THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE
Claim No. CV2012-03205
BETWEEN
(1) DR WAYNE KUBLALSINGH
(2) RIAZ NIGEL KARIM
(3) ELIZABETH RAMBHAROSE
(4) RAMKARAN BHAGWANSINGH
(5) MALCOLM MOHAN
(6) AMEENA MOHAMMED
on their own behalf and on behalf of the members of
THE HIGHWAY REROUTE MOVEMENT Claimants
AND
THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO Defendant
(No 2)
Before the Honourable Mr Justice James C. Aboud
Dated: 7 April 2014
Representation:
• For the claimants: Mr R. L. Maharaj SC and Mr F. Hosein SC leading Mr R. Dass and Ms V. Maharaj instructed by Mr A. Maraj
• For the defendant: Mr R. Martineau SC and Mrs D. Peake SC leading Mr S. Roberts, Mr G. Ramdeen, Mr K. Ramkissoon, and Ms K. Bello instructed by Ms P. Alexander, Ms A. Ramroop and Mr E. Silva of the Chief State Solicitor's Department

JUDGMENT
1. The issue in this case is whether the claimants have rights under the Constitution of Trinidad and Tobago to complain about the frustration of their expectations, which they describe as legitimate. They say that the Government promised them that there would be a review of its decision to build a major multi-Billion dollar highway extension in south Trinidad. They are seeking an interim conservatory order to stop the road construction. The State contends that the claimants do not possess any public law rights and, even if they did, an interim conservatory order should not be granted because they delayed in making the application, they have given no undertaking in damages and that the rights of third parties, including those of motorists who need a modern transportation network in this part of Trinidad, would be adversely affected.

Factual background
2. There are two main highway networks on the Island of Trinidad. The first traverses the northern part of the island, in the area colloquially known as the "East West Corridor". It runs basically from the western peninsula to the eastern peninsula, passing through some of the island's most densely populated areas from Port of Spain in the west to Arima in the east. The second runs north south, connecting the East-West Corridor to the major city of San Fernando in the south. This highway passes through some important population and industrial centres. It ends virtually on the outskirts of San Fernando, in an area called Golconda.

3. Point Fortin is an important borough on the south western peninsula. It has a sizeable population and significant industrial activity takes place in its environs, principally connected to the island's oil

and gas sector. Between San Fernando and Point Fortin are the bustling inland towns of Debe, Penal, Siparia and Fyzabad, also with significant populations. There are two ways of reaching Point Fortin from San Fernando. There is a narrow coastal road that passes through La Brea (a site of major petroleum industries). It is a winding road that connects several smaller communities on its way to Point Fortin. The second route is along the San Fernando-Siparia-Erin Road, known as the SS Erin Road. The ideal way of getting onto the SS Erin Road from the East West Corridor in the north is to drive south on the existing highway to Golconda and then head east until you meet it. The SS Erin Road connects with Debe, Penal, Siparia and Fyzabad en route to Point Fortin. Of these four towns, Debe is northernmost and Mon Desir is southernmost. The majority of the residents of these towns use the SS Erin Road for north/south travel. It is public knowledge that the SS Erin Road, which is a two-lane road, is very congested, especially where it passes through these towns. It is a winding road intersected by many other feeder roads that also adds to the congestion.

4. The north/south Highway is called the Solomon Hochoy Highway. It is a major four-lane highway. It was conceptualized since the 1960s, and the plans included an extension to Point Fortin. It is mentioned in the 1967 National Transportation Plan. Pursuant to this plan the then Government entered into a contract with the Inter-American Development Bank in 1996 to co-operate in the execution of the National Highway Program. The highway designs done under this program were transferred to National Infrastructure Development Company Limited ("NIDCO"), a special purpose company falling under the Ministry of Works. NIDCO is an executing agency for projects undertaken by this Ministry. One such project was the extension of the Solomon Hochoy Highway to Point Fortin. Since 2005 NIDCO and the Ministry of Works have been collaborating on this project.

5. As early as 2005 the proposed route of the highway extension was known. Basically, it extended south from Golconda (where the Solomon Hochoy Highway came to an abrupt end on the outskirts of San Fernando) and then moved in a South Westerly direction linking up the four towns. At each of the four towns substantial interchanges were planned, with ramps, and over- or under-passes to accommodate merging or diverging traffic. Upon reaching the Mon Desir interchange, it travelled west to Point Fortin. The part of the proposed highway that is the subject of this action is the section that links Debe to Mon Desir. Each interchange is connected by the highway that links them all together. I should mention that the interchange at Mon Desir, at the Southern end of the disputed section, also links up with the coastal road on the West.

6. The claimants are persons who say that they are adversely affected by the decision to construct this section. At the time of filing the Fixed Date Claim Form ("FDCF") on 3 August 2012, some of them had been served with Acquisition Notices made pursuant to the order of the President. Some, whose homes are on the perimeter of this section, were not. The lead claimant, Dr Wayne Kublalsingh, does not live anywhere near the path of the proposed extension, but is an environmental and national development activist who is the chief spokesman for the claimants.

7. The claimants, and in particular, Dr Kublalsingh, were aware since 2005 that the government intended to build the disputed section. Residents along the proposed route began receiving notices of intended surveys in early 2006. Protests were held in front of the offices of the company engaged in the surveys. Numerous letters of complaint were written and cottage meetings were held. At that time the residents protested under ad hoc organisations formed for the purpose. The claimants were aware of these activities, and some of them, notably Dr Kublalsingh, participated.

8. Feasibility studies along the route triggered the first public protests. The residents, including many of the claimants, were aware that the government had taken the decision to build the highway extension which included the disputed section in 2006, and that an application was made to the Environmental Management Authority ("EMA") for a Certificate of Environmental Clearance ("CEC") on 23 April 2006. They were aware that the CEC governing the disputed section was granted on 20 April 2010. The grant of the CEC was never challenged by judicial review proceedings although protests had been staged by Dr Kublalsingh and some of the claimants during the consultations on the environmental impact assessment. The Trinidad and Tobago Meteorological Society, the Director of Drainage of the Ministry of Works and the Water and Sewerage Authority voiced their concerns over the issue of flooding and hydrology prior to the grant of the CEC, but it was nonetheless granted by the EMA, subject to certain conditions.

9. Between October 2010 and September 2011 the residents, under the leadership of Dr Kublalsingh, carried out a campaign of public education and awareness opposing the construction of the disputed section. They wrote letters to the editors of the daily newspapers and were interviewed on television. They held public meetings and disseminated a number of pamphlets. Newspaper headlines of the time, atop extensive interviews with Dr Kublalsingh, stated: "Most Debe residents say no to highway plan"; "Mon Desir to Debe: highway to disempowerment"; Mon Desir to Debe Highway: a waste".

10. In September 2011, Dr Kublalsingh was instrumental in organizing a group known as the Highway Reroute Movement ("HRM") to lobby against the disputed section. The main thrust of their argument was that, instead of passing through the four towns, the extension should instead be rerouted or diverted at the Debe interchange and cut across to the coastal road on the West. This goal is underlined in the name of the movement. In essence, this proposed diversion would have by-passed three of the four towns altogether for north/south traffic, and all four towns for south/north traffic. The main grounds of the complaint related to hydrology, the cost of the enterprise in relation to the alternative route, and the prospect of increased crime.

11. During this period, namely on 25 January 2011, Dr Kublalsingh became aware that Construtora OAS, SA ("OAS"), a Brazilian construction company, was awarded the contract to Design and Build the entire highway extension, including the disputed section. The contract sum was TT$5.2 billion. The preliminary design element would likely have begun, or ought to have been known to have begun, around that time, or, at any rate, soon after the formal contract was executed in July 2011. The public awareness and opposition campaign thereafter intensified. In May 2011 the major utility providers (electricity, water, telephone and cable television) began the process of removing or re-locating their installations along the disputed section. In July 2011 the interchange at Debe (which was the first interchange along the disputed section from the north) was released to OAS for design work.

12. OAS sub-contracted part of their services to some 90 firms and entered into substantial contracts for the supply of cement, asphalt and gravel. In September 2011 a variety of sub-contractors began pre-construction works. These included topographical surveys and geotechnical investigations. Limited work was done with bulldozers. Technical equipment was brought on the disputed section to carry out the technical investigations. The work was openly carried out. It was not done in secret.

13. Beginning at the end of 2011 and leading up to February 2012 the State began serving Acquisition Notices on land owners along the route of the disputed section. Four Acquisition Notices were served in relation to the lands owned or occupied by four of claimants. The second claimant is not himself an owner of land but is a licensee of his father (who was served with an Acquisition Notice). One of the other claimants is not landowners but lives in the vicinity of the proposed highway. The remaining claimant, Dr Kublalsingh, lives very far away. That left three claimants as owners of land to which the Acquisition Notices applied. Beginning in this period the government began negotiating prices for the acquisition of all private lands. The dates of the actual acquisitions were not given but the evidence suggests that the acquisition process was ongoing from time that the notices were served. As at October 2013, as the evidence now discloses, the government had paid out TT$62.8 million dollars to 57 landowners and had re-located members of five households to rented premises at a cost of TT$38,000 per month.

14. There are no proceedings before the court to contest the legal validity of the Acquisition Notices served on the claimants, or, indeed, on any of the other landowners. There is therefore no alleged defect in the procedure that led to their issuance.

15. In the course of 2011 and 2012 major interchanges along the disputed section were released to OAS for design, and in relation to some of them, for pre-construction activities.

16. The OAS apparatus was visibly engaged in early 2012. It was being mobilized (which is a verb that involves activity) and exhibiting every intention to build the disputed section. The highway from Golconda to Debe was moving apace, progressing south to the site of the Debe interchange. No objection was taken to this section of the road works that led to the site of the Debe interchange. In terms of actual works on the disputed section, these were limited throughout 2012 and 2013 to work on the interchanges that has been described by the claimants as pre-construction works. These works included topographical surveys, geotechnical surveys, the submission of designs to NIDCO, and the clearing and grubbing of the land with bulldozers and excavators. The clearing and grubbing was taking place at the site of the interchanges along the disputed section and it interrupted at several times during the course of 2012 and early 2013. This was attributed to two causes. Firstly, certain protest actions taken by the HRM involved interference with the work of the bulldozers. The HRM members basically stood in front of the tractors preventing them from operating. Dr Kublalsingh was arrested several times in the course of these protests and was charged with obstruction. The physical works were also retarded by events surrounding the interactions between the HRM and the government. These interactions are what this case is all about. They occurred throughout 2012.

Interactions with the Government

17. In February 2012, during the period when works on that section of the undisputed highway extension from Golconda to Debe were steadily progressing South, and Acquisition Notices and pre-construction activities were being pursued on the disputed section, the HRM staged a demonstration in front of the private home of Mrs Kamla Persad-Bissessar, the Prime Minister. It was said to be in an effort to deliver a letter and a report, both authored by the HRM in that month. The letter called for the “permanent discontinuance” of the disputed section and the rerouting of the highway along the alternate path. The report stated that the project was destructive to the history, the geography, the economy and the ecological balance of the region. It drew reference to the prospect of flooding, the

destruction of agricultural lands, the loss of a pristine rural culture, and the dis-connectivity of its people. It complained about the demolition of homes, businesses and places of worship, and the creation of “urban sprawl” emanating from the four towns with attendant crime. It also protested what it described as the flawed consultation that began in 2005, and the prohibitive financial costs of this major stretch with its many interchanges. The alternative was to divert the highway from Golconda to the coastal road and to repair and, where possible, expand the existing grid of secondary roads around the four towns. The letter was delivered to the Prime Minister.

18. On 15 March 2012 another protest was staged outside the Prime Minister’s office in St. Clair. Dr Kublalsingh said it was called in order to get a meeting with her. These activities were reported in the media. The Prime Minister agreed to meet with the HRM on the next day, 16 March 2012. The meeting took place at the temporary House of Parliament, The Waterfront, Port of Spain.

Representations at the first meeting

19. Dr Kublalsingh says in his affidavit that the Prime Minister, after hearing submissions from various members of the HRM on the issues raised in its report, said that the government would review the issues raised by the HRM and that the disputed section would be “put on hold”. The claimants say that such a review was intended to be an independent technical review. The government deponents admit that the Prime Minister undertook a review, but do not agree that the review was intended to be “an independent technical review”. They also point out that while the Prime Minister said there would be a hold, there was no permanent undertaking not to resume works. These facts will have to be considered in more detail later in this judgment.

20. Following this meeting Dr Kublalsingh and some 50 persons gathered at some distance from the offices of the EMA. Several of them including Dr Kublalsingh went into the building demanding to see the CEO of the EMA. They refused the leave the lobby. Eventually, the CEO met them there. Dr Kublalsingh says that the CEO admitted that there were conditions attached to the CEC that ought to be complied with. Dr Kublalsingh says that the EMA abdicated its responsibility in granting the CEC and they therefore staged a peaceful protest in the lobby until they were physically removed. All of these events, like before, were heavily covered in the newspapers and on television.

Representations at the second meeting

21. On 16 April 2012 the HRM, after more public agitation, were invited to attend a meeting with the then Minister of Works, Mr Jack Warner, to discuss their concerns. The meeting took place at the Ministry’s offices on 18 April 2012. Attending the meeting were Mr Warner, the Ministry’s Environment Officer and Director of Drainage, the Chairman of NIDCO, Dr Carson Charles, and one of NIDCO’s engineers, together with two officials from the EMA, two members of Parliament and a representative of OAS. The composition of the meeting suggests that the Government was thinking along technical and legal lines in making its invitations, and trying to bring together all parties affected by the issues raised by the HRM.

22. The HRM was represented by a number of the claimants including Dr Kublalsingh, and Dr Prame Narinesingh, a hydrologist from the University of the West Indies. The HRM raised their concerns about the hydrology, the social and economic impacts, and the proposed rerouting alternative. The

government attendees tried to get the HRM to agree at least to build the Siparia to Mon Desir section, but Dr Kublalsingh said that the HRM would not agree to that.

23. Eventually, Mr Warner said that the Ministry would establish a nine member committee, comprising seven government appointed officials, and two drawn from the HRM, namely, Dr Kublalsingh and one other person of his choice. Mr. Warner is alleged to have said that "the purpose of the committee was to consider HRM's arguments and to come up with a solution to our concerns and make a decision on the route of the Debe to Mon Desir segment within one month." Dr Kublalsingh objected to the composition of the proposed committee. He said that he did not have the technical skills, and further, that the composition should be five members appointed by the Minister and five appointed by the HRM. Mr Warner insisted on the 7:2 composition. Dr Kublalsingh and the HRM then abruptly left the meeting because, according to Dr Kublalsingh, "Mr Warner was going to form a committee that would not afford the HRM of meaningful participation by our technical persons… it was better for the HRM to respond with its own technical personnel to any review which was promulgated".

24. The defendant says that this did not amount to a decision to set up a "technical review committee". Further, it is not accepted that the report would be delivered within one month. Mr Warner says that there was no further discussion about setting up the committee after the HRM members left the meeting. However, in a newspaper interview following the meeting published in the Trinidad Guardian on 19 April 2012, Mr Warner is reported to have said "This is the first of many meetings to come. I am not going to allow Mr Kublalsingh's histrionics to bother me. We have to meet with the people who live in the area and we have to consider their concerns." The newspaper writer also reported this: "Warner also said the proposed committee had the power to 'co-opt' personnel as necessary. Construction would continue on the initial route until the proposed new route could be thoroughly reviewed, he said." There was no retraction to this newspaper report.

25. Shortly after this meeting, according to Dr Kublalsingh's 3 August 2012 affidavit, "On 19 April 2012, bulldozers and tractors crossed the M2 Ring Road and began to grade lands directly on the path of the Debe to Mon Desir segment." An issue has now arisen as to whether these bulldozing works can be classified, properly, as works on the disputed section. The claimants say that they do not, despite the evidence that I quoted above. They assert that this is an important fact to determine whether they are guilty of any delay. According to my preliminary observations the M2 Ring Road appears to be slightly south of the proposed Debe interchange, and the area was being graded in order to construct it. This matter will need to be more fully examined at the trial. What I ask myself about this event is not so much whether it could be said that work on the actual roadway from Debe to Mon Desir had begun, which is the question that the defendant urges me to affirmatively answer, but whether it could be said that NIDCO and OAS were exhibiting an intention to proceed as planned.

26. On 21 April 2012, the next day, the HRM set up a protest camp about 100 metres south of the M2 Ring Road, in an area that may, at the trial, be found to be either part of the interchange, or part of the actual roadway, or both. Wherever the location of the camp, its placement suggests that the HRM feared that the Ministry was proceeding as planned to continue with road works on the disputed section. Dr Kublalsingh says that the camp was set up "south of the junction between the M2 Ring Road and the SS Erin Road, the starting point of the Debe to Mon Desir segment as

identified in the CEC." It would much later be deposed by Dr Charles that these works were related to the construction of the Debe interchange and did not form part of the disputed section. This assertion was contradicted by the OAS deponent. It is a matter that will have to be decided at the trial. For present purposes, however, I accept that work was being done on the Debe interchange and that part of that work naturally involved structural facilities intended to serve the highway running south to Penal. The point is that NIDCO was laying the ground work conceptualized in the highway extension plan. The setting up of the camp cannot otherwise be explained.

27. The HRM members proclaimed that they were engaging in a 21-day fast. They prayed and distributed information. Following a well-publicized cabinet re-shuffle on 23 June 2012 Mr Warner was appointed as Minister of National Security and Mr Emmanuel George was appointed as Minister of Works. On 27 June 2012 the camp was destroyed by soldiers and police officers. The allegation is that they were illegally acting under the orders of Mr Warner. This event forms part of the substantive constitutional relief, not before the court at this time.

A third representation

28. I return now to the earlier narrative. Following the grading and pre-construction works in the vicinity of the Debe interchange on 19 April 2012, a notice was published in the newspapers inviting members of the public to attend a meeting to discuss the highway extension. The meeting took place on 5 May 2012 at the Debe High School. Attending the meeting on behalf of the government were Junior Minister of Works, Stacey Roopnarine, Dr Charles, Minister Emmanuel George, the Local Government Minister and the Minister of Planning and the Economy. Again, by its composition I infer that this was a high powered assembly of key decision makers and stakeholders. Dr Kublalsingh described it as "a very disappointing meeting". He says that the speakers were simply "making a pitch" for the highway extension, and were not consulting with the members of the HRM. When the members spoke, he says, the meeting became "heated" because "the Ministers did not seem to be there to elicit concerns but rather to tell the attendees what was going to be done." He says that the "technical review" was not being undertaken. I take that to mean the review promised by Minister Warner at the second meeting. Again, what must have been foremost in the mind of the HRM was the threat of construction.

29. Following the meeting Minister Warner gave a statement to the press. This is a verbatim extract of what was reported:

"Speaking on the Reroute Movement's protest over the Debe to Mon Desir segment, Works Minister Jack Warner said in asking that the Debe to Mon Desir segment not be built, the group was asking that Siparia, Penal and Debe be neglected and Government is not prepared to do that.

'The fact is we can't build a highway and avoid the people and I cannot see this government building a highway and avoid the people and I could not see this government building a highway for Point Forting people alone. I could not see this government building a highway for La Brea alone. I do not see why a highway should go to Point Fortin and bypass the people of Debe. Why should a highway go to Point Fortin and bypass the people of Siparia? Why should they be neglected? The plan is to leave Debe, Penal and Siparia as they were back in the 1950's.'

Warner said that they now have to go the communities, the Chambers of Commerce, the Village Councils, the NGO's and the Clubs to convince them about the importance of the Debe to Mon Desir segment toward the development of their communities."

30. Dr Kublalsingh describes this meeting in dismissive terms. He says that “our understanding and expectation of a review was that it should be carried out impartially and sincerely and that there would be legitimate consultation.” He says that instead of being consultative, or to present a review of their concerns, the intention of the meeting was “merely to proselytize members of the public.”

Representation by Steve Garibsingh

31. On 7 May 2012 Mr Steve Garibsingh of NIDCO was quoted in the newspaper as saying that NIDCO had been requested by the Ministry of Works to put a hold on the Debe to Siparia segment for further additional studies “which are required to be able to respond to the inquiries and concerns of the citizens in the area”. It is to be noted, and Mr. Garibsingh reminds me in his affidavit, that this did not mean that all work along the disputed section was being stopped.

Further representation by Mr Warner

32. Notwithstanding his earlier comments Mr Warner was quoted in the newspapers two days later, on 8 May 2012 as saying that the works would be stopped on the disputed section for at least four months. The newspaper article, carried in the Trinidad Express of 8 May 2012, reports that “construction work on the Debe to Mon Desir segment… has been stopped to allow an investigation into complaints being made by protesting residents, Minister of Works Jack Warner has said.” It goes on to report: “He said there will be no work on the construction site for at least four months… Warner said, ‘all our engineers and technicians say it is the best site, but we are making another study again just to make assurance doubly sure there is no other route that we can take but the one we have chosen, when you collect all the information then you justify to the public and to the protesters that you have done your best and you cannot do more than your best.”

33. The same newspaper report, which is being relied upon by the claimants, also contains some statements that qualify the one I quoted above. Firstly, it is reported that Mr Warner said that “work will continue on the highway from Debe to Siparia”. This suggests that the road between the two interchanges at Debe to Siparia, or the interchanges at those towns would continue. It flies in the face of the first published statement that work on the Debe to Mon Desir section would be put on hold. Secondly, the Minister is also quoted as saying that affected residents in the disputed section were being re-located to other lands which were being prepared, and that the preparation of this community site was 55% complete, so that residents could choose their lots. Further, that some 40 persons have already received payment for their properties and more payments would be made in the next three weeks.

34. I pause to note that this appears to be a mixed signal. On the one hand there is the representation that some, or all of the works will be halted for four months pending “a study”. On the other hand the process of acquiring lands is ongoing, and more than three quarters of the affected residents’ lands have already been paid for and acquired. What one hand offers in supposedly meaningful interaction, the other is taking away. Dr Kublalsingh describes these events as “ambiguous”. If there is a four-month halt on any part of the disputed section, why would the process of acquisition and relocation be continuing? How sincere was the offer of a moratorium on works, and was this alleged insincerity not easy to discern?

35. On 30 May 2012, a group of women from the HRM staged a publicized protest at the celebration

of Indian Arrival Day at Parvati Girls Hindu College. They sat down and blocked the entrance to the school. The Prime Minister was carded to give a speech on this important day in the calendar of the East Indian-descended community. They had to be physically removed from the school entrance in order for the Prime Minister to enter the hall. This protest was covered in the press and on TV. On the next day, 1 June 2012, the Prime Minister made a statement to the media.

Further representation by the Prime Minister

36. An article appearing in the Trinidad Express newspaper on 2 June 2012 asserted that on 1 June 2012 she told reporters that work will not proceed until technical advice was received.

37. The same newspaper article quotes from a press release allegedly issued by the Minister of Housing and the Environment, Mr Roodal Moonilal on 1 June 2012. It begins by stating that the Prime Minister had pledged to discontinue the works on the disputed section since 16 March 2012 and that "it is to be noted [that since the meeting at the Ministry with Mr Warner on 18 April 2012] that no work has commenced on that section of the highway for the past two months." It concludes by assuring that the government is committed to dialogue with the HRM. Minister Moonilal never retracted the press release when it was issued. However, when he filed his affidavit he said that the document was not issued by him. He points out that the document was not self-described as a "Press Release". This will be a matter for the trial.

38. On 4 June 2012 Dr Kublalsingh received a letter of the same date signed by Mr Warner. It stated that a meeting was to be held at his offices, attended by staff of his Ministry and NIDCO "to discuss the technical issues relating to the Point Fortin Highway". He recalled that at the meeting on 18 April 2012 "these issues were raised concerning the re-alignment of the route of the highway. Officials of NIDCO have done a report on this alignment and we therefore invite you and your team to give your suggestions and comments on this report". The meeting was scheduled for 8 June 2012. A copy of the NIDCO report was not attached to the letter.

39. On 6 June 2012 Dr Kublalsingh sent an email to the Minister requesting a copy of the report. He also wrote a letter addressed to the Minister and the Prime Minister. It referenced the 16 April 2012 meeting with the Prime Minister at The Waterfront, the 18 April meeting with Minister Warner, and the Steve Garibsingh statement to the press. It stated the belief, based on his interpretation of the statements, that the disputed section had been "shelved pending re-consideration". It stated that the HRM looked forward to "comprehensive and fruitful consultation as a prelude to any re-consideration. The principle of good administration requires public authorities to be held to their promises and this would be undermined if the reviews already promised do not take place, or take place without the input of our group". The letter acknowledged that this re-consideration conflicts with the statements of Mr Warner that the route chosen is the best one. It warned of the dangers of pre-judgment and asked for a mature and judicious approach.

40. The letter went on to describe the proposed meeting with Minister Warner and NIDCO as "a review". I'm not sure that that was what the plain language of Minister Warner's letter signified, but this is how Dr Kublalsingh was telegraphing his assessment of it to Minister Warner and the Prime Minister. Certainly, the invitation to "discuss the technical issues" imports something akin to a hearing involving both sides in a discussion.

41. The HRM letter also stated that “in pursuance of preparing for participation in the review we request the following:
a) The terms of reference for the review;
b) The methodology of the review;
c) The names and qualifications of the persons undertaking the review and with authority for making a final decision;
d) The time period for carrying out the review;
e) The parties who will be allowed to present material before the reviewers;
f) The form that there submissions will take;
g) The form of the reviewers report and/or decision.”
The letter also asked for delivery of any studies that were being undertaken, and referred to the NIDCO report, mentioned by Mr Warner in his letter of invitation, as one such study. The HRM requested a copy of it.

42. There is no letter before me that addressed Dr Kublalsingh’s interpretation that the Minister’s invitation to discuss technical issues involved a review of the arguments of both sides, or, at the very least a hearing of some sort. If it was a misinterpretation it was left like that by the Minister and the Prime Minister. No clarification was provided to explain what was going to happen at the meeting.

43. On 8 June 2012, the HRM members attended the meeting at the Ministry’s offices. Mr Warner was the chairman. The HRM representatives stated that the NIDCO report had not been seen. They then made various presentations on their chief concerns: hydrology, alternative route, and economic costs/benefits. Persons from the government side then made presentations. According to Dr Charles two members of the community affected by the disputed section spoke in favour of the wisdom of the project. Junior Minister Stacey Roopnarine, Dr Charles and Mr Garibsingh also spoke. Dr Kublalsingh says that the HRM members raised some questions and some of the government members replied. Dr Charles says that all enquiries were comprehensively answered. The character of these interactions will need to be fully evaluated at the trial.

44. Eventually, Mr Warner brought the meeting to a close by giving out copies of a NIDCO report titled “Preliminary Report on the Debe to Mon Desir Segment” and stating that the rerouting of the highway was not a possibility. Dr Kublalsingh says that save for the NIDCO report no technical information or studies were disclosed prior to or at the meeting. The preliminary report was the only one delivered and he says that it did not address the HRM issues “except in a broad and superficial manner”.

45. Dr Charles says that the NIDCO report was in fact prepared in response to Dr Kublalsingh’s letter to the Prime Minister in February 2012, and was not a new document. It did not contain any new studies. He says it was compiled to determine whether the matters raised in the February 2012 letter were factual, and whether they had been addressed. NIDCO therefore went back to its previous studies and reports. It consulted its technical people and they produced the “Preliminary Report”. I assume that this must have been done between February and June 2012, but Dr Charles does not say when the preliminary document was prepared. Mr Warner did not say that the report was prepared long before the meeting. The impression given was that it was a document of recent vintage. If it wasn’t, no explanation is given as to why it wasn’t disclosed before.

46. On 9 June 2012 a newspaper article appeared under the headline “Jack: No Reroute of Highway”. In it Mr Warner stated that technical evidence and expert advice from both local and foreign sources were considered. Save for the “Preliminary Report”, no other technical evidence or advice was, or has been disclosed to the HRM. The Minister said that the highway extension would proceed.

The NIDCO preliminary report

47. I have examined the “Preliminary Report”. While it deals sensibly with the impracticalities of the alternate route and the integral benefits of improved transportation, no judicial finding on its conclusions can be made. That is a matter for the trial. I note as well, that in relation to flooding NIDCO was mandated to undertake detailed engineering studies of the South Oropouche River basin along with detailed designs of the proposed solutions. The preliminary report states that a consultant has been identified and that a contract would be awarded for this study by July 2012. In relation to the severing of communities it is stated that all new highway development will cause disruption, and these cannot be avoided, only mitigated. The unavoidable disruptions are said to be due to the growth and development of towns and village in an unplanned manner. With a view to mitigation the government, it was stated, had established a community at Petit Morne with all needed utilities and community services. In addition, connecter roads that form part of the design would be used to maintain connectivity. Again, any conclusions to be drawn about these opinions can only be made at the trial.

48. The Preliminary Report is short 10-pages with a three page appendix dealing with the impracticalities of the alternate route.

49. There was no cost benefit analysis attached to the preliminary report. It was said by Dr Charles that one was available for collection at NIDCO’s office in Debe, but the HRM was never able to get a copy, despite their official enquiries.

50. Of course, there was no input by the HRM in formulating this report. It is obvious from its terms that this document was created pursuant to the HRM letter to the Prime Minister in February 2012, and not pursuant to the proposal to set up a committee by Mr Warner on 18 April 2012. It is possible that when the Prime Minister at the 16 April 2012 Waterfront meeting, referred to “a review by the Ministry of Works” she was referring to the work undertaken by NIDCO following the HRM February 2012 letter, but she hasn’t sworn an affidavit to say so. In any event, as I will examine below, an important question to ask is whether the preliminary report can amount to “a review” such as had been promised.

51. The HRM complain that they have not been afforded an opportunity to respond to the preliminary report, nor have they been provided with a copy of a final report. Technical information which informed the preliminary report has not been disclosed.

52. As stated earlier, on 27 June 2012, Mr Warner, now the Minister of National Security, is alleged to have caused soldiers to destroy the HRM protest camp in the vicinity of the Debe interchange. On the next day, at a post-cabinet press conference, Mr Warner said that the camp was demolished in order to “get on with [the construction of] the highway”. At the same press conference the Attorney General, Mr Anand Ramlogan SC, criticized the conduct of the HRM protest campaign and noted

that they had not filed any action in the court. A transcript of the entire press conference was produced as evidence. Reading it as a whole I form the impression that the Ministers and the Attorney General were pressing ahead to construct the disputed section. In fact, Minister Warner specifically denied that there was any stoppage and referred to his statement to the press on 8 June 2012. He said categorically that the government cannot change the alignment of the highway extension.

53. On 19 July 2012, Mr Emmanuel George, the new Minister of Works and Transport called a press conference and confirmed that the disputed section would be built.

Procedural History
54. The FDCF was filed on 3 August 2012. It sought various declarations and reliefs in relation to the destruction of the HRM camp and the detention of Dr Kublalsingh. These reliefs are not material to the application now before me. These are the material reliefs, which I have re-numbered for the sake of convenience:

1. A declaration that the decision to commence and/or continue construction of the Mon Desir to Debe segment of the Solomon Hochoy Highway Extension project breached and/or contravened the rights of the claimants guaranteed under section 4 of the Constitution to:
a) The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law – section 4(a).
b) The right of the individual to respect for his private and family life – section 4(c).
2. Vindicatory damages for the said breaches and contraventions of constitutional rights;
3. Aggravated and exemplary damages;
4. Such further and/or other relief as the Court may in exercise of its jurisdiction under section 14 of the Constitution and under its inherent jurisdiction consider appropriate for the purpose of enforcing and protecting or securing the enforcement and protection of the claimants' said rights.

55. The FDCF also contained a request for additional relief:
The applicants will ask for the following interim relief:
1. A Conservatory Order directing the Attorney General to undertake that no action would be taken to enforce any rights of the State in continuing works upon the Mon Desir to Debe segment of the [highway] pending the hearing and determination of this application for constitutional relief or until further order upon such terms as this Honourable Court may deem just;
2. An Order staying all notices served on the claimants under the terms of the Land Acquisition Act Chap. 58:01 and all further steps under the Act until the hearing and determination of this application for constitutional relief;
3. A representative order permitting the claimants to be appointed the Court Appointed Representatives for all those persons known as the HRM who are directly affected by the decision to commence and/or continue construction of the Mon Desir to Debe segment of the [highway] and whose names and descriptions are particularized in the affidavit of the first claimant which accompanies this motion.

The FDCF was supported by 12 affidavits.

56. Three judges recused themselves from hearing the matter. The third was docketed sometime in

November 2012, gave some initial directions, but shortly thereafter recused herself.

57. Between the filing of the FDCF and the time that the claim first came up before me on 29 November 2012 a number of events occurred. Some of these events are disputed by the claimants, and where necessary I will take their dispute into account. Clearing and grubbing began on the Mon Desir interchange on 21 August 2012. Residents in San Francique, between Penal and Siparia (approximately mid-way along the disputed section) received notices from OAS on or around 21 September 2012 that works were being undertaken on the road to Point Fortin. On 19 and 23 October 2012 OAS officials notified residents of Fyzabad and Siparia that works on their respective interchanges would begin within two weeks. On 24 October 2012 OAS mobilized equipment in the vicinity of the Siparia interchange in order to begin clearing and grubbing. At the Debe interchange considerable work was done in relation to the interchange and a large steel and concrete culvert was begun at its southern end. The claimants concede that clearing and grubbing took place in October 2012 at the Siparia and Fyzabad interchange but that it was abandoned. The defendant says that these works were begun and not abandoned. That is an issue for the trial. What seems clear, regardless of the extent of the work, is that the apparatus for executing the project was in motion. Clearing and grubbing involves the removal of 1-1 ½ feet of topsoil and the grading of land. It is done by heavy Caterpillar tractors and excavators.

58. On 7 November 2012, the claimant's instructing Attorney, Mr Anil Maraj, wrote a letter to the Attorney General. It stated:
"We did not previously approach the court for interim relief as no works had commenced on this part of the highway. It is with some dismay that we must now report that a notice has been delivered to members of the HRM resident in San Francique advising on the commencement of works to Point Fortin. You will appreciate that our clients rights which they have sought to protect by filing a motion will be rendered nugatory if works are allowed to proceed prior to the determination of this motion. We wish at all costs to avoid having to approach the court for an order to protect our clients' rights. In the circumstances we call upon you to protect the integrity of the pending proceedings by giving an undertaking to cease all works pending the hearing and determination of our motion."

59. There was no response to this letter. By letter of 28 October 2012, Mr Maraj again complained about the activities of OAS to the State's instructing Attorney:

"I am instructed that OAS has moved into locations along the Debe to Mon Desir segment including, but not limited to Murray Trace, San Francique, Timikal Trace, Saltmine Trace, and Thick Village, Siparia [These are areas midway along the disputed section]. I am further instructed that OAS has been accompanied by police officers and entering upon private lands carrying out grading works, damaging private property and trespassing with impunity. We still wish to avoid having to approach the courts for an order to protect our client's rights…In light of the urgency of this matter we ask that you respond to this letter within 7 days and not ignore this communication as was done with mine of 21 September 2012. Failing this we will have no choice but to approach the Honourable Court for interim relief."

60. Despite not having received an undertaking, no interim relief was sought. In November 2012 clearing and grubbing works continued at the interchanges at Debe and Fyzabad. At the site of the Fyzabad connector road, which was part of the design plan, residents were informed that works

would soon begin. On 14 November 2012 Dr Kublalsingh began a hunger strike to bring attention to the State's actions and to demand an independent review of the decision to build the disputed section. The hunger strike gained national attention, and grew in intensity as he slowly became more emaciated. Daily photographs of his shrinking body were printed in the press and a variety of public figures visited him in solidarity.

61. On 19 November 2012, the claimants filed a Notice of Application ("NOA") seeking an order for the state to file its affidavits in the substantive matter within 14 days. No affidavits had yet been filed by the defendant. The NOA also sought an early trial. The evidence filed in support of the NOA narrated the acts of OAS and NIDCO that I set out in the four proceeding paragraphs.

62. Upon being docketed, I sat for the first time on 29 November 2012. On that day an application was made for my recusal on the basis that my brother was a well-known environmental activist who had issued a statement calling on the government to appoint an independent committee and so end the deleterious hunger strike. The application was dismissed on the adjourned date, 6 December 2012. At that hearing certain events took place.

63. Mr. Martineau SC who appeared with Mrs Peake SC for the defendant explained that they had been served with 12 affidavits and a number of supplemental affidavits, some containing expert opinions, and that the task of investigating all the allegations was taking more time than expected. I should mention that the interim relief for the action to be deemed a representative action had been privately side-lined by correspondence between the parties. The claimants had elected not to pursue it. In that correspondence, which was only belatedly adduced, the prospect of a later application was not specifically ruled out by the claimants. In light of this, as Mr Martineau explained on the 6 December 2012 hearing, the defendant was released from the time-consuming obligation of certifying the locus standi of the 613 named persons said to be represented by the HRM. Directions were therefore given for the filing of the state's affidavits in opposition, the claimants' affidavits in reply, and trial dates were set for five days in May 2013. I also set a timetable for the filing of full written submissions in the weeks preceding the trial. The timelines for all these events, in particular, the trial, was designed to suit the convenience of senior counsel on both sides.

64. Prior to giving these trial directions, Mr Hosein SC (who was led by Mr Maharaj SC) complained to the court that the State was refusing to give an undertaking to stop the work on the disputed section. He submitted that if the work proceeded then the declaration of the unconstitutionality of the decision would be rendered nugatory. I asked Mr Martineau whether his client was prepared to do so and he declined. He said that the work must proceed as the government was bound by contract. I then pointed out to Mr Hosein that there was a claim in the FDCF for the interim relief of a conservatory order, and I asked whether it was going to be pursued.

65. The transcript from the FTR system records the following exchange in response to my enquiry: Mr. Hosein: At the time [of filing] there was no work in progress and under section 14 [of the constitution] we can ask for relief at any time. That [application for an interim conservatory order] will further detain us and we have taken a decision not to. But I ask the State in good faith to do two things. Either they give an undertaking to you that they will not do the work or alternatively, that they file their affidavits within a reasonable time period.

Judge: The note I have is that if they continue to build then declaration number one becomes nugatory. Is it not incumbent on you in those circumstances to consider the prospect of a conservatory order or some type of injunction?

Mr. Hosein: M' lord the State will say they want to file affidavits in a conservatory order and that is going to take us into another time frame. The history of conservatory orders, when they are highly contested issues, is a very sad issue indeed. Because what is going to happen is you are going to have a trial within a trial.

Judge: I just feel that it's incumbent on me to mention to you that you should consider the prospect of a conservatory order. That is a matter for you.

66. I made these forceful comments with a view solely to time management. I did not want the hearing of the substantive claim to be belated truncated by such an application on the eve of the trial and preferred to have the whole dispute before me as soon as possible.

67. The day before this hearing a break-through had occurred in relation to Dr Kublalsingh's hunger strike, which was then on its 21st day. He had by been placed on a drip. He was lying on a makeshift bed in front of the Prime Minister's office and the prospect of his imminent death was being discussed in the newspapers. He ended his hunger strike on certain terms which I will come to later in this judgment. The prospect of his death in the course of the proceedings was averted.

68. Applications were made by both sides in early 2013 for extensions of time to file their respective affidavits. On 8 March 2013 an application was made by the claimants for an extension to file their reply affidavits and I heard it in court on 27 March 2013. The State had filed 28 affidavits in opposition and the claimants needed an extension of time to consider all the evidence, some of it containing expert opinion evidence. The claimants said that they needed one month to file their reply affidavits. The upshot of the claimants' application for a time extension was that the May 2013 trial dates that had been fixed would have to be vacated. The postponement of the trial was within the contemplation of both parties. I accordingly granted the extension, the defendant not consenting (according to the note in the minute sheet), and vacated the May 2013 trial dates. The earlier directions given for the filing of written submissions were also vacated. I selected 14 May 2013 as the Pre-Trial Review, at which time, all the evidence being presumably in, I could then re-schedule the written submissions and the trial dates.

69. At that hearing on 27 March 2013 another exchange occurred between the court and the junior counsel for the claimants, Mr Dass. He reminded me that Mr Martineau was still declining to give an undertaking to stop construction works. When I enquired of Mr Martineau he again refused, saying that construction was proceeding, that a multibillion dollar contract was in train, and that there would be millions of dollars in damages for delay if such an undertaking was given. The FTR device thereafter recorded the following exchange:
Judge: You have not sought an injunction to stop the job and I specifically inquired about it on the last occasion and Mr Hosein said "no", that was a choice that was taken. So that, whatever job is being done, is being done.

Mr Dass: I wouldn't want you to conclude from the fact that an injunction was not sought that it is not

urgent. It's just that there is a disconnect between what we would like to be resolved and the threshold test for getting an injunction in these kinds of proceedings. It doesn't mean that it is not important to our clients, that they are now not interested in losing their homes. It is not that. Just because we have not sought an injunction does not mean it's not urgent. Because part of the strategy of not asking for an injunction, because what happens is you grant it or it's not granted, it's then appealed and then it delays the substantive hearing of the case. It is always a difficult decision to make. What we try to do is to get the substantive matter concluded.

70. On the basis of these exchanges between the court and the claimants' senior and junior counsel on 6 December 2012 and 27 March 2013, I formed the view that the decision not to seek the interim relief claimed in the FDCF was consciously taken as part of a forensic strategy, at least up to 27 March 2013.

71. As stated before, the break-through event that ended Dr Kublalsingh's hunger strike occurred on 5 December 2012, the day before the 6 December 2012 hearing. He decided to end his hunger strike on 5 December 2012 after several Ministers of Government had acceded to the request of certain public interest groups to appoint an independent technical committee to evaluate the disputed section, and so end the deleterious hunger strike. The committee was intended to be chaired by an Independent Senator, Dr James Armstrong.

Events surrounding the Armstrong Report

72. On 26 November 2012 the Joint Consultative Council for the Construction Industry ("the JCC") wrote a letter to the Prime Minister. The letter began like this: "We, the undersigned groups, are moved to write you in an attempt to defuse the escalating crisis that has been triggered by the hunger strike on which Dr Wayne Kublalsingh has embarked on behalf of the HRM." It went on to describe the effects upon the national community of bad planning and continued: "Given the heightened public interest in this matter and the crisis conditions that threaten to engulf Dr Kublalsingh, we propose the following in the interest of bringing the crisis to an immediate end and, thereafter, for proceeding towards an outcome with strong public trust."

73. The rest of the JCC letter needs to be quoted verbatim:

"We thus propose:

a) That if an independent review exists on matters pertaining to the Hydrology, Drainage, Environmental Engineering, Transport and Highway Engineering, and Economic Analysis, then this review should be made public immediately;

b) If such independent technical review does not exist, then a technical review committee should be established with the specific mandate as outlined in the proposal below to enquire into the portion of that link to the Point Fortin Highway which has significant environmental implications.

We strongly urge that if this proposal is accepted by both parties, your government not initiate construction work in areas under review along the segment outlined above, thus giving the technical committee an opportunity to report on its findings.

Proposal

1) That Independent Senator Dr James Armstrong be approached to chair the technical review committee;

2) The technical review committee should not involve persons who have had any involvement in the project to date;

3) The technical teams should include personnel with disciplines in Hydrology, Drainage, Environmental Engineering, Highway and Transport and Economic Analysis. The JCC will support Senator Armstrong in identifying persons that are independent and have the necessary technical competence in the disciplines outlined above;
4) The technical review committee should be given all existing data, documents, reports, drawings, maps etc. related to the project;
5) All persons involved in the project so far should make themselves available to the technical review committee for discussion and clarification;
6) That the terms of reference of the independent review committee be set up and made public within 48 hours;
7) That all documents submitted to the review committee be made public by means of a web site;
8) That the independent review committee be mandated to make specific recommendations in the public interest;
9) That the technical review committee be mandated to outline proposals that could be of benefit to the project in social, environmental, and economic terms;
10) That the independent review committee's report be made available to you Madam Prime Minister, the HRM, and the public at the same time;
11) That we the citizens through our government pay for this independent technical review;
12) That the review team report in a period not exceeding three months."

74. The JCC letter was countersigned by nine other prominent public interest groups drawn from the professions of engineers, surveyors, architects, planners, and Trade Unions, among others.

75. On 3 December 2012 NIDCO met with the JCC representatives together with Ministers Emmanuel George (Minister of Works), Ganga Singh (Minister of the Environment) and Junior Minister Stacey Roopnarine. Mr Steve Garibsingh, who, together with Dr Carson Charles, represented NIDCO states that at that meeting it was "made expressly clear by NIDCO that work would continue on the sites of the Highway which had been released to the Contractor."

76. On that very day, after their deliberations, a press statement, signed by the representatives of the JCC, the government and NIDCO was issued under the letterhead of the Minister of Works. This is what it provided:
PRESS STATEMENT
Re: The Extension of the Solomon Hochoy Highway to Point Fortin

The Government welcomes the inputs of the JCC and other civil society organizations [four were listed] in meeting today to progress the matter involving the extension of the Solomon Hochoy Highway Extension to Point Fortin. The discussions have been fruitful in pointing the way forward.

The meeting concluded as follows:
1. NIDCO undertook to make available to the JCC all the relevant documentation in its possession on the project in respect of the Debe to Mon Desir segment of the Highway Extension.
2. The JCC undertook to examine all the documentation on the project provided by NIDCO and all other relevant documentation and to produce a report within 60 days from today's date to NIDCO for its consideration and it publication thereafter.
3. Work will continue on sites of the highway released to the contractor.

77. Mr Garibsingh says that at the time of the issue of the press statement, and prior to that, OAS was already carrying out construction work at the Debe, Siparia and Fyzabad interchanges. The claimants say that this work, which was not being consistently performed, was limited to clearing and grubbing. Implicit in this admission is that heavy tractors and excavators would have been engaged. The true extent of these works, even if described as pre-construction, is a matter for the substantive hearing. Photographs have been produced by OAS but the claimants have testified that most of the photographs relate to work done on the Debe interchange, which, they say, is not part of the disputed section. This leaves open the question whether the other photographs show works at other interchanges along the disputed section. This is not a dispute that can finally be resolved on affidavits.

78. I should make a few observations about the JCC letter and the joint press statement.
The JCC letter
a) The proposal did not involve any commitment on the part of the government to be bound by the recommendations of the proposed review committee;
b) The review committee was mandated to outline proposals that could be of benefit to the project;
c) The interests of the HRM were being addressed in formulating the JCC proposal;
d) The government was expected to pay for the work of the review committee;
e) The review committee needed 90 days to do its work;
f) No work would be done on the disputed section during the 90-day period.
The joint press statement
a) NIDCO would share all its documentation with the JCC and a report would be produced by a committee, expected to be led by Dr Armstrong.
b) The report would be produced in 60 and not 90 days.
c) The report would be considered by NIDCO
d) A stoppage of all works on the disputed section was not contemplated.

79. Dr Kublalsingh did not end his hunger strike, despite the publication of the press statement. He said that he would continue his fast until the Prime Minister agrees to undertake the review of the disputed section. He said in his affidavit that he wanted her government's "approval to the establishment of the Armstrong Committee." To my mind, the government's commitment to the formation of the committee had already been given but perhaps Dr Kublalsingh was hoping for some further concession in light of the relatively conservative agreement embodied in the joint press statement. At this time, it is public knowledge that he was severely emaciated lying on a cot outside the Prime Minister's offices and receiving medical attention. His refusal to end his hunger strike was a bold, if not suicidal move. It might possibly have been a strategy to get the Prime Minister go on record to personally confirm the agreement arrived at between her Ministers and the JCC.

80. Two things happened on 5 December 2012. Firstly, the JCC issued a media release setting out the terms of reference of the Armstrong Committee.
The JCC Terms of Reference
a) The terms of reference went beyond the agreement embodied in the joint press statement in that, in addition to the submission and evaluation of all the NIDCO documentation, it involved an examination of "transparency and compliance with prevailing statutory requirements", and a re-examination of the bases of study used in the Environmental Impact Assessment (upon which the

legally unchallenged CEC had been issued), a study of the route selection and alternative routes and the power to make recommendations for best practice.
b) The stated goal underpinning the terms of reference was “civil society oversight of large scale development in our country”.
c) The JCC efforts would “signal the heralding of a new era of civil society’s participation in the national development agenda.”

81. The terms of reference of the Armstrong Committee mirror, in many important ways, the terms of reference of this court. In fact, they go further. Of course, the Armstrong Committee was not envisioned as a superior court of record, able to make binding declarations, nor was any appeal from any of its finding capable of being launched. Insofar as the terms of reference is said to represent the dawn of a new era of civil society oversight of the formulation and execution of executive policy, such an era more effectively begins within the Houses of Parliament. While the goals expressed in the JCC terms of reference are laudable, in the absence of a statutory framework such goals are utopian at best. It seems to me that there were already many untapped remedies prior to the drafting of the terms of reference to challenge the Environmental Impact Assessment, the CEC, and even the absence of transparency and consultation. These included judicial review and constitutional action. At the time that the JCC issued its terms of reference -in furtherance of its hunger strike intervention- the constitutional motion was already before the courts, seeking, in part, a declaration that would have effectively achieved the same purpose, as well as the dormant interim conservatory order. Finally, having regard to the rules of natural justice, I note that the government was not consulted, nor did it have any hand in drafting the terms of reference of the committee charged with evaluating its conduct.

82. The second thing that happened on 5 December 2012, according to Dr Kublalsingh, is contained in this sentence from paragraph 34 of his affidavit of 29 April 2013:
“On 5 December 2012 I called off my hunger strike after the government committed publicly to abiding by the terms of the agreement with the JCC and the outcome of the review. The Prime Minister publicly confirmed this commitment on the part of the government and was reported in the Newsday Newspaper of 6 December 2012 under the heading: “PM welcomes Kublalsingh’s end to hunger strike.”
A copy of the newspaper report is attached to the affidavit. It was the only evidence adduced, at the time of swearing, of what the Prime Minister allegedly said.

83. The article began by quoting the Prime Minister as being happy for Dr Kublalsingh and his family in light of his decision to end the hunger strike. It also reported that the government had given its commitment to the agreement encapsulated in the joint press statement. The news report records this sentence:
“She said the government will abide by the terms of that agreement and the outcome of the review. Recalling that the matter is also before the High Court, Persad-Bissessar said, ‘Government will abide with the decisions of the court’.”
Mr Martineau drew reference to the parts of the report that were within quotation marks, as actually having been said by the Prime Minister and those not within quotation marks. He drew my attention to the affidavit of Mr Davendradath Tancoo, a Special Advisor to the Office of the Prime Minister (filed 7 October 2013). Mr Tancoo says that he was present when the Prime Minister received a telephone call from a Newsday reporter. The speaker phone function was activated. He denied that

she said that the government would abide by the terms of the agreement and the outcome of the review. She did however say, according to Mr Tancoo, that she would abide by the decisions of the court. In response to this affidavit the claimants later produced another newspaper article of the same date appearing in the Express Newspaper. This report is remarkably different from the Newsday report. Its headline is "Kamla: Let the Courts Decide." Its first three paragraphs:

"Prime Minister Kamla Persad-Bissessar said last night that she was happy that environmentalist Dr Wayne Kublalsingh has ended his hunger strike, but reiterated that Government will be bound by the decision taken by the courts in the highway matter.

Speaking with the Express by phone, Persad-Bissessar said her Government also stands by the agreements made between her Ministers and the JCC.

"Government has committed to abiding with the conclusions arrived at the meeting between Government Ministers and the JCC," said Persad-Bissessar."

84. The Express article does not contain any statement of an agreement to be bound by the outcome of the review by Dr Armstrong. Of course, the two reporters spoke to the Prime Minister in separate telephone conversations and there is no way of knowing whether she said the same things to both of them. In trying to determine whether she said that the government would abide by the report of the Dr Armstrong Committee I will have to take account of the relative weight of both sources of information. Mr Tancoo is giving direct testimony of what he heard. Dr Kublalsingh is giving direct testimony of what a Newsday reporter said he heard. The words that the Newsday reporter chose to include in quotation marks do not support Dr Kublalsingh's assertion. The words that are not included in quotation marks do. Dr Kublalsingh is relying on these parts for two reasons: firstly, that it was on the basis of these words in the Newsday that he decided to end his hunger strike and secondly, because a representation to abide by the conclusions of the Armstrong Committee will have public law consequences.

85. I will examine the first reason now and defer the second for later in this judgment. The Newsday article was published on 6 December 2012. Dr Kublalsingh ended his hunger strike on the day before. The statement or representation that he is relying on as the reason why he ended the hunger strike was published the day after his decision. Further, the article clearly records that he has already ended his hunger strike and the reporter is asking for the Prime Minister's comments. The reporter records that the conversation with the Prime Minister's occurred "last night", meaning on the night of 5 December 2012. She is clearly expressing the government's happiness that his hunger strike is over. Dr Kublalsingh must therefore be wholly mistaken in saying that a representation contained in the Newsday on the day after he ended his hunger strike was the reason why he made that decision on the day before. Nonetheless, the Newsday article is a document in the public domain and its public law consequences will be evaluated below.

86. On 19 February 2013 an advance copy of the report was issued to Mr Emmanuel George, the Minister of Works. In a post cabinet press conference he said that it listed no major issues to prevent the resumption of construction. I take this to mean a resumption of works on the parts not released to the contractors. His statement was published in a newspaper story. The report also quoted Dr Charles as saying that there was never any agreement to halt work on the site. The writer of the

article also sought the opinion of Dr Kublalsingh. This is what the reporter wrote: “Meanwhile Kublalsingh is threatening to engage in ‘serious and unmitigated action’ if the government did not heed the findings of the report. He said the protest would be ‘peaceful, but severe’. He maintained his opposition to the construction of the section of the highway on the ground that it would have an adverse impact on the environment.”

87. Dr Armstrong delivered his formal report on 3 March 2013, within the scheduled 60 days. Pursuant to the JCC letter the government paid some $672,000 for the work of the committee. It contains a number of serious criticisms, notably in relation to the observance of the conditionalities in the CEC and the Town and Country Planning permission. While it calls for a halt to the work in order to fulfil these conditionalities and to carry out a Social Impact Assessment of affected residents it also concludes that the alternative route proposed by the HRM is not preferred as it does not provide enough capacity for future traffic requirements. I make these general observations only in passing, and with caution, because the parties have agreed that insofar as some of this evidence is subject to evidential objections, I can only rely on those parts that have been specifically answered by the defendant. The issue is whether or not the interim conservatory order should be made, and the findings of Dr Armstrong’s committee are not within my powers to now uphold or to dismiss. It is not known how deeply its recommendations were considered. What is plain however is that the Armstrong Committee made criticisms of the Government’s methodology. Whether those criticisms are justified and how, if at all, they were considered is a matter for trial.

88. It seems to me that NIDCO and the government expressed an intention to proceed with the works despite the findings of the Armstrong Committee. Of course, the joint JCC press statement specifically provided that work would continue in relation to those parts of the section that had been released to OAS. The claimants concede that these works on the released sites were confined to surveying, “sporadic” clearing and grubbing, and that these works were taking place at the sites for the interchanges. They also concede that substantial works were taking place at the site of the Debe interchange, but they say that those works are not related to the disputed section. Of course, clearing and grubbing involves the use of heavy equipment that has to be mobilized. Skilled labour is needed to operate this machinery. The tractors and excavators do not, to my mind, work helter skelter. They must carry out their work in accordance with a design plan that must be audited on a daily basis by other skilled labour. What I gather from the post cabinet press conference is the decision that work would now proceed on all the other areas. It is to the prospect of this eventuality that Dr Kublalsingh promised protest that would be “peaceful, but severe” and unmitigated in its scope.

89. About one month after the 19 February 2013 post cabinet press conference, Mr Dass, the junior counsel had the discussion with me in court over the claimant’s decision not to seek a conservatory order. In the months that followed, OAS continued with its works at the interchanges, according to the evidence of their representatives and those of NIDCO. A lot but not all the works were taking place at the Debe interchange. Photographs at Debe show the construction of substantial culverts. Work was also taking place at the Mon Desir interchange, at the end of the disputed section. This interchange was meant to service traffic arriving from the North via the disputed section en route to Point Fortin, as well as traffic coming from the coastal road, which was also being upgraded as part of the Highway Plan. It was a major interchange. The evidence strongly suggests that some 100 metres of clearing and grubbing was taking place North of this interchange, that is to say, on the

disputed section itself. These works were said to be taking place between February and August 2013.

90. On 31 July 2013 NIDCO met with residents of Ghandi Village, Debe to apprise them of their work schedule. On 3 August 2013 NIDCO invited residents of Penal to a meeting at Shiva Boys College, Penal, to advise them that construction work on the segment between the interchanges of Debe and Penal would soon begin. On 8 August 2013 NIDCO met with residents of Gopie Trace, Penal. Photographic evidence has been produced by OAS allegedly showing works being done at Mon Desir (on 14 August), and at Debe (on 14 and 24 August, and 17 September 2013). On 8 August 2013 the HRM met with the Prime Minister to draw her attention to the findings of the Armstrong Committee and the events at the Shiva Boys College. The Prime Minister said that the response to the report was being addressed by NIDCO. On 30 August 2013 at the opening of the Golconda to Debe segment the Prime Minister indicated that the disputed section would be built.

91. In court, various pre-trial events were taking place during this period. At a Pre Trial Review on 15 May 2013 Mr Martineau indicated that evidential objections were being taken in relation to the claimants' new evidence concerning the appointment of the Armstrong Committee and its report. Directions were given for the making of the application, and the filing of affidavits and written submissions. The dates for these events were fixed to accommodate the busy schedules of senior counsel on both sides. The Pre Trial Review was adjourned to 28 October 2013. The defendant filed the application to strike out the evidence, mainly on the ground that the events surrounding the Armstrong Committee were not pleaded in the FDCF. They also filed their written submissions in support. The claimants did not file any submissions in opposition.

92. On 18 September 2013 the claimants filed a NOA seeking permission to amend the FDCF to include the events surrounding the appointment of the Armstrong Committee and the delivery of their report. This amendment had the practical effect of shutting down the defendant's evidential objections. In addition, the 18 September NOA sought two interim conservatory orders. One was in the terms set out in the FDCF. The other was an entirely new order:

A conservatory order or other order staying any continuation of works upon the Debe to Mon Desir segment of the Solomon Hochoy Highway Extension Project pending the hearing and determination of this application for constitutional relief or until further order upon such terms as this Honourable Court may deem just.

93. The grounds of the claimants' application were set out, and I abbreviate them like this:
(1) At the time of filing the FDCF on 3 August 2012 "no works had yet started on [the disputed section] although works had begun elsewhere on the [Highway Extension Project]".
(2) The claimants did not pursue the conservatory order in the FDCF as part of their interim relief because no works had begun on the disputed section.
(3) The claimants' property will be destroyed.
(4) The interim relief was not pursued because the claimants hoped that by filing the FDCF on 3 August 2013 "it might be possible to complete the hearing of this claim prior to any works commencing without the need for an application for interim relief.
(5) In October 2012 surveying works were done but other than that no physical works were undertaken.

(6) On 12 November 2012 OAS tractors entered the site of the Fyzabad interchange for the purpose of commencing bulldozing, but did not do so.
(7) On 15 November the hunger strike began as a consequence of the mobilization of equipment in Fyzabad.
(8) The hunger strike ended in the formation of the Armstrong Committee and the Prime Minister publicly reaffirmed her commitment to the review process stating “Government has committed to abiding with the conclusions arrived at in the meeting between government ministers and the JCC” and that Government would abide by the outcome of the review.
(9) Notwithstanding the recommendations of the Armstrong Committee the Government did not undertake further investigations or any further hearing with the claimants.
(10) On 3 August 2013 NIDCO informed residents that construction work between the Debe and Penal interchanges would soon begin. On 8 August 2013 the Prime Minister told the HRM that the response to the Armstrong Committee report would be addressed by NIDCO.
(11) On 14 September and 17 September 2013 heavy machinery, including excavators and tractors commenced work on the disputed section. These are the first physical works undertaken on the disputed section.
(12) If these works continue the declarations sought in the FDCF will be rendered nugatory.
(13) The amendments of the FDCF should be allowed.

94. On 20 September 2013 I gave directions for the hearing of the claimants’ NOA, scheduling the filing of the defendant’s affidavits in opposition to the claimants affidavits (there were 26) and the claimants reply affidavits, and, as well, the filing of written submissions. The Pre Trial Review became obsolete. At the next hearing on 18 October 2013 the claimants presented oral arguments based on their written submissions in support of their 18 September NOA. They argued in favour of the amendment of the FDCF and the grant of the two interim conservatory orders. The claimants’ oral arguments continued on 8 November 2013, when they were concluded. The defendant’s Senior Counsel was scheduled to reply on 13 November 2013.

95. On that day an oral application was made for me to recuse myself. The application was based on certain events surrounding the arrest of my brother Gary Aboud, Secretary of Fisherman and Friends of the Sea. He had previously made certain statements meant to bring Dr Kublalsingh’s hunger strike to an end, but he was arrested in relation to an unconnected environmental cause.

96. The application for me to recuse myself involved the filing of several additional affidavits, the viewing of video evidence, and the exchange of written submissions, and was keenly contested. The application was heard on 3, 12, 13, 16 and 18 December 2013. On 15 January 2014 I delivered a written decision refusing the application, and gave directions for the defendant to respond to the claimants’ oral and written submissions on 4 and 14 February 2014.

97. My decision was appealed to the Court of Appeal. Further affidavits were filed on both sides, in relation to the 18 September 2013 NOA.

98. On 4 February 2014, the day set aside for Mr Martineau’s response, the claimants made an oral application for a conservatory order to stop the work pending the hearing and determination of their 18 September 2013 NOA. They presented arguments in favour of suspending the hearing of their NOA in favour of their oral application. On the next day, 11 February 2014, Mr Martineau objected to

the hearing of an oral application. He pointed out that the oral application amounted to an “interim-interim conservatory order” and would make a mockery of the orderly management of the proceedings. I nonetheless decided on 14 February 2013 that I would allow the claimants to make the oral application. On that day it was brought to my attention that the defendant was seeking a stay of the proceedings in the Court of Appeal, in addition to an appeal from my recusal decision. I scheduled the hearing to the day after the appeal was to be heard (3 days later), and proceeded to hear the matter on that day. I continued hearing it despite the appeal having been dismissed in the Court of Appeal and special leave having been sought in London to appeal to Privy Council (which eventually was refused).

99. What followed was 12 days of intense hearings spread over eight weeks, with both sides filing a variety of written submissions, reply submissions, revised submissions, “speaking notes”, and “timeline” documents, and a variety of tables. 13 such documents were filed or delivered to the court, together with copies of over 75 decided cases.

100. In the course of the arguments the claimants filed another application on 6 March 2014. It sought to convert the proceedings into a representative action on behalf of some 300 named persons and to add five additional claimants. This application was meant to counter the defendant’s evidence that, due to a re-alignment of the route, the Acquisition Notices that affected the property of three of the claimants were being withdrawn. Accordingly, the only claimant said to be affected in terms of property ownership was the second claimant, who did not himself own property but was a licensee of the legal owner. The five additional claimants were owners who had received Acquisition Notices. This application was never determined, due to constraints of time. Nonetheless the parties agreed on the last day that in giving judgment I should theoretically consider the constitutional position of persons who legally owned property in the path of the highway. It was also conceded that I should treat the FDCF as having been already amended, although an order to that effect was never granted. By that time, I think that all counsel were exhausted.

The issues to be decided
101. In my opinion, this judgment will be determinative of the oral and the written applications. I see no reason why this onerous exercise should be duplicated. The issues are these:

(1) Whether the claimants have raised a serious issue to be tried in relation to their allegation that their substantive legitimate expectations have been breached in relation to section 4(a) or (c) of the Constitution.

(2) Whether the claimants are entitled to an interim conservatory order.

The law
102. Sections 4, 5, 6 and 14 of the Constitution provides:

4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
(a) The right of the individual to…the enjoyment of property and the right not to be deprived thereof except by due process of law;

…
(c) The right of the individual to respect for his private and family life.
5.(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognized and declared.
(2) Without prejudice to subsection (1), but subject to this chapter and to section 54, Parliament may not –
…
(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection of the aforesaid rights and freedoms.

6.(1) Nothing in sections 4 and 5 shall invalidate –
(a) an existing law
…
(3) In this section –
"existing law" means a law that had affect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution…

14.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction—
(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.

103. The Highways Act, Chap 48:01 was enacted in 1971 and is thus existing law within the meaning of sections 6 (1) of the Constitution. Section 9 of the Highways Act provides:

9 (1) The Minister may construct new highways whenever he considers it expedient to do so.

104. In Paponette v The Attorney General of Trinidad and Tobago [2010] UKPC32 PC the relatively recent doctrine of substantive legitimate expectation was expanded. Owners of taxis who operated a maxi-taxi stand were induced to re-locate to City Gate, a public transport hub owned by the Public Transport Service Corporation (PTSC). The inducement was made by way of representations that were held to be clear unambiguous and devoid of relevant qualification. The representation was that they would not be under the control of PTSC, that the management of City Gate would be handed

over to them, and that a certain skywalk would be constructed between the city centre and City Gate. The management of City Gate was not handed over to them. Instead in 1997, the Government introduced regulations which gave the PTSC control of City Gate and the power to charge the taxi drivers a fee. In 2001 the PTSC imposed a $1.00 fee for every exit journey. The appellants claimed that the actions of the State had frustrated their legitimate expectations of a substantive benefit in a way which affected their property rights protected under section 4(a) of the Constitution. In the High Court, the respondent failed to comply with the deadline to file evidence and the case proceeded on the evidence of the claimants alone. The appellant maxi-taxi owners appealed to the Privy Council after the Court of Appeal had overturned the High Court decision in their favour.

105. Sir John Dyson SCJ gave the leading judgment and Lord Brown dissented. The majority disagreed with the Court of Appeal's finding that the interference with property was insubstantial and that it did not amount to a deprivation, as the taxis were still able to operate their taxi business. Dyson SCJ said that it was not necessary to show in a business context that the infringement made the operation of the business impossible. In his view, the interference was substantial.

106. In stating the principles to be applied when considering a legitimate expectation based on a representation Dyson SCJ applied Lord Hoffman's speech in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] AC453, at para 60:

"It is clear that in a case such as the present, a claim to a legitimate expectation can be based only on a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see R v Secretary for State for Education and Employment, ex parte Begbie [2000] 1 WLR 1115, 1131."

107. The Board posed the question like this: in a fair reading of the promise, how would it have been understood by those to whom it was made?

108. In Paponette the infringement was not considered to be unfair in the Court of Appeal as the PTSC was exercising powers vested in it by the Public Transport Service Act, 1965. The majority of the Board disagreed, pointing out that the power to charge a fee arose out of Motor Vehicle and Road Traffic Act, 1934. Both of these statutes can safely be described as existing laws as defined in section 6 (3) of the Constitution. The Board felt that the existence of a statutory power for the imposition of the fee was not a proper answer to the appellants' case.

109. A legitimate expectation is not cast in stone. The Board in Paponette examined how an expectation can lawfully be frustrated on the ground of an overriding public interest. It cited the leading authority of R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213, per Lord Woolf MR, at para 57:

"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the

court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

110. The importance of Paponette is that it establishes where the burden of proving an overriding public interest lies:

"The initial burden lies on the applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest." (per Dyson SCJ at para 37)

111. If the public authority does not place material before the court to justify its frustration of the expectation "it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power" (Dyson SCJ at para 38). With respect to the burden of proof question, the Board agreed with the observation of Laws LJ in Nadarajah v Secretary for State for the Home Department [2005] EWCA Civ 1363 at para 68:

"The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

112. An overriding public interest cannot be inferred:
"If [the authority] wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in R (Bibi) v Newham London Borough Council [2001] EWCA Civ 607, at para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court" (per Dyson SCJ at para 42).

113. Where an applicant has a legitimate expectation, and the legitimacy of the expectation is known to the decision maker he must take this factor into account in deciding whether to depart from the earlier promise. As Dyson SCJ succinctly put it, "…in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account." (at para 46)

114. Paponette is a powerful and far-reaching judgment by this country's highest court. English jurisprudence on the principles of substantive and procedural legitimate expectations – I am not sure how important the distinction between them remains in every case – have been grafted onto our constitutional law. Legitimate expectations are now permanently linked to the due process provision

in section 4(a) of our Constitution. The majority of the Board found that, in the absence of an overriding public interest, the regulations which imposed the user fee could only have been permissible by compliance with due process. In Joseph and Boyce v Attorney General of Barbados [2006] CCJ 69 WIR 104 the Caribbean Court of Justice had three years earlier grafted legitimate expectations onto the fundamental right to "the protection of the law" found in the Barbados Constitution (which mirrors section 4 (b) of our Constitution). Legitimate expectations have therefore now permanently entered the landscape of Caribbean constitutional law. It seems settled now that where property, or the enjoyment of property, is the subject of substantial interference – a fact that must be objectively assessed – and this interference has occurred in defiance of a legitimate expectation of a different outcome, the interference cannot be said to have been undertaken in accordance with "due process of law" if it is not justifiable in the public interest. It would give a right of redress under section 14 of the Constitution.

The justification dilemma

115. Paponette establishes where the burden of proof of justification lies, but does not clearly articulate the required standard. In Coughlan, Lord Woolf MR (at para 57) described the interference as unfairness that amounts to an abuse of power. In Nadarajah, Laws LJ preferred the test of proportionality. In Bancoult, Lord Mance dealt with the proportionality approach like this: "I prefer to reserve for another case my opinion as to whether it is helpful or appropriate to rationalize the situations in which a departure from a prior decision is justified in terms of proportionality" (at para 53). The issue didn't arise in Paponette because the State did not advance any evidence of an overriding public interest. An assessment was therefore impossible.

116. Unreasonableness, in the Wednesbury sense, has little significance in evaluating an authority's change of policy in legitimate expectation cases: Coughlan. In any event, the Court's supervision must not derail the executive's policy making powers: Hughes v Department of Health and Social Security [1985] AC 766, 788, per Lord Diplock.

117. In Coughlan, Lord Woolf discussed the court's role in legitimate expectation cases. He identified three classes of cases: (a) those where the public authority is only required to bear in mind its previous policy or other representation before deciding to change course; (b) those where an expectation arises before the decision to change course has been taken (involving, for example, a right to consultation); and (c) those where the representation induces a legitimate expectation of a substantive and not a procedural benefit. In the first class, the court will examine the case on the conventional Wednesbury grounds of rationality. In the second class, the court will examine whether the decision was procedurally fair. In the third class, the court will ask itself whether there is a sufficient overriding public interest to justify the change of course. Notwithstanding these classes, Lord Woolf recognized the existence of unities among them that make easy categorization difficult in practice to implement; see his discussion at para 71. According to Lord Woolf:

"Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts. Its application is still being developed on a case by case basis. Even where it reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest. It may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices. And without injury to the Wednesbury doctrine, it may furnish a proper basis for the application of the now established

concept of abuse of power." (Para 71)

118. In Ex Parte Begbie [2000] 1 WLR 1115, Peter Gibson LJ expanded this thought and said that these categories of cases were not hermetically sealed:

"There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or the other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

119. In Nadarajah, Laws LJ eschewed the idea of abuse of power as a litmus test: "Principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law… It goes no distance to tell you, case by case, what is lawful and what is not." (Para 67)

120. Laws LJ went on (at para 68) to make some enlightening obiter observations that deserve very wide exposure:
"The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represent how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not for to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which…takes its place alongside such rights as fair trial and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly, a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

121. It seems to me that in evaluating the legality of the change of course which frustrates the legitimate expectation the court's first duty is to determine whether the departure is a proportionate response having regard to the overriding public interest in deciding to deviate. Abuse of power is a catch-phrase that displays the tendency of itself being abused. In any event, it is an emanation of a more fundamental principle, described by Laws LJ as "a legal standard": that public bodies ought to deal straightforwardly and consistently with the public in fulfilling the requirements of good administration. This, to my mind, is the standard by which an overriding public interest should be

measured.

Property rights under section 4 (a)
122. Do the claimants have rights to property and to the enjoyment of property that are capable of being infringed? This question has less importance in light of the concession given to the court to treat the claimants' 6 March 2014 NOA as if, theoretically, it had been already been granted. The evidence in support of the application discloses that the five additional claimants, proposed to be joined, received Acquisition Notices and are owners of property. Therefore the class of claimants includes property owners who have received Acquisition Notices for land through which the disputed section will pass, a licensee of one such property owner, and persons who are in close proximity but whose properties are not at risk, save for the inconvenience and disruption that the highway extension will allegedly cause.

123. With respect to property owners in receipt of Acquisition Notices, Mr Martineau pointed out that there is nothing unlawful about the issuance of the notices. They conform to law, having been authorised by the President. Moreover, they were issued pursuant to the inherent power of the Minister to build roads, a power specifically authorized under the Highways Act. He correctly pointed out that the Minister was properly exercising executive powers that had not been called into question. He submitted that the Highways Act, having been enacted before the Constitution was part of saved or existing law, and that, consequently, acts lawfully done pursuant its powers could not be held to be unconstitutional. He relied on section 6 (1) and (3) of the Constitution. With respect, I do not agree. Nothing in the Highways Act authorizes the Minister to interfere with anyone's legitimate expectations. It may be that a power is being properly exercised pursuant to an existing law but if there is a legitimate expectation that the power would be exercised in a different way, the expectation, if it is enforceable, would trump the exercise of the power, whether it was lawfully exercised or whether it is derived from existing law. In Paponette, although the issue was not raised, the statutory powers being exercised were derived from existing law.

124. With respect to those claimants who have not received Acquisition Notices but who claim that they will be discommoded by a highway in proximity to their properties the position is different. The enjoyment of property obviously involves something wider than the mere legal ownership of it. I would include among its meanings a right to peaceful and undisturbed possession. These claimants allege that their homes and neighbourhoods will be disrupted by the presence of a busy highway and that they will be de-linked from friend and family networks. However, it is a fact that every public development, in any part of the world necessarily involves disruption. If every disruption was actionable, where would the Fire and Police Stations be established, and where would one build roads and hospitals? Nonetheless, to my mind, such disruptions can amount to a deprivation of the enjoyment of property in its wider sense, and be actionable under section 14 of the Constitution, if they are a result of a decision to depart from a policy that such an adjoining owner legitimately expected would be followed. The quality of the injury is not solely dependent on whether or not the property will be lost, but how it will its enjoyment be affected. In Paponette, the regulations did not deprive the maxi taxi owners of their business. The question there was whether or not the interference with their rights was substantial. In this case I think that the interference with property owners on the periphery of the highway is substantial. I do not doubt that there is a serious question to be tried, but the exact nature or extent of their rights can only be fully defined at the substantive hearing.

125. With respect to the claimant who is the licensee of the legal owner (who has been served with an Acquisition Notice) I regard his rights to the enjoyment of property as a licensee in possession to be sufficiently proximate to those of the true legal owner to entitle him to apply for redress. I say so only on the basis that there is no dispute between him and the legal owner (his father) as to the existence or the terms of the licence, or his indefinite enjoyment of it.

Respect for private and family rights under section 4 (c)
126. The claimants are also alleging an infringement of their section 4 (c) rights, namely respect for their private and family life. They claim to have a legitimate expectation that these rights would not be infringed. There is no legal authority for extending the application of legitimate expectations to section 4 (c) breaches. Paponette and Boyce have extended the principle to sections 4 (a) and (b) infringements, and this has been predicated by the court's understanding of the meaning of the terms "law", "due process" and the "protection of law" found in those sections. There is no equivalent language in section 4 (c). Even in the absence of an available legitimate expectation jurisdiction, the declaration under section 4 (c) would still be problematic for the claimants. The enjoyment of the family rights of those non-residents who need to get to a hospital on time, or catch a movie with their children have to be balanced against the family rights of those living in proximity to the Highway Extension. The non-resident members of the public are as much entitled to private and family rights to go on an unimpeded excursion to Siparia as those who claim that the traffic created by all their excursions will interfere with their own private and family rights. And where exactly does one draw the line in relation to physical proximity? Is it 100 feet or one mile? The section 4(c) rights will need to be fully explored at the trial. At this stage, however I do not find that the claimants have made out a serious case that their section 4 (c) rights are infringed as a result of the frustration of their expectations. I prefer to be guided by higher authority on this point.

To whom were the representations made
127. There is, in law, no requirement that the representation should be made directly to a specific person: R (on the Application of Rashid) v Secretary of State for the Home Department [2005] EWCA Civ 744, at para 25. In the absence of a coherent and official published statement of Government policy in relation to the HRM demands, the court must look at the various representations as a whole. To my mind, the HRM could not be faulted for having the reasonable belief that the representations were directed at them. They had been in the vanguard of the opposition before 2011, and, since then, the sole voice of opposition. Its leader, Dr Kublalsingh, is its major spokesman and might even be described as its alter-ego. A representation made to a few members of the HRM must necessarily be intended to affect the entire membership to whom they report. When a representation is also carried in the news media and it is uncontradicted by its maker, it reinforces the belief that the representation is valid and that the report is reliable. The argument that the representations were, at least in respect of some claimants, only received via the news reports, does not go far in rebutting the fact that a representation was made. In my view all the representations were directed to the HRM who, throughout the narrative, were waging a very effective political campaign opposing the decision to build the highway extension. The fact that some of the claimants only heard of some of these representations via news reports is immaterial.

Was there an expectation and was it legitimate?
128. The burden of proving this rests on the claimants. I cannot doubt that the Prime Minister agreed

to meet with the HRM at the Waterfront in response to the HRM protests in February and March 2012. Her actions then and later suggest to me that she wanted to defuse the situation, to prevent the momentum of the protest actions and to restore some semblance of order, at least on the streets outside her office and her home. It must be remembered, and it is a fact that can be judicially noticed, that the proposed highway extension was also meant to serve her constituency as Member of Parliament for Siparia, and that the protests were being undertaken by persons who fell within her constituency, and other constituencies that form part of her government's traditional support base. The need for a quieting of their voices or a rapprochement would not have been politically impractical. These voices were becoming vociferous by 16 March 2012 when she had her first meeting with the HRM. I am not however making any finding in relation to her motive to call the first meeting. Obviously, there was a problem and this was how she chose to address it.

129. The representation made by the Prime Minister was that the government would review the concerns of the HRM and in the meantime the works on the disputed section would be put on hold. There is no evidence that this review would involve the appointment of an independent technical review committee. According to the Oxford English Dictionary, online edition, the word "review" involves a formal assessment of something with the intention of instituting change if necessary. This meaning is ascribed to the word as a noun and a verb. The question is how, on a fair reading of the representation, would it have been reasonably understood by those to whom it was addressed: R (Association of British Civilian Internees) v Secretary of State for Defence [2003] EWCA 473. All the representations in this case must be evaluated of the same basis.

130. There was no evidence of any type of review brought to the attention of the HRM, and no opportunity afforded to them to participate in any proposed review. Of course, the Prime Minister might have intended to conduct the review internally, without any participation in the process by the HRM. But she didn't say so. She left it open. If protesting teachers wanted the headmaster to review his decision to remove the teachers' lunch room, I would expect that if he promised a review, it would imply the involvement of the teachers in the process. Every review involves the possibility of change, and for change to be meaningful, it must involve the participation of those who are affected.

131. The next meeting was with Minister Jack Warner on 16 April 2012. It was preceded by another protest action inside the lobby of the EMA headquarters, and, again, in the midst of heightened adverse publicity. This was a high powered meeting of technocrats on the government side to which the HRM was invited. It was specifically called to address their concerns. The formation of a lop-sided nine-member technical committee was proposed but the HRM walked out of the meeting. The offer of 2 seats signified an intention for HRM participation. The fact that the HRM refused any executive position on the proposed committee does not mean that they did not want to be consulted, or make representations to the proposed committee. In fact, the evidence of Dr Kublalsingh is that the HRM was readying itself to do just that. The Government's interpretation of these events was that there was no decision to appoint a committee. I disagree. There was a decision to appoint a committee, but there was a breakdown as to its composition. In any event, Minister Warner's statements to the press following the meeting clearly envisaged that, in light of the HRM walk-out, the consultation process was not over, and that a "co-opted" committee would conduct a review. These press reports were not retracted.

132. At the meeting at the Debe High School, on 5 May 2012, Dr Kublalsingh expressed

dissatisfaction that a review process was not in train. On 7 May 2012 Mr Garibsingh of NIDCO indicated in the press that the Ministry of Works had directed NIDCO to put the works on the Debe to Siparia portions of the disputed section on hold. He said this was necessary to respond to the concerns of residents in the area. This representation would obviously be directed to those residents in the Debe to Siparia area and this includes many of the HRM membership. Again, "responding to concerns" implies that those with concerns will be given an opportunity to explain themselves, and will be told whether they are valid or invalid concerns. A response is what occurs in a conversation and a conversation involves more than one speaker.

133. On 8 May 2012 Minister Warner was quoted in the newspaper as saying that work on the disputed section would be stopped for at least four months pending an investigation or a study of complaints. As indicated before, the newspaper also reports that the work stoppage will only occur on the Debe to Siparia section, and that the process of acquisitions was nonetheless ongoing. However, contradictions aside as to where the stoppage would take place, it seems apparent that a process of investigation or study of the complaints was in train, or being proposed.

134. Following the demonstration at the Parvati Girls Hindu College, where protestors blocked the entrance of the Prime minister, she made another representation. She is reported to have said that works would not continue until technical advice was received. Following on this representation, there is the disputed ministerial press release of Dr Moonilal on 1 June 2012. It was not retracted until these proceedings were filed. In its published form it gives the commitment of the Government to have dialogue with the HRM.

135. The second meeting with Minister Warner on 8 June 2012 was self-described by Dr Kublalsingh as a review process, and meant to receive the NIDCO report. As stated earlier, no one corrected Dr Kublalsingh's interpretation of what the meeting was about, nor was any advance copy of the Report delivered to the HRM. Dr Kublalsingh's letter to the Minister, prior to the meeting, speaks of the meeting as a re-consideration of the decision. The presentation of the "Preliminary Report" by NIDCO was thought to be virtually a fait accompli that justified the completion of works and an end to all further discussion. In my view the preliminary NIDCO report could not, on the basis of its heading alone, be considered as determinative of the issues in dispute. Its content was selective and showed no input by the HRM on the three main areas of concern: hydrology, social impact assessment, or cost benefit analysis. Where the preliminary report dealt with flooding and social impact, it did so superficially. Insofar as basic courtesy is involved, the preliminary report should have been forwarded to the invited guests before the meeting. If the meeting was called to "discuss the technical issues" then it would be disingenuous to have withheld the NIDCO preliminary report until the last moment and then to have laid it on the table as an ace of spades. Such actions suggest pre-judgment and a lack of sincerity in a process meant to be a meaningful discussion of technical issues.

136. All representations ceased until Dr Kublalsingh began his hunger strike in November 2012 and the Armstrong Committee was appointed. The representations surrounding the formation of the Armstrong Committee are qualitatively different from the ones previously described. They contained a commitment in the joint press statement, issued above the signatures of Government Ministers, to engage in a technical review of the NIDCO papers. The representation was that the JCC committee report would be considered by NIDCO. Consideration involves something meaningful, something

that is not artificial. While I am not satisfied on the evidence that the Prime Minister agreed to be bound by the findings, I do not understand why there is no proper evidence to show exactly how it was considered, and if any of its recommendations necessitated a change of tack in the methodology of the project. To say that it was considered but rejected (as the defendant's witnesses in sum testified) does not assist the court in determining the genuineness of the consideration process. This is no mere semantical exercise. If a promise is made to consider something then the court expects that the promise is serious. The work of the Armstrong Committee cost the government $672,000. Is it that the joint press statement was just a ploy to cause Dr Kublalsingh to end his hunger strike, and that the Government privately intended to reserve the right to ignore its findings? That may well be so, but in relation to the promised consideration there was no statement in the joint press release that qualified its plain meaning. The representation was that the report would be considered, and I must accept that promise at face value. As I have found, the evidence is weak in relation to the Prime Minister's alleged representation to abide by the findings. However, this has nothing to do with the genuineness of the promised consideration.

Conclusion

137. It seems to me that what runs through the evidence is the absence of a clearly formulated policy statement in response to the HRM activities. If it was the chosen executive policy to build the highway, the Government Ministers, and the Prime Minister especially, should have acted decisively and plainly told the HRM that the decision was not reviewable and that the Government policy would not be changed. Instead, in response to the HRM accusations in the political arena, there were a series of minor capitulations. These achieved temporary respites from the pressure generated by the HRM, and, I think, put the Government in a good public light as being caring and considerate. These capitulations however have public law consequences. Mr Martineau, ever resourceful and methodical, took me through each and every representation. He said that each of them was not clear, unambiguous, or devoid of relevant qualification. While I agree that to some extent he is right – in relation to work stoppages and an agreement to be bound by the Armstrong report – they were sufficiently clear, unambiguous and unqualified in one important unifying respect: they all promised a review or a reconsideration. The fact that different persons offered reviews at different times, he said, meant that a later promise would have revoked an earlier one. I respectfully do not agree. A court must take a panoramic view of all the evidence and it must sum up the total of all its parts. When a person no less than the Prime Minister promises a review she must be expected to understand what that term means and to have said it with sincerity. Instead of dealing with the HRM in a straightforward and consistent manner (to use the words of Laws LJ in Nadarajah) and telling the HRM that she refused to negotiate, she took a series of steps that are now made out to be half-promises – or no promises at all – to appease, or defuse, or otherwise deal with the activities of the HRM.

138. With respect to the appointment of the Armstrong Committee, the political crisis the Government wished to avoid was the death of Dr Kublalsingh. Again, if the Government wished to be straightforward it would have refused to promise that the report would have been considered. If a man chooses to die for a lost cause that is a matter for him, but he should know that it is a lost cause. If a government insists that its executive policy will be carried out, and it is acting lawfully, there is absolutely no public law penalty for its actions. Those are matters for an electorate to judge, not a court. In the end, the promises of a review and a consideration having been made, the claimants were entitled to believe that the process would have been meaningful and that they would

have been consulted. Their expectations were therefore legitimate.

Overriding public interest

139. The argument was raised that there is an overriding public interest in constructing the disputed section and that this interest overreaches the claimants' legitimate expectations. The national and regional benefits of such a highway are not difficult to discover. In all the cases, an overriding public interest has been raised to justify the departure from the promised policy. It is obvious that such a public interest must arise after the creation of the legitimate expectation. The court will then determine whether, in light of the overriding public interest, the departure from the promised policy is a proportionate response. In my view there has been no change in the overriding public interest in completing the highway. The interest was there since 1967 and it continues unabated until now. No new public interest justification has been raised since the making of the several promises. The only thing that the defendant could raise was the long existing need for better public transportation. At the time that some of these promises were made it was known that the area served by the highway extension was intended to be a "growth pole" with plans to build a hospital, a university campus, and a sports facility. To amount to an overriding public interest, some new factor must emerge which justifies the change of policy. In this case there is no new factor that the government was faced with. In fact, the representations and promises were made in spite of the known pre-existing public interest in building the highway extension. There is therefore nothing new that the court can have regard to in considering the proportionality of the decision not to engage in a proper review. There is certainly a pre-existing public interest of great importance but it does not, in law, amount to an overriding public interest in the public law sense.

140. In light of all that I have said I have come to the conclusion that the claimants (including those persons who are now applying to be joined) have raised a serious issue to be tried in relation to the declaration that they seek.

The interim conservatory order

141. The right to apply for a conservatory order under a Commonwealth Caribbean Constitution has been recognized as far back as 1971. In Jaundoo v Attorney General of Guyana [1971] 16 WIR 141, Lord Diplock is said to have coined the phrase. He said that if the urgency of a case so required a court could grant a conservatory order ex parte. This was a case involving the building of a road through the appellant's property pursuant to a statutory power. Compensation was supposed to be paid for such an acquisition but the appellant brought her constitutional action seeking an injunction to prevent the Government of Guyana from entering her land without paying the compensation that she sought. At that time Guyana was a Commonwealth Dominion with executive power vested in Her Majesty. The body of the judgment deals mostly with the procedure used, and whether, on the basis of the parties named in the proceedings, an injunction was an available remedy. Lord Diplock said that the court had jurisdiction to make a conservatory order. He made that remark in relation to the duty of an applicant to give notice of his constitutional motion, to the person, or the legislative or executive authority against whom the relief was sought. He said that this was the only qualification to the unhindered right to seek redress under Article 19 of the then Guyana Constitution, which in material respects is identical to our Constitution save that the court's powers were not restricted by the State Liability and Proceedings Act. He immediately thereafter said: "This would not, however, prevent the court from making conservatory orders ex parte pending the giving of such notice if the urgency of the case so required" (at 46 I). Later on his judgment Lord Diplock discussed the non-availability of an injunction against the Government. He said that if the matter was urgent "it would

have been open to the landowner to add as an additional party to the motion, the Director of Works or the Minister…and to claim the injunction against him. This would give the court jurisdiction to grant an interim injunction if the urgency of the matter so required" (at 148 H). It seems to me that the reference to the availability of the ex parte conservatory order was made on Lord Diplock's understanding that it amounted to an injunction, and that, to avoid the statutory prohibition against injuncting the Crown, the ex parte conservatory order could have been made on the undertaking that the responsible official would have been joined after the order was made. Was the difference in nomenclature indicative of two different reliefs, governed by separate considerations and jurisdictional bases? His suggestion that an "injunction" could have been obtainable by simply joining the responsible official to the constitutional action does not, to my mind, correlate exactly with the unqualified right to a "conservatory order" (which is essentially, save in name only, an injunction) against the Crown, in the absence of the joinder. It must be remembered that under Guyanese law an injunction sought solely against the Attorney General was not possible by virtue of the Crown Proceedings Act (UK). Finally all of Lord Diplock's remarks were obiter. The Privy Council dismissed the appeal and remitted the matter for assessment of damages and compensation.

142. The jurisdiction to grant a conservatory order was frontally addressed in Attorney General v Sumair Bansraj [1985] 38 WIR 286, CA. This case involved the Attorney General's appeal against an interlocutory order granted in the High Court (which Braithwaite JA was at no pains to describe as an injunction, at 295 E-F) restraining the Minister of Works and the Director of Highways from taking possession of the applicant's lands pursuant to a Notice of Acquisition. Like in Jaundoo the issue concerned the construction of a highway, but in Bansraj the validity of the notice was being challenged. I note as well that the reports do not certify whether the action was brought against the Minister of Works and the Director of Highways as well as the Attorney General. In the High Court the action, keeping with the practice in those days, was merely intituled "In the matter of the Constitution and In the matter of the Application of Sumair Bansraj and Others". The defendants were not identified, although I assume that the notice of motion would have been addressed to these officials and they would have been served and represented. How else could the interlocutory injunctive order have been made? In the Court of Appeal the action was intituled "Attorney General v Sumair Bansraj", reflecting that the Attorney General had launched the appeal against the interlocutory injunction, not the injuncted officials, as the report makes clear.

143. Braithwaite JA overruled the High Court injunction preventing the Government officials from taking possession of the land. He described it as an injunction that was not permissible, as it offended the State Liabilities and Proceedings Act. The relief available under section 14(2) was expressly made subject to the provisions of this Act. However, he recognized the importance of preserving the status quo and devised a formula that was acceptable to the majority of the Court of Appeal:
"Now to the formula. Both remedies of an interim injunction and an interim declaratory order as excluded by the State Liability and Proceedings Act, as applied by section 14(2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the 'conservatory order' in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective rights will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction which would offend the provisions of section 22 of the State Liability and Proceedings Act, as applied by the

Constitution; but on the other had it would be well within the competence and the jurisdiction of the High Court to 'give such directions as it may consider appropriate for the purpose of…securing the enforcement of…the provisions of the Constitution…'"

144. Lead Counsel for the claimants, R.L. Maharaj SC in his written and oral submissions, relied extensively on the following passage from the judgment of Kelsick CJ in Bansraj:

"If the State cannot be prevented from destroying or disposing of the relevant property until the termination of the constitutional proceedings, and there is a final determination that the applicant is entitled to the enjoyment of property, the object of the Constitution will be defeated if he is restricted to his remedy of damages.

There is a right to a stay of execution of a judgment of the High Court on appeal to the Court of Appeal under section 14(5) of the Constitution to which there should be a complementary interim process for maintaining the status quo and restraining the exercise of the coercive powers of the State pending the hearing and determination of the dispute in the High Court."

145. Despite these statements Kelsick CJ nonetheless was only prepared to grant the conservatory order using Braithwaite JA's formula, namely, an exchange of mutual undertakings. Mr Maharaj urged the court to grant an interim conservatory order in terms that would effectively injunct the State. The orders being sought on the 18 September 2013 NOA are (a) a conservatory order or other order staying the continuation of works on the disputed section and, alternatively (b) a conservatory order directing the Attorney General to undertake that no action would be taken to continue any works on the disputed section. In relation to the oral application for the interim conservatory order no specific direction was given as which of the two alternatives was being sought. I will assume that they were being sought in the alternative.

146. Insofar as the stay is sought, it is unprecedented in constitutional actions involving multi-billion dollar contracts involving the commercial rights of third parties. The cases cited by Mr Maharaj in favour of a stay involve judicial reviews of orders to extradite, town planning refusals or death penalty cases. The commercial or other effects of stays in those types of cases is however inconsequential to the State and no argument of prejudice, like the one taken here by Mr Martineau, were raised. Nonetheless assuming for the time being that a stay is within the jurisdiction of the court, the question is on what grounds should a stay be ordered.

147. Insofar as a direction for an undertaking is being sought, I have no doubt, on the authority of Bansraj that such an order can be made. The mechanics in law of forcing someone to give an undertaking against their will is not dealt with in Bansraj and it seems to me that the Court of Appeal was striving to make sense of section 14(2), and to devise an ingenious remedy to by-pass the prohibition against injuncting the State. Ideally, this matter should have been frontally addressed in Parliament after the decision in the Court of Appeal, but it never was. I am therefore left with Bansraj as the sole and binding authority on this topic. The question is, upon what grounds should a direction for an undertaking be made? Both orders will have the effect of an injunction, which is an equitable remedy in the civil law courts.

148. An order made against the Attorney General staying the continuation of works is really an

indirect mechanism for injuncting the Minister of Works, who is not a party to the proceedings. An order for a stay was not discussed in Bansraj nor pursued as a relief. The furthest that Braithwaite JA was prepared to go was the order directing the exchange of mutual undertakings. I have serious doubts as to whether a stay, in proceedings like these, is an available constitutional remedy, but I will err on the side of caution and assume that the jurisdiction exists.

149. Both of these interim reliefs will have the practical effect of immediately halting the construction. Mr Maharaj said that these orders were necessary to preserve the status quo pending the hearing and determination of the written application for the conservatory order and/or the substantive claim. He said, quoting Kelsick CJ, that if the applicant is successful at the trial in establishing the right to the enjoyment of property "the object of the Constitution would be defeated if he is restricted to his remedy of damages." There is no gainsaying the fact that if the conservatory orders are not granted the claimants (and I refer to the current claimants, and those applying to be joined) will suffer loss. The declaration, if granted in its current form, will be meaningless in the absence of a review if the highway is built. The evidence does not disclose that any tractors are near to the properties of the intended additional claimants, but they will eventually arrive, I was not told when. The right to a review pursuant to the declaration has the possibility of resulting in a design change. Of course, a declaration is meant to obeyed by the State, but how can it have any real significance if the highway is already built? Mr Martineau suggested that at the final hearing I would have freedom to craft a declaration that would suit the needs of the claimants at that time, and that damages could be structured in a way that was adequate to meet the justice of the case.

150. What is at risk for both groups of claimants now is the loss of their right to a review that they hoped, in filing their claim, would lead to an alteration of the modalities of the proposed highway before it was built. It was contemplated that the substantive claim would have been heard and determined without delay. From very early, it was apparent from the scale of the dispute on the numerous affidavits, and the diaries of senior counsel, that this was not to be. The May 2013 trial was scheduled to accommodate the needs of both sides, and its postponement occurred on the same basis.

151. Even if a declaration of a right to a proper review was granted at an early determination of the substantive claim, there is no guarantee that a proper review, conducted pursuant to the declaration, would result in the cancellation of the decision to build the disputed section. Dr Armstrong's committee found, in any event, that the alternate route was not preferable to the one now under construction. I say this with caution because that evidence is subject to undetermined evidential objections. Of course, the possibility that the same outcome will occur with or without a review is not relevant to the question of the declaration. But does it have any place it in relation to the question of an appropriate remedy? Although it is not a decisive factor, I do not think that it can be completely ignored.

152. Mr Martineau SC and Mrs Peake SC, who both argued forcefully for the defendant, laid out a catastrophic scenario in the event that any conservatory order was granted. They relied on evidence that I have no reason to doubt:
A. Expenses incurred
(1) As of 18 September 2013 (the date of the written application) TT$ 120.8 million was expended on the interchanges along the disputed section, and US$7 million has been claimed by OAS in part due

to delays caused by protest action by the HRM.
(2) As at 7 October 2013, TT$ 62.8 million was expended in 57 acquisition claims and TT$ 192,500 was expended in rental facilities for residents and TT$61,000 was paid to three residents for six months rental.

B. Financial or other implications of an interim conservatory order
(1) If the highway construction is stopped the project engineer estimates financial consequences in the sum of US$ 170 million.
(2) Approximately 125 local employees will be laid off and expatriate employees of OAS, who are here on work permits, will be repatriated and laid off.
(3) 90 sub-contractors and suppliers will be adversely affected. OAS has placed orders stretching into the future since 2012 and 2013 for major supplies of cement, asphalt, and gravel and they have secured contracts with suppliers of heavy equipment.
(4) Box culverts, drainage pipes, and materials from the utility companies will deteriorate and vegetation will overrun the area. The culverts, drainage and waterways will become silted and exposed embankments on the interchanges will erode, leading to infestations of mosquitos. The exposed steel and other construction materials are likely to be pilfered. Exposed and uncapped piles driven into the earth will become silted and pose a danger to the public.
(5) Temporary connections and road diversions will cause inconvenience to residents.
(6) Utility relocation activities will be delayed and the utility companies (telephone, water, electricity, cable television) will re-prioritize their schedules. The utility companies will charge NIDCO for materials purchased to effect the relocation.
(7) Properties and homes that have been acquired will stand abandoned and squatters (a perennial problem) are likely to move in.
(8) The delay in completing the disputed section will cause untold inconvenience to the members of the public who suffer in time-wasting traffic jams and who expect the highway to be completed.
(9) The lengthening of the time frame for completing the highway, whether on the basis of the existing design, or some new design that may be called for, will result in significant increases in costs, which will be passed onto NIDCO.
(10) The development of the proposed South Western “Growth Pole”, which includes the Penal Hospital, the University of the West Indies’ Southern Campus at Debe, the DME Energy Project, and other named projects will be stymied.
(11) The expenditure on the other segments of the highway, including the interchanges at Debe, Penal, Siparia, and Mon Desir will be wasted or compromised. The traffic congestion will deleteriously affect the economies and businesses of the affected towns, which is lower than other regions of the nation. The South Western Peninsula, and the towns serviced by the highway will not have the benefit of transportation in the immediate future.

153. All of these financial, economic and social implications will be borne by the taxpayer. Mr Maharaj and Mr Hosein were nonetheless unsympathetic. They said that these calamities were self-induced and have no place in a discussion on appropriate relief. Mr Maharaj, in particular, contended that a Bansraj order was an entirely new remedy, that it was not meant to involve the equitable principles that govern private law, and that it facilitated the preservation of the status quo pending a final hearing. As a back-up argument he said that even if equitable principles were involved, which was denied, then they were satisfied according to the American Cyanamid guidelines.

154. There is no discussion in Bansraj about the factors that need to be considered in deciding whether or not to make the order. In that case the validity of the Acquisition Notice was challenged. At the substantive trial in the High Court the challenge was dismissed. When the appeal against the injunction came up in the Court of Appeal, the substantive rights had not yet been finally determined, because the judge's decision in the substantive claim was also on appeal. In the Court of Appeal hearing of the appeal from the interlocutory injunction, the issue was whether the State's possession of the land on the basis of a challenged Acquisition Notice, should be stopped pending the final determination of the substantive issue. The report does not say whether any argument of delay in seeking the order or prejudice to the commercial rights of third parties was raised by the State. The Court of Appeal did not deal with issue because it was not raised. The only issue was whether the High Court judge was right to have granted an interlocutory injunction, and in light of the finding that he had no such power, whether there was any other alternative relief that could be granted. Section 14(2) empowers the court to make such orders or directions "as it may consider appropriate." To my mind, this involves the exercise of a discretion and every discretion must be judicially exercised. I would go further. The discretion must be exercised in accordance with principles of equity. It is another way of saying that the selection of an appropriate remedy must be conducted with an eye on fairness.

155. The constitutional right to the enforcement of legitimate expectations is based on principles of fairness. It has been wholly imported from principles developed in private law that seek to maintain standards of fairness between ordinary individuals. How can it then be said that principles of fairness are not relevant to the question of remedies for its breach? Again too, if proportionality is a factor in considering an overriding public interest, why should it be disregarded in a discussion of appropriate remedies? If principles of good administration are standards by which to judge the actions of a public authority, should there not, in fairness, be any principles by which to judge the conduct of a claimant seeking a public law remedy? I answer all these questions in the affirmative.

156. In my analysis of the facts earlier in this judgment I pointed out those parts of the claimants' evidence that disclosed their apprehensions about the building of the disputed section. As early as 2005 their activism began. Instead of filing for judicial review of the EMA decision to grant the CEC in 2010, which would have shut down the plans and prevented the government from entering in any contract, they chose to pursue a political option. The contract was awarded to OAS in January 2011, and preliminary works, involving topographical and geotechnical surveys were being done in September 2011. Some bulldozer and excavator activity was taking place at that time. Of course, their public law rights did not crystallize until their expectations for the review, made by different public officials, were dashed in July 2012. By the time that the action was filed in August 2012 the situation should have appeared grim. The unequivocal statement coming from Minister George on 19 July 2012 was that the disputed section would be built contrary to earlier legitimate expectations of a review. Similar statements were previously made by Minister Warner on 9 June 2012. Dr Kublalsingh's original affidavit in support (3 August 2012) describes the contract as a "Design/Build" contact. This obviously is an admission that design services would be taking place off-site, and that such services would entail costs. Acquisition Notices were served between November 2011 and February 2012. The work on the Debe interchange began on 28 June 2012, after the demolition of the HRM camp. In every respect the State showed a firm intention to proceed with the work in breach of the claimants' legitimate expectations, and despite their previous assurances that the works would be temporarily put on hold. Those assurances expired in June 2012.

157. As early as 21 September 2012 the claimants' instructing attorney wrote a letter complaining about a notice to residents in San Francique (midway along the disputed section) advising of the commencement of works. He asked for an undertaking that all work cease. It was disregarded. OAS conducted outreach exercises in October 2012 to advise residents of the impending work on the Fyzabad and Siparia interchanges, and, in fact, equipment was mobilized in the vicinity of the Siparia interchange.

158. On 28 October 2012 the claimants' instructing attorney wrote another letter to the State informing that OAS had moved into locations along the disputed section. It stated: "We did not previously approach the court for interim relief as no works had commenced on this part of the highway…we still wish to avoid having to approach the court for an order to protect our clients' rights. In the circumstances we again call upon you to protect the integrity of the pending proceedings by giving an undertaking to cease all works pending the hearing and determination of our motion." I ask myself, why does the claimants' instructing attorney say that his clients wish to avoid seeking an interim order? Is it not plain that one was needed? The claimants do not dispute that clearing and grubbing works were taking place at certain of these interchanges, or that topographical surveys were taking place. The question at this stage is not to determine the extent of the works but whether there was a real threat that the building of the disputed section was proceeding. OAS and NIDCO evidenced every intention of proceeding. Their evidence is that they were actually engaged in work.

159. On 7 November 2012 the claimants' instructing attorney wrote another letter to the State informing it that the claimants will apply for an expedited hearing should no undertaking be given. The claimants' application was filed on 19 November 2012, supported by the affidavit of the second claimant. It narrated a variety of works along the route and contained this sentence: "In this case it is clear that the claimants' rights of property and to respect for private and family life will rendered nugatory if the State is permitted to continue with its proposed construction while failing and/or neglecting and/or refusing to both give any undertaking and/or file its evidence in these proceedings."

160. The events throughout November 2012 to March 2013 were set out earlier in this judgment, including the two exchanges between counsel for the claimants and the court. In spite of all this activity on the ground and another public declaration by Minister George that works on the disputed section will continue, there was no application for an interim conservatory order. The application was only filed on 18 September 2013. In the absence of an undertaking – or more properly put, the plain refusal to give one – the claimants must surely have been aware of what was at stake.

161. As I have earlier held, on the basis of the evidence thus far presented the Government did not agree to abide by the terms of the Armstrong Report, and, in any event, did not agree to stop work everywhere on the disputed section. Works were to be continued on the parts of the section that were released to OAS. Arguments were raised on the basis of Dr Charles' evidence, that the work on the Debe interchange was not part of the disputed section, and cannot be regarded in any discussion of delay. I must however have regard to all the evidence. The interchange at Debe is a link in the chain along the way to the other interchanges. The Debe interchange straddles the M2 Ring Road and I have no reason to doubt that it is designed to accommodate the intended traffic

travelling from Point Fortin that wishes to use a ramp to go onto the M2 Ring Road. In the same way, I have no reason to doubt that the interchange will facilitate traffic by a ramp from the M2 Ring Road that wishes to enter the disputed section of the highway en route to Point Fortin. It is challenging to accept that, because the individual segments between the various interchanges are described as "segments" in some of the State's evidence, the various segments do not in fact make up one whole. Each interchange is intended to serve traffic travelling North and South along its entire length that wishes to exit at the interchanges of the towns between Debe and Mon Desir. OAS has been contracted to design and build the entire highway extension. Saying that the contract or the highway extension is segmented is like saying, in relation to the construction of a sky scraper, that each floor is a separate segment. In fact, each floor is an integral part of the whole building, and if work is taking place on the first floor and the penthouse a segmentation analysis is not persuasive, at least in relation to arguments about delay. Why should a contractor be allowed to build the ground floor and the penthouse in the first place? If the middle floors of the skyscraper are objectionable those objections ought to be raised in a court of law at the earliest possible moment. These observations are especially striking in the circumstances of this case where an undertaking was being flatly refused from as early as September 2012, and the decision not to seek an interim conservatory order was deliberately taken, in spite of what should have been alarm bells in the ears of the HRM. In any event, the Debe interchange aside, there is evidence of construction works on the other interchanges as early as 2012. The response of Dr Kublalsingh to the work on the Fyzabad interchange was to go on a hunger strike in the political arena. It ought properly to have been to pursue the interim conservatory order lying dormant before me in the FDCF.

162. According to Mr Labate of OAS, as of 7 October 2013, 19 days after the 18 September 2013 application, some 18,000 metres of piles were driven on the Debe interchange, to service the bridge and the embankment constructed near to the interchange. 40% of the earthworks had been completed. The interchange bridge is 20% complete. The overall interchange in 30% complete. At the Fyzabad interchange 75% of the clearing and grubbing was completed. At the Siparia interchange 50% of the clearing and grubbing was completed. On this date OAS had already purchased 2,500 metres of pipes, 500,000 tonnes of aggregate, as well as geo-grid forms, metal beams, pre-cast panels, dump trucks, asphalt pavers. A concrete batch plant had already been imported.

163. A public law court cannot disregard delay in seeking relief of the type sought, especially where the commercial rights of third party rights are concerned: Walkerwell v Water and Sewerage Authority (unreported) Civ App 94 of 2000, CA. In that case there was evidence explaining the delay in pursuing the relief, but in this case, there is no explanation save that the works were sporadic, or not extensive (in the claimants' view) and only limited to the interchanges. I do accept these reasons as reasonable. Section 14(1) makes it abundantly clear that constitutional redress is available if any constitutional provision "is likely to be contravened". It was plain as early as July 2012 that the State intended to complete the highway extension project. By that time, after earlier promises for a review had been broken, and temporary work stoppages had expired, the opportunity to apply for an interim conservatory order should have been seized.

164. In Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Anor [2003] UKPC 63, Lord Walker of Gestingthorpe considered the availability of injunctions in public law cases, and appropriated the American Cyanamid factors, taking account of

the “special factors” in a public law case. Lord Walker approved the approach of Lord Goff in R v Secretary of State for Transport, ex parte Factortame (No 2) [1991] AC 603, 671-4. The guiding principle enunciated is that injunctive relief is discretionary. Lord Walker conducted his analysis of whether an injunction should be granted in a public law case by applying American Cyanamid principles, and he made adjustments in accordance with Factortame to involve the public law elements. After examining a number of authorities (notably R v Inspectorate of Pollution, ex parte Greenpeace Limited [1997] Env LR 431, 440), he concluded that “an undertaking in damages should normally be required, even in a public law case with environmental implications if the commercial interests of a third party are engaged.” In this case the claimants offered no undertaking in damages and did not submit any evidence of their ability to pay damages in the event that any were suffered as a result of the orders sought. This omission was grounded in their submission that no undertaking was required.

165. I have already held that the claimants have raised a serious issue. The question to determine is how should the discretion to grant relief at this stage be exercised. Lord Walker said that “the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimize the risk of an unjust result)” (at para 39). In analysing the balance of the risk of injustice he took into account the absence of an undertaking in damages, the rights of third parties, and the fact that the impugned dam site was already a busy construction site. He refused the injunction. I recognize that there are differences in the fact situation between Belize Alliance and this case, but I cannot ignore the statements of principle enunciated there.

166. The fact that these, and other authorities relied upon by the defendant (notably Walkerwell and TICFA v Patrick Manning (unreported) H.C.A. 3606 of 2003), arose in judicial review applications does not matter. Judicial review is part of public law, and often involves claims of constitutional infringement. The powers exercisable under section 14(2) of the Constitution are not to be exercised without a rudder, and the court must seek guidance from related sources of law that, in principle, are sound.

167. Mr Hosein submitted that if an undertaking in damages is required then poor people would be deprived of their constitutional rights. With respect, I do not agree. An interim conservatory order is an exceptional discretionary constitutional remedy, unlike a declaration. There is no fetter on the right to seek declarations. Poor people who expeditiously seek this exceptional interim relief will not be adversely effected by this consideration. There is, in any event, no rule of law that says that a rich man or a poor man is entitled to any remedy of his choice, under any circumstances. The scale of the loss to the State and third parties is an exceptional feature of this case. It is not likely to often arise. In considering the balance of justice, the granting of an order to stop the highway to secure a right of review must be balanced against the tremendous cost that the taxpayer has already borne and the stupendous cost that he or she will bear as a result of its grant. To this must be added the continued burden of oppressive traffic faced by thousands of motorists. I must bear in mind as well that the review sought to be protected by this order is not guaranteed to result in any substantial design alteration, and, at least on the basis of Dr Armstrong’s report, is unlikely to lead to a reroute of the highway. In the absence of any allegations of an unlawful acquisition process, or the illegal exercise of executive powers save in relation to the frustration of a right to a review, the orders sought will cause more trauma to taxpayers and third parties if it is granted, than to the claimants if it is not granted. It would be a disproportionate loss. Many of these considerations would have had

less force if the claimants had expeditiously sought their interim orders.

168. Taking into account the unreasonable delay in pursuing the interim conservatory order, the fact that no undertaking in damages was offered, that third party commercial rights and the rights to accessible transport by those living in the four towns, will be adversely affected I decline the oral and the written applications for the interim conservatory orders.

169. I do not feel that the declaration, which will be crafted to meet the circumstances of the case after the trial, will be inadequate. An appropriate declaration is not beyond my powers to create. Further, in attempting to arrive at fairness, I do not see why damages cannot be assessed to meet the justice of the case. The prospect of adequate damages for breach of a legitimate expectation is persuasively argued using Irish and English cases in Legitimate Expectation–An Odyssey, Irish Jurist 2013, 50, by Professor Hilary Biehler.

170. The attorneys in this matter conducted this case over many days, and often, despite the clearing of days in the court's diary, the matter could not proceed from day to day. The industry and expertise of senior and junior counsel in delivering 13 written submissions/ "speaking notes", a variety of tables, close to 75 authorities and filing over 50 affidavits is to be commended, but it necessitated a lengthy judgment writing process. The task of writing this judgment was set to take place over the Easter Court Vacation. In the course of writing I fell ill. It caused an eight-day delay in the delivery. I apologize to the parties for the delay.

171. I make myself available for 5 days this month or the next to hear the outstanding applications and to determine the substantive claim.

172. I will now hear senior counsel on the question of costs on this application and the written application.

James Christopher Aboud
Judge