Michaelmas Term
[2022] UKPC 37
Privy Council Appeal No 0077 of 2021

JUDGMENT

The Central Bank of Trinidad and Tobago (Appellant) *v* Maritime Life (Caribbean) Ltd (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

LORD HODGE
LORD SALES
LORD HAMBLEN
LORD LEGGATT
LORD STEPHENS

JUDGMENT GIVEN ON
20 October 2022

Heard on 20 July 2022

Appellant
Ian L Benjamin SC
Kerwyn Garcia
Dionne Springer
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Edward Fitzgerald KC
Fyard Hosein SC
Joseph Middleton
Sasha Bridgemohansingh
Annette Mamchan
Aadam Hosein
(Instructed by Simons Muirhead & Burton LLP)

LORD STEPHENS (with whom Lord Hodge, Lord Sales, Lord Hamblen and Lord Leggatt agree):

1. Introduction

1. The respondent, Maritime Life (Caribbean) Limited, brought legal proceedings against the appellant, the Central Bank of Trinidad and Tobago, in relation to the appellant's oversight of the bidding processes for the sales and its subsequent approval of certain Traditional Insurance Portfolio ("TIP") sales to Sagicor Life Inc. ("Sagicor"). The sales were made by Colonial Life Insurance Company (Trinidad) Limited ("CLICO") and British American Insurance (Trinidad) Limited ("BAT"). The respondent commenced legal proceedings (Claim No. CV2019-04772) seeking judicial review and raising certain constitutional challenges. No leave was required to commence the constitutional challenge but as required by section 6 of the Judicial Review Act Chapter 7:08 the respondent sought and, on 6 April 2020 obtained from Rampersad J, leave to apply for judicial review. On 17 February 2021 the Court of Appeal, by a majority, dismissed an appeal against that decision (Boodoosingh and Aboud JJA with Rajkumar JA dissenting). The appellant now appeals as of right to the Privy Council, contending that leave to bring judicial review proceedings against the appellant should not have been granted to the respondent.

2. It is well settled that the threshold for the grant of leave to apply for judicial review is low. The Court is concerned only to examine whether the applicant has an arguable ground for judicial review that has a realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14. The low threshold would usually not be met "if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed": see *Attorney General v Ayers-Caesar* [2019] UKPC 44 at para 2.

3. It is equally well settled that the threshold on appeal for overturning a grant of leave to apply for judicial review is high. In *Sookhan v The Children's Authority of Trinidad and Tobago* [2021] UKPC 29 at para 6 the Board stated that if leave to apply for judicial review has been granted then the grant of leave stands on appeal "unless the appellate court is satisfied that it should plainly not have been granted." In circumstances where leave to apply for judicial review has been granted, then ordinarily the preferred course is to proceed to a hearing on the merits, unless there is some clean knockout blow. On an appeal a very powerful - even an overwhelming - case presented on behalf of an appellant ordinarily will not suffice unless it amounts to a clean knockout blow.

4. The threshold is even higher in circumstances where (as here) there was a grant of leave to apply for judicial review at first instance which was then upheld in the Court of Appeal. There are several reasons for this. First, two courts will have already concluded that the case discloses arguable grounds with a realistic prospect of success. In other words, the reliability of the judge's grant of leave will already have been subjected to review by an experienced Court of Appeal. Second, the leave filter should not become an instrument of delay and increased costs by virtue of the interposition of a series of appeals on this preliminary gateway. Third, judicial review proceedings ordinarily not only affect the interests of the parties but also affect public interests. The public interest will generally not be served by the parties engaging in satellite litigation by second appeals against the grant of leave to apply for judicial review. Accordingly, for a second appeal against a grant of leave to apply for judicial review to succeed *there must be some exceptional circumstance establishing plainly that leave should not have been granted*. Such an exceptional circumstance will usually need to be demonstrated in clear terms in the appellant's written case. If the Board is not persuaded by pre-reading it, then the Board is likely to require such exceptional circumstances to be established at the outset of the hearing in concise oral submissions. Absent exceptional circumstances being established at the outset, it should be anticipated that the appeal will be dismissed.

5. Given the low threshold for the grant of leave to apply for judicial review and the high threshold on a first appeal, let alone on a second appeal, Mr Benjamin SC, in his well-structured and able submissions on behalf of the appellant, correctly accepted that there was a considerable hurdle to be overcome for the appeal to have any prospect of succeeding.

2. The constitutional challenge

6. The respondent also asserts that its constitutional right to equal treatment under sections 4(b) and 4(d) of the Constitution of Trinidad and Tobago was breached, in that it did not receive the same standard of treatment from the appellant as the appellant accorded to Sagicor. The respondent did not have to establish that there were arguable grounds with a realistic prospect of success to commence proceedings based on its constitutional challenge, as no leave is required for constitutional challenges. The appellant, whilst accepting that the principle of equal treatment enshrined in section 4(d) of the Constitution applied to its oversight of the bidding process and its subsequent approval of the sales to Sagicor, sought to submit before the Board that the respondent's constitutional challenge should be struck out on the basis that there was no evidence of any violation of any constitutional rights.

7. There are two difficulties with this submission.

8. The first is procedural but nonetheless fundamental and determinative. The appellant ought to have applied to the High Court or Court of Appeal to strike out the respondent's challenge. It did not do so. Consequently, there has been no order of the lower courts dealing with the application, which in turn means that there is no order against which to mount an appeal to the Board. The issue not having been raised by way of an application to strike out below, it is simply not open for the appellant now to appeal to the Board.

9. The second difficulty is equally fundamental. The essence of the appellant's submission is that the Board should strike out the constitutional challenge as there is no evidence of any violation of any constitutional right. This submission is an echo of the appellant's related submission in relation to the respondent's application for leave to apply for judicial review. In that context, the appellant also submits that there is no evidence of any breach of public law duties. However, if on the evidence in relation to the appellant's public law duties there is an arguable case that has a reasonable prospect of success then the Board considers that there would be sufficient evidence of a violation of the principle of equal treatment enshrined in section 4(d) of the Constitution to render an application to strike out untenable. As will become apparent, the Board does consider that on the evidence in relation to the appellant's public law duties there is an arguable case that has a reasonable prospect of success - as a result, even if the appellant had made an application to strike out the constitutional challenge, the Board considers that the application ought to have been dismissed.

3. Factual background

10. The lower courts have set out a detailed description of the factual background. Given the limited issues that arise on this appeal that description need not be repeated in full.

11. An essential part of the factual background is the financial emergency which engulfed CLICO and BAT so that it is appropriate in this part of the judgment to set out the statutory special emergency powers of the appellant which in those circumstances enabled the appellant to assume control of those companies, to direct them to sell their TIPs, to oversee the sale processes and to approve the sales.

(a) The appellant

12. The appellant is a body corporate established under the Central Bank Act, Chapter 79:02 ("CBA") for the purpose of promoting such monetary credit and

exchange conditions as are most favourable to the development of the economy of Trinidad and Tobago. It is a public authority for the purposes of section 4(d) of the Constitution so that individuals, such as the respondent, have a right to equality of treatment from the appellant in the exercise of any of its functions.

(b) The respondent

13. The respondent is a local company and is incorporated under the laws of Trinidad and Tobago. It is one of the largest insurance companies in the domestic market and has several affiliates, including a finance company, a trust company, and a leasing corporation. The respondent has been regulated since its incorporation in 1971, initially by the Ministry of Finance and subsequently by the appellant.

(c) Sagicor

14. Sagicor is a Trinidad and Tobago subsidiary of Sagicor Financial Corporation Limited, which is registered in Bermuda with its head office in Barbados. An undated BAT "Board Note", which does not clearly differentiate between Sagicor and other group companies, states that "Sagicor is an insurance provider domiciled in Bermuda with total assets of $34.0 BN and is currently active in Trinidad and Tobago through its [Sagicor Life Inc] Trinidad and Tobago … operations, which holds assets of $5.1 BN. In addition it is a subsidiary of Sagicor Financial Corporation (SFC), with total assets of $45.3 BN."

(d) CLICO, BAT and CL Financial Limited

15. CLICO and BAT are affiliates of CL Financial Limited, a Trinidad and Tobago financial conglomerate.

(e) The appellant's statutory special emergency powers

16. Sections 44C to 44I in Part VA of the CBA confer special emergency powers on the appellant.

17. Section 44D in so far as relevant provides:

> "(1) Where the Bank is of the opinion—

(a) that the interests of depositors, creditors, policy holders or members of an institution are threatened;

(b) that an institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment; or

(c) that an institution is not maintaining high standards of financial probity or sound business practices,

the Bank shall, in addition to any other powers conferred on it by any other law, have power—

... (ii) to such extent as it thinks fit, to assume control of and carry on the affairs of the institution and, if necessary, to take over the property and undertaking of the institution;

(iii) to take all steps it considers necessary to protect the interests, and to preserve the rights of depositors and creditors of the institution...

…

(vi) to acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the institution, at a price to be determined by an independent valuer; …

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

18. Accordingly, if the appellant were of the opinion under section 44D(1)(a) that the interests of creditors and policy holders of CLICO and BAT were threatened, and if the appellant were also of the opinion under section 44D(2) that the financial system

of Trinidad and Tobago was in danger of disruption, substantial damage or impairment, then section 44D(1)(c)(ii) would empower the appellant to assume control of CLICO and BAT, and section 44D(1)(c)(vi) would empower the appellant to acquire or sell or otherwise deal with the property of those companies.

19. Section 44E in so far as relevant provides:

> "(1) Where the Bank proposes to exercise powers under section 44D(1)(ii), it shall publish in the Gazette and in such newspapers as it thinks appropriate a notification to that effect.
>
> …
>
> (3) Upon the publication of the notification the property and the powers of control stated therein shall vest in the Bank."

20. Accordingly, if the appellant thought fit to assume control of and carry on the affairs of CLICO and BAT and to take over the property and undertaking of those companies, then section 44E(1) provides that the appellant shall publish a notification to that effect. Section 44E(3) provides that where the appellant has published a notice to that effect, the property and powers of control under section 44D(1)(c)(ii) vest in the appellant.

21. Finally, section 44F in so far as relevant provides:

> "(1) Where the Bank has under section 44D assumed control of an institution, it may terminate or retain the services of any or all of the directors, officers and employees of the institution and the directors so retained shall manage the affairs of the institution subject, however, to any directions of the Bank; and no acts done or resolution, rules, bye-laws or decisions made or conveyances, transfers, assignments or instruments executed during such period relating to the business affairs, property, undertaking or management of the institution shall have effect unless they are approved by or are in conformity with the directions of the Bank.

…

> (5) In the performance of its functions and in the exercise of its powers under section 44D the Bank shall comply with any general or special directions of the Minister and shall act only after due consultation with the Minister."

22. Accordingly, if the appellant were to assume control of CLICO or BAT then the appellant may terminate the services of any of the directors of those companies, no decisions relating to the business of those companies shall have effect without the appellant's approval and there is an obligation on the appellant to consult with and to comply with general or special directions of the Minister.

(f) The financial crisis in relation to CL Financial Limited and the response of both the government and of the appellant

23. In 2009 there was a financial crisis in relation to the affairs of CL Financial Limited and its affiliates CLICO and BAT. The State intervened to finance a rescue package in an attempt to avert a national financial crisis. The "bail-out" provided amounted to TT$18 billion of taxpayer funds (approximately £2 billion).

24. The appellant's response on 13 February 2009 was to exercise its special emergency powers under sections 44D and 44E of the CBA. In accordance with section 44E it published Legal Notices No. 32 and No. 33 of 2009 to that effect and thereby achieved control of the affairs and took over the property and undertakings of CLICO and BAT. The emergency powers were exercised to safeguard the interests of policyholders and creditors of CLICO and BAT and to prevent the disruption, substantial damage and impairment of Trinidad and Tobago's financial system posed by the collapse of CL Financial Limited.

25. The appellant kept in place CLICO and BAT's governance structures but pursuant to section 44F(1) terminated the services of the existing directors. Thereafter the appellant appointed new Board members.

(g) The appellant's resolution plan and the tendering process for the TIPs

26. On 27 March 2015, the appellant announced its resolution plan for CLICO and BAT. A core element of this plan was the sale of the companies' TIPs to a prudent, well

managed, strongly capitalized, registered insurance company with a sound track record of compliance with regulatory requirements and capable of managing the TIPs into the future.

27. On 6 November 2015, the appellant stated in an update on the resolution plan that the process of selling CLICO's assets required "oversight by the Central Bank for accountability and transparency, statutory independent valuations in accordance with Section 44D of the Central Bank Act and consultations with the Minister of Finance under Section 44F (5) of the said Act". The same position applied to the sale of the BAT TIPs.

28. The respective Boards of CLICO and BAT were tasked by the appellant with making the necessary arrangements for the sale of the TIPs which included engaging third-party international expertise. In 2014 Towers Watson ("TW"), an international actuarial firm was appointed to provide independent valuations of the TIPs and Oliver Wyman Limited ("OW"), an international firm of management consultants and actuaries, was appointed to manage the bidding and sale process of the TIPs.

29. There were two separate bidding processes comprising one for the CLICO TIPs and the other for the BAT TIPs. Both bidding processes initially comprised two rounds, as follows:

(a) In round 1, potential buyers would be provided with relevant information and submit a non-binding bid, which would be assessed on the basis of criteria such as the proposed transaction structure including price, investor qualifications and transaction due diligence, and a shortlist created; and

(b) In round 2, the shortlisted entities would submit final binding offers and a preferred bidder would be selected, again based on assessment against criteria.

30. By letter dated 5 February 2016, OW, who stated that they had been retained by both CLICO and by the appellant to support the sale process of the CLICO TIPs, invited the respondent to participate in round 1 in respect of the CLICO TIPs.

31. By letter dated 10 March 2016, OW, who stated that they had been retained by both BAT and by the appellant to support the sale process of the BAT TIPs, invited the respondent to participate in round 1 in respect of the BAT TIPs.

32. On 28 April 2016 the respondent submitted two separate preliminary bids for the CLICO TIPs and the BAT TIPs respectively.

33. At the conclusion of round 1 and by letters dated May 2016, OW informed the respondent that it had been shortlisted for the CLICO and BAT TIPs. The bidding process then proceeded to round 2 with the appellant inviting separate binding offers for the CLICO and BAT TIPs.

34. By separate letters each dated 21 July 2016, the respondent submitted two second round bids for the CLICO TIPs and the BAT TIPs, respectively. The remaining three bidders in round 2 withdrew from the process, citing a variety of reasons which included financing difficulties and legal concerns related to threatened litigation by Mr Lawrence Duprey, former CL Financial Limited Chairman and principal shareholder, against the Government of Trinidad and Tobago in relation to the resolution plan. The respondent was not told that it was the only remaining bidder at the end of round 2.

35. The appellant decided to have a third round in the bidding process which was initiated one year and six months after the conclusion of round 2.

36. The respondent was invited by letter dated 3 January 2018 from OW to participate in the third round of bidding for the CLICO TIPs. OW stated that they had been retained by both CLICO and by the appellant to continue advisory support with the sale of CLICO's TIPs. The letter invited binding offers based on a draft seller's agreement which was to be provided by OW to the bidders. In this way the draft seller's agreement would form the contractual basis for the transaction. The letter stated that amongst the information that the binding offers shall contain was:

> "An explicit statement that your Binding Offers are not subject to any condition other than obtaining the necessary authorizations and approvals from the competent authorities as required by law ("the Mandatory-Approvals") and that you undertake to act timely in order to seek such Mandatory Approvals."

The letter also provided that:

> "The Seller reserves the right to reject any or all Binding Offers without discussing the reasons for such decision. The

> Seller shall not be obliged to review nor to accept the highest, or any, offer."

37. By a separate letter dated 4 January 2018, the respondent was invited by OW to participate in the third round of bidding for the BAT TIPs. OW stated that they had been retained by both BAT and by the appellant to continue advisory support with the sale of BAT's TIPs. This letter also contained provisions identical to those in relation to the sale of the CLICO TIPs by inviting binding offers based on a draft seller's agreement, requiring an explicit statement that the binding offer was not subject to any condition other than in relation to mandatory approvals and a seller's reservation of the right to reject any or all binding offers.

38. By separate letters each dated 30 April 2018, the respondent submitted two separate third round final binding offers in respect of the CLICO TIPs and the BAT TIPs, respectively. Based on documents which were anonymously disclosed to the respondent, there is evidence that the respondent's combined bids for the CLICO and BAT TIPs came to TT$ 408 million more than Sagicor's combined bids.

39. On 30 April 2018 Sagicor submitted a binding offer for the CLICO TIPs. In respect of the BAT TIPs, Sagicor, whilst making an offer, indicated it was not interested in acquisition unless it was permitted to acquire both the CLICO and BAT TIPs. Sagicor also indicated that if both portfolios go to Sagicor then Sagicor's bid price is improved by TT$73M. Documentary evidence on this appeal suggests that the extra TT$73M was to be divided so that TT$30M would be added to the Sagicor's offer for the BAT TIPs and the balance of TT$43M would be added to Sagicor's binding offer for the CLICO TIPs.

40. It is apparent from an undated BAT "Board Note", which was one of the documents anonymously disclosed to the respondent, that three bids were received for the BAT TIPs which were assessed and weighted against six key criteria. The criteria were:

> "(a) Maintain the financial strength of the balance sheet backing policyholder benefits.
>
> (b) Avoid undue financial system risk.
>
> (c) Provide for sufficient ease of transition.

(d) Demonstrate credible commitment to bid & ease of completion of the bid.

(e) Achieve a competitive, fair transfer price that balances [appellant] and policyholder interests.

(f) Preserve policyholder service levels."

41. Weighting was to be applied to the assessed marks in respect of each of the criteria. The highest weighting, involving multiplying the assessed mark by three, was given to criteria (e) of price.

42. In assessing the final bidders for the BAT TIPs and if Sagicor's improved bid of TT$30M was disregarded, then the respondent's bid was the most favourable. However, the position was reversed if CLICO selected Sagicor as its preferred bidder, in which case Sagicor's improved bid of TT$30M meant that it was the preferred bidder for the BAT TIPs.

43. On 30 July 2018, Sagicor was selected as the preferred bidder by the Board of CLICO to acquire the CLICO TIPs. This in turn meant that Sagicor was assessed as having the most favourable bid for the BAT TIPs so that also on 30 July 2018 Sagicor was selected as the preferred bidder by the Board of BAT to acquire the BAT TIPs.

44. In August 2018, the appellant endorsed this selection of Sagicor as the preferred bidder for both the CLICO and BAT TIPs.

45. By letter dated 10 September 2018, OW notified the respondent that it had not been selected as the preferred bidder for either portfolio but asked it to keep its bids open for six weeks if negotiations with the preferred bidder failed and it wished to negotiate with the respondent. By letter dated 27 September 2018, the respondent agreed to do so.

46. By separate letter dated 10 September 2018, OW notified Sagicor that it was selected as the preferred bidder for both portfolios and wished to commence negotiations and arrive at a final enhanced price and sale and purchase agreement terms.

47. On 29 March 2019, the Minister of Finance announced at a press conference that the appellant had identified Sagicor as the preferred bidder for the CLICO TIPs, even though their bid was TT$300 million lower than the respondent's. The Minister confirmed that the appellant had made its recommendation but that he had made no decision and he would not be a "rubber stamp". The Minister indicated that the appellant was concerned about selling the CLICO TIPs to a company that was less stable than the preferred bidder and which might be unable to manage the portfolio.

48. On 10 April 2019, the respondent wrote to the appellant about the Minister's comments at the press conference and the rationality of the approach described by the Minister. By letter dated 21 May 2019, the appellant responded that the respondent had participated in the bidding process on terms as to confidentiality and without obligation on the part of the appellant to accept the highest or any offer and to reject any offer. The appellant considered that it was inappropriate to provide any further information.

49. On 20 September 2019, bidding documentation relating to the sale of the BAT TIPs was anonymously delivered to the respondent. This included the BAT "Board Note" (see para 37 above) which stated that on a stand-alone assessment, making no assumptions about whether Sagicor was awarded the CLICO TIPs, the respondent ranked first for the BAT TIPs.

50. On 30 September 2019, a Sale and Purchase Agreement was executed between CLICO and Sagicor for the sale of CLICO's TIPs. A similar Sale and Purchase Agreement was executed between BAT and Sagicor for the sale of BAT's TIPs.

51. On 20 November 2019 the respondent commenced these proceedings supported by an affidavit of Andrew Ferguson, the Chief Executive Officer, and Chairman of the Board of Directors of the respondent. On 13 January 2020 in opposition to the respondent's application for leave to apply for judicial review, the appellant filed an affidavit of Dr Alvin Hilaire, the Governor and Chairman of the appellant's Board.

52. On 6 April 2020 Rampersad J granted the respondent leave to apply for judicial review. The judge also issued an interim injunction preventing the appellant from taking any steps to provide regulatory approval or to otherwise progress or finalise the transfer of the CLICO portfolio and the BAT portfolio to Sagicor pending the hearing and final determination of the matter or until further order.

4. The appellant's appeal against the grant of leave to apply for judicial review

53. The appellant's case in relation to the appeal against the grant of leave raised an "amenability" ground of appeal and an "arguability" ground of appeal. In relation to the amenability ground the appellant submitted that the impugned decisions are not amenable to judicial review having regard to the fact that the decisions and, more importantly the processes by which they were arrived at, were purely commercial in nature. In relation to the arguability ground of appeal, the appellant submitted that the material on which the respondent relies does not make out an arguable case either that the decisions, or the underlying processes by which they were made, were tainted by inequality, unfairness, discrimination or any related species of impeachable conduct. The Board will deal with each ground in turn.

(a) The amenability ground of appeal

54. The amenability ground raises issues regarding the interaction of private law and public law in relation to the negotiation of commercial contracts for the sale of the CLICO and BAT TIPs. In essence the appellant submits that as a matter of principle the appellant's decisions lie outside the scope of the judicial review jurisdiction of the court, because they involve matters of commercial judgment and are decisions of a purely private nature having nothing to do with public law.

55. The interaction between private law and public law was considered by Lord Sales giving the judgment of the Board in *State of Mauritius v CT Power Limited* [2019] UKPC 27 at para 43. He stated:

> "It is true that a decision whether or not to enter into a contract involves deciding whether to accept obligations sounding in the private law of contract. However, a contract is made between legal persons, and where the person who is a proposed party to a contract is a public authority the way in which it may behave is subject to rules of public law; and whether the public authority has acted lawfully in accordance with those rules is a matter which may be subject to judicial review."

Lord Sales continued by observing that:

> "…, it is a separate question what public law standards apply and whether the Ministry of Energy did anything unlawful in terms of those standards in taking the decision it did."

56. In relation to the interaction between private law and public law in this case, Boodoosingh JA stated at para 28 that:

> "… the Central Bank, being a public entity, must carry out its functions in keeping with certain principles. These include fairness, transparency, accountability, non-discrimination and rationality. These are governing principles for any public entity."

57. During his oral submissions Mr Benjamin correctly conceded that the way in which the appellant behaves in its oversight of the bidding processes for the sales of the CLICO and BAT TIPs and its subsequent approval of the sales is subject to rules of public law.

58. In relation to the separate question as to what public law standards apply it is not necessary for the Board to determine all the public law standards that might apply as Mr Benjamin correctly conceded that certain standards do apply including:

(a) affording fair and equal treatment to those involved in the bidding process (see *Central Tenders Board v White* [2015] UKPC 39; [2015] BLR 727, at para 4);

(b) accountability and transparency on the part of the appellant;

(c) good faith; and

(d) rationality in the *Wednesbury* sense.

59. The Board illustrates the effect of these concessions by reference to the provision in the third round of the bidding process that the seller has the right to reject any or all binding offers, see paras 33 and 34 above. The right to do so would be subject to public law duties of, for instance, good faith and fair and equal treatment. The appellant could not exercise that right in bad faith or to secure an unfair advantage to a particular entity in the bidding process.

60. In conclusion, the Board considers that not only is there an arguable case with a reasonable prospect of success that the appellant's oversight of the bidding process and its subsequent approval of the sales was amenable to judicial review, but also that it was in fact amenable to challenge, though the exact public law duties engaged are to be determined at the hearing on the merits. This ground of appeal does not meet the threshold of some exceptional circumstance establishing plainly that leave should not have been granted. Rather the courts below were plainly correct in relation to the amenability ground. The Board considers that this ground of appeal is not made out.

(b) The arguability ground of appeal

61. In relation to this ground of appeal the appellant submitted that the material on which the respondent relies does not make out an arguable case either that the decisions, or the underlying processes by which they were made, were tainted by inequality, unfairness, discrimination or any related species of impeachable conduct.

62. In the High Court, under the heading "Devoid of Merit" and at paras 49 to 63, Rampersad J considered whether there was evidential material which gave rise to an arguable case with a realistic prospect of success that the appellant had acted unlawfully in terms of public law standards. In relation to whether the appellant had lawfully exercised its right to reject any binding offer the judge concluded at para 61 in relation to the evidence at this preliminary leave stage that "there [was] nothing at this stage that plainly determines the case one way or the other." Having reviewed the evidence the judge concluded at para 63 that there was an arguable case in keeping with the test set out in *Sharma v Brown-Antoine*.

63. In the Court of Appeal Boodoosingh JA set out at paras 59 – 61 a summary of the evidence of Mr Ferguson and Dr Hilaire before observing at para 62,

> "Dr Hilaire's response did not address all of the matters raised by Mr Ferguson. It also demonstrated there were rival contentions on different matters. Mr Ferguson … pointed to various aspects of irrationality and asserted bad faith. Absent at this stage from Dr Hilaire's affidavit was what oversight was undertaken by the [appellant] over the process of the selection of the purchaser and what evaluation was done by the [appellant] of the recommendations. There was no explanation why they went to a third round a year and a half later. There was no explanation why [the respondent] was not accepted for the BAT portfolio after all of the other bids

> were withdrawn. There was no categorical response to what the BAT anonymous documents revealed. There was no analysis of why [Sagicor] was ranked higher according to the criteria other than to say they were ranked higher. Thus, there was no comprehensive or detailed answer to the claim."

The Board considers that these observations are accurate as to the state of the evidence at the leave stage.

64. Boodoosingh JA provided several examples at para 64 of matters about which the judge at trial would have to make findings after "careful examination of the evidence on both sides." It is only necessary for the Board to take one of the examples which was whether the offer made by Sagicor was conditional. The letters dated 3 January 2018 and 4 January 2018 in relation to the third round of bidding (see paras 33 and 34 above) each invited separate bids for the CLICO and BAT TIPs and both contained a requirement for an explicit statement that the binding offer was not subject to any condition except for mandatory approvals. The appellant contends that the Sagicor offers (see para 36 above) which contained a provision for an increase of TT$73M dependent on acquiring both the CLICO TIPs and the BAT TIPs were not conditional bids. The respondent submits that these were conditional bids so that the prohibition on conditional bids was unfairly disapplied by the appellant in relation to Sagicor to the disadvantage of the respondent. The respondent also submits that this was a combined bid for both the CLICO and BAT TIPs so that the prohibition on combined bids was also unfairly disapplied by the appellant in relation to Sagicor to the disadvantage of the respondent. Furthermore, the respondent submits that if the Sagicor bids were within the terms of the letters dated 3 January 2018 and 4 January 2018 then those letters were unfairly ambiguous to leave one bidder at an unfair advantage. In relation to that example the Board agrees with the judge and the majority in the Court of Appeal that there is evidential material which gives rise to an arguable case with a realistic prospect of success that the appellant had acted unlawfully in terms of the public law standard set out at para 54(a) above by affording unequal treatment to the respondent in comparison with Sagicor.

65. On behalf of the appellant Mr Benjamin sought to analyse all the other examples given by Boodoosingh JA to establish that in respect of some or all of them the judge and the majority in the Court of Appeal were wrong to conclude that there was an arguable case with a reasonable prospect of success. However, to take such an approach is to misunderstand the extremely high threshold that must be met by an appellant, as set out in para 4 above. The appellant must establish some exceptional circumstance absent which the Board does not consider it profitable or necessary to

engage in a detailed factual analysis. The Board has examined with care the detailed critique of the evidential material provided on behalf of the appellant but considers that it does not approach the requisite standard of some exceptional circumstance.

66. The Board considers that this ground of appeal is not made out.

5. The Constitutional challenge

67. The Board considers that the appeal in respect of the constitutional challenge is not made out there having been no application to strike out that challenge. Furthermore, there is evidential material supporting the challenge so that even if the appellant had made an application to strike out the constitutional challenge, the Board would have dismissed that application.

6. Conclusion

68. The Board dismisses the appeal.