of the Joint Venture undertaking. 4. A meeting on 29th January 2007 between the claimant's Managing Director and the second defendant in light of the information received concerning the second phase of the proposed joint venture. 5. Following the completion of the testing of the Phase I engine, the third defendant was informed that the said engine was ready to supply commercial power to the third defendant with effect from 1st February 2007; and a request being made by the claimant for a power purchase agreement.

[11] It is deposed by Calid Hassad that with respect to the Joint Venture Proposal, as of 31st January 2007, no communication had been received by the claimant with respect to the same notwithstanding the allegation by the second defendant that only Phase I was agreed to. He deposes further, that on 28th March 2007[6], a letter was sent to claimant's attorney by the Attorney General which also maintained the position that Cabinet definitive approval was only with respect to the 17 MW Wartsila 18 V46 engine. It is Mr. Hassad's evidence at paragraph 39 of his affidavit that the issue of land surfaced at a meeting convened at Cabinet Office on 13th August 2007, between the parties, and that at that meeting it was alleged that the claimant was not providing the defendant with full details of expenditure made in respect of the project and that there was no full disclosure. In response, according to Hassad, Mr. Francis Hadeed handed Minister Walker a copy of the Wartsila agreement and at the same time the claimant was told that the land would be provided as part of the defendant's equity and would not be transferred to the claimant.

[12] At paragraph 44, Hassad addresses the question of a letter[7] dated, 2nd November 2007 sent by Minister Trevor Walker to the claimant's attorney which concerned a Cabinet Decision relating to the finalization of the "Joint Venture Agreement" for the supply of 50.9 MW of power generator, together with a request for the supply of all relevant financial information "to assess whether the

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[6] Exhibited as C.H. 20
[7] Exhibited as C.H. 24

joint venture is in the best interest of the Government."[8] Also mentioned at paragraph 45 is the claimant's response in which the contract price and its willingness to accept an evaluation of the 50.9 MW Turnkey project by an internationally recognised and registered asset evaluator were stated.[9]

[13] It is further deposed by Mr. Hassad that by letter[10] dated5t h November, 2007 he was advised of a committee appointed by Cabinet to negotiate with the claimant "without prejudice" as follows:

(a) the proposed Joint Venture Agreement- Phase I (17 MW which has been agreed) and Phase II (33,9 MW) on terms that the Cabinet considers acceptable; or alternatively

(b) a buy-out of the aggregate 50.9 MW Generator Project.

[14] The deponent concludes by saying that the claimant remains committed to negotiate with the defendants and has no issue with any buy out.

[15] In cross-examination by Mr. Douglas Mendes, S.C., learned counsel for the first, second and fourth defendants, Mr. Hassad was asked to clarify paragraph 11 of his affidavit which sought to interpret the content of the third defendant's letter of 30th April 2006 addressed to him. In this regard, the witness testified that the letter dealt with a combination of Cabinet discussions and mutual discussions between the parties, APUA and APC[11].

[16] Concerning the 25th April meeting of Cabinet, attended by representatives of the claimant and the third defendant, the witness was asked if he agreed that only Phase I of the Joint Venture was discussed, He disagreed and contended that both phases were discussed. He said that he was not sure if the taking of the minutes were inadvertent or inaccurate. Finally, when the witness was asked if he was dissatisfied with the minutes as they do not reflect what took place, his response was in the affirmative.

[17] Paragraph 11 of the letter dated 30th April 2006, (CBD 9) (Symister to Hassad) makes mention of APUA being fully briefed and provided with copies of all documentation of all negotiations with Wartsila for the purchase of gen sets. In this regard, Calid Hassad was asked whether he agreed with this aspect of the proposed and whether it was honoured. In response the witness testified variously by saying: "We did not refuse it, for sure." "We did not refuse it. We did agree to that." And on the question of APUA being fully supplied with copies of documentation concerning

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[8] C.H. 25

[9] Ibid

[10] Letter with Cabinet Decision of October 31, 2007 exhibited as C.H. 26.

[11] Transcript of Trial Proceedings, Vol. 1, p.127, lines 12-16.

negotiations with Wartsila, Hassad's response was in the negative. And on the connected question as to whether or not APUA was a party to and represented at all negotiations for the acquisition of Wartsila gen sets, the answer was also in the negative. Further, when questioned as to why, after not objecting to paragraphs 11 and 12 of the letter of 30th April 2006, he did not comply, the responses was that he acted in accordance with the letter of 11th May 2006, "as discussions were still ongoing and the letter was sent to us by APUA."[12]

[18] With respect to the negotiations with Wartsila, Calid Hassad initially testified that the resulting agreement with Wartsila was conducted in accordance with the Joint Venture Proposal signed on 11th May 2006. This he later modified by saying that it was based on mutual discussions that were held. And in terms of the content of the actual proposal, Hassad did testify that in view of the two phases, this amounted to two separate transactions; and was unsure if the Joint Venture envisaged a Joint Venture with respect to the purchase of the 17 MW engine. The witness later agreed that the Cabinet Decision of 9th May 2006 did not authorise the 50.9 MW plant.

[19] In cross-examination by Sir Gerald Watt, Q.C., learned counsel for the third defendant, Mr. Hassad agreed that the genesis of the matter was really the provision of electricity for World Cup; and on that basis traced the event's leading up to the Joint Venture Proposal.

[20] Specifically on the matter of the negotiations regarding the Joint Venture, Hassad testified that APUA was provided with the technical specifications regarding the whole plant to be purchased from Wartsila.

[21] With respect to the language of the Cabinet conclusion as to what was to be purchased, Hassad testified as follows: "My understanding was that we were to proceed to buy 17 megawatt engine and the associated auxiliaries so that we could produce power from the 17 megawatt engine. That is what I say the auxiliaries [are]."

[22] In terms of the progress report on the project and APUA's involvement, to the extent of the removal of transmission lines, removal of pipelines and assistance in installing substation transformers, Mr Hassad gave substantial details.

[23] When it was put to the witness by Sir Gerald Watt, Q.C., that Austin Joseph's involvement was confirmed to participation with the recording and signing of minutes, he responded by saying that Joseph was involved in the presentation of the project.

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[12] Transcript of Trial proceedings, Vol. 1, p.144-145, lines 20-25 and 1-2, respectively.

[24] In re-examination by Mr. Jeffrey Robinson, Q.C., Mr. Calid Hassad maintained that Mr. Austin Joseph was not merely an observer but an active participant in the building of the 51 megawatt power station. He then went on to detail same of the activities in this regard.

Francis Hadeed

[25] Francis Hadeed in his affidavit deposed that he is the Chairman of the Board of Directors of the claimant and as such is authorized to swear to the several matters contained in his said affidavit. He went on to depose further that he took issue with several matters contained in the affidavits of Justin Simon, Q.C., Elsworth L. Martin and Lyndon Francis, the latter two being employees of the third defendant.

[26] At paragraphs 4 and 5 of his affidavit, Mr. Hadeed explained that during the month of April 2006 the claimant was engaged in negotiations with the third defendant for the expansion of its power generating facilities and that such negotiations continued until the submission by the third defendant on 11th May 2006, of its joint Venture Electricity Supply Proposal. Included among the matters with which Mr. Francis Hadeed takes issue is the content of paragraph 13 of Mr. Simon's affidavit. According to Hadeed, this paragraph is not completely true as far as it relates to the Cabinet Decision of 16th May 2008, and the Joint Venture Agreement APCL/APUA in respect of the producers of electricity and the shareholders of 55% / 45% APCL/APUA.

[27] The matter of the project being solely funded by the claimant, the ordering of the engine for the first phase and the conditions laid down by Wartsila are addressed by Mr. Hadeed at paragraph 8 and he goes on to explain the signing of the Letter Agreement with Wartsila on 3rd May, 2006.

[28] It is the contention of the deponent that the Letter Agreement stipulations were "Critical factors which necessitated Cabinet meetings, Cabinet Decision of 9th May 2006, and its consequent decision on May 15, 2006." He continues: "Otherwise the Claimant would not have committed it self to any financial outlay short of a firm commitment by the Government of Antigua and Barbuda."

[29] The deponent further deposes that by letter dated 23rd May 2006, sent by the claimant's General Manager, the parties were all notified at the commencement of the Joint Venture Electricity Supply Project. He also contends that APUA, representatives fully participated in the discussions as to the scope of supply, logistics and site preparation as well as the actual development of the 50.9 MW power plant at Crabb's Peninsula. In the circumstances, Hadeed expresses concern with the

Attorney General's statement, at paragraph 13 of his affidavit, that the Cabinet was never informed of the June 23rd 2006, Turnkey Contract with Wartsila.

[30] At paragraph 13, the deponent deposes that prior to November 2006, he was not aware of any discussions between the Government and the People's Republic of China. Further details in this regard are given at paragraph 15 of his affidavit which arose out of a meeting at the Attorney General's Chambers in March 2007 and at which time both the Attorney General and Minister Walker professed no knowledge of the issue.

[31] Further issue is taken with paragraph 22 of Mr. Simon's affidavit in terms of the investments required for the 50.9 MW power plant; the Joint Venture Company that would run the plant and the shareholding in that company between APCL and APUA.

[32] In cross-examination by learned counsel for the first, second and fourth defendants, Mr. Francis Hadeed testified that the Circulation Note mentioned at paragraph 6 of his affidavit came to him in the mail, anonymously. He further testified that the proposal from the Chinese came by the same route, in an envelope without any other document. And in terms of the Cabinet minute mentioned at paragraph 16 of his affidavit, Hadeed testified that he received it from Minister Daniel in discussion with him. This was later retracted when it was pointed out to him by learned counsel that the minute is dated March 2007 and by which time Minister Daniel was no longer the Minister responsible for APUA.

[33] With respect to the contract with Wartsila to purchase engines, Mr. Hadeed admitted that this was done prior to Cabinet had approved any aspect of the project. He later explained further that: "We were bound with Wartsila for the 17 megawatt engine to hold it and we had discussions with Cabinet on the 27th regarding the 50 megawatt." This was later affirmed after further cross-examination on the issue.

[34] In this context, Mr. Hadeed was asked whether he had any guarantee from anyone in the Cabinet that there would be approval for any aspect of this venture. This was his answer: "We had discussions that there was indication from Cabinet that approval would be forthcoming and were in discussion with the whole Joint Venture issue up and down from a whole three, four weeks before and the whole premise was we were doing a 50 megawatt – 50.9 megawatt plant."

[35] At a later stage in the cross-examination, Mr. Hadeed testified that prior to May 3rd there was a verbal agreement from Cabinet based from "our discussions." According to Hadeed, this indication

came from the entire Cabinet. When questioned further on the necessity or otherwise of official communications, this was doubted by Mr. Hadeed, his preference being for more information on the matter by way of another Cabinet Decision.

[36] In re-examination, Mr. Hadeed testified that he had discussions with Elsworth Martin, Lyndon Francis, John Bradshaw, Leon Symister and Minister Daniel concerning the generators. According to the witness, these discussions led him to the belief that he had on 3rd May 2006 in relation to the Agreement with Wartsila.

[37] In answer to a question arising posed by learned counsel for the first, second and fourth defendants, concerning the verbal Cabinet approval and the context of the requirement for Cabinet as contained in the last paragraph of the letter dated 30th April 2006, Mr. Hadeed maintained that after the meeting with Cabinet he had verbal approval.

Justin Simon

[38] In his affidavit filed on 12th February 2008, Mr Justin Simon, Q.C. , deposes that he is the Attorney General of Antigua and Barbuda, is named as the first [defendant] in the action and is a member of Cabinet. He deposes further that he had personal knowledge of some of the issues raised in the action and had advised Cabinet from time to time in this regard.

[39] At paragraphs 5 and 6 of his affidavit, Mr. Simon address the issues of the oral presentation on 25th April 2006 to Cabinet by a team of representatives of the claimant, Wartsila Caribbean Inc, and the third defendant with respect to the supplying of generators to the claimant, and the Joint Venture proposal contained a letter dated 27th April 2006 from the claimant's Managing Director to the Hon. Wilmoth Daniel and copied to the first and second defendants. According to the deponent, the letter proposed a "Joint partnership" with the third defendant for the supply of electricity following a turn key project fully financed by the claimant comprising: (1) a 17 MW generator by the end of 2006, three 11.33 MW generators by the end of 2007 and a substation facility to accommodate the generators. In this connection, it is deposed that the defendants deny that they initiated discussions on the issue of generation of electricity as indicated by the claimant. However, at paragraph 8, it is deposed, in part, as follows:

> "I am advised that subsequently by letter dated April 30, 2006, the Third [Defendant's] General Manager outlines the terms of a Joint Venture between the parties to provide, install and commission generator sets on terms discussed by the parties to include a new company created for that purpose with share ownership and a Board of Directors between the parties."

[40] At paragraphs 9 to 13, Mr. Simon Q.C., outlines a number of events as follows: First, on 9th May 2006, representatives of the third defendant addressed Cabinet on Phase I of their proposed joint venture with the claimant to provide, install and commission a 17 MW Wartsila generator set by 31st January 2007 with the claimant providing the financing. Additionally, a new company would be created to be owned by the claimant and the defendant 55% and 45% respectively, in respect of the 17 MW set. Second, by letter dated 11th May 2006, addressed to the claimant's General Manager and copied to three Ministers of Government the third defendant's General Manager spoke to an agreement by the claimant and the third defendant "to enter into a Joint Venture for the new 50.9 megawatt Turnkey Project, utilizing a phased approach as to ensure effective preparation and implementation of the Joint venture Agreement." The deponent goes on to say that the letter was signed by representatives of both parties, outlined a Phase I and Phase II each of which was made subject to the approval of the Cabinet of Antigua and Barbuda. Third, by a Circulation Note dated 15th May 2006, the Hon. Minister of Public Works, Transportation an the Environment sought the approval of Cabinet with respect to (1) The Joint Venture Agreement APCL/APUA in respect of producers of electricity and (2) Shareholding of 55% /45% APCL/APUA, respectively. A connected issue, according to Mr. Simon is that on 16th May 2006, Cabinet allowed representatives of the third respondent and the claimant to make a further presentation and decided that further to its decision of 9th May 2006, to approve the following:

> "(i) The Joint Venture Agreement between APCL/APUA in respect of the producers of electricity;
> (ii) Shareholding of 55% / 45% to APCL and APUA, respectively."

[41] With respect to the Turnkey Contract the following is deposed:

> "13. That the Cabinet was never informed of the execution of a Turnkey Contract on June 23 2006, between the claimant and Wartsila Finland OY until the same was brought to its attention by the Hon. Attorney General in September 2007."

[42] At paragraph 14 of his affidavit, Mr. Simon addresses the question of two documents prepared by the claimant's attorney and which were presented by the Hon. Wilmoth Daniel to Cabinet for its consideration. They were a draft Joint Venture Agreement and a draft lease to Energen Limited. It is the contention of the deponent that no representative of Cabinet was a party to the preparation of either of the documents. In this regard, detailed reasons are given by the deponent.

[43] The matter of non-implementation of Phase II of the Joint Venture Proposal is dealt with by the deponent by saying that there was never a decision by Cabinet authorizing same.

[44] Finally at paragraph 26, the following is deposed:

"26. That pending resolution of the impasse particularly the issue of the three generators which formed part of the proposed Phase II, the respondents [defendants] refused to grant the Claimant permission to install the generators at the power plant lest such permission be interpreted to represent either reversal or an implied waiver of the respondents stated position on the claimant's Phase II proposal."[13]

[45] On 9th September 2008, Mr. Justin L. Simon, Q.C., filed a further affidavit in order to exhibit certain Cabinet Decisions and correspondence. At paragraph 8 of the further affidavit, Mr. Simon deposes that: ".... I am advised by counsel and verily believe that the importance of these additional exhibits is self-evident and that their disclosure at this stage would not cause any surprise or embarrassment to the claimant."[14]

[46] In cross-examination by learned counsel for the claimant, Mr. Jeffrey Robinson, Q.C., in reference to Exhibit C.B.D. 9 (Circulation Note),Mr Simon testified that the matter World Cup being less than a year away and coupled with the inadequacy of electrical generating capacity were matters of "major concern." He also agreed that in this regard, an agreement was entered into subject to the approval of Cabinet in two phases.

[47] In respect of the Circulation Note dated 15th May 2006, it was put to the witness that the recommendation contained therein was adopted. This was denied and it was explained that the decision taken therein was further to the Cabinet's Decision of 9th May 2006, when Phase I of the Joint Venture Project was approved and which itself called for a Joint Venture Agreement.

[48] In so far as Cabinet Meeting of 15th May, 2006 is concerned, Simon explained that it "formally communicated the decision of the Cabinet." And in response to the suggestion that that was an aspect dealing with respect to the completion of documents, Mr. Simon said: "That is indeed so because we were rather concerned that the information that we received was without any technical and financial information, so that we could make a proper decision in terms of going forward."

[49] Mr. Simon was next cross-examined on whether or not the effect of decision recorded at paragraph 97 of Exhibit of C.B.D. 10 was to approve the entire Joint Venture Agreement without qualification and thereby supercede its decision of 9th May 2006. This is Simon's response: "Respectfully, I disagree this respect of the entire Joint Venture Agreement. It was only in respect of the Joint Venture Agreement as far as the 17 MW was concerned, because that was the only phase that Cabinet at this stage had approved."

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[13] Exhibit J.L.S 4
[14] Exhibit J.L.S 5

[50] On the question of the agreement with Wartsila and the claimant, it was put to Mr. Simon that this was known on 25th April 2006 as a generator was available. This was rejected in these terms: "We certainly did not know that they had entered into an agreement with Wartsila, what happened on the 25th April was that there was a presentation made by Wartsila in the presence of APCL and APUA indicating the possibilities in terms of obtaining a generator with that capacity and also discussing our needs in respect of World Cup." And at a later stage in the cross-examination, he added this: "As far as I am concerned, no decision was made on that date, either. It was simply a presentation and the persons invited, APCL/APUA and Wartsila, were then excused and we continued our discussions on the matter."

[51] Mr. Robinson also approached the question of the approval of Phase II from the perspective of APUA and questioned whether this body had put a proposal to Cabinet in this regard. The response by Mr. Simon was that it was up to Cabinet to make such a determination. And the further suggestion that no approval was necessary because the entire Joint Venture was approved on May 16 was also rejected by Mr. Simon. And at a later stage on being further cross-examined on the question of the approval of Phase II of the Joint Venture, Mr. Simon testified that it was his understanding that it does not necessarily follow that because one approves the first part that the second part is good as approved.

[52] Again, much later in the cross-examination, the matter of Cabinet's ratification of the 50.9 megawatt Joint Venture, Mr. Simon gave this explanation:

> "In two phases ... and irrespective of each phase the documents spoke to Cabinet's approval. To my knowledge, only phase one was approved by Cabinet and that decision was communicated to APC. I am not aware of any other decision being communicated to APC, though of course, I have learned during the course of this, there were matters which reached APC through some anonymous letter."

[53] In cross-examination by Sir Gerald Watt, Q.C., Mr. Simon restated his testimony that the decision 97 (CBD 10) dealt solely with the 17 megawatt generator and that both APCL and APUA were invited to the meeting and did attend same. The witness also outlined the procedure followed in Cabinet when presentations are made to the Cabinet by third parties.

Lyndon Francis

[54] In his affidavit filed on 4th April 2008, Lyndon Francis deposes that he is the Electricity Manager of the third defendant and in that capacity he took part in the oral presentation to the Cabinet on 25th April 2006. He says that at issue was the supplying of generators by Wartsila to the claimant who

in turn would supply additional electricity needs to the third defendant. The witness deposes further that: "The plant to be supplied then was a 17 megawatt (MW) generator which [would] supply electricity in time for World Cup 2007 to satisfy a maximum demand of 55 MW at affordable rates and with the third respondent acquiring a 45% equity inferred in the claimant company."

[55] At paragraph 5 to 8, Francis details a number documents relative to the issue of additional electricity generation: (1) Letter dated 30th April 2006 (Symister to Hassad-CH 4) setting on terms of a Joint Venture between the claimant and the third defendant; (2) Cabinet Decision of 12th May 2006 which authorized certain actions by Minister Daniel and the management of APUA; (3) Letter dated 11th May 2006 (Hassad to Symister) settling out the claimant's understanding of the proposed Joint Venture; (4) Circulation Note dated 15th May 2006 wherein the Hon. Wilmoth Daniel sought certain approvals.

[56] The deponent reveals that in the "month of March", discussions were held between the third defendant and certain representatives of The People's Republic of China and that a result of these discussions specifications for 30 MW power plant were forwarded to Non-Resident Ambassador, His Excellency, David Shoul.

[57] Mr. Francis at paragraph 11 of his affidavit admits that the third defendant submitted to Cabinet a Joint Venture buy-out proposal for 17 MW generator set. According to the affiant:

> "This document made an assessment of the MOU for the joint venture, the capital cost of the 17 MW Generator set and the operation maintenance, and insurance costs thereof, and recommended a buying out of the existing 17 MW Generator set and the entire infrastructure or alternatively negotiations with the Claimant to finalize the Joint Venture Project in respect of the 17 MW electricity generation. The report further specifically noted that "Phase 2 which was to provide three 11.3 MWA Wartsila Generator sets with the associated auxiliaries by January 2008, was not approved by the Cabinet of Antigua and Barbuda. A copy of the said document is exhibited by the First defendant as 'JLS 3'."

[58] It is the evidence of Lyndon Francis that the construction in the Greenfield site of the power plant facility commenced on or about June 2006 and the 17 MW Wartsila gen set was installed and commissioned on 31st January 2007. It is his further evidence that he received correspondence from Calid Hassad, General Manager of the claimant, informing him of the successful completion of the performance and reliability of the 17 MW engine and associated auxiliaries of the 50.9 MW Joint Venture Project.

[59] Finally, at paragraph 15 of the affidavit, the witness deposed that he was not aware of any Cabinet Decision approving Phase II.

[60] In cross-examination by Mr. Robinson, the witness testified that he is still the Electricity Manager. He testified further that disciplinary proceedings were brought against him in connection with two employees travelling to Trieste, Italy. He refused to give the purpose of the trip to Italy but did admit that three 11.3 generators arrived in Antigua from Trieste.

[61] It is the testimony of Lyndon Francis that on the instructions of the General Manager of the third defendant; he designated Mr. Austin Joseph to head the project. In turn, Mr. Joseph reported on the progress made, initially to the General Manager and later to the affiant himself.

[62] On being questioned concerning about being summoned by the Board, the witness said that he was so summoned but could not recall the dates. He also said that he was summoned to report generally on Electricity Division matters that were relevant and pertinent.

[63] In further evidence, the witness revealed that he journeyed to Finland to observe the 17 megawatt engine in a factory and made observations. And when questioned as to whether his purpose was to approve the generator, he responded this way: "I don't want to use the word 'approve' or 'not approve', but we were there to observe and if we made notes of anything that was unusual. We really didn't observe anything."

[64] In relation to the ordering of the three 11.3 MW generators, the witness was asked whether the order was placed to complete Phase II. His response was that Wartsila had given him a progress report.

[65] Concerning the scope and extent of the foundations to house the project, when it put to the witness that foundations were not just for Phase I but for the entire project , Mr. Francis responded in this way: "Generally, it was my understanding that the building and foundations were being put down that could house the entire 50.9 megawatts." And in this connection, the witness testified that APUA assisted with the project and mentioned, in this regard the temporary construction of transformers.

[66] In response to a question posed, learned counsel for the first, second and fourth defendants concerning the generation of electricity, Mr. Francis testified as follows:

> "APUA has the sole authority to generate electricity. Anyone who generates would have to pass through my department and such a person would have to meet our specifications, otherwise it would not be allowed on the ground. It would be in our best interest to inspect any machinery that was being brought in."

Elsworth Lenroy Martin

[67] In this affidavit filed on 4th April 2008, Elsworth Lenroy Martin says that he is the General Manager of the third defendant bearing responsibility for the general management of the assets and resources, including human resources of the Public Utilities Authority. He goes on to say that he is authorized to swear the affidavit on behalf of the said third defendant.

[68] At paragraph 4 of his affidavit, the deponent details the fact that on 25th April 2006, he, along with other representatives of the third defendant, the claimant and Wartsila Caribbean Inc., took part in an oral presentation to the Cabinet of Antigua and Barbuda. He deposes further that the purpose of the presentation was the supply of generators by Wartsila to the claimant who in turn would supply additional electricity to the third defendant.

[69] Also detailed by the deponent, is the letter dated 30th April 2006, from the General Manager of the third defendant to Calid Hassad, the General Manager of the claimant. According to the deponent, the letter addressed the question of Joint Venture between the claimant and the third defendant to provide, install and commission generator sets on terms discussed by the parties. Some of the important terms are indentified by Mr. Martin.

[70] The affiant makes reference to the Cabinet Decision dated 12th May 2006, a letter dated 11th May 2006, from the General Manager of the third defendant to the General Manager of the claimant, the Circulation Note dated 1st May, 2006.

[71] At paragraphs 12 and 13 of his affidavit, Mr. Martin deals with his understanding of the Cabinet Decisions of 12th May and 15th May, 2006 concerning the purchase of a 17 MW generator for Phase I.

[72] Finally, at paragraph 15, Mr. Martin denies knowledge of or being privy to any decision Cabinet granting approval for Phase II of the Joint Venture Electricity supply proposal either in terms similar to that of 12th May 2006, or otherwise, which speaks unequivocally or unambiguously to approval by the Cabinet in respect of the provision, installation and commission of three 11.3 megawatt generators as stipulated in Phase II of the said proposal.

[73] In cross-examination, Mr. Martin testified that it was his recommendation to Cabinet that a Joint Venture should be pursued with APCL as being in the best interest of Antigua and Barbuda. He

said that this was done against the background of the deepening crisis in electricity and in the knowledge that the time involved in ordering and delivery of an engine was 12 to 18 months. However, according to him, there was a 17 MW engine available as of 25th April 2006.

[74] It is the testimony of Elsworth Martin that Cabinet accepted his recommendation as there was concern over loosing the World Cup. And in further testimony, Mr. Martin gave details of the Joint Venture that was signed by the parties between 11th and 12th May and subsequently being informed by Minister Daniel that both Phase I and Phase II had been approved by Cabinet.

[75] In cross-examination by Mr. Mendes, Mr. Martin repeated his earlier testimony that shortly after 10th May at a meeting with Minister Daniel, he was informed that Phase I of the project had been approved and at a subsequent meeting, he was again informed by the Minister that Phase II has also been approved. In further cross-examination, the witness indicated that the Minister told him that "the project" had been approved by Cabinet.

[76] Concerning the letter dated 21st September 2006, and addressed to Calid Hassad, the witness explained that APUA's Board was now appointed and that had raised with it the whole question of "substantiating authorization of the project." The witness explained further that this was because no documentation had been received from Cabinet.

[77] Some aspects of Mr. Martin's testimony in this regard are as follows:

> "So I have an auditing background, I am covering myself and the members of my team and I want to see something authentic, so I made the request. Not only that, I think that during September '07, we had gone to Cabinet on a couple of occasions, the Board and some members of the management team.
> And in addition to that, I think, the Board itself had sought clarity in this matter as well...
> So that is the reason why by September 21st '07, it became apparent to me that the whole, the entire thing was questionable.
> Maybe I need to add something. When we had gone to Cabinet it was made clear to me in Cabinet that the project Phase two was not approved. It was said at that time when we were in Cabinet."

[78] In his final response, Mr. Martin testified that at the time of writing the letter on 21st September 2007, he had not received any authentic communication from Cabinet approving Phase II.

[79] In re-examination, Martin testified after 16th May 2006, no Cabinet Decision had come to him as General Manager of APUA.

Clarvis Joseph

[80] In his affidavit filed on 17th April 2006, Clarvis Joseph deposes that he is Chairman of the third defendant having assumed the position on 1st September 2006. He further deposes that he is authorized to swear the affidavit.

[81] At paragraphs 4, 5 and 8 of his affidavit, Mr. Joseph refers, ***inter alia***, to a letter dated 11th May 2006, addressed to the claimant's General Manager, Minister Daniel, the Electricity Manager and the Finance and Accounts Manager. This letter set out the terms of a proposal APC/APUA Joint Venture Agreement. The other document referred to is the Circulation Note dated 15th May 2006, whereby the Minister Daniel sought certain approvals from Cabinet. He deposes further that he is privy to the 'Joint Venture Buy Out proposed for 17 MW Generator Set' dated February 2007 and which was presented to Cabinet by the management team of the third defendant.

[82] The matter of the circumstances of the commissioning of the 17 MW Wartsila Gen set is addressed by Mr. Joseph at paragraph 11 of his affidavit; while at paragraph 12, he addresses Cabinet non-approval, formally or otherwise of the installation and the commissioning of the three 18 V46 Wartsila generating engines; in so far as the third defendant is concerned. The matter is again re-visited at paragraph 28 but on this occasion reliance is placed on the advice of the first and second defendants to the effect that there was never a decision of the Cabinet authorizing Phase II of the Joint Venture proposal between the third defendant and the claimant. At the same time, Mr. Joseph denies the existence of plan by the third defendant to 'scupper and second phase of the agreement' as alleged by the claimant.

[83] A final denial of the Cabinet Decision approving Phase II of the Joint Venture electricity supply proposal is contained in paragraph 37 of Mr. Joseph's affidavit.

[84] In cross-examination by Mr. Dane Hamilton, Q.C., Mr. Joseph testified that having assumed office of Chairman of the Board of APUA from 1st September 2006, he was not present at the material time, being May to June 2006, when Cabinet made its decisions with respect to the Joint Venture Proposal. He did testify however, that the general Manager of APUA did advise him of an ongoing project at Crabb's Peninsula involving power generation by APC.

[85] With respect to the Joint Venture Electricity Supply Proposal, the witness admitted that he saw it some two to three months after assuming office as Chairman of the Board of APUA. He also

revealed that it was his understanding that only Phase I of the proposal, involving a 17 MW generator had been approved by Cabinet.

[86] In so far as a Joint Venture Company is concerned, Mr. Joseph agreed that the agreement contemplated the establishment of such an entity to run the 17 MW plant but not the 33 MW plant or the 50.9 MW plant for that matter. In his view, there was only approval for a 17 MW. This position was maintained despite the fact that learned senior counsel pointed out to the witness that the relevant Cabinet minute does provide for a 17 MW plant but for the purchase of a 17 MW generator.

[87] In cross-examination by Mr. Mendes, Mr. Joseph testified that he is a businessman and has over a period of 40 years, been involved in all kinds of businesses. The witness then went on to testify that when he assumed office as Chairman of the APUA Board, he had sought of a letter dated 11th May recording an agreement between APCL and APUA. He also said that he observe from the letter that there were two aspects of the project and each needed the approval of Cabinet.

[88] It is the testimony of Mr. Clarvis Joseph that when he assumed office in September 2006, he did seek to ascertain whether or not there were approvals in relation to the letter of 11th May. In this regard, he went on to testify that he learnt from the Attorney General and the Prime Minister that Cabinet had approved the establishment of a Joint Venture for 17 megawatts. He said that he did not receive information but was referred to a letter, the last paragraph of which said 'Subject to Cabinet approval' and was assured that that was the only approval.

PRELIMINARY ISSUES

Issue regarding filing of skeleton arguments

[89] With respect to the written submissions ordered to be filed by the Court, an issue as to compliance with the Court's order was raised and which must now be considered.

[90] The order of the Court was that such submissions should be filed by all sides by 5th September 2008. There was only partial compliance. In fact, only the claimant complied with the said order. For this reason, it is the submission by learned counsel for the claimant, Mr. Jeffrey Robinson, Q.C., argues that the offending submissions should be ignored especially since there was no application for relief from sanctions. Learned counsel goes on to submit that in the circumstances the appropriate sanction for the breach of the Court's order is that neither skeleton argument should be accepted.

[91] The submission by learned counsel for the first, second and fourth defendant is the contention that the Court has permitted the claimant to claim judicial review. The issue identified by learned counsel is the stage at which the point is taken given the fact that the Court heard an application by the first defendant as late as 20th September 2008 and the objection is being taken on 22nd September 2008. Says counsel: "Evidently had they complied with the Court Order and filed their skeleton on 5th September 2008, they would have taken the point and they obviously had not thought of it at that stage."

[92] It is correct to say that no application was made for relief from sanction pursuant to Part 26.8 of C.P.R. 2000. At the same time, however, under C.P.R 2000 the Court has wide powers of case management. To this end, Part 25.1 mandates the Court to further the overriding objective by actively managing cases. Therefore, in all the circumstances, including the nature of the case and the overriding objective, no sanction will be imposed on the defendants. And although the premise of the Court is somewhat different from that of learned senior counsel, the point is taken. It is therefore important as a matter of common fairness and justice that this trial should proceed as the trial dates were set for several months, since June 2008.

[93] The Court will therefore consider all submissions.

The proper legal vehicle

[94] The skeleton arguments filed by the defendants reveal a number of points in limine. And as indicated at the start of the trial, the rulings thereon will be given at the time of the judgment.

[95] Given the fact that the circumstances of the case give rise to the contention of a contract between the claimant and the third defendant, the point raised thereby is whether judicial review is the proper legal vehicle as opposed to private law remedies.

Submissions

[96] Learned counsel for the first, second and fourth defendants, Mr. Douglas Mendes, S.C., having reagrd to the relief sought by the claimant submits, that: "....the claimant's claim in relation to the above-stated relief is an abuse of the process of the Court having been brought under the

provisions of Part 56 of C.P.R. 2000 when the claim "sounds as private law for breach of contract." The arguments goes on to say that by initiating action under the said Part 56, the claimant has by-passed the elaborate procedure relating to claims in private law. For this proposition, the case of **O'Reilly v Mackmann**[15] is cited.

[97] On behalf of the third defendant, it is submitted that the claim for judicial review on the facts before the Court is entirely misconceived.

[98] The submissions on behalf of the third defendant begin with a reference to the Privy Council decision in **Kuper Prince v Minister of Finance** which holds that in the context of judicial review, the concern of the court is legality rather than the merits of the decision and with the fairness of the decision making, rather than whether the decision is correct.

[99] The submissions continue with a reference to the law relating to the meaning of judicial review and the conditions that are necessary for a decision of a public body to be reviewable. In this regard, the submission is made that even where a public law cause of action arises, judicial review may still be appropriate where there is a sufficient public issue. And with respect to the instant matter before the Court, the submission is that the evidence discloses no decision by the third defendant involving the claimant and as such judicial review does not arise.

[100] The elaborate and learned nature of the submissions notwithstanding, the issue can be narrowed to whether the public law element in the matter is sufficient to ground judicial review.

[101] The foregoing in turn depends on the scope of judicial review and in this regard, the rule is that any public authority, even where it is created by virtue of the prerogative, or by or under an enactment, is susceptible to judicial review.[16]

[102] In a leading text, **JUDICIAL REVIEW OF ADMINISTRATIVE ACTION** it is said that: "A body is performing a public function where it seeks to achieve some collective benefit for the public or a sector of the public and is accepted by the public or that sector of the public as having the authority to do so."[17]

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[15] [1983] 2 A.C. 237

[16] See: R v Criminal Injuries Compensation Board Exp Lain [1967] 2 QB 864, 881 per Lora Parker CJ and per Diplock LJ at 883.

[17] 5th ed. by De Smith, Woolf and Jowell at para. 3-010 – 3-020.

[103] At issue here is the action or inaction of the third defendant, and in this regard it must be common ground that it owes its existence to the Public Utilities Act,[18] ("the Act"). In particular, section 5(1) of Act says that: "Subject to subsection (2), the Authority[19] shall have the exclusive right to generate, distribute, supply and sell electricity within Antigua and Barbuda and to perform services incidental thereto." This is undoubtedly a public function.

[104] To say that the claimant's case sounds in private law for breach of contract must be juxtaposed against the fact that the third defendant performs a public function in order to determine whether or not judicial review is the appropriate vehicle for the claimant.

[105] In Vol. 1 (1) of **HALSBURY'S LAWS OF ENGLAND** at paragraph 61, it is stated that there is no single test for determining whether a body will be amenable to judicial review. The source of the body's power is a significant factor. As such, if the source of the body's power is a statute or subordinate legislation it will usually be amenable to judicial review. Decisions of bodies whose authority is derived solely from contract or from the consent of the parties will usually not be amenable to judicial review. In between these extremes, it is helpful to look not only at the source of the power but also the nature of the power.

[106] Professor, Albert Fiadjoe[20] after a review of the authorities especially the case of **R v Civil Service Appeal Board Exp. Bruce**[21] submits that the central element of the test is whether the dispute has a sufficient public law element and if the public law would prevail even if there was a contract of employment.

[107] The question of private law dominating proceedings was considered in **Roy v Kensington, Chelsea Family Practitioners Committee.**[22] The case concerned a claim by a general practitioner for his full allowance, notwithstanding the fact that the Committee had decided that the practice allowance should be reduced because the practitioner was diverting a substantial amount of time to his private practice. The Committee argued that the proceedings should have been by way of judicial review because of the nature of the allegations which were being made against a public authority.

[108] Ultimately, the appellant was allowed to continue his proceedings by way of private action since the House of Lords held the view that the Court had jurisdiction to entertain his action either because

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[18] Cap. 359, Revised Laws of Antigua and Barbuda, 1992.
[19] In section 2 of the Act "Authority" means the Public Utilities Authority established under section 3.
[20] **Commonwealth Caribbean Public Law** (2nd ed.) at pages 82 – 84.
[21] [1988] 3 All E.R. 686
[22] [1992] 1 A.C. 624.

the **O'Reilly v Machmann** principle did not apply because his private law rights dominated the proceedings, and the order sought for the payment of money could not be granted on judicial review.

[109] It has already been shown that the third defendant holds a statutory monopoly over the generation and supplying of electricity and the issues in these proceedings revolve around that monopoly. Therefore, the question of the dominance of public law is, in the view of the Court, patent and therefore the appropriateness of judicial review.

[110] With that said, and as noted above, reliance was placed on the "much criticized"[23] case of **O'Reilly v Mackmann.** This is misplaced as the sole issue in that case was whether the Court could grant declaratory relief in ordinary actions begun by what of originating summons at the instance of prisoners disputing the validity of punishments awarded by a board of prison visitors. The House of Lords held that in view of the new Order 53 [of the Old Rules of the Supreme Court] the proceedings should be struck out as an abuse of the process of the Court; and that the only available procedure in such a case, since it was a matter of public law, was an application for judicial review.

Striking out the Second Defendant

[111] Learned counsel for the first, second and fourth defendant, Mr. Douglas Mendes, S.C., also raises the issue of the procedural appropriateness of naming the second defendant as a (party) in the proceedings, having regard to the holding in **Goodwin v Spencer & Simon.**[24]

[112] There need not be any debate in this regard as the above-cited case has established for all times that the Attorney General should be the sole defendant in cases involving civil action against the Crown. However, the matter has proceeded to trial with the original parties and in the view of the Court; the removal of the second defendant at this stage is likely to lead to practical difficulties having regard to the pleadings. The critical point, however, is the Attorney General, the nominal defendant, is named as the first defendant.

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[23] De Smith et al, op cit, para. 36-068
[24] Civil Appeal No, 25/2005, C.A: ECSC

Availability of alternative remedy

[113] Sir Gerald Watt, Q.C., for the third defendant, has raised the issue of the existence of an alternative remedy in private law. On this issue, the case **Preston v Inland Revenue Commissioners**[25] and in particular the dicta of Lord Scarman[26] and Lord Templeman.[27] They say quite categorically that a remedy by way of judicial review should not be granted where an alternative remedy is available.

[114] But no rule is absolute and there are other cases which establish the propositions that the matter of the grant permission to proceed with judicial review is a matter of the overriding discretion of the Court;[28] and the presence or absence of an alternative remedy in private law is not determinative as to whether the matter is amenable to judicial review.[29]

[115] There is also authority that says that the matter of the availability of an alternative remedy should be taken at the stage of the application for permission and not at the hearing on the merits.[30]

[116] It is therefore the determination of the Court the point sought to be pursued cannot be pursued at the time of the hearing on the merits; and regardless of which exception is preferred there are grounds for permitting the hearing of the application on its merits.

Compliance with section 38 of the Public Utilities Act

[117] It is the submission of learned senior counsel for the third defendant is that there was a failure to comply with section 38 of the Act. The contention being that the section prescribes certain circumstances in which the Cabinet may assume control and management of the Authority.

[118] It is therefore submitted that:

> "(1) [B]etween April and September 2006 APUA operated without the benefit of a duly appointed Board of Commissioners. Consequently it cannot be argued that the circumstances existed in which the claimant could invoke section 38(1). Indeed, there is absolutely no evidence that they purported

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[25] [1985] 2 All E.R. 327.
[26] Loc cit at p. 330.
[27] Loc cit at p. 337.
[28] R v Lambeth LBC, ex p Crookes [1997] HLR 28 ???
[29] R v Crown Prosecution Service, ex p. Hoss [1994] 6 Admin LR 778
[30] R v Falmouth and Turo Port Health Authority, exp. South WestWater Ltd [2001] ???

to do so. The evidence simply shows that the substantive Minister, Wilmoth Daniel was involved in policy matters which related to APUA.

Further, the claimant has been unable to exhibit a notice published in the ***Gazette*** pursuant to section 38(3) stating that the Cabinet had asked in pursuance of subsection(1) by reason of the fact that there has been no publication."

[119] Given the foregoing, it becomes necessary to reproduce section 38 of the Act in its entirety. It reads thus:

> "38. (1) Notwithstanding any other provision of this Act, where the Cabinet is satisfied-
>
> (a) that there has been failure by the Authority to comply with or to give effect to any direction or requirement of the Minister pursuant to section 37; or
>
> (b) that with respect to any public utility, the Authority is for any reason unable or unwilling to act and that such conduct on the part of the Authority is contrary to the interest of Antigua and Barbuda,
>
> the Cabinet may assume the control and management of such public utility for such period as the Cabinet may deem necessary and may perform all the functions and exercise all the rights, power and duties appertaining thereto as are vested in the Authority under and by virtue of this Act.
>
> (2) In the exercise of its functions under subsection (1) of this section, Cabinet may delegate any of its rights, powers or duties or issue directions to such public authority, public officer, committee or person as the Cabinet may seem fit in the interests of Antigua and Barbuda.
>
> (3) A notice published in the *Gazette* stating that the Cabinet has acted in pursuance of subsection (1) of this section shall be conclusive evidence of the assumption by the Cabinet of the functions, rights, powers and duties mentioned in that subsection and of the date of such assumption stated in the notice; and the Cabinet may in like manner by notice published in the ***Gazette*** specify the termination of any such assumption of control and management and the date thereof.
>
> (4) For the avoidance of doubt, it is hereby expressly declared that the assumption of control and management by the Cabinet as provided for in this section shall be to the exclusion of any other Authority, body or person whatsoever, or their agents; and such exclusion shall continue until the publication of a notice of termination of control and management as provided for in subsection (3) of this section.
>
> (5) This Act shall, for the purposes of this section, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this section."

[120] The submissions on behalf of the third defendant bear on the **ultra vires** doctrine which has been described as the central principle of administrative law and as the juristic basis of judicial review.[31] The simple proposition being that a public authority may not act outside its powers.

[121] In essence, section 38(1) of the Act, vests a discretion in the Cabinet to be satisfied of either of two circumstances in order to assume control of such public utility. And utilities is defined as services

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[31] Wide & Forsyth, op. cit, at page 35. This legal proposition was approved in Boddington v British Transport police [1999] 2 A.C. 143, 171 per Lord Steyn.

authorized under this Act for supplying electricity, providing and maintaining telephone services and telephones, and supplying water; while 'public utility' is defined as any one such service.

[122] On the assumption that the Cabinet is 'satisfied' that either of the two circumstances exists, subsection (3) requires a notice to be published in the Gazette stating that the Cabinet had assumed the functions, rights, powers and duties of the Authority with respect to the supplying of electricity. In like manner another notice is required on the termination of such control by the Cabinet.

[123] It is the contention of learned counsel that there is no evidence to show that either of the circumstances prescribed by section 38 (1) of the Act existed; and also that there is no notice is in evidence in these proceedings, as required by section 38(3).

[124] It may be said that given the draconian nature of section 38(1), Parliament considered that such a notice would lend transparency to the exercise of the power and good governance. But perhaps more importantly, the requirement goes towards the rule of law. In other words, it must appear that whatever Cabinet did in these unusual circumstances accords with some rules prescribed by law. To the point it is said that: "Government according to the law means that the executive or any civil authority or Government Official cannot exercise a power unless such exercise of it is authorised by some specific rule of law."[32]

[125] The **ultra vires** doctrine, therefore returns into focus again; and the Court agrees that there is no evidence to suggest that any of the prescribed circumstances existed plus there is no evidence of a notice being published in the ***Gazette***. And it means that the Cabinet, by not acting in accordance with the said section 38 means acted outside of its clearly prescribed powers. In plain terms, the Cabinet never lawfully assumed control and management of the public utility, namely the supply of electricity covering the period of at least April to August 2006. The same must be said to the public officer to whom the Cabinet purported to delegate some or all of its control and management. The action of the Cabinet may properly be classified in judicial review terms as an illegality as the purported exercise of power exceeds the limits or there was a failure to perform the power of duty in a lawful manner. In the result the action of the Cabinet of assuming control of a public utility, namely electricity services, otherwise than as prescribed by the Act is nugatory and hence an illegality.

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[32] Michael Allen & Brian Thompson, Cases and Materials on Constitutional and Administrative Law, (5th ed.) p. 183.

[126] In this context, this telling dictum of Lord Donaldson MR in **R v Boundaries Commission for England, ex p Foot** is most appropriate:[33]

> "It is of the essence of parliamentary democracy that those whom powers are given by Parliament shall be free to exercise those powers, subject to Constitutional protest and criticism and parliamentary and other democratic contents. But any attempt by Ministers or local authorities to usurp powers which they do not have or to exercise their powers in a way which is unauthorised by Parliament is quite a different matter."

[127] By way of footnote, it is of some importance to note that no submissions were tendered on behalf of claimant with respect to the submissions with respect to section 38 of the Act. However, learned senior counsel, Mr. Jeffrey Robinson, Q.C. in his cross-examination of the learned Attorney General did allude to the absence of the notice as required by the enactment in issue.

[128] In the event that the Court is mistaken in its conclusion regarding section 38 of the Act, the substantive issues must now be considered.

ISSUES FOR DETERMINATION

[129] The following issues arise for determination:

1. Whether the Joint Venture Proposal created obligations between the claimant, the third defendant and any other person or authority.
2. Whether the Cabinet of Antigua and Barbuda gave its approval to Phase II of the Joint Venture Proposal.
3. Whether the claimant is entitled to the remedies sought in judicial review under the heads of legitimate expectation, illegality and bad faith.
4. Whether the doctrine of estoppel arises in the circumstances..

ISSUE NO. 1

Whether the Joint Venture Proposal crated legal obligations between the claimant, the third defendant and any other person or authority.

[130] In plain terms the issue without a doubt points to a question as to whether there was a creation of legal obligations which ordinarily does not invoke the question of judicial review. Therefore, in the

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[33] [1983] 2 W.L.R. 458, 465.

circumstances the locus of question of fact within the fabric of judicial review must be pursued and put into a true perspective.

Judicial review and issues of fact

[131] According to Michael Fordham, **JUDICIJAL REVIEW HANDBOOK**, (3rd ed.) at page 460: "Judicial review is a principal tool of public law applicable to 'public' bodies...." This is the case whether the source of that body's power is the common law[34], statute[35] or rules of Court[36]. And of the many dicta as to the nature and purpose of judicial review that of Lord Brightman is especially elegant and accurate. This is what his Lordship said in **Chief Constable of the North Wales Police v Evans**[37]:

> "Judicial review is concerned, nor with decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the court... will under the guise of preventing the abuse of power, be itself guise of usurping power."

[132] The important distinction between an appeal and an application for judicial review is also made by Lord Templeman in **Reg v Independent Television Commission, Ex parte TSW Broadcasting LTD.**[38] According to him:

> "Parliament may by statute confer powers and discretions and impose duties on a decision maker who may be an individual, a body of persons or a corporation.... When Parliament has not provided for an appeal from a decision maker, the Courts were not to invent an appeal machinery. The Courts had invented the remedy for judicial review, not to provide an appeal machinery but to ensure that the decision maker does not exceed or abuse his powers."

[133] In short, therefore, judicial review is not concerned with merits, the province of appellate courts, but with the legality of the decision making process. In this regard, a concrete example is provided by Sir Alastir Blair-Kerr in **Marks v Minister of Home Affairs**[39]:

> "Court does not and cannot inquire into the merits of the Minister's decision. There is also no appeal to this Court against the Minister's decision on the merits. This Court can only examine the legality of the process adopted to reach a decision a nullity if the decision has not been reached according to law."

[134] In view of the narrow but precise scope on the jurisdiction of a review court, it cannot be surprising to find this dicta being enunciated by the Privy Council in **Kemper Reinsurance Co. V Minister of Finance and Others** in these terms[40]

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[34] See Wade & Forsyth, **Administrative Law** (7th ed.) P.38
[35] Administrative Justice Act, Cap. 109B, Laws of Barbados
[36] Civil Procedure Rules 2000, Part 56.
[37] [1982] 1 WLR 1155, 1173
[38] The Times, 30th March, 1992.
[39] [1983] 35 W.I.R. 106, 109.

"In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision maker and the fairness of the decision making process rather than whether the decision was correct."

[135] These proceedings rest on judicial review which for the most part usually involves questions of fact and law. But a perusal of the evidence and the proceedings reveals that some of the issues are heavily weighed almost exclusively on questions of fact. In this regard, the authorities suggest that finding of fact by a review court is not outside that court's competence. Wade and Forsyth, at page 643, make the point that: "Questions of fact may easily be crucial, for example where the case turns on jurisdictional fact or error or violation of natural justice." Indeed, in **R v SOS for the Department of the Environment, ex p London Borough of Islington**[41], Nolan LJ noted that: "Disputed questions of fact do not normally arise in judicial review cases, but they can of course arise and they may be crucial."

[136] In this instance, the Court is of the view that the question as to whether or not a binding agreement exists and whether or not Cabinet approved Phase II of the Proposal are substantially questions of fact that are critical to the whole application for judicial review. From this it follows that the issues of fact and of law surrounding the application for judicial review will dominate the inquiry.

The application for judicial review

[137] In the application for judicial review, the claimant advanced extensive pleadings on the particulars of the contract. They cover the initial discussions between the Government and the claimant concerning the generation of additional electricity, the time and financial constraints of Wartsila, the supplier of the generators – all in the context of World Cup Cricket '2007 and Antigua and Barbuda's desire to stage part of the event.

[138] The claimant advances the basic submission that a proposal from the claimant and the third defendant arising out of discussions and which was eventually accepted and signed by the parties.

[139] At paragraphs (viii) and (ix of the application the following is pleaded:

"(viii) As accepted and agreed to by the Claimant was that both the Claimant and the Third Defendant had agreed to enter into a Joint Venture for the new 50.9 megawatt Turnkey project utilizing a phased approach so as to ensure effective preparation and implementation of the Joint

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[40] [2001] 1 A.C. 1

[41] [1992] COD 67. See also Michael Fordham, op cit at para. 19.3.4

Venture Agreement. The two phases of which were confirmed by the parties with the approval of Cabinet and were:-

(a) Phase I: inter alia, the installation, commissioning and maintenance of a 17 mw Wartsila Gen Set by the 31st January, 2007, on the understanding that this was the only unit Wartsila can make available in this time frame.

(b) Phase II: install, commission and maintain a further 33.9 megawatts comprising of three 11.3 megawatts generators with associated auxiliaries and substation facility by December, 2007. It was provided that these installations will complete the 50.9 megawatt Turn Key project and will be financed by the Claimant and its shareholders. This agreement will be refereed to at the trial as to its true terms and meaning.

(ix) That notwithstanding the execution of the proposed development in two phases as approved by Cabinet, there was never two separate projects but one for the development of a 50.9 megawatt power plant. Further, the parties thereto knew and understood that Wartsila could only as of May 11th 2006 supply one 17 mw engine given the lead time of 8 months to 2 years required to develop and supply engines of the megawattage and size requested by the project. Further, all of the parties well knew and understood that to complete Phase II of the agreement, the Claimant as financier would have to contract with Wartsila as of May 2006 for the three engines in keeping with the required lead time and the agreement deadline of December, 2007."

[140] The claimant also pleads the facts surrounding the contract with Wartsila and the development of the plant and the financing thereof. The fact of the commissioning of the 17 megawatt engine is also pleaded. Then at paragraph (xxii) the following:

"(xxii) The Second and Third Defendants had full knowledge of the terms and conditions of the 11th May, 2006 agreement and of the matters set out in paragraphs 5 (xi) (xiii) and (xiv) above; the Third Defendant engineer well knew of the scope of the power plant under development at Crabbs, and in no way dissenting therefrom or objecting or demurring in any manner whatsoever within a reasonable time or communicating any objection thereto within a reasonable time prior to the Claimant's expenditure of moneys for the projects. In the premises, the First and Second Defendants thereby agreed to and accepted the full scope of the project financed by the Claimant. Alternatively, by their silence and conduct, and with full knowledge that the Claimant would proceed in all of the circumstances then inhering with the financing of the 50.9 mw power plant to be completed by December, 2007 they permitted and induced the Claimant to believe that they had agreed to and accepted the full scope of the May 11th 2006 agreement."

Submissions

[141] On behalf of the claimant, the following is submitted: "The exchange of drafts and re-drafts between the parties indicates an intention to enter into a formal, binding written contract between APUA and APCL, as evidenced by the documents exchanged between 30th April and 9th May. These exchanges clearly envisage a Joint Venture for the establishment of the entire 50.9 MW plant."

[142] The submission on behalf of the first, second and fourth defendants are in these terms: "It is clear, however, that whichever way that issue of fact is determined, there is no evidence of any agreement between the claimant and the Government of Antigua and Barbuda to conclude a Joint Venture Agreement. Such is between the claimant and the APUA."

[143] The third defendant submits that the claimant's contention that a valid and binding contract exists is misconceived for the following reasons: 1. **Exhibit CH 6** is a proposal between APUA, APCL and retains that status until accepted by the third defendant. 2. The proposal speaks of Phase I and II each being approved by Cabinet or by the Board of APUA. 3. Such approval was given with respect to Phase I by way of Cabinet Decisions 101 and 97 of 9th May and 16th May, 2006, respectively. 4. The foregoing is confirmed by Cabinet Minute **(Exhibit CH 5)** which deals with the purchase of the 17 MW engine and a request for all relevant documentation with the technical and financial arrangements to the said engine.

Conclusion

[144] As noted above, it may be said that the events with respect to the generation of additional electricity began on 25th April 2006, when representatives of APC, APUA and Wartsila appeared before Cabinet to make a presentation regarding the supply of generators to APC, the claimant. In this regard, the excerpts of Cabinet minute dated 25th April 2006, records the following:

> "7. The following are the points highlighted:
>
> - Mr. George[42] said that they could deliver a 17.5 mega watt plant which could provide electricity by December, 2006 or in time for Cricket World Cup 2007.
> - Antigua Public Utilities Authority (APUA) agreed to Antigua Power Company (APC) undertaking supply of the additional electricity required at this time. The maximum anticipated future demand is 55 mega watts. At present supply is 38 mega watts but could peak at 44 mega watts.
> - APUA pledges to sell electricity to consumers at affordable rates. Partnership with APC would ensure sustainability of this policy.
> - APUA intends to acquire at least 45% equity interest in APC.
> - APUA should pursue the use of alternative energy.
> - APUA expects to decrease cost of electricity generation in the near future.
> - APUA is striving for better engine efficiency in electricity generation.
> - APC intends to set up a plant on the southern site of the island to supply electricity to consumers in that area."[43]

[145] What followed the presentation was a letter dated April 27, 2006 (CBD 3) from Calid Hassad, General Manager of APCL to the Hon. Wilmoth Daniel, Minister of Works, Transportation, the

[42] Representing Wartsila Caribbean Inc.
[43] Exhibited as JLS 4 / CBD 2

Environment and APUA. The letter contained the first mention of the "Joint Partnership" and for present purposes; the first paragraph of the said letter is relevant. It reads thus:

"Dear Sir,

Antigua Power Company is hereby submitting the following proposal as a Joint Partnership with APUA for the supply of electricity.

We are prepared to install the following Turnkey Project on a Greenfield site that will be fully financed by Antigua Power Company Limited.

(a) One - 17 Megawatts generator and associated by the end of year 2006;

(b) Three – 11.3 Megawatts generators each and associated auxiliaries by the end of year 2007;

(c) Subsection facility to accommodate the generators above."

[146] The response from APUA was quick. It came from the General Manager, Mr. Leon Chaku Symister and sought to outline APUA's understanding of what had transpired thus far. The relevant parts of the letter dated 30th April 2006, **(CBD 4)** to Calid Hassad are in these terms:

"Re: Proposal APC/APUA Joint Venture

Dear Sir,

Antigua Public Utilities Authority hereby acknowledges receipt of your correspondence dated, 27th April, 2006 on the subject matter. The Authority also refers to the Cabinet meeting of 25th April 2006, and other discussions between the parties. The following is APUA's understanding of the discussions to date and the mutual understanding that has emerged therefrom:

1. APC and APUA agree to enter into a Joint Venture to:
   (i) Provide, install and commission a 17 MW Wartsila Gen-set by December 2006, in sufficient time for World Cup 2007. It is understood that this is the only unit that Wartsila can make available in the time frame. It is further understood that this unit would be dispatched primarily at or below 12 MW.
   (ii) Provide, install and commission a further 34 MW Gen-set capacity to meet the growing consumer demands: (a) 23 MW by Dec '07 and (b) 11 MW by Dec '09.
2. A new company shall be created for the purpose of the Joint Venture with APC holding 55% of the shares in the new entity and APUA holding 45% of the said shares.
3. APC and APUA shall each have representatives on the Board of Director of the new company proportionate to their respective shareholdings.
4. – 13....

14. It is understood that in order to ensure the commissioning of the 17 MW Gen set in time for World Cup 2007, it is necessary for APC to make a down payment to Wartsila by 3rd May, 2006.

15. Such down payment by APC shall be at APC's sole risk as it is expressly understood and agreed that the understanding arrived at herein shall be subject to the approval of the following:

(i) The APUA Board of Director (where the said Board is in place at the date of the execution of any agreement emerging out of this Memorandum of Understanding).

(ii) The Cabinet of Antigua and Barbuda.

The Authority looks forward to your favourable and expeditious response in this letter.

Respectfully yours,

Leon Chaku Symister
General Manager

cc: Hon. Wilmoth Daniel, Minister of Works, Transportation, Environment and Public Utilities
Mr. Francis Hadeed, Director APCL
Mr. Elsworth Martin, Finance Manager, APUA
Mr. Lyndon Francis, Electricity Manager, APUA."

[147] Further correspondence was sent to Minister Daniel by way of a letter dated 4th May, 2006. The content of this letter is somewhat similar to that of 27th April 2006[44], but it bears the caption: "Letter of Agreement 50.9 MW Turnkey Project." And its contents are more elaborate on technical details. Importantly, it does mention the matter of the installation of a turnkey project by APCL and its shareholders comprising: (i) One -17 Megawatts generator and associated auxiliaries by the 31st January, 2007 in sufficient time for World Cup 2007. (ii) Three - 11.3 Megawatts generators each with associated auxiliaries by the end of year 2007. (iii) Substation facility to accommodate the generators above. (iv) Requisite substation in the southern side of the island of Antigua so as to connect the consumers on that part of the island."

[148] The letter ends with these words: "It is firmly recognised that time is of the essence in that this agreement must be signed on or before May 5, 2006 to comply with WARTSILA relative to the purchase of the 17 Megawatts generator to ensure its full operation by January 31st 2007."

[149] Further correspondence between APUA and APC dated, May 8, 2006 and APUA and APC, dated May 9 2006, are exchanged. The technical contents are similar but they expressly introduced the notion of Phase I and Phase II. And the matter of the approval of Cabinet is recited in relation to each phase.

[150] The letter of May 8, 2006 from APUA mentions: "APCL and APUA agree to enter into a Joint Venture utilizing a phased approach." On the other hand, the letter dated May 9, 2006 contains the following paragraph: "APC and APUA agree to enter into a Joint Venture utilizing a phased approach so as to ensure effective preparation and implementation of the Joint Venture Agreement. The following is therefore mutually agreed to and confirmed by the parties with the approval of Cabinet."

[151] The culmination in terms of common ground came on May 11, 2006 when a letter following the basic pattern of the letter of May 9, 2006 from APC, the claimant, to APUA, the third defendant.

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[44] Exhibit **C.B.D 3**

[152] Without a recital of all of the details the following excerpts from the letter are considered to be salient:

1. "APCL and APUA agree to enter into a Joint Venture for the new 50.9 Megawatt Turnkey Project utilizing a phased approach so as to ensure effective preparation and implementation of the Joint Venture Agreement.
2. The following is therefore mutually agreed to and confirmed by the parties with the approval of Cabinet.
3. Phase I and II are mentioned with the 17 Megawatt Generators to be installed and commissioned with associated auxiliaries and substation facility by 31st January, 2007. And with respect to Phase II: "Provide, install, commission and maintain a further 33.9 megawatts. Comprising three- 11.3 megawatts generators with associated auxiliaries and substation facility to meet the growing consumer demand by December 2007.
4. A new company shall be created for the purpose of this Joint Venture with APCL holding 55% of the shares in the new 50.9 megawatts Turnkey Project and APUA holding 45% of the said shares.
5. APUA will appoint a Project Engineer and Site Engineer in consultation with APCL during this project execution phase of the 17 MW Turnkey Project. The employment costs of the same to be for the account of APUA.
6. The Joint Venture shall terminate on 31st January 2009, or at an earlier date mutually agreed upon by the parties.
7. The "subject to the approval of Cabinet of Antigua and Barbuda" characterizes both Phase I and Phase II."

[153] Critically, the letter from APUA bearing the caption "Joint Venture Electricity Supply Proposal – APUA/APCL" is signed by the General Manager, the Minister responsible for APUA. The Finance and Accounts Manager and the Electricity Manager, APUA and agreed and accepted by Francis Hadeed, Chairman APCL and Calid Hassad, General Manager APCL on 12th May 2007. It is copied extensively.[45]

[154] In historical perspective, the various pieces of correspondence between the parties have been variously described as joint partnership,[46] proposed APC / APUA joint venture,[47] letter agreement[48] and joint venture electricity supply proposal- APUA / APCL.[49]

[155] The rule is that the label which parties place on documents agreed on does not determine its legal effect. At the same time, such a document need not be labelled 'contract' in order to give rise to binding legal obligations.

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[45] Included are: Hon. Baldwin Spencer- Prime Minister, Hon. Wilmoth Daniel- Minister...[responsible for] APUA, Hon. Dr. Errol Cort - Minister of Finance and the Economy, Hon. Justin Simon- Attorney General and Minister of Legal Affairs, Francis Hadeed- Director of Antigua Power Company Limited, Ms. Vernessa Matthews- Permanent Secretary – Ministry of Works, Transportation, the Environment and APUA, Leon Chaku Symister- General Manager – APUA, Mr. Esworth Martin- Finance and Accounts Manager – APUA, Mr. Lyndon Francis – Electricity Manager – APUA.
[46] Exhibit C.B.D 3
[47] Exhibit C.B.D 4
[48] Exhibit C.B.D 5
[49] Exhibit C.B.D 6

[156] In this case, the operative letter bears the caption: "Joint Venture Electricity Supply Proposal – APUA / APCL."

[157] In one instance Joint Venture is defined[50] as:

> "A commercial undertaking entered into by two or more parties, after setting up a separate joint-venture company in which all partners have shares, to enable resources and skills to be shared. Joint Ventures are defined in a European Commission notice of 31 December 1994 as 'undertakings which are jointly controlled by two or more undertakings'. In practice, joint ventures encompass a broad range of operation, from merger-like operations to cooperation for particular functions, such as research and development, production, or distribution."

[158] A perusal of the operative joint venture document reveals many of the elements outlined above. In addition, it contains this provision:

> "APCL and APUA agree to enter into a Joint Venture for the new 50.9 Megawatts Turnkey Project, utilizing a phased approach so as to ensure effective preparation and implementation of the Joint Venture Agreement.
> The following is therefore mutually agreed to and confirmed by the parties..."

[159] Having regard to the evidence and the law, the Court agrees with the following propositions advanced on behalf of the claimant in support of a valid contract[51]:

> "The scope of the contract is clear as to the following essential requirements:
>
> (1) The scope of the works – This is the 50 megawatt project, to be procured on a turnkey basis in two phases.
> (2) The contract period and completion dates for provision of the project. Phase I was to be completed by the 31st January 2007. Phase II by December 2007.
> (3) The contract consideration. APCL were to procure the 50.9 MW project on a Build, Own, Operate and Transfer (BOOT) basis. Thus APCL would recoup the costs involved in constructing the project from the revenue stream received from the sale of the electricity provided by the plant for the life of the Joint Venture. The price of that electricity and its distribution between the parties is agreed on Page 3.
> (4) The duration of the Joint Venture. The Joint Venture was agreed to terminate on 31st January 2029."

[160] The Court also agrees that the proposal that was accepted and signed on 11th May 2006, created binding obligations, between the claimant and the third defendant, however, these were conditional on the act of a third party, namely the Cabinet which at the material time, performed the functions of the Board of the said third defendant.

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[50] **Oxford Dictionary of Law** (5th ed.) p. 270

[51] See: Skeleton arguments on behalf of the claimant, pages 10-11.

[161] It is to noted, that learned counsel for the first, second and fourth defendants in his written submissions implicitly accepts the existence of a binding contract between the claimant as the third defendant, subject to certain basic rules of contract. His fundamental point however is that the first and second defendants are not parties to the agreement. On the other hand, the submission on behalf of the third defendant that the content of Exhibit CH6, which relates to a proposal, retains that status is not supported by the evidence and the law.

[162] At paragraph 796 of **CHITTY ON CONTRACTS**, the following learning illuminates the circumstance[52]:

> "The liability of one or both of these contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event. In such a case, the contract is said to be subject to a condition precedent may have one of a number of effects. It may, in the first place suspend the rights and obligations of both parties, as, of instance where the parties enter into an agreement on the express understanding that it is not to become binding or either of them unless the condition is fulfilled[53]. Secondly, one party may assume an immediate unilateral binding obligation subject to a condition. From this he cannot withdraw, but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled. Thirdly, the parties may enter into an immediate binding contract but subject to a condition, which suspends all or some of the obligations of one or both parties pending the fulfilment of the condition."

[163] With the contract in place and common ground that Phase I of the contract was approved, there must necessarily follow a determination as to whether the condition of Cabinet approval was granted with respect to Phase II.

ISSUE NO.2

Whether the Cabinet of Antigua and Barbuda approved Phase II of the Joint Venture Project

[164] It is common ground that the question of approval characterizes one of the terms of the agreement as it relates to both Phase I and Phase II. Consideration of the issue must necessarily begin with the matter of interpretation of the agreement.

The matter of interpretation

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[52] Vol.1,(26th edition).

[53] For this proposition the following cases are cited: Pym v Campbell [1856] 6 E & B 370; Aberfoyle Plantations Ltd v Cheng [1960] A.C. 115; William Cory & Sons Ltd. V 1 R.C. [1965] H.C. 1088; Haslemere Estates Ltd. V Baker [1982] 1 W.L.R. 1109.

[165] The journey must necessarily begin with an examination of the competing arguments as to the manner in which the Court should interpret the agreement.

Submissions

[166] In this regard, the submissions are primarily those advanced on behalf of the claimant which are as follows: 1. When construing the document the following should be borne in mind: (a) It is a commercial document reflecting an agreement between two experienced commercial bodies of equal bargaining position. (b) The question is what a reasonable person, in the circumstances of these parties would have understood the parties to have meant by the specific language used. (c) The agreement should be construed in the light of its commercial objective and to reflect business common sense. A commercially sensible construction is more likely to give effect to the intention of the parties. **[Mannai Investment Co Ltd v Eagle Star [1997] AC 749.** (d) The Court's construction should generally be against literalism - ***Sirius International Insurance Co v Fai General Insurance* [2004] 1 WLR 3251.** 2. The agreement must be read as a whole as there is no implication and no possible or honest way of construing the agreement as binding only in respect of the 17 MW Generator. 3. While the Phase I and Phase II works are separately described as two phases, they are not severable. 4. There are no stand alone provisions which apply only to one of the two phases. Instead, the entire contract provisions relate to the entire contract works, that is the 50.9 MW project. 5. The description of the project as a 50.9 MW Turnkey Project is repeated throughout the document.[54] 7. APUA's suggestion that the agreement was concluded in respect of Phase I only does not bear scrutiny.

[167] In terms of the law on the matter of the construction of commercial documents, Mr. Robinson is correct. The movement is away from literalism. It is towards a commercially sensible construction. This is articulated by Lord Steyn in the House of Lords decision in **SIRIUS INSURANCE CO. V FAI GENERAL INSURANCE**[55] when he said this:

> "There has been a shift from literal methods of interpretation towards a more commercial approach. In Antaios Compania Noviera SA v Salen Rederierna AB [1985] AC 191, 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: 'if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion sense, it must be made to yield to business common sense.' In Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd [1997] AC 749, 771, I explained the rationale of this approach as follows:
>
> > 'In determining the meaning of the language of a commercial contract... the law... generally favours a commercially sensible construction. The reason for this approach is that a

[54] Reference is made to page 1 of the document, paragraphs 2 and 4, page 2, paragraphs 2 and 11.
[55] [2004] 1 WLR 3251, 3257-3258

commercial construction is more likely to give effect to the intention of the parties. Words are therefore in a way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis or niceties of language.'

Lord Steyn therefore comes to this conclusion:

"The tendency should therefore generally speaking against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 ed.), Vol III, p. 60. The moral philosophy of Paley influenced thinking on contract in the 18th century. The example is as follows: the tyrant Tenures premised the garrison of Sebastic that no blood will be shed if they surrender to him. They surrendered to. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in interpretation process. This approach by the decisions of the House in Mannai Investment Co. Ltd. V Eagle Start Life Assurance Co. [1997] AC 749, 775 E-Q, per Lord Hoffman and in Investors Compensation Scheme Ltd. V West Bromich Building Society [1998] 1 WLR 896, 913 D-E, per Lord Hoffman."

[168] In the recent case of **Nearfield Ltd. v Lincoln Nominees Ltd. and another**[56] involving a Joint Venture Agreement the word 'procure' fell to be construed and Mr. Justice Peter Smith, who, in adhering to the business common sense approach, quoted, with approval, the following from the House of Lords decision in **Investors Compensation Scheme Ltd. v West Bromich Building Society** as follows[57]:

'I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds [1971] 3 All E.R. 237 at 240-242, [1971] 1 W.L.R. 1381-1386 and Reardon Smith Line Ltd. v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co. [1976] 3 All E.R. 570, [1976] 1 W.L.R. 989,* is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret

[56] [2007] 1 All E. R. (Comm) 441, 451g- 452h. It is to be noted that the case of **Mannai Investment Co. Ltd. V Eagle Star Life Assurance Co. Ltd., (*supra*)** quoted by Lord Steyn is discussed in the judgment.
[57] [1971] 3 All E.R. 237, 240.

utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *[Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd. [1997] 3 All E.R. 352, [1997] A.C. 749.].*

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All E.R. 229 at 233, [1985] A.C. 191 at 201.*

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

[169] Amidst this plethora of highly persuasive authority it follows that business common sense must determine the import of the Joint Venture Agreement in issue.

[170] The Court has already ruled on the binding nature of the agreement[58]. It is dated 11th May 2006, signed on behalf of APUA, the third defendant, on the one hand, and "agreed and accepted" on behalf of the claimant on 12th May 2006.

The agreement

[171] The agreement is in the form of a letter and bears the caption: "Joint Venture Electricity Supply Proposal – APUA / APCL and addressed to Calid Hassad, General Manager, APCL."

[172] The document[59] begins at paragraphs 1 – 3 with a reference to a letter dated 11th May 2006[60], and the negotiations between the parties, the decision of the Cabinet with regard to the subject matter.

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[58] Signing were: Hon. Wilmoth Daniel, Minister of Works, Transportation, the Environment and APUA; Leon Chaku Symister, General Manager APUA, Esworth Martin; Finance and Accounts Manager and Lyndon Francis, Electricity Manager.

It goes on to say that APCL and APUA agree to enter into a Joint Venture for the new 50.9 megawatt Turnkey Project, utilizing a phased approach and that "the....following is therefore mutually agreed to and confirmed by the parties with the approval of Cabinet."

[173] Under the caption Phase I at paragraph 4, the following is stated:

> "Provide, install, commission and maintain a 17Mw Wartsila gen-set with associated auxiliaries and substation facility by 31st January, 2007 in sufficient time for World Cup 2007. This 17Mw generator with associated auxiliaries will form part of the 50.9 megawatt turnkey project. It is understood that this is the only unit that Wartsila can make available in this time frame. It is further understood that this unit would be dispatched primarily at or below 13Mw. It must be emphasized that it will be required at time to operate this unit at about 100% capacity so as to perform certain performance monitoring and also to ensure optimum technical performance. These tests will be done approximately once monthly and shall be of duration two or three hours. This is to be financed by APCL and its shareholders."

Overview of the agreement

[174] Clauses 5 to 12 of the agreement are concerned with the creation of the Joint Venture company with specific shareholding between the parties; reduction of 7% of the unit price charged to APUA with effect from 1st June 2006; representation on the Board of Directors as between the parties; purchase of fuel under the Joint Venture, minimum dispatch guarantee for the contract year 2007; right of to first dispatch when energy is in excess of the minimum dispatch; fuel dispatch for the new engines; day to day management and plant operational activities of the Turnkey Project resting with APCL in consultation with APUA;

[175] Clauses 13 to 15 are in these terms:

> "APUA will appoint a Project Engineer and a Site Engineer in consultation with APCL during the project execution phase of the 17MW turnkey project. The employment costs of the same to be for the account of APUA.
>
> This Joint Venture shall enter into a PPA agreement along a Build, Own, Operate and Transfer (BOOT) concept for the new 50.9 Megawatt project that shall commence January 2007 and terminate January 2029.
>
> The understanding arrived at herein shall be subject to the approval of the cabinet of Antigua and Barbuda."

[176] Under the caption "Phase 2," clause 17 is of critical importance and provides thus:

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[59] The document (Exhibit CBD 8) is entirely unnumbered and for the purposes of this judgment the paragraphs are numbered 1 – 30 beginning with the paragraph which says "We refer". The agreement was signed on behalf of the claimant by Francis Hadeed, Chairman, APCL and Calid Hassad, General Manager, APCL.

[60] It was accepted in cross-examination of Calid Hassad that there was no such letter and hence an error.

"Provide, install, commission and maintain a further 33.9 megawatts comprising of Three-11.3 megawatts generators with associated auxiliaries and substation facility to meet the growing consumer demand by December 2007. Requisite substation facility in the Southern side of the island of Antigua will also be installed so as to connect the consumers in that part of the island. Financing for such substation will not exceed US$ One Million and will be borne solely by APCL and its shareholders. These installations will complete the 50.9 megawatt turnkey project and will be financed by APCL and its shareholders."

[177] Further to clause 17, clause 18 to 22 detail the following matters: the price of energy delivered from the new generating facility with effect from 1st February 2007, establishment of a bank account by APUA at the bank holding the APCL Loan in order to assure a line of revenue; the right of first dispatch when energy is in excess of the minimum dispatch guarantee; the interest rate to be borne by the Joint Venture company; and the day to day management and plant operational activities of the turnkey project resting with APCL in consultation with APUA.

[178] Also of critical importance are clauses 23 to 31. They provide as follows:

"APUA will appoint a Project Engineer and a Site in consultation with APCL during the project execution phase of the 33.9 MW turnkey project. The Employment costs of the same to be for the account of APUA.

Two engineers from APUA will be appointed in consultation with APCL so as to be involved in plant operations and energy dispatch and curtailment. The employment cost of the same shall be for the account of APUA.

Neither APUA nor APCL will sell or assign any of their shares without the prior written consent of either party.

At a later stage there will be Public participation in the joint venture at a percentage to be determined by both parties.

At any time during the life of the Joint Venture, each party has the right to purchase the shares of the other party at an agreed upon price.

The entity will aggressively explore the possibility of alternative energy solutions to reduce cost and dependency on fossil fuel. APUA will be informed on the progress of these explorations.

The Joint Venture shall terminate on 31st January 2009 or at an earlier date mutually agreed upon by the parties.

The understanding arrived at herein shall be subject to the approval of the Cabinet of Antigua and Barbuda.

It is firmly recognized that time is of the essence in that this agreement must be signed on or before May 15th 2006 to comply with WARTSILA relative to the purchase of the 17 megawatts generator to ensure its full operation by January 31st 2007."

[179] But while the Court is persuaded on the matter of avoiding literalism, it cannot agree that Phase I and II, as detailed on the agreement are not severable. Further, given the nature of the document, the attendant urgency and the other circumstances and guided by high persuasive authority, the following observations are made:

(a) Two distinct provisions exist with respect to both Phase I and Phase II.[61]

(b) Clauses 4 and 16 (Phase 1 & II) are detailed in their technical requirements and time lines. Both clauses also address the matter of financing.

(c) The appointment of a Project Engineer and a Site Engineer by APUA during the 17 MW Turnkey Project; and the appointment of Project Engineer and a Site Engineer by APUA during the execution phase of the 33.9 MW turnkey project.[62]

(d) Clause 25 places a restriction on the sale or assigning of shares in the Joint Venture but clause 27 gives either party a right to purchase the other's shares.

(e) Responsibility for day to day management and plant operational activities.[63]

(f) The right of first dispatch when energy is in excess of the minimum dispatch guarantee.[64]

(g) Each phase being subject to the approval of Cabinet.[65]

(h) While clause 31 is not duplicated, it makes a clear distinction regarding the purchase of the 17 MW generator. In this regard, the clauses says that time is of the essence.

(i) Clause 29 provides for a mutually agreed early termination.

[180] Therefore, to construe these two latter provisions, as learned counsel, Mr. Robinson, Q.C., does, to mean that a single approval is called for would in the words of Lord Diplock 'flouts business common sense'. With that said, the essential questions become: Why would parties to a joint venture insert provisions in an agreement contemplating two distinct circumstances or events with distinct attendant events, if otherwise is intended? And why would the parties place terms in an agreement which they intend to ignore?

[181] It is therefore the view of the Court that the parties intended, consistent with business common sense, that the agreement must to be flexible and more importantly that the two phases should commence at different times so long as the requisite approvals were obtained and with their own technical specifications and time lines. And it must be that the parties intended to address their situation especially the special circumstance of the third defendant and the agenda of all parties that was made known at the time.

The documentary background

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[61] See clauses 4 and 17, respectively.
[62] See clauses 13 and 23, respectively.
[63] See clauses 12 and 22, respectively.
[64] See clauses 10 and 20, respectively.

[65] See clauses 15 and 30, respectively.

[182] This involves, essentially, a consideration of the Cabinet Decision of 9th May 2006, and 15th May 2006, and the Circulation Note associated with the latter.

[183] For the time being, it suffices to set in full the Cabinet Minute of 12th May 2006 which records the decisions of 9th May 2006. Its contents are as follows:

> "Proposed Antigua Power Company Ltd. (APCL)/ Antigua Public Utilities Authority (APUA) Joint Venture
>
> Cabinet, at its meeting held on Tuesday 9th may, 2006, agreed to authorize the Honourable Minister of Works, Transportation and the Environment together with the Management of Antigua Public Utilities Authority (APUA) and Antigua Power Company Ltd. (APCL) to proceed immediately to make all necessary arrangements for the purchase of one(1) 17 Mw Generator from Wartsila.
> Cabinet further agreed that the Management of APUA should compile all of the relevant documentation with the technical and financial arguments relative to the above and make same available, in the form of a full report, to the Honourable Minister (with responsibility for Antigua Public Utilities Authority) for presentation to the Cabinet.
>
> Secretary to the Cabinet (Ag)
>
> cc: General Manager, APUA
> General Manager, APCL"

[184] The Cabinet Decision of 15th May 2006, has its genesis in a Circulation Note[66] with respect to the Joint Venture between APCL and APUA.

[185] The Circulation Note is from Honourable Minister of Public Works, Transportation and the Environment to Honourable Members of Cabinet. It is dated May 15, 2006. It is divided into four parts: Background, Consideration, Recommendation and Decision Sought.

[186] Under "Background" the fact of the impending Cricket World Cup is mentioned as well as the discussions and negotiations between APCL and APUA and the presentations (in conjunction with Wartsila Company) made to the Cabinet. It then goes on to state the following:

> "APUA / APCL have agreed to enter into a Joint Venture for a 50.9 megawatt turnkey project. In Phase I, APCL has agreed to provide, install, commission and maintain a 17 MW Wartsila Gen set with associated auxiliaries and substation facility by Jan 31, 2007 in sufficiently time for the 2007 World Cup. In Phase II, the remaining 33.9 megawatt generators, similar to Phase I to meet the growing consumer demand by Dec. 2007."

[66] In some jurisdictions this document is referred to as a 'Cabinet Paper'.

[187] Under "Consideration", the matter of the creation of a new company for the Joint Venture, the shareholding thereof, representation on the Board and the day to day management. Also mentioned is the following: "The project will be in two phases. Phase I – 17 MW Wartsila Gen Set by Jan 31, 2007. While Phase II, will be the remaining 33.9 MW." And even further:

> "APUA will appoint a Project Engineer and a Site Engineer in consultation with APCL during the project execution phase of the 17 MW Turnkey Project. The employment costs of the same to be for the account of APUA."

[188] The remainder of the Circulation Note reads as follows:

> "RECOMMENDATION
>
> The Ministry of Works (APUA) recommends the Joint Venture of Antigua Power Co. Ltd and APUA at 55% and 45 % respectively. The other details are outlined in the Phase I and Phase II of the attached."
>
> DECISION SOUGHT
>
> The Hon. Members of Cabinet are asked to approve:
>
> (1) The Joint Venture Agreement APCL / APUA in respect of the producers of electricity.
>
> (2) Shareholding of 55% / 45% APCL and APUA respectively."

[189] The Note is duly signed under the above name Hon. Wilmoth Daniel, Minister of Works, Transportation and the Environment. And attached to the Note are the relevant extracts from the agreement relating to Phase I and Phase II.

[190] The minutes of the proceedings of the Cabinet on 15th May 2006, records the following:

> "Cabinet suspended its meeting at 1:05 p.m. to allow Antigua Public Utilities Authority (APUA) and the Antigua Power Company Ltd (APCL) to give explanation on the contents of the Circulation Note.
>
> The following subjects were raised during the presentation followed by discussion:
>
> - Worker participation; i.e. workers being shareholders in the company
> - Improved cash flow
> - Manpower exchange with APCL
> - Reduction in electricity staff
> - Achieving efficiency in electricity production
> - Public ownership."
> -
>
> 97. Following the presentation by management of Antigua Public Utilities Authority (APUA) and Antigua Power Company Ltd (APCL), Cabinet decided that, further to its decision of 9th May 2006, to approve the following:
>
> (i) The Joint Venture Agreement between APCL / APUA in respect of the producers of electricity;
>
> (ii) Shareholding of 55% / 45% to APCL / APUA respectively."[67]

[67] The document also records the following as being in attendance: Leon "Chaku" Symister- General Manager, APUA, Mr. Lyndon Francis- Electricity Manager, APUA, Mr. Esworth Martin- Finance and Accounts Manager, APUA, Mr. John Bradshaw- Water Manager, Mr. Francis Hadeed- Representative of APCL and Mr. Calid Hassad- Representative of APCL.

Events of major significance

[191] In the context of the issue of whether Cabinet approved Phase II, an event of major significance is the signing of a Letter of Agreement involving the claimant and Wartsila. It is major because it laid the substratum for the ordering of all of the generators required for both Phase I and Phase II of the Joint Venture.

[192] In his affidavit, filed on 22nd April 2008, Mr. Francis Hadeed deposed that there were negotiations with the third defendant during the period April 2006 to 11th May of the same year. According to him, these negotiations were driven by the fact that there were failures in other negotiations with several corporate entities which did not include his company or the Chinese.

[193] The affiant says further, that at the negotiations with the third defendant everything was discussed regarding the generation of additional electric power. Also discussed was the deposit required by Wartsila.

[194] In this regard, at paragraph 8 of his said affidavit, the following is deposed:

> "That throughout the preliminary discussions leading up to the conclusion of the Agreement of 11th May 2006, it was clearly understood by the parties that the project would be solely funded by the claimant. Further, in order to secure the first Phase 18 V46 engine from Wartsila in terms of production slot, it would be necessary to the Claimant to enter into binding arrangements with Wartsila and pay to the said Wartsila a non-refundable payment of U.S $1 million. All of these matters were fully ventilated at the negotiations stage. It was absolutely critical that the first phase engine be commissioned in time for World Cup Cricket. None of this start-up money was forthcoming from the Third Respondent. The Claimant assumed the risk and on May 3rd 2006 signed a Letter Agreement – 39.6 MW DIESEL POWER PLANT. The intent of Wartsila being to bind the Claimant to the purchasing of the 18 V46 engine pending the outcome of negotiations with Government and the Third Respondent. This is exhibited herewith as F.H.3 together with a letter from Wartsila dated May 12th 2006."

[195] The Letter of Agreement from Wartsila is dated May 3, 2006 and signed by Mr. Rodney George, Vice President, Power Plants, Wartsila Caribbean, Inc. It is addressed to Mr. Francis Hadeed, Managing Director, Antigua Power Company Ltd. For the time being it is sufficient to detail the first four paragraphs of that letter. They are as follows:

> "Re: LETTER AGREEMENT – 39.6 MW DIESEL POWER PLANT
>
> Dear Mr. Hadeed:
> Reference is made to the various discussions between Antigua Power Company Ltd (hereinafter "APCL"), and Wartsila Caribbean, Inc. (hereinafter "Wartsila") concerning the supply delivery and erection of a diesel power plant of nominal capacity of approximately 40 MWe consisting of 1 x 18

V46 and 2 x 12 V46 Wartsila diesel generator sets and related auxiliary equipment (hereinafter the "Project").

This Letter Agreement reflects APCL's commitment in exclusively negotiating and entering into an Engineering, Procurement, and Construction contract (hereinafter the "EPC") with Wartsila for the construction and delivery of the said Wartsila diesel power plant for the Project. Hereinafter APCL and Wartsila are jointly referred to as "Parties" and individually as a "Party".

SECTION 1 – BINDING LETTER OF INTENT

Upon execution of the Letter Agreement by APCL and Wartsila, the following provisions will constitute the legally binding and enforceable agreement with respect to the matters set forth herein. The terms of this Letter Agreement shall be binding upon the Parties and their respective successors and assigns.

SECTION 2 – COOPERATION, NEGOTIATION IN GOOD FAITH

A Budgetary EPC price of EUR 31.4 million (US$39.32 million) has been offered by Wartsila for the scope of work as outlined in Exhibit A attached hereto (price excludes piling or any other soil remediation measures)."

[196] Given the foregoing, it is sufficient merely to note that the Letter of Agreement calls for the supply, delivery and construction of a diesel power plant of nominal capacity of approximately 40 MWe consisting of 1 x 18 V46 and 2 x 12 V46 Wartsila diesel generator sets and related auxiliary equipment at a cost of US $39.32 million. Further, the Letter was agreed and accepted by Francis Hadeed on said date of the Letter being May 3, 2006.

[197] The significance of Letter of Acceptance becomes more apparent when it is recalled that the Cabinet Decision concerning Phase I was made on May 9, 2006. The difficulty arises because it is the claimants contention that on 15th May 2006, Cabinet approved both Phase I and Phase II. And more than that Mr. Francis Hadeed testified in re-examination that he had a verbal agreement from Cabinet as early as April 2006.

Submissions

[198] A summary of the salient aspects of the submissions on behalf of the claimant is as follows: It is the contention of the claimant that Cabinet approved the 50.9 MW project on 15th May. It is also contended that the earlier Cabinet Decision on 9th May regarding the 17 MW generator cannot detract from Decision 97 of 15th May. The further submission is that at the material time, APUA was controlled by the Government and APCL was permitted to proceed with Phase II but made no attempt to obtain further approval which is now claimed to be necessary. And that if such approval was required APUA either deliberately or obstructively failed to obtain it; or in breach of its obligations neglected to seek and obtain such approval. As such, according to the claimant, APUA

either waived the requirement for Cabinet approval for Phase II, or alternatively, is estopped from relying on the requirement as a condition to the agreement for the Phase II works.

[199] The claimant further submits that there is "other compelling evidence" that the Government and APUA treated the agreement as binding, at least until some secret dealing with the Chinese took place in November 2006 and a plan hatched thereafter to double cross APCL. The other compelling evidence advanced includes: (a) consideration on 9th July by Cabinet of a request by APUA to acquire lands at Crabbs; (b) APUA officials endorse the 51 MW project – Next Level Case, (c) the appointment of Austin Joseph as Project Manager of Phase I and Phase II; (d) acceptance of 3 engines by APUA after tests in Trieste; (e) the 50.9 MW project was made a matter of public record; and (e) in order to scupper the May 15, 2006 decision of the agreement, the conspirators adopted a pretence by way of a document described as a Joint Venture Buy-Out Proposal for the 17 MW Generator Set.

[200] Finally, says the claimant: On a proper construction of the agreement dated 11th/12th May 2006, the Circulation Note, the Cabinet Decision of 15th May 2006 and all of the surrounding facts and circumstances, the agreement between the parties was for the financing, development, installation and commissioning of the 50.9 megawatt turnkey project.

[201] On behalf of the first, second and fourth defendants, it is contended that approval of Cabinet was a prerequisite to the finalisation of any contractual relations between the parties – APUA and APCL. And in so far as Phase I and the 17 megawatt are concerned, the contention is that Mr. Justin Simon, Q.C., Attorney General gave testimony that these were approved and not Phase II as contended by the claimant. The further position is that Mr. Simon is a credible witness who gave the Court no reason to disbelieve him.

[202] Apart from the matter of Mr. Simon's evidence the other aspect of the submission relates to "a host of corroborating evidence". In this regard the following are identified: 1. The exchange of letters dated 8th and 9th May 2006 between APUA and APCL concerning the Joint Venture with specific mention of two phases and a Joint Venture company with each party holding specific shares. 2. The authorization by Cabinet of the purchase of the 17 megawatt engine on 9th May and the decision being communicated by the Secretary to the Cabinet to the Minister of Works and his Permanent Secretary and copied to APUA and APCL. 3. The execution of an agreement dated 11th May 2006 by APUA and APCL which reflected a Joint Venture project for a 50.9 megawatt turnkey project utilising a phased approach. 4. The Circulation Note submitted to Cabinet on 16th May 2006 which largely recited the agreement of 11th May 2006 and which sought Cabinet's approval of, ***inter***

alia, the Joint Venture Agreement between APUA and APCL in respect of the producers of electricity. 5. At the meeting according to Mr. Simon's testimony, Cabinet did approve the Joint Venture between APUA and APCL but only in relation to the 17 megawatt engine. 6. Although the Cabinet minute does suggest that the entire 50.9 megawatt plant was approved, Mr. Simon's testimony is to the contrary. 7. Mr. Simon's evidence is supported by the following: there was no communication of approval from the Secretary to the Cabinet regarding the 50.9 megawatt plant, none of the claimant's witnesses gave evidence regarding any inquiry with respect to such approval. 8. The minute of the Cabinet meeting on 16th May with respect to the Joint Venture Project is stated to be further to its decision of 9th May 2006, which is at least consistent with an approval of a Joint Venture for the 17 megawatt only, communication by way of a letter dated 22nd May 2006, from APCL, referring to the Joint Venture Proposal and the Cabinet Decision dated May 12th 2006 officially informed APUA of the commencement of Phase I of the project made no mention of the Cabinet Decision of May 16th 2006 which corroborates Mr. Simon's evidence. 9. The evidence of Calid Hassad is that sometime between October and November 2006, he received information from Mr. Hadeed that Phase II had not been approved. 10. Correspondence from the claimant's Attorney-at-Law to APUA dated 30th November 2006 concerning a draft Joint Venture Agreement made no mention of Phase II being approved – only to the Cabinet Decision dated May 12th 2006; 11.Calid Hassad further testified that in January 2007, the Prime Minister confirmed the non-approval of Phase II.

[203] The basic submission on behalf of the third defendant is that Phase II was never approved. The submission is built around the following: 1. An objective reading of the Circulation Note [upon which the Cabinet Decision of 15th May 2006 was based] could not be construed as referring to both Phase I and II. 2. The words in the decision of 15th May 'further to its decision of the 9th May 2006' cannot be ignored as they clearly indicate that the decision follows upon and is based on the decision of 9th May 2006 which dealt with the immediate purchase of the 17 megawatt gen set from Wartsila. 3. The reason for the approval by Cabinet on 15th May 2006 was due to an oversight in giving approval for the immediate purchase of the 17 megawatt gen set. 4. Had Cabinet intended to approve Phase I and II of the Joint Venture Agreement more precise and specific language would have been employed. 5. Nowhere in his affidavit does Francis Hadeed unambiguously and unequivocally state that he, Hassad or the claimant had received Cabinet approval for the complete 50.9 megawatt plant. Neither was there any evidence as to how this approval was transmitted to the claimant. 6. A conjoint reading of the affidavits of Hassad and Hadeed and analysis of their oral testimony in cross-examination discloses beyond doubt that none of these witnesses had ever received approval in respect of the entire 50.9 megawatt project; that the only

approval that the claimant had received was in respect of Phase I communicated to the claimant by copy of Cabinet Minute dated 12th May 2006 **(CBD11)**.

Conclusion

[204] Learned senior counsel for the claimant in one of his many submissions on the issue of Cabinet approval heads in this direction:

> "Cabinet approval was a necessary formality because ... whilst such approval was a contingent requirement which in theory may not happen, in the circumstances of this case Cabinet approval was all but inevitable not the least because the terms of the Agreement had been proposed by the Minister himself."

[205] Having regard to the submission, it is not even clear to the Court whether learned Counsel is treating the matter of approval lightly or an inevitable consequence, or both.

[206] The submissions on all sides dictate that the analysis and conclusion of the Court must be dealt with two fronts: first, the legal and constitutional implications of Cabinet approval; and the analysis of the Cabinet decision of 16th May 2006.

Legal and constitutional implications of Cabinet approval

[207] This of necessity must begin with extensive quotations from the cross-examination, re-examination of Mr. Francis Hadeed as his testimony has an important bearing on the issue.

[208] The extracts begin with the cross-examination of Francis Hadeed by Mr. Douglas Mendes, S.C.[68]:

> "Q. ... Now when you entered into that agreement on May 3rd, did you have a guarantee from anyone in the Cabinet that there would be approval for any aspect of this venture?
>
> A. We had discussions that there was indication from Cabinet that approval would be forthcoming and we were in discussions with the whole joint venture issued up and down for a whole three, four weeks before and the whole premise was we were doing a 50 megawatt - - 50.9 megawatt plant.
>
> Q. Now, before May 3rd, you had an indication from Cabinet that this would be approval? That's the part of it I am interested not in that long answer that you answer that you gave.
>
> A. A verbal agreement, yes.
>
> Q. You had a verbal agreement?
>
> A. From our discussions - -
>
> Q Mr. Hadeed, could you please - -

[68] Transcript of Trial Proceedings, Vol. II at p. 298, lines 17 to p. 303, lines 6.

MR. ROBINSON: Well, let hem him answer, please, in his own way. It's quite improper for him to being badgered in this way. He's being asked a question and he can give an answer in his own way.

THE COURT: Provided he answers the question.

MR. MENDEZ: My Lord, what is improper is he is not answering my question.

MR. ROBINSON: He is answering your question.

MR. MENDEZ: No, he is not.

MR. ROBINSON: In his own language. In his own way.

MR. MENDEZ: Mr. Hadeed, I am interested in the part of your answer previously where you said that you had an indication from Cabinet that the project would be approved, you understand my question.

A. Yes.

Q. Good. So that is in relation to that aspect of your answer and that aspect of your answer alone that I'm asking this follow-up question, do you understand?

A. Yes.

Q. Good. From whom did you get the indication that Cabinet would approve this project prior to May 3rd, 2006?

A. Well, I would say the entire Cabinet.

Q. You got it from the entire Cabinet?

A. Not. Wait hold on a while. We were in discussions with Cabinet - -

Q. Mr. Hadeed. Mr. Hadeed.

MR. ROBINSON: He's answering the question. He said the entire Cabinet and he was going on to explain.

THE WITNESS: We were opened and had discussions with Cabinet on that. That was in April 27th when we went with Rodney George, Calid Hassad. There was no objection in Cabinet from anybody on the project and that's what we went there to discuss.

Q. Okay. So you went on the basis of there being no objection from Cabinet?

A. No objections and that is what the Nation required at that time.

Q. So you did not require any specific official written approval from Cabinet in order to commit your company to millions of USDs, is that basically what you're saying?

A. Well, I trusted them.

Q. And is the answer to my question yes? My question was let me repeat it?

A. We - - there was to be - -

Q. Mr. Hadeed. Mr. Hadeed.

A. - - further negotiation - -

Q. Mr. Hadeed, I am concerned to ensure that you are answering my question. Okay. My question is whether it is whether it is your position that you did not need an official confirmation from Cabinet approving the project before you proceeded to bind your company to the payment of millions of dollars. Is that your position you did not need an official approval from Cabinet to bind yourself in that way?

A. We needed approval from Cabinet.

Q. Yes, sir. But you did not - -

A. We were led to believe that the approval was there, the urgency, the time of it and I trusted them.

Q. And therefore you got that from the discussions that you had in Cabinet on April the 25th?

A. Yes, sir.

Q. And you did not need anything further to bind yourself? To go ahead and negotiate with Wartsila and enter into an agreement. You needed nothing more.

A. No. We were led to believe more information will be coming. We had more discussion to do, more negotiations, but the premise was that we had to hold the generator.

Q. And is the answer to my question yes? You did not need any official communication from them to go ahead?

A. We needed more information.

Q. Is it your answer that you did not need any official communication from the Cabinet to go ahead that it was sufficient as it were judge their mood from the April 25th meeting and that you trusted them, is all that you needed? That's all I'm asking you, sir.

A. We needed more information.

Q. What further information did you need from them before you felt able to bind yourself?

A. We needed another Cabinet decision.

Q. And before May 3rd, did you get it?

A. No. I got it verbally, but not in writing.

Q. Before May 3rd?

A. Yes, from our discussions on April 27th. so we go ahead and order the engines.

Q. Sir, and you just said to us that you needed something more; you needed further information. I ask you what is that information - -

A. Yes. We needed more decision but I trusted them based on what was going on at that time.

Q. Very well."

[209] The extracts continue with re-examination by Mr. Robinson, Q.C.[69]:

"Q. Had you - - apart from those two letters had you been involved in any discuss in relation to the generators?

A. Yes, My Lord.

Q. With whom?

A. With APUA.

Q. Who at APUA?

A. Elsworth Martin, Lyndon Francis, John Bradshaw.

Q. And anyone else? Any Minister?

A. Yes, the Minister was involved: Mr. Leon Symister.

Q. Mr. Wilmoth Daniel?

A. Yes, sir.

Q. And did those discussions continue over that period?

A. Yes.

Q. After the Cabinet meeting until the 3rd?

A. Yes.

Q. And did those discussions lead you to what belief today lead you to have on May the 3rd in relation to the agreement you made with Wartsila on that date?

A. Yes, sir.

Q. Well, what? What belief did you have on May the 3rd as a result of those discussions?

A. As a result of discussions that we basically had a commitment.

Q. What commitment?

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[69] Transcript of Trial Proceedings, Vol. II, p. 305, line 4 to p. 306, line 7.

A. From APUA and the Government to go forward with this contract; with this deal."

[210] The extracts end with Mr. Mendes' examining Mr. Hadeed on a question arising from the re-examination[70]:

"Q. I am asking you to look at the last page of that document. On that page this is what it said, "Such down payment by APC shall be at APC's risk as it is expressly understood and agreed that the understanding arrived at herein shall be subject to the approval of the following: 1.The APUA Board of Directors. 11. The Cabinet of Antigua and Barbuda. By May 3rd, sir, do you have the approval of the APUA Board of Directors or the Cabinet of Antigua and Barbuda?

A. After the meeting with Cabinet I had the verbal approval of Cabinet.

Q. Did you by May 3rd and that was the meeting of April the 25th, sir? You talking about?

A. No, we – yes, April 25th.

Q. And this is an April the 30th letter, sir?

A. Yes.

Q. Okay. So that's after the April 25th meeting and this letter from Mr. Symister is saying that this is all subject to approval by the Cabinet of Antigua and Barbuda. By May 3rd, did you have the approval of the Cabinet of Antigua and Barbuda?

A. From the meeting on April 27th, I was led to believe we had the approval of Cabinet."

Q. I see."

[211] Of importance to this issue is the number of words, phrases and clauses which are supposed or intended to bear on the question of approval by Cabinet. They include: verbal agreement[71], indication of approval from the entire Cabinet[72], implication that written approval was unnecessary[73], by implication, mere approval of Cabinet[74], verbal approval of the Cabinet and being led to believe that we had the approval of Cabinet[75].

Cabinet Decision in its constitutional context

[212] The evidence reveals that a number of Cabinet Decisions are central to this matter before the Court. But that apart, as noted above, there is mention of Cabinet 'assurance' and similar concepts of dubious pedigree in this context. For this reason, the Court considers it necessary to put a Cabinet Decision in the context of Antigua and Barbuda in its proper constitutional context and otherwise. The added necessity arises from the fact that during the period April to August

[70] Transcript of Trial Proceedings, Vol. II, p. 307, line 7 to p. 308, line 4.
[71] Transcript of Trial Proceedings, Vol. II, p.299, line 5.
[72] Ibid, p.300 at lines 7-10.
[73] Ibid, p.301 at lines 2-6.
[74] Ibid, p.302 at lines 19-25.
[75] Ibid, p.308 at lines 3-4.

2006, the Cabinet assumed the duties of the Board of the third defendant pursuant of section 38 of the Public Utilities Act.

[213] Given the embodiment of the Westminster Model[76] of Government in the Constitution of Antigua and Barbuda ("the Constitution") the setting up of the Cabinet follows logically, as well as related provisions. In brief these are sections 70, 72 and 77.

[214] Section 70(1) establishes the Cabinet for Antigua and Barbuda and vests it with the power to have general direction and control of Government and shall be collectively responsible therefore to Parliament. Subsection (2) concerns the composition of the Cabinet headed by the Prime Minister and other Ministers one of whom must be the Attorney General, all appointed in accordance with section 69.

[215] Section 72 deals with the summoning of Cabinet by the Prime Minister or a Minister appointed in that behalf by the Prime Minister.

[216] Given the present context, section 77 which deals with the Secretary to the Cabinet warrants reproduction in its entirety. It says this:

> "*77.* (1) There shall be a Secretary to the Cabinet whose office shall be a public office.
>
> (1) The Secretary to the Cabinet, who shall have charge of the Cabinet office, shall be responsible in accordance with such instructions as may be given him by the Prime Minister, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority and shall have such other functions as the prime Minister may direct.
>
> (2) The Secretary to the Cabinet shall, before entering upon the duties of his office, make and subscribe the oath of secrecy."

[217] At the distinct risk of being characterized as being repetitive, it is necessary to say that a conjoint reading of sections 70(1) and 77(1) and (2) yield the following: The Cabinet has general direction and control of the Government of Antigua and Barbuda and at a Cabinet Meeting, it is the duty of the Secretary to the Cabinet to, ***inter alia,*** keep the minutes of the Cabinet and conveying the decisions of the Cabinet to the appropriate person or authority.

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[76] In S.A. de Smith, **The New Commonwealth And Its Constitutions** (1964) at pages 77-78, the learning is this: "In its narrower sense... the Westminster Model can be said to mean a constitutional system in which the head of state is not the effective head of Government; in which the effective head of Government is a Prime Minister presiding over a cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of Government is parliamentary in as much as Ministers must be members of the Legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative Legislature."

[218] Jamaica too, has embraced the Westminster Model of Government with a Cabinet derived from members of the elected and nominated Houses of Parliament. And with respect to the Cabinet, Llyod Barnett, **THE CONSTITUTIONAL LAW OF JAMAICA**[77] writes:

> "The internal organisation of the Cabinet is shrouded in secrecy, its deliberations are concealed from the public gaze and its records are confidential."

He continues at page 77 thus:

> "Attendance at Cabinet meetings is normally limited to Ministers. Parliamentary Secretaries do not attend as a normal practice. Senior Civil Servants are occasionally summoned to the meetings to explain technical matters. On rare occasions even private persons are allowed 'to present a case' to the Cabinet, but the conclusions of the meeting are only formulated after their departure. As we have seen, Civil Servants attend the special annual discussions on the draft Estimates of Expenditure.
>
> The minutes of the meeting are drafted by the Secretary to the Cabinet who attends the meeting but takes no part in the deliberations. The minutes are subject to the approval of the Prime Minister. Copies are sent to all the Ministers. These minutes are in fact succinct statements of the problems and proposals considered and the conclusions of the meetings. The Secretary indicates on copies of the minutes which Ministry should carry out the decisions of the Cabinet as well as the Ministries to which the decisions have been sent for information. Usually the Ministry responsible for the execution of the decision is that from which the Submission emanated. The extracts of the minutes containing the relevant decision is known as a 'Cabinet Decision'."

[219] Apart from the foregoing, De Smith and Brazier, **CONSTITUTIONAL AND ADMINISTRATIVE LAW**[78], make the point that: 'Cabinet papers[79] are Crown property and so improper publication[80] of them could be actionable as in breach of the Crown's copyright.

[220] What emerges from all of the foregoing is constitutional reality that the Constitution only knows or speaks of decisions of the Cabinet being conveyed by the Secretary to the Cabinet. Based on the Carltona Principle this function of conveying decisions may be delegated to a person within the Cabinet Office, but that is where the delegation ends. As such it is not open to any Minister to create the extraordinary situation of conveying a Cabinet decision. At best he or she can only be attempting to be polite. More importantly, however, the further reality is that such decisions must be written. The critical importance of this reality was alluded to by Mr Mendes, S.C. in his cross-examination of Mr Francis Hadeed .And although section 77(2) of the Constitution does not speak of written decisions, by implication it must be for two reasons: the first is that the Secretary to the Cabinet has the duty of keeping the minutes of meetings of which the decision is an extract; and

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[77] (1997) at p.76. And for a comprehensive overview see: The British Cabinet System (1952, 2nd ed.) by N.H. Gibbs.
[78] (7th ed.) at page 190.
[79] In the case of Antigua and Barbuda a Circulation Note.
[80] Speaking in the context of Britain, Wade and Phillips, **Constitutional and Administrative Law** (9th ed.) at page 250 says: "The operation of the Cabinet is surrounded by considerable secrecy. Most Cabinet papers are made available for public inspection in the Public Records Office after 30 years or such other period as the Lord Chancellor may direct."

secondly, this is decision making at the highest level (general direction and control of Government). To this conclusion one must add the celebrated dictum of Lord Diplock in **Hinds v R**[81] to the effect that our constitutions are evolutionary – not revolutionary; based on custom and usage. What this means is the context of section 77 of the Constitution did not an instant creation. Rather, settled practice is a constituent of the Constitution.

[221] Mr. Hadeed merely uses these phrases of doubtful or no pedigree and even suggests that he had a verbal agreement from Cabinet. But regardless of what term Mr. Hadeed used, the Constitution, the supreme law, does not take cognisance of any such action and naturally the Court follows. For this reason the claimant, who placed great reliance on these assurances by the Cabinet and trust placed in the Cabinet as a whole with respect to its intended action with Wartsila cannot prevail in the face of the prescription of the supreme law of the land – the Constitution. In short the assurances in the context of a Cabinet Decision are of no moment.

[222] But there is more as Mr. Hadeed sought to give the impression that Cabinet in effect made verbal decision in the presence of persons invited to attend Cabinet. This issue is addressed by Llyod Bannett above by saying that no decisions are made in the presence of such persons. And this is what Mr. Justin Simon, Q.C., said in re-examination on the precise point by Sir Gerald Watt, Q.C.:

> "That never ever ever happens. Any group or person who makes presentations, they usually make their presentation and leave. We will of course seek clarifications by asking questions and obtaining explanations, but the discussions as to arriving at a decision is never done in the presence of any third party."

[223] Finally, the omnibus point must be that whenever Cabinet invites persons to give information or to demonstrate matter it suspends its sitting. Therefore, the obvious point is that once Cabinet suspends its sitting is it is not sitting *qua* Cabinet. This is reflected expressly in minutes contained in the evidence before this Court[82] and by implication from Mr. Simon's testimony quoted above. Consequently, the perceived 'assurances' and 'verbal approval' did not even get into Cabinet far less to rise to the level of a Cabinet Decision. And even if Cabinet did give a verbal agreement while its meeting was suspended, the logic of the Constitution is that on resumption of Cabinet, there would be a compelling requirement for a formal decision to be taken on the matter which is then conveyed as appropriate.

The Cabinet Decision of 16th May 2006

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[81] [1977] A.C. 195

[82] See for example Exhibit CBD 2 at para 5 "Cabinet suspended its meeting at 11:35 am to accommodate a visit by management team from the Antigua Utilities Authority, Antigua Power Company Limited and Wartsila."

[224] By now it is common ground that the Joint Venture Agreement called for two phases of implementation. On the one hand, the contention is that they were always intended to be separate. On the other, the contention is that they are inseparable. With respect to the latter contention, the Court has already rejected the same. This supported by Calid Hassad in his testimony in cross-examination when in seeking to explain the two phases said this:

> "...[I]t was a very desperate period, there was World Cup Cricket to come on stream, then there were certain requirements that were given to the World Cup Cricket to provide power so that Antigua could be a venue for World Cup. It was a big desperation thing that's why we had two different phases for the 17 MW and the second phase for the 33.9 megawatts; but we always spoke about one Joint Venture 50.9 megawatt project."

[225] What Mr. Hassad said regarding the urgency of power for World Cup, by any criteria, must form the backdrop to the Cabinet Decision of 16th May 2006. In fact, that in essence as the background of the Circulation Note mentions the fact of the two phases but also dealt specifically with the appointment of Project Engineer and Site Engineer during the project execution phase of the 17 MW Turnkey Project. Also covered by the Note, the recommendation and the decision sought.

[226] For reasons that are not apparent to the Court the decision sought included approval of the Joint Venture Agreement APCL / APUA "in respect of the producers of electricity."

[227] In so far as the actual Cabinet Decision of 16th May 2006 is concerned, as noted above, the decision in part, was that "... further to its decision of 9th May 2006 to approve the following: (i) The Joint Venture Agreement between APCL / APUA in respect of the producers of electricity."

[228] The main contention of the claimant is that Cabinet was asked to approve the 50.9 MW Turnkey Project without a distinction being made between Phase I and Phase II. Further, that the earlier decision regarding the 17 MW Wartsila generator cannot detract from the latter decision which supercedes it.

[229] On the other hand, the defendants placed emphasis on particular words of the decision: 'further to its decision of 9th May 2006....' For the first second and fourth defendants, Mr. Mendes, S.C., submits that those words are at least consistent with a decision to approve a Joint Venture for the 17 MW generator only. Sir Gerald Watt, Q.C., says that said words cannot be ignored or glossed over as it showed a connection to the decision of 9th May 2006 which dealt with the question of the immediate purchase of the 17 MW Wartsila generator time for World Cup 2007.

[230] It is the view of the Court that the phase 'immediate purchase' puts the matter in its correct perspective. To begin with, Calid Hassad in giving testimony when being cross-examined on the 50.9 MW project described in the World Cup Cricket requirements or demands as a 'very desperate period.' The Circulation Note giving rise to the Cabinet Decision of 16th May 2006 while mentioning the two phases made specific mention of certain appointments respecting the project execution phase of the 17 MW Turnkey Project.

[231] In seeking to convince the Court that the Cabinet Decision of 16th May 2006, gave approval to Phase II, Mr. Dane Hamilton, Q.C., for the claimant mounted this closing argument of great depth and prolixity[83]:

> "So, My Lord, on the 16th of May, there is another meeting in Cabinet present this time are the negotiating parties who have just concluded an agreement. Representatives of APUA and representatives of the claimant APCL. They presents the argument, Cabinet hear them out. They presented the argument because they were, they were invited to present these arguments because the Minister Daniel had gone to Cabinet seeking approval for the very agreement he and his team negotiated. He put in a Circulation Note, he put in a Circulation Note, My Lord, in which he outlined phase one and he outlined phase two. And all he is asking Cabinet to do, My Lord, is to approve the Joint venture between the parties as producers of electricity. But that is what they are going to do. They signed an agreement to set up a joint venture for 50.9 megawatt in which APUA would have 55 – 45 percent of the shares and APCL would have 55 percent of the shares. That's the joint venture. They were going to own the generating, the power generating plant and they would form a new company to own that power generating plant and Cabinet, My Lord, agreed to just that. Cabinet approved of the joint venture. I don't need to refer you. Your Lordship, My Lord, my learned friend Mr. Watt walk you through it before but that is to be found My Lord at CBD 9 and the recital reads, My Lord, you don't need to write this, but the recital reads:
>
> > 'APUA and APCL have agreed to enter into a joint venture for a new 50.9 megawatt turnkey project.'
> >
> > That's the only recital. That's the background. It comes under "Background." It is the fourth paragraph down. The Minister who by their own arguments give directions legal -- legally – can legally give directions to the manage - - to the board and the management of APUA is saying listen APUA and APCL have entered into an agreement for a joint - - into a joint venture for a 50.9 megawatt turnkey project.
> >
> > He went into consideration and he said.
> >
> > 'A new company shall be created for the joint venture.'
> >
> > He discusses the shareholding. He then tells them that the project will be in two phases and he ask for a Cabinet Decision and the recommendation, the Minister's recommendation for Cabinet approval, My Lord, was the Minister of Works who recommends the joint venture of Antigua Power Company and APUA at 55 and 45 percent respectively. What joint venture they talking about My Lord, except one for 50.9. The Minister made that clear. The agreement made that clear."

Mr Hamilton therefore advances this proposition:

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[83] Transcript of Trial Proceedings [Vol. iv] p. 91, line 21 to P. 93, line 19.

"So this approval argument, My Lord should be consigned to the dust bin of history where it properly belongs. It has no place in the courtroom. It's a smoke screen. They come and they say, 'oh, we don't have no approval, but Cabinet approved the agreement."[84]

[232] The proposition sounds convincing in the context created. But the simple questions to be asked are these: Why would Cabinet choose this circuitous and perhaps hazardous route if the simple matter before it was to approve the additional phase? And why speak of 'producers of electricity' if the objective was the approval of the additional phase, being further to what was approved before? Or as learned senior counsel for the third defendant put it in a submission: Why not use more precise language?

[233] To say that APCL and APUA are 'producers of electricity' is in part superfluous as APUA has a statutory monopoly in this regard and APCL is already a producer by virtue of agreements with APUA which is sanctioned by the enabling Act.

[234] Taken in the context of the Circulation Note, the Court agrees with the submission by the defendants that the decision of the 16th May was confined to the immediate purchase of the 17 MW generator from Wartsila – hence the words 'further to.' The Court also agrees that the wording of the decision suggests that in the urgency of the situation, Cabinet may not have content with the wording of the earlier decision. In this regard, the two letters written by the Hon. Trevor Walker and the Hon. Baldwin Spencer, the Prime Minister (dated 8th and 13th, November, 2007 respectively)[85] on the matter of the landing of the engines provide or illustrate the context in which 'further to' is used. The point is this: Mr. Walker wrote to Mr. Hassad and the Prime Minister wished to remove doubts and began by saying 'further to the letter dated November 8, 2007 addressed to you from Hon. Trevor Walker' and went on to explain his purpose. In short 'further to' makes it clear that the same issue is in focus. And that is what the Cabinet decision sought to do- nothing more.

[235] A further point is that Phase II, as noted above, has its own completion date and in any event if the Cabinet intended to deal with Phase II that would have been stated in the decision in straight and simple language.

[236] Much of the thrust of the claimant's case is towards events which, in the context of a requirement for a Cabinet approval, do not help the claimant's cause. The fact of the matter is that the Letter Agreement with Wartsila dated 3rd May 2006, the Turnkey contract with Wartsila dated 3rd June

[84] Transcript of Trial Proceedings [Vol. iv] p.93, lines 19 to 24.
[85] C.D.B. 29 & C.D.B 30.

2006, the financing of the project and the failure of the claimant to inform the first, second and third defendants of the Trunkey Contract, all serve to complicate the matter and may have led an unreasonable expectation.

[237] In fact in this regard, this is what Mr. Simon deposes at paragraph 13 of his affidavit and repeated in cross-examination[86]:

> "That Cabinet was never informed of the execution of a Turnkey Contract on June 23 2006, between the claimant and Wartsila Finland OY until the same was brought to its attention by the Hon. Attorney General in September 2007."

[238] When the foregoing is weighed against what Mr. Francis Hadeed deposed at paragraph 12 of his affidavit, the Court accepts Mr. Simon's testimony

[239] Some of the events identified by the claimant as evidence (some as "proof") of the approval of the 50. MW project include the following:

1. 'Technical assistance provided by APUA to the building of the power plant': This reliance overlooks the fact that the 17 MW generator was approved for Phase I and the period prior to World Cup Cricket 2007 was 'a very desperate period'. Put simply, any assistance with respect to Phase I would have been lawful.
2. 'The weekly site meetings': This follows from the foregoing.
3. 'The testing of engines being witnessed by representatives of APUA in Trieste, Italy': This was not without complications which the APUA General Manager sought to clarify in his letter dated 21st September, 2006 to Mr Calid Hassad.
4. 'The holding of disciplinary proceedings in relation to Lyndon Francis, Electricity Manager, APUA': These were merely held with no decision or action as yet.
5. 'Inspection of the site of the power plant, the General Manager and the Electricity Manager': It is not clear on the evidence as to when such a visit was made.
6. 'Attendance at a start up party for the pre-commissioning of Phase II works on 1/2/08 representatives of APUA': This borders on the frivolous.
7. 'The question of the acquisition of land for APUA': This is a matter fraught with legal difficulties which Mr. Robinson expressly or impliedly accepts in his submission.
8. 'The Government's position that it would undertake Joint Venture projects to increase electricity output by up to an additional 50.9 megawatts': This is not a specific relation to the claimant, as to begin with the plural ('projects') is used. In cross-examination, Mr. Simon testified that the Minister of Finance in making the

[86] Transcript of Trial Proceedings, Vol II, Page 324, lines 2-8.

statement in his budget speech "may have been referring to Government's intention to ensure that there is an increase in electricity output to 50.9 megawatts."

9. 'The Government's further position on the 50.9 megawatts being in the national interest': This is another vague concept which is not necessarily encompass the claimant's contention.

10. 'The appointment of Mr. Austin Joseph as Project Manager for Phase I and II': In this connection it was noted that under the agreement engineers were required to be appointed with respect to each phase of the project.

[240] The point must also be made that the defendants being initially unaware of the Letter Agreement and Turnkey contract between the claimant and Wartsila, the defendants, and even the claimant, virtually had no control over subsequent events except by way of a breach. This can be inferred from certain terms of the Turnkey contract of which Articles 1 and 10 read, in part, as follows:

> "1.1 In accordance with the terms and conditions set forth below, the Contractor [Wartsila Finland OY) shall sell, deliver, erect, start-up and provisionally hand over, commission, test, do a reliability run and finally hand over a diesel power plant more particularly specified in the Technical Specifications provided as Appendix 1, to this contract.
>
> 10.1 The works shall be substantially completed and the Installation Certificate issued by the buyer's [Antigua Power Company Limited] Representatives and performance and reliability test completion period (hereinafter referred to as the "Completion Time"). The Completion Time of the Works shall be January 31, 2007 for the 18 V46 and February 29, 2008 for the remaining three engines (3x12 V46), provides that the down payment of USD 3 million (as stipulated in the May 3 2006 Letter of Agreement between Wartsila Finland OY and Antigua Power Company Limited) is received by the Contractor on or before May 30, 2006, and the irrevocable standby Letter of Credit as mentioned in Article 4 hereof before June 15, 2006...."[87]

[241] A further point is that in Mr Robinson's cross examination of the APUA Electricity Manager he sought to suggest that the nature of building and the foundations were indicative of approval of the entire project. To this Mr. Francis responded by saying that it was his understanding that the building and foundation could house the entire 50.9 megawatts. In other words, it was driven by the contract with Wartsila rather than Cabinet approval.

Position of the defendants

[87] Exhibit Core Bundle No.2 T.A.B. 9.

[242] For their part the first and second defendants have always maintained that Phase II had not been approved by Cabinet. In this regard Esworth Martin as early as February 23, 2007 in a letter[88] to Mr. Dane Hamilton referred to his (Hamilton) letter of 30th November 2006 and then told him that it was "our understanding at APUA" is that the matter of consideration is in relation to the commissioning of the newly constructed 17 megawatt power generation facility. And having raised the issue of the incorporation of a company for the purpose of the Joint Venture arrangement , contends that APUA stands ready to negotiate.

[243] In letters dated, March 28, 2007[89], August 24, 2007[90] and 31st December 2007[91] addressed Mr. Dane Hamilton, the Attorney General, Mr. Justin Simon, Q.C., sought to inform Mr. Hamilton that Phase II had not been approved. In the latter document, the final paragraph reads:

> "For the avoidance of doubt, kindly be advised that the Government maintains its position that it has no contractual obligation in respect of the 33.9 MW generators but recognizes its commitment to implementing a Joint Venture in respect of the 17.5 MW generator as per Cabinet Decisions of May 09, 2006 and May 16, 2006."

[244] Further still, in his affidavit filed for the purposes of these proceedings, the Attorney General of Antigua and Barbuda, Mr. Justin L. Simon, Q.C., deposed as follows:

> "The Respondents maintain that there was never a decision by Cabinet authorizing Phase II of the Joint Venture Proposal between the third respondent and the claimant; and deny the existence of any plans to 'scupper the second phase of the agreement' as alleged by the claimant. In March 2006 the Electricity Manager and the General Manager of the third respondent had preferred proposals for technical and financial assistance for generating plants and had forwarded same to the Non-resident Ambassador to China for onward transmission to the Government of the Peoples Republic of China."

[245] At the trial, Mr. Simon again re-stated the Government's position on Phase II of the Joint Venture Project- while being crossed-examined by learned senior counsel for the claimant[92], that in simple terms, Phase II was never approved. And to re-state common ground: Mr Simon is a member of Cabinet.

[246] The position regarding the generators was also re-stated by the Secretary to the Cabinet in a letter 5th November 2007, addressed to the General Manager of Antigua Power Company Ltd. The letter also contained this paragraph:

> "Cabinet has directed that the negotiations be resumed immediately without prejudice; on: (a) the proposed Joint Venture Agreement – Phase I (17 MW which has been agreed and Phase II (33.9

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[88] Exhibit C.H. 16.
[89] Core Bundle No. 2, T.A.B. 18.
[90] Exhibit C.H. 21.
[91] Exhibit J.L.S. 5.
[92] Transcript of Trial Proceedings, Vol. II, page 320, line 20, page 328, line 20 and page 334, line 25.

MW) on terms that Cabinet considers acceptable; or alternatively (b) a buy out of the aggregate 50.9 MW Generator plant."[93]

[247] When the General Manager of APUA, the third defendant, had clarified the conflicting information given to him by the Minister then responsible for APUA (not the Secretary to the Cabinet) and upon being invited to send representatives to witness the testing of the three engines in Trieste, Italy responded in a terse and purposive letter, dated 21st September 2006 to Mr. Calid Hassad. The relevant portion reads thus:

> "It is APUA's understanding that the representatives are being asked to witness testing of APC's 3 x 12 V46 engines; however, the authority seeks to clarify the extent of its obligation as a consequence of its participation at the test. Please therefore clarify the purpose of your invitation."[94]

Conclusion

[248] It is therefore the determination of the Court that on the issue being considered the following matters are critical: The terms of the agreement, the Circulation Note dated 1st May 2006, the Cabinet decision dated 16th May 2006, coupled with the fact that Mr. Simon was present at that said meeting and at the trial gave uncontradicted evidence that Cabinet (*qua* Cabinet) never gave approval for the commencement of Phase II. The constitutional implications respecting a Cabinet Decision. The fact that Phase I and II were always intended to be implemented at different times. What Cabinet did approve on 16th May 2006 was the Joint Venture Agreement between APCL / APUA in respect of the producers of electricity and this was further to its decision of 9th May 2006 which dealt with 17 MW Gen Set. Therefore contextually, Cabinet could only reasonably be referring to the said generator. As noted before, had that been the intent of the Cabinet it would have said so. Indeed as shown above, the first and third defendants were consistent in their insistence that Cabinet had not approved Phase II.

[249] It is the contention of the claimant that if Cabinet approved Phase I only then the requirement for Phase II would have imposed upon APUA and the Government the following duties: "(1) Not to prevent the obtaining of Cabinet approval and /or (2) A duty of reasonable diligence to obtain Cabinet approval."

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[93] Exhibit C.H. 26. This letter was copied to: Honourable Prime Minister, Hon. Minister of State with responsibility for APUA, Hon. Minister of Finance and the Economy, Hon. Attorney General, Mr. Clarvis Joseph, Chairman, APUA Board, Mr. Esworth Martin, General Manager, APUA and Mr. Francis Hadeed, APCL Chairman.
[94] Exhibit C.H. 24 (attachment.)

[250] To begin with, there is no evidence pointing to APUA preventing the obtaining of Cabinet approval or that Cabinet refused a request to give approval for Phase II to be commenced officially. Nor was any such evidence drawn to the attention of the Court consistent with the claimant's burden of proof And with respect to the second duty, the following must be recalled: 1. The Cabinet performed the duties of the Board of APUA during the period April to August 2006. 2. Clause 27 of the agreement[95] gives the other either party the "right" to purchase the other's shareholding. 3. The Cabinet was seeking to negotiate with respect to Phase II[96] and also sought technical information in this regard.[97] Even further, a determination was sought to be made as to whether the proposed Joint Venture Agreement is in the best interest of the Government of Antigua and Barbuda.[98] These matters are all within the letter and spirit of the agreement of 11th/12th May 2006.

[251] Reasonable diligence, as advanced by the claimant, must therefore be measured with the parameters outlined above; and in this context of the Court cannot conclude that the third defendant or the Cabinet, *qua* Board, did not use reasonable diligence. In any event, the evidence reveals that the agenda of the claimant, on the one hand, and that of the other, are not entirely in alignment. Learned counsel for the first, second and fourth defendants took the matter to the next level by making a submission on the non-communication of the approval, if indeed there was Cabinet approval of Phase II. The submission[99] is essentially as follows:

> 6"...[J]ust as an acceptance which is not communicated into an offeror does not bring a contract into being, the failure to communicate an approval which is required to bring a contract into being, similarly has no effect. A party who has decided to accept an offer does not thereby become bound by contract to the offeror unless and until he or she communicates that acceptance - Chilty on Contracts - 29th ed. Paras 2-043 to 2-045. Likewise, where the existence of a contract is dependent upon the approval of a third party, the contract does not come into being unless and until the third party communicates its approval.
>
> 7. In this case, the claimant has relied upon the minutes of Cabinet meetings which it clearly did not receive through formal, official channels. It has not received any communication from Cabinet that Phase 2 was approved and so has been forced to construct its case *ex post facto* from internal Cabinet documents which it has obtained by the back door. More importantly, it has constructed its case in this way even after it was told that no approval has been obtained."

[252] It is not difficult to follow the logic of this submission and the Court accepts it accordingly.

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[95] The exact wording of the clause is: "At any time during the life of the Joint Venture, each party has the right to purchase the shares of the other party at an agreed upon price."
[96] Clause 28 provides that: "The Joint Venture shall terminate on 31st January 2029 or at an earlier date mutually agreed upon by the parties."
[97] See for example, Exhibit C.H. 26.
[98] See Exhibit C.H. 25.
[99] Final submissions of the first, second and fourth defendants, at pages 9-10, paras, 6-7.

[253] Learned senior counsel for the claimant relies on the case of **Mackay v Dick**[100] in support of his contention that Phase II was approved by Cabinet. This case is authority for the proposition that if the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, and the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. Lord Blackburn in giving his opinion stated this general proposition at page 263 of the report in these terms:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is part of each must depend on circumstances."

[254] What has done in his dictum is to identify the distinguishing feature in that case namely the parties being merely the buyer and seller; while in the case before the Court there is a third party whose approval is mandatory. Another distinguishing feature which is independent of **Mackay v Dick** is the fact that the nature of the agreement in this case providing expressly for 'buy out, early termination of the joint venture and the incorporation of a joint venture company all cause a substantial element of negotiations and hence some element of delay to attend the implementation of the agreement as a whole, especially Phase II. Even further, is the fact that there was no 'period of desperation' or urgency that attended Phase II as the attainment of 55 MW concerned future and not immediate demand. Accordingly, the foregoing ought to end the life of **Mackay v Dick** in this factual matrix.

[255] Therefore, the Court's determination stands: There was no approval of Phase II based both on findings of fact and on the application of legal principles.

ISSUE NO. 3

Whether the claimant is entitled to the other remedies sought by way of judicial review pursuant to Part 56 of C.P.R. 2000 under the heads of legitimate expectation, illegality and bad faith.

[256] In its application seeking judicial review, the following remedies are sought:

(1) An Order that the Claimant is entitled to the benefit of a Joint Venture contract with the Government of Antigua and Barbuda and Antigua Public Utilities

[100] (1881) 6 App Cas 251.

Authority entered into during the month of May, 2006 to supply the third Defendant/Respondent with electrical generating capacity power plant capable of out putting 50.9 megawatts.

(2) That the Claimant has legitimate expectation of a substantial benefit of the aforesaid contract to supply the required 50.9 megawatt of electricity power.

(3) Damages for breach of agreement between the Claimant, the Government of Antigua and Barbuda and the Third Defendant for the financing and supply by the Claimant a power plant at Crabs Peninsular having an electrical generating capacity of 50.9 megawatts.

(4) An Order that the Claimant/Applicant is entitled to damages against the Second and Third Defendants.

(5) An Order that the Claimant is entitled to aggravated and/or exemplary damages against the Second Defendant.

(6) An Order that the acts and/or conduct of the Second Defendant to and in relation to the aforesaid contract in particular his several acts of obstruction directed against the Claimant are arbitrary, unfair, contrary to law, an abuse of his power as Prime Minister and the substantive Minister of APUA and Energy and are unlawful.

(7) A Declaration that the Second Defendant as the substantive Minister for the Third Defendant has failed to exercise his powers fairly and with proper regard to and in accordance with the law in relation to the Government and APUA contractual relations with the Claimant.

(8) An Order quashing the Second Defendant's decision on December 4th 2007 to prevent the Claimant from lawfully installing its three 11.3 megawatts 18 V46 Wartsila engines in the Power Plant constructed at Crabb's Peninsula in furtherance of its Joint Venture contract with the expressed and/or implied approval of the Second Defendant, the Government of Antigua and Barbuda and the Third Defendant.

(9) A Declaration that the Claimant is entitled to benefit of a lease of land admeasuring 6.34 acres upon which its power plant and auxiliaries have been constructed and placed in keeping with the Joint Venture Agreement.

(10) An injunction restraining the Second and Third Defendants from acting unlawfully and in breach of the Joint Venture contract with the Claimant.

[257] The grounds upon which the remedies are sought as pleaded are as follows:

GROUNDS

1. The Joint Venture Agreement/Proposal sated May 11th coupled with the parties thereto subsequent conduct, promises and representations give rise to a contract entitling the Claimant to wholly fund, develop and commission a power generating

facility capable of producing 50.9 megawatts of power on lands provided by the Parish of St. George in Antigua and Barbuda on or before February 28th 2008.

2. The said Joint Venture Agreement/Proposal of itself and together with the parties thereto subsequent conduct, promises and representations give rise to a legitimate expectation of a substantive benefit namely the establishment of a joint venture corporate entity whose principal shareholders will be the Claimant with 55% of the shares and the Third Defendant with 45% of the shares.
3. That the Claimant is entitled to compensation and or damages for breach of the said agreement and/or its rights and/or legitimate expectation of a substantial benefit namely majority participation in the Joint Venture Company and repayment of its investment by the said proposed company with interest thereon and or damages for loss of bargain and profit and/or unlawful interference by the Second defendant of the aforesaid agreement.
4. The Second Defendant and the Third Defendant acting under the instructions of the Second Defendant breach the rights and/or legitimate expectations of the Claimant of a substantive benefit by their individually, unilaterally repudiated the Joint Venture Agreement/Proposal.
5. The Second Defendant in his capacity as Prime Minister and/or head of Cabinet and/or Minister responsible for Public Utilities together with the Third Defendant have in the face of performance of the agreement by the Claimant reneged on the said agreement and/or acted in breach thereof by their several acts and/or conducts and/or asserting thereof that there is no agreement between the said Defendant and the Claimant to finance and supply a Power Plant at Crabbs Penninsula capable of generating by January, 2008 50.9 megawatts of electrical power.
6. The Second Defendant acted arbitrarily, unfairly, unreasonably and abused his powers by his unilateral and unlawful acts and conduct in unilaterally repudiating the Joint Venture agreement/proposal and the unlawful misuse of and abuse of police coercive powers on December 4th 2007 to prevent the Claimant from legitimately and lawfully accessing the Power Plant premises which was constructed with the Claimant's funds at Crabbs Penninsula.
7. That the decision of the Second Defendant to prevent the landing and installation of the Claimant's three (3) 18 V46 Wartsila engines at the Power Plant at Crabbs Penninsula is unlawful and contrary to law; FURTHER, the Second Defendant directive of December 4th 2007 to the Commissioner of Police and/or her subordinate officers to prevent by use of police coercive power the Claimant from accessing its Power Plant (premises) at Crabbs Penninsula was and is contrary to law and an abuse of power and/or an improper and illegal exercise of executive power.
8. The Second Defendant acted in bad faith.

[258] The remedies sought by the claimant stem from a Joint Venture Proposal dated 11th May 2006 coupled with the subsequent conduct, promises and representations of the parties giving rise to a contract entitling the claimant to wholly fund, develop and commission a power generating facility capable of producing 50.9 megawatts of power. It is also contended that the subsequent conduct, promises and representations give rise to a legitimate expectation of a substantial benefit namely the establishment of a joint venture corporate entity with the claimant and the third defendant holding shares of 55% and 45% respectively.

[259] The claimant case is that the various actions of the defendant deprived it of the benefits of the joint venture agreement and as such the question is posed as to whether the Government of Antigua and or the Prime Minister together with APUA acted in bad faith, unreasonably and unlawfully.

[260] On the other hand, the defendants contend that the Phase II of the agreement was never approved as required by the agreement itself and by implication, there was no unlawful actions on their part.

General submissions on judicial review

[261] The following are the submissions on behalf of the claimant:

1. By a binding agreement dated 11th/12th May 2006, the claimant APCL agreed at its own cost to deliver the 50.9 megawatt turn-key project. This agreement required Cabinet approval, given Cabinet's assumption of power under section 38 of the Act. Cabinet approval was given on May 15th, 2006.
2. The agreement provided for a completion date of December 2007 or as the exigencies of APCL contract with Wartsila permitted February 29th 2008. That although the Defendants begun acting in breach of the contract on or about January, 2007 APCL as the innocent party treated the agreement as subsisting and performed its obligations thereunder right up to the institution of these proceedings when given the action of the Second and Third Defendants it became manifest that they together evinced an intention to be no longer bound by the agreement: HEYMAN v. DARWINS LTD [1942] A.C. 356; JOHNSON v. AGNEW [1980] A.C. 367, 373; STOCZNIA GDANSKA SA v. LATVIAN SHIPPING CO. (No.2) [2002] EWCA Civ. 889.
3. It will be further submitted that the actions of the Second and Third Defendants along with the Government are amenable to judicial review by the Court. APUA is a statutory corporation carrying on business in the interest of the public. The Cabinet prior to September 1st 2006 assumed the powers of the Authority by virtue of Section 38 of the Public Utilities Act. Decisions made by either or both purportedly in the public interest has adversely affected the rights and liabilities of

APCL. These decisions are tainted with unlawfulness, bad faith and improper motives. The pleadings herein raise issues of the legality and constitutionality of the actions of the Second and Fourth Defendants, in particularly, the use of the State coercive power improperly to unlawfully intervene in what is in essence a civil commercial dispute. As to the reviewability of their joint and several actions: C.O WILLIAMS CONSTRUCTIONS LTD v. BLACKMAN (1994) 45 W.I.R. 94; MERCURY ENERGY LTD. V. ELECTRICITY CORPORATION OF NEW ZEALAND [1994] 1 W.L.R. 521.

4. APCL also relies on the doctrine of legitimate expectations (substantive) and grounds the same as follows:-

    (i) APCL has the expectation of a benefit to a contract to supply a 50.9 megawatt turn-key power plant

    (ii) This expectation has been induced by the expressed agreement of APUA and Cabinet made on the 11th/12th May, 2006 and 15th May, 2006.

    (iii) The Cabinet and the management of APUA were the persons lawfully entitled to create that contractual expectation and it was intended by them to be binding.

    (iv) APCL has acted to its detriment by the expenditure of large sums of money in order to obtain the benefit of this legitimate expectation (contractual)

    (v) That there has been no rational grounds communicated to APCL as to why this benefit has been withheld or withdrawn, neither has APCL been afforded any opportunity for contending or challenging its withdrawal.

    (vi) That the withdrawal of the benefit has been done in bad faith, without notice or regard to the agreement between APCL and APUA

    See: COUNCIL OF CIVIL SERVICE UNION v. MINISTER FOR THE CIVIL SERVICE [1984] 3 A.E.R. 935 PRESTON v. INLAND REVENUE COMMISSIONERS [1985] 2 A.E.R. 327;
    MATRIX SECURITIES LTD. V. INLAND REVENUE COMMISSIONERS [1994] 1 W.L.R. 334
    ATTORNEY GENERAL OF HONG KONG v. NG YUEN SHIU [1983] 2 A.C. 629

[262] The submissions on behalf of the third defendant are as follows: In essence the third defendant contends that the claim for judicial review on the facts before the Court is misconceived. After citing the leading authorities relating[101] to the purpose of judicial review the submission continues:

[101] These include Kemper Reinsurance Co. v Minister of Finance and others [1998] 3 W.L.R. 630, **Blackstone's Civil Practice 2006,** Chapter 74; R v British Broadcasting Corporation ex parte Lavelle [1983] 1 W.L.R. 23; R v Criminal

"...[N]othing in the claimant's grounds as cited form or the substantial affidavits and the extension exhibits filed in support discloses any decision of the third defendant involving the claimant, or otherwise, on which the claimant can pursue a claim for judicial review. There being no decision there can be no judicial review thereof."

[263] Apart from the foregoing Sir Gerald Watt, Q.C., for the third defendant posed this question in his final address: "....where is the evidence that APUA fettered its discretion, improperly delegated its function, reached a conclusion that nobody properly directed himself on the relevant law and acting reasonably could have reached, failing to take into account relevant matters or took into account irrelevant matters, abused [its] powers or acted in a disproportionate [manner]?".

[264] That question sets the stage for a full launch into the main stream judicial review. And based on the law as it now stands judicial review is undertaken by the Courts using three broad heads, which in reality are constituents of the *ultra vires* doctrine. They are illegally, irrationally and procedural impropriety.[102] Additionally, in recent times the doctrine of legitimate expectation has been added as the traditional grounds of review. [103] It is against these grounds advanced by the claimant must be analysed.

The Methodology

[265] The remedies sought and the grounds of review advanced by the claimant raise several heads of review used by review Courts. Accordingly, these grounds will be addressed, as appropriate, except grounds 1 and 3 for the reasons given below.

Excluded grounds on which review is sought

[266] The following grounds with the attendant remedies which are sought to be reviewed are excluded from consideration for these reasons:

Ground 1: This deals with the question of a contract and has already been considered. To this must be added the prayer for an order that the claimant is entitled to a Joint Venture contract.

Injuries Compensation Board ex parte Lain [1967] 2 Q.B. 864; R v National Joint Council for the Craft of Dental Technicians (Dispute Committee), ex parte Neate [1953] 1 Q.B. 704.

[102] See: Council of Civil Service Union v Minister of Civil Service [1984] 3 All E.R. 935.

[103] See: Michael Fordham, JUDICIAL REVIEW HANDBOOK (3rd ed.) at p. 760-769.

Ground 3: This ground dwells on the claimant's entitlement to compensation on damages for breach of the agreement. This would involve a consideration on the merits which as noted before is not the function of judicial review.

Grounds of review to be addressed

Grounds 2 & 4: The Joint Venture Agreement of itself with the parties thereto subsequent conduct; promises and representations gave rise to a legitimate expectation of substantial benefit a contract to supply the required 50.9 megawatts of electrical power

[267] By way of introduction to the doctrine of legitimate expectation, the following quotation from **De Smith Woolf and Jowell** is appropriate:

> "Since the early 1970's one of the principles justifying the imposition of procedural protection has been the legitimate expectation. Such an expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the Courts have held that the expectation ought not to be summarily disappointed.
> The scope of the legitimate expectation has been the subject of intense discussion; it is still in the process of evolution. It is founded upon a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle in Government's dealings with the public. 'Legal certainty' is also a basic of European Law."[104]

[268] One of the leading cases on the doctrine is **R v NORTH AND EAST DEVON HEALTH AUTHORITY ex parte Coughlan**[105] and the learning in the headnote is coughed in these terms:

> "That if a public body exercising a statutory function made a promise as to how it would behave in the future which included a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that in such circumstances, the Court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant had a legitimate expectation that the health authority would not resile from its promise unless there was an overriding justification for doing so; and that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power."

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[104] Op cit(5th ed.) at para. 8-037.
[105] [2001] Q.B. 213.

[269] Essentially, what attends the doctrine is some promise, representation or practice which induced the claimant to act as he did to his detriment. This is the locus on which the claimant rests his case.

Submissions

[270] In summary, the claimant is saying that its expectation was induced by the express agreement with APUA together with the parties subsequent conduct, promises and representations coupled with the Cabinet Decisions made on 11th/12th May 2006 and 15th May 2006. Based on this expectation, it incurred large sums of money in order to obtain the benefit of the legitimate expectation. Further, that no rational grounds were communicated to it as to why this benefit has been withheld or withdrawn; neither has APCL been afforded any opportunity for contending or challenging its withdrawal.

[271] The essence of the submissions on behalf of the third defendant fall within the following:

> "The learning as given in Blackstone's Civil Practice 2006 at para 74.18 is that in order to qualify for protection under the head of substantive legitimate expectation, the following qualities are necessary:
>
> (a) The representation or expectation sought to be relied upon must be clear, unambiguous and unqualified;
>
> (b) The applicant must be within the class of persons entitled to rely upon the representation or alternatively it must be reasonable for the applicant to rely upon it;
>
> (c) There must usually be reliance upon the representation to the detriment of the applicant, although the claimant need not always demonstrate detriment *(R v (Bibi) v Newham London Borough Council [2002] 1 W.L.R. 237);* and
>
> (d) There must be no overriding public interest which would entitle the respondent to renege from its representation."

[272] The Court accepts the criteria enumerated in **Blackstone's Civil Practice 2006** as advanced by learned counsel for the third defendant, Sir. Gerald Watt, Q.C., and will now proceed to analyse them, seriatim. In any event, most or all of the said criteria are foreshadowed in claimant's submissions. At this stage, however, the point must be made that the legitimate expectation must necessarily be confined to Phase II of the agreement since Phase I has been implemented in accordance with the said agreement.

The representation or expectation

[273] In this regard, the claimant advances the express agreements of 11th/12th May and 15th May 2006. The difficulty, or lack of it, is that the Court has already dealt with these issues in a different context with the result that: (1) the agreement contemplated a two phase development of a plant with each phase being subject to the approval of the Cabinet, (2) the Cabinet decision of 15th May did not grant approval of Phase II of the said project. Further, the Court did not accept the evidence of Mr. Francis Hadeed that the Cabinet gave verbal approval. This is in light of the contrary testimony of the Attorney General who was present both at the suspension of the Cabinet meeting on 15th May 2006, and at the resumption thereof.

[274] The reasoning of the Court in relation to the Cabinet Decision of 15th May 2006 is that it relates to Phase I especially by the use of the phrase 'further to' plus, all the legal and factual circumstances. This of course brings into focus the criteria of the representation or expectation must be clear, unambiguous and unqualified.

[275] Stated shortly, there was no representation that was clear, unambiguous and unqualified the reasons given. And the expectation was equally not clear, unambiguous and unqualified due to the qualification of the approval of Cabinet. By way of a reminder it is to be noted that the requirements or criteria enunciated in **Blackstone Civil Practice 2006** are conjunctive.

[276] By way of a supplement argument on the issue of representation ('practice or promise') learned senior counsel cites a dictum of Schiemann LJ in **R v (Bibi) v Newham LBC** in which he laid down three practical question to be applied in all legitimate expectation cases. The dictum is as follows:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the Court should do."

[277] According to learned senior counsel:

> "The answer to Schiemann LJ's first question of what did the 3rd Defendant commit itself with respect to Phase 2 is the establishment of a new company created for the purpose of the Joint Venture. This was of course subject to the approval of Cabinet and Cabinet did approve the formation of the new company at its meeting on 16th May 2006. [Further], a new company entity, ENERGEN Limited, was formed on 21st October 2006 'subject to the terms negotiated between the parties encompassed in the Joint Venture' (See Exhibit CH10)."

Applicant must be a person entitled to rely upon the representation or it must be reasonable for the applicant to rely on it

[278] Given the fact that the agreement was signed by the claimant and the third defendant it follows that the claimant would be a person entitled to rely upon it if such representation was made. In this regard, it has been determined that what the claimant relies upon in this connection does not amount to a representation that is clear, unambiguous and unqualified. And even although the question of representation does not arise it is instructive to refer to the manner in which Mr. Mendes described the conduct of the claimant in proceeding to contract with Wartsila even before the approval of Cabinet was obtained with respect to Phase I. Learned counsel referred to the claimant, in that context, as 'risk takers'. As such had there been a representation the reasonableness of the reliance would have been measured against that conduct.

[279] Again, although it has been determined that there was no representation by the third defendant, the learned senior counsel has pointed to certain events which go towards the context of Phase II:

> "[81] In February 2007 the 3rd Defendant submitted to Cabinet a report entitled 'Joint Venture Buy Out Proposal for 17 MW Generator Set'. The report recommended a buy-out of the existing 17 MW Generator Set and the entire infrastructure or alternatively negotiations with the Claimant to finalise the Joint Venture Project in respect of the 17 MW electricity generation (see para 17 of the affidavit of Justin Simon, Q.C.).
>
> [82] Following the presentation of the report to Cabinet, Cabinet mandated the Hon. Attorney General and the Hon. Trevor Walker to meeting with representatives of the Claimant and the 3rd Defendant towards negotiating and incorporating and capitalizing the joint venture entity.
>
> [83] Numerous meetings were held between the Hon. Trevor Walker, the Chairman of the 3rd Respondent, and various representatives of the Claimant. The meetings proved to be inconclusive with respect to a number of matters which are detailed at paragraph 21 of the affidavit of Justin Simon, Q.C., *inter alia*, an outstanding issue between the parties was the fact that implementation of the joint venture vehicle, that is to say, the new corporate entity, necessitated capitalization of the company and to this end full and frank disclosure as to cost, related expenses, and finance charges in respect of the 17 MW generator and the Power Plant had to be made by the Claimant. Provisionally assessed costs of US $59,514,483.00 as advanced by the Claimant were not itemised, particularised, or sufficiently substantiated.
>
> [84] Another outstanding issue relating to land upon which the new power plant would be located. The 3rd Defendant was prepared to contribute land as part of its 45% equity contribution. The capitalisation of the joint venture as proposed by the Claimant would require the 3rd Respondent to pay off all capital investment costs, interest, legal and documentation fees, insurance premiums, operation maintenance and administration costs without any financial contribution from the Claimant who would be entitled to a 55% share interest in the joint venture company."[106]

Reliance on the representation to the detriment of the applicant

[280] The matter of the representation or expectation has already been addressed so that ordinarily, given the conjunctive requirements of the doctrine of legitimate expectation, the matter should end

[106] Closing submissions for the Third Defendant (filed 6th November 2008) at p. 32-33.

there. However, the Court considers it necessary to point to aspects of the evidence that hint at the question of detriment.

[281] APCL through its servants and agents has let it be known that it was prepared to fund and has funded the entire project[107] and learned counsel, Mr. Dane Hamilton, Q.C., emphasized the point in letters, both dated 30th November 2006, to the General Manager of APUA and the Minister then responsible for APUA.[108] Further still, Francis Hadeed in responding to paragraph 22 of the Attorney General's affidavit said in part that:

> "The Third Respondent will not be paying off all of the capital investment costs. TheThird Defendant provided no capital investment provided. The Third Defendant provided no capital for the development of the 50.9 MW plant at Crabbs. It provided no security in respect of loans obtained from the banks. It had no funds, took no risks but agreed to enter into a commercial undertaking whereby a joint venture company would own the 50.9 MW plant. In return it was getting 45% of stake and eventual full ownership. That new company would sell electricity generated by the plant to APUA..."[109]

[282] Mr. Geoffrey Robinson, Q.C., in his skeleton arguments[110] put the foregoing into the context of: "The contract consideration." And the submission continued: "APCL were to procure the 50.9 MW project on a build, own operate and transfer (BOOT) basis. Thus APCL would recoup the costs involved in constructing the project from the revenue stream received from the sale of the electricity provided by the plant for the life of the Joint Venture."

[283] Much of the foregoing has already been recorded in this judgment but the complexity and interlocking of the issues lead to such a result. With that said, reference must again be made to the following statement of Francis Hadeed contained at paragraph 8 of his affidavit: "None of this start up money was forthcoming from the Third Respondent. The Claimant assumed the risk and on May 3rd 2006 signed a Letter Agreement – 39.6 MW DIESEL POWER PLANT. The intent of Wartsila being to bind the Claimant to the purchasing of the 18 V46 engine pending the outcome of negotiations with Government and the Third Respondent."

[284] At paragraph 9 of the said affidavit, Mr. Hadeed goes on to explain the context of the Letter Agreement dated May 3, 2006, and in the process says that it provided a price valid until May 15th, 2006 in respect of three engines, 18 V46 MW with alternator and production slots for 2 x 12 V46 engines.

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[107] See affidavit of Francis Hadeed (filed 22 April 2008) at para 18 and Transcript of Trial Proceedings, Vol. II, p. 301. lines 2-25.
[108] Core Bundle No. 2 TAB 10 & TAB 11.
[109] Francis Hadeed, op cit at para 18.
[110] Filed on 5th September 2008, at 11(3)

[285] Repetitious as it may be, the Court finds it unavoidable in the context of legitimate expectation and in particular 'detriment' to re-state the foregoing. Importantly the claimant's Chairman, Managing Director, testified that the claimant assumed the risk based on his understanding of matters.

[286] Therefore, with this course of conduct by the claimant in evidence it is difficult to see how 'detriment' on the part of the claimant can arise with respect to Phase II.

[287] It is therefore the determination of the Court that, given the circumstances, the claimant has no legitimate expectation of a substantial benefit of a contract to supply a 50.9 megawatt electricity power plant. It is the further determination of the Court that there is no evidence to suggest that third defendant acted on instructions of the second defendant with respect to legitimate expectation claimed by the claimant.

[288] Accordingly, it is the determination of the Court that legitimate expectation does not arise in the circumstances of the claimant to supply 50.9 megawatts of electrical power.

Legitimate expectation and change of policy

[289] It has been noted that **R v North and East Devon Health Authority, ex parte Couglan**[111] is a leading case on the doctrine of legitimate expectation. And as shown above, it also dwells on the question of a change of policy in that context. In short, it is permissibe so long as there is an overriding interest to depart from a policy. This principle is rationalized in this way by De Smith, Woolf and Jowell at para. 8-063.

> "An expectation need not endure eternally. It may come to an end naturally or it may be cancelled. There are sound reasons why officials ought to be free to change their policies and practices, for otherwise their discretion would be fettered. As with the creation of an expectation, its revocation may be effected by either an express or an implied representation. An express representation must be clear and unambiguous. A change in a departmental circular would, if properly communicated, although not necessarily personally to any particular individual, serve as an express representation for these purposes. In some cases, however, the existing procedures of consultation may be so entrenched that they may be cancelled only after giving interested persons a 'proper opportunity to comment and object.' "

[111] [2001] Q.B. 213, supra.

[290] On a different plane, Lord Diplock in **Hughes v Department of Health and Social Security**[112] noted that a change in administrative policy is "inherent in our Constitutional form of Government."

[291] In **Garner's Administrative Law** at page 210-210, two examples of the application of overriding interest/sufficient countervailing facet of the public interest are discussed. This is the learning:

> "Thus, in the Civil Service Unions case the House of Lords took the view that national security was a sufficient countervailing facet of the public interest to justify defeating the applicants' legitimate expectations. By contrast, in Re Findlay, their Lordships upheld a change of parole policy which very significantly defeated expectations of certain categories of prisoners as to their likely date for consideration for parole. The reasoning was essentially that the prisoners' expectations should only have been that they would be so eligible at such time and according to such conditions as Government policy might from time to time provide."

[292] Although this case is concerned essentially with an agreement as opposed to pure Government policy, the Court is satisfied that test is equally applicable. Therefore, the question is whether there a sufficient overriding public interest to justify a change of policy?

[293] Evidence from Mr. Justin Simon, Q.C., the Attorney General, and Mr. Trevor Walker, Junior Minister responsible for APUA concerning debts that will be incurred under the Joint Venture and consequentially whether the agreement was in the Government's best interest coupled with the buy-out proposal all point to the question of a sufficient overriding public interest. These are matters known to the claimant. In fact, Mr. Calid Hassad in his affidavit deposed that he had no problem with the buy-proposal (which contradicts the contention of Mr. Hadeed and his counsel's submission that the "bogus"[113] buy-out proposal dated 27th February, 2007 was never communicated to the claimant). These are matters that are within the letter of the agreement and hence no illegality arises. In any event, the law allows for a change of policy as the authorities establish and as such it is within the competence of the Court to determine whether in the circumstances there was a sufficient overriding interest to justify such a change of policy. And, on the evidence the Court so determines.

[294] The Court, in the circumstances considers it prudent to point out that the English Court of Appeal in the celebrated case of **Laker Airways Ltd. v Department of Trade**[114] did give recognition to the fact that a change of policy "may work some injustice or unfairness to a private individual..."

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[112] [1985] A.C. 776.
[113] Closing submissions page 37 at para 104.
[114] [1977] 2 All E.R. 182, C.A.

Legitimate expectation and fairness

[295] The matter of legitimate expectation and fairness rests in part on a dictum of Bingham L.J. in **R v Board of Inland Revenue ex parte M.F.K. Underwriting Agencies Ltd**. In that case the learned Lord Justice after restating the generally applied principles upon which the doctrine of thrives said this:

> "In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or stopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing to which the authority is as much entitled as the citizen."

[296] A somewhat narrower view is taken by De Smith, Woolf and Jowell at paragraph 8 – 037 with this formulation:

> "The scope of legitimate expectation has been the subject of intense discussion, it is still in the process of evolution. It is founded upon a basic principle of fairness that legitimate expectation ought not to be thwarted. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty on Government's dealings with the public."

[297] The Court's reason for characterising the latter learning as being narrow is because it appears to confine the issue to the public authority and, unlike Lord Bingham, fairness is not spread across the full spectrum. In other words, on all sides- the public authority as well as the claimant in terms of fairness.

[298] There is hardly a need to rehash the details surrounding both sides. It is sufficient to say that the claimant took certain actions even before Cabinet had approved Phase II. These actions, to a substantial extent, extended to the entire width of the agreement (Phase I & II) without compliance with the conditions in the agreement since Phase I was approved but Phase II was not. And on top of all these judicial review proceedings were instituted on 21st December 2007, after obtaining leave for the purpose fourteen days earlier. This is at a time when negotiations were active with a commitment in this being expressed in deposed in Mr Hassad's affidavit in support of the application for leave to file these proceedings, which affidavit was deposed to on 7th December 2007.

[299] On the other hand, the Court has put the actions of the third defendant fully within the letter and spirit of the agreement. In other words, there are circumstances of negotiations, buy out, technical details requested and or determination as to whether Phase II was in the Government's best

interest. And as noted above, what compounds the issue is that Mr. Calid Hassad, the Managing Director of the Claimant deposed in his affidavit that the claimant "remains committed to negotiate with the defendants" and he had no problem with the buy-out.[115] To this must be added the fact that Phase I is fully operational for some time now so that there is a revenue stream in the claimant's favour. Indeed Mr. Hassad in re-examination by learned senior counsel, Mr. Robinson gave copious details of the cooperation provided by APUA with respect to Phase I. And the same the claimant even highlights the fact that certain APUA officials even attend the commissioning or start up party. And as matters stand the agreement runs until 2029 coupled with its flexibility which Mr. Hassad clearly recognized.

[300] Therefore, when the scales of fairness are viewed, whether by way of Wednesbury reasonableness or proportionality, the result as far as this Court is concerned there is a lack of fairness on the part of the claimant. This is another reason for holding that legitimate expectation does not arise.

The joint venture entity

[301] The question of the joint venture entity is even clearer as the evidence is that learned counsel for the claimant, Mr. Dane Hamilton, Q.C., on 30th November 2006, informed the Acting General Manager of APUA of the fact of the incorporation of a body corporate. The operative paragraph of that letter reads[116]:

> "As you are aware, the Memorandum of Agreement contemplated the incorporation of a Joint Venture Company. This has taken place. ENERGEN LIMITED was incorporated on October 21st 2006 and is a legal entity subject, of course, to the terms negotiated between the parties encompassed in the Joint Venture."

[302] The matter of the "terms" to be negotiated has run the full gamut of correspondence between the parties. For instance, a letter[117] from Hon. Trevor Walker to the Chairman of the Board of Directors of dated 14th June 2007, asked the Board to commence negotiations with the Antigua Power Company concerning the Joint Venture Agreement; accordance with the decision of the Cabinet dated 1st March 2007, and that while the negotiations were not limited they should include, **inter alia**, the structure of the Joint Venture company and the share capital issue and financing. Further,[118] at paragraphs 20 and 21 of his affidavit, the Hon. Attorney General gives details of meetings held on March 5, 2007, July 30, 2007 and August 13, 2007 involving the Hon. Trevor

[115] At paragraph 48
[116] Core Bundle No. 2, T.A.B. 10.
[117] C.D.B. 27.
[118] Core Bundle No. 1 T.A.B. 13.

Walker, the Chairman, APUA, the Chairman, APCL along with company's Managing Director and Attorney-at-Law. The purpose of the meetings was the resolution of outstanding issues, including the incorporation and capitalization of the Joint Venture entity. Also detailed is the correspondence between the parties between March 12, 2007 and August 10, 2007. And it is further deposed that the meetings were inconclusive with respect to the resolution of the issues and that the defendants maintained certain positions regarding the said issues. These included the contention that the implementation of the Joint Venture vehicle necessitated capitalization of the company and to this end full and frank disclosure was required respecting cost, related expenses, and finance charges in respect of the 17 MW generator and the power plant had to be made by the claimant. Also included was the position that the provisionally assessed costs of US $59,514,483.00 was unacceptable in the absence of full disclosure of itemised costs and expenses.

But while Mr. Francis Hadeed sought to contradict[119] paragraph 22 of Mr. Simon's affidavit there was no attempt to do the same in respect of paragraphs 21 and 22 mentioned above. As such, the evidence with respect to the meetings, correspondence and outstanding issues and the defendant's position thereon are accepted by the Court as being factual.

[303] The evidence does not suggest that the negotiations were ever completed so that in such circumstances legitimate expectation concerning a Joint Venture company falls into alignment with the Court's general finding or conclusion regarding legitimate expectation, or otherwise.

[304] **Grounds 5 & 6: The second defendant in his capacity as Prime Minister and/or head of Cabinet and/or Minister responsible for Public Utilities together with the third defendant have in the face of performance of the agreement repudiated or reneged on the said agreement and/or acted in breach thereof by their several acts and/or conducts and/or asserting thereof that there is no agreement between the said defendants and the claimant.**

[305] Long though this ground may be, the answer is quite short. And in this regard what the claimant contends is that given the actions of the second and third defendants it became manifest that they together evinced an intention to be no longer bound by the agreement.

[306] Learned counsel for the third defendant submits that neither the second defendant nor the Crown as represented by the Attorney General is party to the agreement so that the question of repudiation or reneging cannot arise in law. This is beyond argument. Indeed, as shown above,

[119] At paragraph 18 of his affidavit.

this is what the learned Attorney General, in part, sought to make clear in his letter to Mr. Dane Hamilton, Q.C., in his letter dated 31st December 2007.[120]

[307] In so far as the third defendant is concerned, it has already been shown that the concern had to do with the non-approval of Phase II plus there were other events and actions that were in accord with the agreement. In particular, the buy-out proposal. But whether or not the actions of the third defendant constitute repudiation of the agreement goes to the merits of the matter and as such excluded from consideration in these proceedings. The Court notes, however, that the third defendant in seeking to address the claimant's submissions has cited authority[121] which says that repudiation of a contract is a "serious matter not do be lightly found or inferred."[122] In our Commonwealth Caribbean jurisdiction the same point is made by Chief Justice Simmons made in **Locke v Billington.**[123]

[308] But principle apart, where is the evidence on which the claimant relies? If it is that reliance is being placed on what the learned Attorney General said in his letter of 31st December 2007, he made it clear that he was speaking of the 33.9 MW generators the subject of Phase II that was yet to be approved.

[309] In the circumstances, the Court is satisfied that the claimant has failed to discharge its burden to show that the third defendant committed any unlawful act towards or with respect to the agreement.

[310] **Ground 7: The decision of the second defendant to prevent the landing of and installation of the claimant's three (3) 18 V46 Wartsila engines at the Power Plant at Crabbs Peninsula is unlawful and contrary to law; Further, the second defendant's directive of December 4th 2007 to the Commissioner of Police and/or her subordinates to prevent by use of coercive power the claimant accessing its Power Plant (premises at Crabbs Peninsula was and is contrary to law and an abuse of power and/or an improper and illegal exercise of executive power).**

[311] In their submissions under this ground of review, learned counsel for the claimant has used very strong and unwarranted language to describe the actions of the second and fourth defendants, the offices held by these persons, especially that held by the second defendant, notwithstanding.

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[120] Exhibit JLS 5
[121] Ross T. Smyth & Co. Ltd. V T.D. Bailey, Son & Co. [1940] 3 All E.R. 60.
[122] Ibid at p 71-72 per Lord Wright.
[123] [2002] 65 W.I.R. 19.

[312] The basic case of the claimant is that the second and fourth defendants acted unlawfully and unconstitutionally in preventing the engines from landing at the Crabbs compound where the power plant is located. The contention is that the fourth defendant acted in the telephone instructions of the second defendant.

[313] In this regard, sections 9, 10 and 18 of the Constitution are cited. Also cited is **R v Metropolitan Police Commissioner ex parte Backburn**[124] to say that a police officer in enforcing the law is not the servant of anyone save the law itself.

[314] Based on the non-approval of Phase II and the second defendant's letter to Calid Hassad indicating clearly that there was no approval for the engines to be housed at the APUA Power Plant at Crabbs, Court agrees with learned senior counsel for the first, second and fourth defendants that the attempt to place the engines within the compound constituted trespass.

[315] For the avoidance of doubt, the Court considers it necessary to reproduce the material parts of the second defendant's letter to Mr. Calid Hassad and copied to the Minister of the State with responsibility for APUA, Minister of Public Works, Minister of Finance and the Economy, the Attorney General and the Chairman, APUA Board. The letter dated November 13, 2007, some 20 clear days prior to the landing of the engines on 3rd December, 2007, left no doubt as to what could not be done. It is in these terms:[125]

> "Dear Sir:
>
> Further to the letter dated November 8, 2007, addressed to you from Hon. Trevor Walker, I advise as a further clarification that my Government will not give approval for the engines to be housed at the APUA Power Plant at Crabbs. The unqualified approval which you seek will only be given when an agreement is reached as per the recent Cabinet decision earlier communicated to your good self.
>
> Please be guided accordingly."

[316] As learned senior counsel put it: "The claimant was a licensee of the premises only to the extent of operating the 17 MW generator. On behalf of the Government, the second defendant was well within his rights to seek to prevent the claimant unlawfully delivering and installing the generators." As far as the fourth defendant is concerned, the **Police Act**[126] is relevant and by virtue of section 22(1) (a) of that Act, a police officer may arrest without warrant any person whom he suspects upon reasonable ground of having committed a felony. And under section 23(1) of the same Act, a police

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[124] [1968] Q.B. 118, 135 per Lord Dunning.
[125] Exhibit C.B.D. 30.
[126] Cap. 330 (Revised Laws of Antigua and Barbuda, 1992)

officer is fixed with a number of general duties including, "to preserve the place and prevent and detect crimes and other infractions of the law...."

[317] It is trite law that powers of arrest at common law are enjoyed both by private citizen and the police. These powers are exercisable in the circumstances where a person has breached or is about to breach the peace. In this regard, in **Albert v Lavin**[127] the House of Lords held that this is the right and duty of every citizen in whose presence an actual or reasonably apprehended breach of the peace is being or is about to be committed to make the person who was breaching or threatening to breach the peace, refrain from so doing and if appropriate, to detain him against is will.

[318] As noted, a police officer in the exercise of his duties is entitled to act on reasonable ground (akin to reasonable suspicion) and the law does not place a fetter on the manner in which he arrives at his reasonable ground so long as it is not unlawful or unconstitutional. In any event, there is no evidence of any telephone call to the Commissioner of Police at the material time by the second defendant.

[319] According the relief sought is refused.

[320] But even further, the claimant makes mention of redress with respect to sections 9 and 10 of the Constitution by virtue of section 18 of the said Constitution. These provisions are not pleaded in the application so the strictures of Part 56.7 of C.P.R. 2000 render such a mention to be just that and nothing more.

Ground 8: The second defendant acted in bad faith.

[321] Apart from the phrase bad faith being mentioned in a strange way by Mr. Francis Hadeed in his affidavit and learned senior counsel mentioning it in his submissions, it hardly goes beyond that. Paragraph 15 of his affidavit, Mr. Francis Hadeed said in part: "My conclusion at the time was that this was all a bad faith move on the part of elements in Cabinet." This was in the context of what deponent had heard about the Chinese being involved in supplying engines. Then Mr. Robinson in cross-examining Mr. Justin Simon, Q.C., said: "The point Mr. Simon is bad faith. You knew that

[127] [1981] 3 All E.R. 878.

you couldn't deal with the land and you were pretending to offer it as part of the 45 percent equity. That is bad faith."[128]

[322] In Vol. 1 (1) of **HALSBURY LAWS OF ENGLAND**[129] at para 82 a succinct statement of the law on bad faith is in these terms:

> "The exercise of a discretion by a public body in bad faith is unlawful and will be quashed by the Court. A decision is taken in bad faith if it is taken dishonestly or maliciously although the Courts have also equated bad faith with any deliberate improper purpose. Bad faith may be imputed to ministers, but probably not to the Crown itself. A decision or order, though itself taken or made in good faith, will be quashed by the Court if procured by fraud. In very exceptional circumstances a narrow definition of the statutory grounds for challenging an administrative act may be effective to exclude fraud or bad faith as a ground of challenge; but it is well established that in general legislative formulae purporting to exclude judicial review of a tribunal's proceedings altogether do not operate to exclude challenges founded on fraud. Fraud or bad faith must be expressly pleaded by the party alleging it.
>
> There are situations where tortuous liability may be incurred in respect of acts done in bad faith although no liability would arise were the same acts to be done in good faith."

[323] In **Cannock Chase DC v Kelly,** Megan L.J., in view of the linguistic treatment of the phrase bad faith advocated the following:

> "It would stress- for it seems to me that an unfortunate tendency has developed of looseness of language in this respect – that bad faith, or, as it is sometimes put; 'lack of good faith', means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave change. It must not be treated as a synonym for an honest, thought mistaken, taking into consideration of a factor which is in law irrelevant."[130]

[324] In Michael Fordham, **JUDICIAL REVIEW HANDBOOK** the learning on the meaning of bad faith is on these terms at para. 51. 1.5:

> "Meaning of bad faith. Smith v East Elloe Rural District Council [1956] A.C. 736, 770 Lord Smervell, disserting: Male fides is a phrase after used in relation to the exercise if statutory power. It had never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud or corruption. As [defendants] have moved before the bad faith has been particularized, one must assume the worst." Roberts v Hopwood [1925] 578, 603-604 (Lord Sumner: 'Bona fide here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to discharge of their duty towards [the] public whose money are local business they administered."

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[128] Transcript of Trial Proceedings, Vol. III, p. 413, lines 18-22.
[129] 4th ed. 2001 Re-issue.
[130] [1978] 1 W.L.R. 1, 6.

[325] For the time being, therefore it may be said that bad faith imports dishonesty, malice and fraud. And in this context Wade and Forsyth[131] at page 413 make this learned comment:

> "The judgments... are freely embellished with references to good and bad faith. These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally, they are found to have erred if at all, by ignorance or misunderstanding. Yet the Courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' merely means 'for legitimate reasons'. Contrary to the natural sense of the word they impute no moral obliquity."

[326] The learned authors after an examination of dicta in certain authorities[132] come to this conclusion:

> "An Lord Greene MR, in the passage already quoted, treated bad faith as interchangeable with unreasonableness and extraneous considerations. Bad faith therefore scarcely has an independent existence as a distinct ground of invalidity. Any attempt to discuss it as such would merely lead back over the ground already surveyed but a few examples will illustrate it in its customary conjunction with unreasonableness and improper purposes.
>
> If a local authority were to use its power to erect urinals in order to place one 'in front of any gentleman's horse', then it would be impossible to hold that to be a bona fide exercise of the powers given by statute. If they wish to hold that to acquire land, their powers are 'to be used bona fide for the statutory purpose and for none other. If they refer numerous cases en masse to a rent tribunal without proper consideration, this is not a valid and bona fide exercise of the powers.' If a lignum licence is cancelled for political reasons, the Minister who brought this about is guilty of a departure from good faith."

[327] So the equation is customary conjunction of bad faith and unreasonableness and improper purposes. This rests on the new dispensation regarding grounds of review laid down in the **CCSU** case. That is the law, but the difficulty which the Court faces is the evidence to determine whether or not the allegation of bad faith is satisfied.

[328] It will recalled that mention was made of Mr. Hadeed's utterance of 'bad faith move on the part of elements within the Cabinet.' The full context of that statement relates to the Chinese were being asked to supply the 3 x 11 MW engines. This is what Mr. Hadeed deposed at paragraph 15 of his affidavit:

> "Discussion about the Chinese first surfaced at a meeting in March 2007 at the Attorney General's Chambers when my Attorney, Mr. Dane Hamilton suggested that the Government was trying to get out of the deal and invite the Chinese to supply the 3 x 11 MW engines. Both Mr. Trevor Walker (the Junior Minister of APUA) and the Attorney General professed no knowledge of the same and expressed surprise. My conclusion at the time was that this was all a bad faith move on the part of some elements within Cabinet."

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[131] Op cit.

[132] Roberts v Hopwood [1925] A.C. 578, 603; Westminster Corp. v London and NW Railway Co. [1904] 1 C.L. 759, 767

[329] But Mr. Clarvis Joseph in his affidavit filed on 17th April 2008, did put the matter into perspective by deposing that at paragraph 29 that he is aware of ongoing discussions with the People's Republic of China with a view to obtaining Chinese assistance in addressing the shortfall electrical generation requirements of the third defendant. At paragraphs 30 and 31 of the said affidavit further details are deposed and he ends by saying that a cooperation agreement was signed involving the Beijing Construction Engineering Group Company Ltd. (BCEG) and the third defendant; following on the presentation of a technical proposal by BCEG.

[330] The sequel is deposed at paragraph 32 as follows:

> "Pursuant to this presentation by the Third [Defendant] I am advised by the First Defendant and the Honourable Trevor Walker to meet with representatives of the claimant and the Third [Defendant] towards negotiating, incorporating and capitalizing the Joint Venture entity in respect of the 17 MW generating plant which had in January 2007 been commissioned at the Power Plant. Further, that pending completion of these negotiations to arrange for the purchase by the Third [Defendant] from the claimant of power from the 17 MW generator at a price not exceeding the current rate '*at which APUA purchases under the existing PPA.*'"

[331] The record does not show that Mr. Joseph was cross-examined on this aspect of his affidavit. Rather, his cross-examination centered on Phase I and Phase II of the Joint Venture and APUA's cessation of activities with respect to the said Joint Venture.

[332] It is now clear that the allegation of bad faith is centered, for the most part, on the actions of APUA and the Government with the Chinese. But the evidence reveals that a technical proposal was signed which relates to the matter of power generation. Thus in this connection, learned counsel for the claimant in his skeleton arguments says at page 36 that: "Meanwhile APCL is expending massive amounts of money – up to US $39 Million in performing in good faith the 51 MW agreement. This is notwithstanding the bad faith repeatedly shown by the defendants through their secret dealing with the Chinese for a 30 MW power station."

[333] The question now becomes whether the actions of the defendants constitute bad faith within the meaning of the law. And, more particularly, whether such actions constitute or fall within the customary conjunction in bad faith and unreasonableness and improper purposes.

[334] This must be answered in the context of what the Court has characterized as a flexible agreement, paragraph 16 of Mr. Francis Hadeed's affidavit and paragraph 29 to 32 of Mr. Clarvis Joseph's affidavit, all quoted above.

[335] The nature and extent of the flexibility of the agreement has been noted resting mainly on the buy-out and early term is consistent with the terms of the agreement. And there is no secrecy about any dealing with the Chinese when the matter is considered in its true and proper context. To this must be Phase I of the agreement has been approved by Cabinet and fully implemented and commercially operational by February 2007. Further, as noted above, any public authority is free to change policy so long as there is an overriding public interest.

[336] Judicial review is concerned with legality. APUA has wide powers under its enabling Act to enter into contracts and the Government still has power and authority under the prerogative to enter into all kinds of agreements[133] so long as they are not prohibited by law or the Constitution.

[337] In this regard it is therefore the determination of the Court that the actions of the defendants do not meet the threshold of the customary conjunction of bad faith, unreasonableness and improper purposes . The same may be said of the specific issue of the acquisition of land for the purposes of the Joint Venture as this is consumed more in executive/legal confusion, rather than bad faith.

[338] It is of utmost importance to note the following submission by learned counsel for the claimant; at paragraph 87 of the Closing Submissions on behalf of the claimant. This is the submission:

> "It transpired that there were issues over ownership of the land at Crabbs Peninsula. The Government appeared to have forgotten that it had agreed in 2004 to include the same land as part of a deal with Stanford, who had registered caution over land. Nevertheless despite the confusion and incompetence of the Government representatives, it is clear that the Government intended to acquire the land for APUA for the construction of the Plant."

[339] It is may also be of some importance to import into the equation the fact that entirety of the land in Antigua is registered under a system of registered titles which has as its culmination a Land Register. This Land Register is in turn conclusive as to land titles and is notice to the entire world, including the claimant.

[340] The remedy sought is therefore refused.

ISSUE NO. 4: Whether the principle of estoppel arises in the circumstances

[341] In **The Law Relating to Estoppel by Representation** by Bower and Turner, part of the basic the learning on matter of the onus in this context is as follows:[134]

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[133] See: Attorney General of Hong Kong v Humphreys Estate [1987] 1 A.C. 114, 127-128.

> "The onus is on the representee of establishing the precise acts and conduct alleged, and, further of showing that the acts and conduct so proved were such an unequivocal character as to involve the particular representation relied upon as the ground of the estoppel.
> It is a question of fact, where there is evidence both ways whether the particular acts alleged took place or not, and whether by virtue thereof the party made the particular representation alleged."

[342] It is the claimant's contention that if contrary to its case, Phase I and II required separate approval, or the Cabinet approved only Phase I, APUA and/or the Government are estopped from denying the contract is for a 50.9 megawatts project and the Phase II works. The submission continues: "Put shortly APCL contends that both APUA and the Government acted, both by acquiescence and encouragement, as if approval for the entire project had been given. Thus APUA allowed APCL to proceed on that basis and act to their detriment by incurring the costs of carrying out the enabling works and purchasing engines from Wartsila for Phase II."

[343] Further still, the contention is that the conduct of APUA and the Government triggers the application of the principle in ***Ramsden v Dyson***[135] as explained by Oliver J in **Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd**[136] and reviewed more recently in the speech of Lord Walker in **Yoeman's Row Management Ltd. v Cobbe.**[137]

[344] In closing arguments, learned senior counsel for the first, second and fourth defendants mounts these arguments in relation to the doctrine of estoppel in this context:[138]

> "I would respectfully submit that no estoppel could arise at this instance because the claimant, certainly in relation, I am speaking in relation to my clients, the claimant has not proved that the Government has done anything that would lead them to believe that they approve the entire project. As a matter of fact, I point out again, there is no evidence of a communication like the May 12th communication when Cabinet told the claimant what decision it had made on May 9th. There is no similar communication and therefore in the absence of that communication the claimant had to have been wondering what was going on. They knew - - they made a presentation to Cabinet on May 15 for the project to be approved and therefore they had to have been at that point in time wondering what actually happened. They have not said to this Court that anybody then told them their project had been approved. As a matter of fact, quite the opposite as I have just pointed out, Mr, Hamilton when he is writing his letter in November, he is referring only to the decision of May the 9th as the Authority and that decision clearly is a decision in relation to the 17 megawatt plant only, generator, I'm sorry, only. So therefore they cannot rely on anything the Government did or said.
> More than that, Mr. Hassad has testified that from October, at least, he has information to the contrary, he has information that phase two has not been approved and his evidence is that Government's position thereafter was consistent from October thereafter his evidence is the Government was clear in its position for the remainder of 2006 right through to 2007 that

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[134] (3rd ed., 1977) at paras. 52 & 54.
[135] [1866] L.R 1 H.L 129
[136] [1982] Q.B 133
[137] [2008] U.K. H.L. 55
[138] Transcript of Trial Proceedings, [Vol. IV], p. 44, line 7 to p. 46, line 15.

Government's position was that phase two has not been approved. So, if the Government has encouraged them to do anything, it could only have been between May and October, 2006, but they have not pointed to anything that the Government did in that period that encouraged them to act. On the contrary, My Lord, the evidence is that the persons in charge of the claimant were obvious risk takers, because they concluded the agreement of May the third with Wartsila on the basis of, according to Mr. Hadeed, discussions that he had been having with the Cabinet on April 25th when he was basically getting good vibes from them, that is essentially what he is saying, 'I got good vibes from them,' and therefore he went out and he concluded the agreement on May 3rd with Wartsila binding the claim to default of a deposit of US $1 million if the agreement was not carried out, but that was not only in relation to the 17 megawatt plant it was also in relation to the other generators. So he was prepared to bind himself to Wartsila before the Government had agreed on anything at all, because the May 3rd agreement with Wartsila is arrived at even before the decision on May 9th to authorize the Minister to proceed to purchase the 17 megawatt plant. So they are risk takers. They then proceed at the end of June to enter into the longer agreement with Wartsila without having received any communication from the Government concerning what happened on the meeting of May 16th. They are risk takers."

[345] Sir Gerald Watt, Q.C., for the third defendant in making his final address, indicated that he had no desire to make submissions on the doctrine of estoppel as Mr. Mendes', S.C., submissions on the point were correct. Instead, he did comment on a case cited by the other side. It is **Cambrio v Mansroe Management.** After citing a dictum from the case, he submitted that the case has no applicability to that case since concerned with land and not with a right to a contract.

[346] Naturally, this Court must be guided by the principles that govern the doctrine. A good starting point is Vol. 16 **Halsbury's Laws of England** at para. 955 where it is explained that:

"Estoppel in pais or estoppel by representation operates where a person has by words or conduct made to another a clear and unequivocal representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon and the other person has acted upon such representation and thereby altered his position to his prejudice.

The estoppel arises against the party who made the representation and he is not allowed to aver that the fact is otherwise then he represented it to be."

[347] To the same effect is this learning from W.J. Swalding, in **Restitution Law** (1998):

"The whole point of estoppels is claims that they concern promises which, since they are unsupported by consideration are initially revocable. What later renders then binding and therefore irrevocable is the promisee's detrimental reliance on them. Once that occurs there is simply no question of the promisor changing his mind."

[348] The cases and the learning relating to the doctrine of estoppel show that it is pervasive and applied by the courts in a disciplined and principled way. Therefore, to rely on a vague assurance such as:

'It'll all be yours one day'[139] will not suffice. Indeed although the case of **Gillet v Holt and another**[140] was concerned with proprietary estoppel the headnote makes the point that:

> "The doctrine of proprietary estoppel could not be treated as subdivided into three or four watertight compartments. Rather, the quality of the relevant assurances could influence the issue of reliance which was often intertwined with detriment. Detriment itself was not a narrow or technical concept, and it need not consist of the expenditure of money or other quantifiable financial detriment, provided it was something substantial. Thus detriment had to be approached as part of a broad inquiry as to whether the repudiation of an assurance was or was not unconscionable conduct, and the Court had to look at the matter in the round."

Conclusion

[349] The rule is that estoppel thrives on representation, whether by word or conduct that is clear and unequivocal, and a person acting thereon to his detriment. It has already been determined that the assurances and trust placed in the Cabinet by Mr. Francis Hadeed of APCL has no pedigree in the confined context of a suspended Cabinet meeting. In fact, the Attorney General's evidence contradicts the existence of assurances and verbal approval and expressions of like dubious pedigree.

[350] Mr. Mendes in his submission made reference to a host of evidence concerning the conduct of the claimant in terms of the ordering if engines and the signing of a contract with Wartsila. At this stage, these and related matters cannot be in dispute. In any event, the Court further accepts the events identified by Mr. Mendes as being factual.

[351] Further, the Court has already shown the consistency of the defendants in denying the approval of Phase II. This would take care of the encouragement pillar of Mr. Robinson's submission. In any event, the point must be made that in so far as Phase I is concerned, the third defendant would have been bound by its obligations under the terms of the agreement. And the further point must be made that once the contract between the claimant and Wartsila had signed the contract to construct the power plant and with the finance being provided by the claimant it is difficult to comprehend the nature and extent of the encouragement and acquiescence in that context. This the claimant has not done apart from uttering the words and phrases which do not rise to the level of proof so as to discharge its onus.

[352] The claimant has placed reliance on the case of **Ramsden v Dyson** and other cases to support its submissions in estoppel. To this end, the case of **Yeoman's Row Management Ltd. & Anor v Cobbe**

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[139] Mayling v Jones [1993] 69 P & CR 170.
[140] [2000] 2 All E.R. 289.

– a case concerning the sale of land with terms yet to be settled. Of far more importance is Lord Walker's reliance of a certain dictum of Oliver J in **Ramsden v Dyson** in these terms:[141]

> "Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* LR 1 HL 129 principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

[353] To repeat what has been said before: Phase I was approved by Cabinet so that the contest is over Phase II for which engines were ordered and contract to build the power plant signed without the initial knowledge of the third defendant and even the Cabinet. The test in **Ramsden v Dyson** speaks of it being unconscionable for a party to be permitted to deny that which knowingly, or unknowingly he has allowed or encouraged another to assume to his detriment.

[354] In this instance, having regard to what the Court has concluded with respect to Phase II and generally in respect of the claimant's conduct, it cannot be unconscionable for the third defendant to deny encouraging the claimant. In saying this the Court is not unmindful of the earlier submission made by Sir Gerald Watt, Q.C., that estoppel is not concerned with right to contract but with rights in and over land. In the end the same result obtains.

[355] The following dictum taken from the very opening of Lord Walker's judgment or speech in Yoeman's Row Management Ltd. case has special significance for this case. This is what His Lordship said:[142]

> "Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. This iscertainty is important in property transactions."

[356] It is therefore the determination of the Court that the doctrine of estoppel has no application to the circumstances of this case.

[357] Further to the above, it is of some interest to note that there are authorities[143] for the legal proposition that the principle of estoppel does not apply to public authorities, to prevent it from

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[141] [2008] U.K. H.L. 55 at para 59.
[142] [2008] U.K. H.L. 55 at para. 46.
[143] Vol. 16(2) **Halbury's Laws of England,** para 961 and Wade and Forsyth, op cit, p.243 -244, **Garner's Administrative Law** (8th.ed) by B.L.Jones & K. Thompson

exercising their statutory powers; and, in the case of Government, to frustrate its policy. The proposition is articulated in this way[144]:

> "In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess.
> Another limitation is that the principle of estoppel does not operate at the level of Government policy. A Government department which encourages an airline to invest in aircraft on the understanding that its licence will continue is not estopped, if there is a change of Government and a reversal of policy, from withdrawing the licence. Many people may be victims of political vicissitudes and 'estoppel cannot b allowed to hinder the formation of Government policy.' "

[358] It is the view of this Court this limitation applies to the circumstances of this case. This rests on the connection between APUA and the Government of Antigua and Barbuda by virtue of section 37(1) of the Act, whereunder the Minister is empowered to give directions as to the policy to be followed by the Authority in the performance of its functions as appear to be necessary in the interest of Antigua and Barbuda. And "the Authority shall be given effect to such directions."

[359] It will be recalled that when the Board of the Authority was not in place, the Authority through the Cabinet embarked upon the 'buy out' and the question was also raised that the Government wished to determine that the Joint Venture was in the interest of Antigua and Barbuda. To this mast be added the Chinese constituent of the equation which is reflected in the affidavit of Mr. Clarvis Joseph at paragraphs 30 and 31. In these paragraphs the deponent details the meetings held between 6th March 2006 and 7th June 2007 involving the "People's Republic of China, the Beijing Construction and Engineering Group Company Ltd (BCEG), the Government of Antigua and Barbuda and the third defendant. According to Mr Joseph, over the several months of negotiations the discussions centered on the setting up of The Antigua and Barbuda New Power Plant. He goes on to say that this resulted in BCEG presenting a technical proposal, dated 12th October 2006, to the Government and the third defendant concerning the Antigua and Barbuda New Power Plant.

[360] Mr Clarvis Joseph puts the entire matter into perspective at paragraph 32 of his affidavit with the following:

> "Pursuant to this presentation by the third defendant I am advised by the first defendant that Cabinet mandated the first defendant and the Honourable Trevor Walker to meet with representatives of the claimant and the third [defendant] towards negotiating, incorporating and capitalizing the Joint Venture entity in respect of the 17MW generating plant which had in January 2007 been commissioned at the power plant. Further, that pending completion of these negotiations to arrange for the purchase by the third [defendant] from the claimant , of power from 17 MW Generator 'at a price not exceeding the current rate at which A.P.U.A. purchases under the existing PPA'"

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[144] Wade and Forsyth op. cit, (7th ed.) at p. 270- p.271.

[361] In the view of the Court the foregoing reflects the essence of a new policy on the part of the Government which the third defendant is bound to follow and implement in accordance with section 37 of the Act. Of even greater importance is the legal reality that this policy falls within the exception to the doctrine of estoppel and as such cannot be reviewed or pursued by the Court.. It is absolute and unless modified it cannot be shaken- not even by intense cross-examination.

Costs

[362] The claimant has not succeeded in its application for judicial review and accordingly it must pay costs to the defendants in accordance with Part 65.5 of C.P.R. 2000.

[363] **ORDER**

IT IS HEREBY ORDERED AND DECLAIRED as follows:

1. Judicial review is appropriate procedure in view of the dominance of the public law element of the proceedings.
2. While the law is clear as to the appropriate nominal defendant in proceedings involving the Crown the question of the removal of the second defendant at this stage is likely to lead to practical difficulties having regard to the pleadings, and in any event, the nominal defendant is a party to the proceedings.
3. The issue of the availability of an alternative remedy should be taken at the stage of the application for permission to seek judicial review and not at the hearing on the merits.
4. There was non-compliance with section 38 of the Public Utilities Act, Cap. 359 so as to render the actions purported to be taken pursuant to that section nugatory.
5. There exists a binding agreement between the claimant and the third defendant which is subject to conditions, namely the approval of Cabinet and as such the rights and obligations of the parties must depend on the satisfaction of such conditions.
6. Phase II of the agreement was never approved by Cabinet as required by the terms of the said agreement.
7. The claimant has no legitimate expectation of substantive benefit, namely the establishment of a Joint Venture corporate entity whose principal shareholders will be the claimant with 55% of the shares and the third defendant with 45% of the shares.
8. There is no illegality arising from the third defendant's conduct which has a bearing on repudiation of or reneging on, the agreement.

9. There is nothing in the conduct of the second defendant which amounts to an illegality with respect to the landing of the three engines and as such damages and or exemplary damages against the said second defendant are refused; further the order sought quashing the second defendant's decision regarding the three engines is refused.

10. There is no illegality in the conduct of the fourth defendant in preventing the claimant from entering the compound at Crabbs for the purpose of depositing the three engines, the fourth defendant's legal authority being derived from the Police Act, Cap. 330 and the common law.

11. The second defendant's conduct does not fall within the customary conjunction of bad faith, unreasonableness and improper purposes.

12. The doctrine of estoppel has no application in the circumstances of these proceedings since the doctrine does not apply in respect of Government policy and further government policy constitutes an exception to the doctrine of estoppel which the Court cannot review or pursue.

13. The injunction sought against the second and third defendants to prevent them acting unlawfully is refused.

14. The claimant must pay costs to the first and third defendants in accordance with Part 65.5 of C.P.R. 2000, unless otherwise agreed.

[364] By any standard this case is one of great complexity. For this reason the Court wishes to record its deep appreciation for the extensive research and the high level of advocacy by learned counsel on all sides.

Errol L. Thomas
Judge (Ag.)