

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1483 of 2002

**In the matter of an Application by
Oropune Village Multipurpose
Co-Operative Society Limited for
Leave to apply for Judicial Review
Under Order 53 of the Orders and
Rules of the Supreme Court and
The Judicial Review Act, 2000**

And

**In the matter of the decision of the
First and Second respondents to inter alia:
Sell 54 additional vacant lots in the Oropune
Development on the open market being part
Of the 46 acres of state lands at Oropune to
Be leased to the Applicant by the state of
its Agents**

Between

**Oropune Village Multipurpose
Co-operative Society Limited**

Applicant

And

**(1) Oropune Development Limited
(2) Urban Development Corporation
Of Trinidad and Tobago Limited
(3) The Minister of Integrated Planning
And Development**

Respondents

Before the Honourable Mr. Justice Gregory Smith

Appearances:

Mr. R. Dolsingh S.C., Dr. Charles Seepersad, Mr. G. Ramdeen for the
Applicant

Mr. R. Armour, Ms. V. Gopaul for the First and Second Respondent

Mr. D. Allum S.C., Mr. G. Delzin for the Third Respondent

JUDGMENT

FACTS:

1. This application for judicial review has been a lengthy matter with a host of voluminous affidavits, a multitude of applications, extensive cross-examination, lengthy submissions and extended hearings. In spite of this, I will endeavour to give a summary of the basic facts which are essential for the further consideration of this matter,

2. For a period in excess of 20 years, successive governments had recognized the need to expand, upgrade and relocate the Piarco Airport Terminal. However, to effect this, it would have been necessary to relocate two villages, Piarco and Oropune. There were reports in 1981 and 1991 concerning the relocation of these villages but matters really came to a head around 1997 when the government of the day had made a firm commitment to, and started work on the relocation of the Piarco Airport Terminal.

3. The Applicant society was registered as a Co-operative Society on the 20th September 2000. According to Dianne Balla, the President of the

Applicant Society and the principal deponent on its behalf, the society was formed “to represent the villagers at all levels and assist the government with the organizing and relocation exercise.” The Second Respondent, Urban Development Corporation of Trinidad and Tobago, (hereafter referred to as “UDECOTT”), is a private company formed on 29th December 1994 and continued under the Companies Act 1995. According to Mr. Winston Agard, the Chief Executive Officer of UDECOTT, its “Mission Statement is to develop, redevelop and rehabilitate the physical fabric of urban and other designated areas of Trinidad and Tobago.....” Its only shareholders are, the State, through the corporation sole, and a public servant, who holds, one share on trust for the State. The first Respondent, Oropune Development Limited, (hereafter referred to as “ODL”) is a wholly owned subsidiary of UDECOTT and was incorporated under the Companies Act 1995 as a private company on the 26th May, 2000.

4. The Cabinet of the day had originally decided to relocate the villagers of Oropune and Piarco on to a 150 acre parcel of land owned by Orange Grove Estates Ltd., and to vest that parcel of land in the National Housing Authority. However, by cabinet minute 383 of 2000 dated 23rd February 2000, cabinet made the following decisions with respect to the relocation exercise (since this minute is pivotal to many of the arguments in this case, the full text is set out hereunder):-

“Cabinet, with respect to the resettlement of the villagers of Oropune Village, Piarco to facilitate the opening of the new Terminal Building Facility at the

Piarco International Airport on August 31, 2000 agreed:

- (a) to vary its decision recorded in subparagraph (b) of Minute 197 of January 23, 1997 to allow for the 150-acre parcel of land described hereunder to be vested in the Urban Development Corporation of Trinidad and Tobago Limited (UDECOTT) instead of in the National Housing Authority (NHA):

The area bounded on the West by lands of Orange Grove Estate, on the North by the Churchill Roosevelt Highway, on the East by private lands and on the South by the Orange Grove Estate;

- (b) to accept the under-mentioned mechanism proposed by UDECOTT for the development of the 150 acres referred to above:
 - (i) 46 acres be developed with main infrastructure and the lots be distributed to the displaced villagers
 - (ii) the remaining 104 acres be developed and sold on a private commercial basis
 - (iii) to give effect to(i) and (ii) above, a Development Company be formed to secure equity investors through a public offering of shares as the means of financing the initial development together with Government's allocation
 - (iv) thereafter the Development Company raise loans, if and when necessary without Government guarantees to complete the development and, through the sale of lots for residential and commercial purposes, repay the loans and earn a return to the investors as well as to UDECOTT
 - (v) the proposed Village Co-operative also have equity in the above mentioned Company

- (vi) the 150 acres of land be transferred to UDECOTT on a lease basis for a period of 199 years.”

(This minute is hereafter referred to as “Minute 1”)

It should be noted that ODL was the company formed to give effect to b (iii), (iv) and (v) above, and also, instead of vesting the 150 acre parcel of land in UDECOTT as prescribed by note b(vi) of minute 1, the land was vested in ODL for 199 years.

Subsequent to these matters, the Ministry of Housing through its various agencies commenced infrastructure work and the construction of houses on the 46 acre parcel of land mentioned at b(i) of Minute 1 above. It was foreseen that 150 houses would have been built.

When the time for the resettlement of displaced villages was approaching, Cabinet agreed to the following matters which were recorded in cabinet minute 399 of 2001 dated 4th April 2001 (hereafter referred to as “Minute 2” which is also set out hereunder:-

- “(a) ownership of the houses constructed by the Ministry of Housing and Settlements on the 150-acre parcel of land excised from the Orange Grove Estate and vested in the Urban Development Corporation of Trinidad and Tobago Limited (UDECOTT), for the resettlement of the villagers of Oropune Village, Piarco, be vested in UDECOTT or its subsidiary, Oropune Development Company, whichever is appropriate (Minute No. 197 of January 23, 1997 and No. 383 of February 23, 2000 refer);
- (b) in connection with (a) above, UDECOTT/Oropune Development Company

acknowledge the indebtedness equivalent to the cost of construction of the houses, estimated at \$10.35-Mn., and make an arrangement with Government for the repayment of the indebtedness;

- (c) the Ministry of Housing and Settlements advise on, monitor and ensure the implementation of the arrangement agreed between Government and UDECOTT/Oropune Development Company for the repayment of the indebtedness referred to at (b) above;
- (d) the allocation and distribution of the completed houses to the displaced villagers be managed by the Oropune Multi-Purpose Co-operative Society Limited, in conjunction with UDECOTT/Oropune Development Company.

Cabinet noted that, pending the vesting of ownership of the houses in UDECOTT/Oropune Development Company, the Project Execution Unit Ministry of Housing and Settlements, would provide the necessary security on the site.”

5. According to Ms. Balla, in the second week of April 2001 the Applicant was asked to arrange a handing over ceremony in which the keys and relevant documents for 47 completed houses in the new Oropune Gardens were handed over by the Minister of Housing to the Minister of Integrated Planning and Development. At the end of the ceremony, the Minister of Integrated Planning and Development handed over the keys for these 47 houses to Ms. Balla. Thereafter, the Ministry of Housing and Settlements handed over keys and relevant documents to the Applicant through Ms. Balla, as, and when the remaining houses that were constructed (149 in all) became available and the

Applicant then distributed these houses to “bona fide Oropune residents” (see paragraph 8 of Ms Balla’s affidavit filed 30th April 2002). This resettlement process seems to have continued up to at least December 2001; however, the 149 houses only took up some 26.7 acres of the 46 acre plot that was earmarked for displaced villagers and there were some 54 residential lots left on the remaining 19.3 acres, which latter parcel of land had already been developed with infrastructure works but upon which no houses stood. The thorny issue of what was to be done with these additional 54 lots is at the heart of this litigation.

6. As a result of Minute 2, UDECOTT became responsible for repaying the Government some \$10.35 million, being the cost of the construction of the 149 houses. Further, UDECOTT had also incurred a debt of some \$4.6M to construct a sewer system for the new Oropune Gardens, without which system, the houses would have been un-inhabitable. To recoup this expenditure, UDECOTT, as early as May 2001, had decided to attempt to repay some of its indebtedness by selling off the 54 vacant lots that remained on the 46 acre parcel, on the open market. This move was strenuously resisted by the Applicant and met with the disapproval of the Minister of Planning and Development at the time. This friction continued till sometime in December 2001 when it appeared that the Board of UDECOTT allegedly took a decision not to sell these lands on the open market but to make them available at lower

than market rates to displaced villagers, (arguably) through the medium of the Applicant Society.

7. Subsequent to this decision there was a change of Government and nothing was done with the 54 vacant lots. However, from around February 2002, it appears that complaints were received by UDECOTT about the allocation of the houses on the 26.7 acre parcel of land being made to persons who may not have been entitled to the same, and other allegations of impropriety were also being made against the Applicant. In these circumstances, UDECOTT attempted to investigate the complaints and they alleged that the Applicant was obstructing their investigations. On the 11th April 2002 cabinet agreed that the allocation and distribution of completed houses was to be handled solely by UDECOTT to the exclusion of the Applicant. On the 20th and 22nd April, 2002, the Applicant noticed advertisements in the daily Newspapers inviting tenders from suitably qualified contractors for the design and construction of 54 single family residential units at Oropune Gardens. On 30th April 2002 this action was commenced.

History of the Litigation

8. On the 3rd May, 2002 leave was granted to apply for Judicial Review and from the 20th June 2002, the Applicant pursued certain injunctive reliefs before a judge in Chambers. These were (a) to prevent UDECOTT and ODL from selling, leasing, mortgaging or from parting with possession of the 46 acre

parcel of land or any part thereof; (b) to prevent UDECOTT, ODL and the 3rd Respondent (The Minister of Integrated Planning and Development) from awarding contracts for the design and construction of any housing units on the 46 acre parcel. The application for the injunction came on for hearing on nine occasions (some of which entailed long sittings) and during the course of which there were detailed written submissions and preliminary points taken. Leave was also granted to Amend the Applicant's Statement for the Judicial Review Application to add new reliefs and grounds. On the 2nd August 2002, the learned judge refused to grant any of the injunctive reliefs sought.

9. The Applicant appealed from the judge's refusal to grant injunctive relief and the Court of Appeal also refused to grant the relief sought but ordered an early hearing of the substantive motion for Judicial Review.

10. Before me there were 13 hearings. The first five of these related to applications to strike out paragraphs in affidavits, applications to cross-examine deponents and the actual cross-examination of some deponents. This having been completed, all Counsel submitted lengthy and detailed submissions in writing, and appeared before me on three occasions, after which, it was realized that certain queries which I had raised had not been adequately dealt with, and all Counsel requested that they be allowed to reformulate their arguments to deal with the points raised. Counsel then submitted fresh written submissions, some of which were indeed quite voluminous and then I

entertained addresses for five more days. On the second day of the last set of addresses, Counsel for the Applicant sought to Re-Amend the reliefs and the grounds of the application. After hearing lengthy submissions on the application to Re-Amend, I refused the application to Re-Amend the grounds and gave an oral decision thereon which will be reduced into writing in the event of an appeal.

Counsel for the Applicant then (on the 3rd of the last five days of hearing) applied for leave to use a fresh affidavit and also moved the court to visit the locus. After hearing argument on both these issues, the applications were refused. On the 4th day of the last five day of addresses, Counsel for the Applicant applied for the appointment of an investigator under section 5 (a) (1) of the Judicial Review Act, which application was also refused after hearing detailed submissions from all Counsel. In all cases my decisions were oral ones and would be reduced to writing in the event of an appeal.

11. The matter now falls to be dealt with upon the Amended grounds filed on 28th June, 2002.

These grounds are set out below:

- (1) "The first and second Respondents are public bodies created by the State to perform public functions for the State. The Oropune Housing Project arose out of the State's decision to build the Piarco Airport and to relocate those persons affected by the Piarco Airport development. At all material times these Respondents are required to carry out government's policy in the 46 acre parcel of State lands;

- (2) That the first and second Respondents breached the principles of natural justice by failing to afford to the Applicant a hearing when the second Respondent decided to make available to the Applicant a lease of 26.7 Acres of State land on which the 149 houses were built and depart from Government policy which required 46 Acres to be developed with main infrastructure and the 54 additional vacant lots be distributed to the displaced villagers by the Applicant in conjunction with the first and second Respondents;
- (3) The third Respondent acted in breach of the rules of natural justice when it decided to exclude the Applicant from the distribution/allocation of houses on the 46 Acre parcel without hearing the Applicant or inviting representations from the Applicant;
- (4) The Land Settlement Agency and the second Respondent decided that the additional vacant 54 lots be sold on the open market (when it was agreed by the third Respondent and the Applicant that the additional vacant 54 lots be sold to the Applicant for the construction of homes for displaced villagers without hearing the Applicant on the new proposal. Further, the sum of \$17 million was earmarked from the Piarco Airport project for the provision of infrastructural works and that no further money is required for infrastructural works in respect of the additional vacant 54 lots;
- (5) The first and second Respondents acted illegally or irrationally when it decided to depart from Government's policy in respect of the 46 Acre parcel of State lands in the Oropune Housing project;
- (6) The Respondents deprived the Applicant of a legitimate expectation to inter alia:
 - (a) have the 54 additional vacant lots vested in it to sell to displaced Oropune villagers;

- (b) have vested in it 46 Acres of State land in the Oropune Village consisting of 149 housing units on 26.7 Acres and the remainder of the 46 Acre parcel i.e. 18.3 Acres;
 - (c) to have equity holding in the first Respondent;
 - (d) to distribute housing units on the 18.3 Acres of land being the remaining portion of the 46 Acres in conjunction with the first/second Respondents;
- (7) The first and second Respondents are motivated by bad faith/improper purpose and/or irrelevant considerations inter alia:-
- i. Acting on rumour and/or upon allegations without first investigating them and/or giving the Applicant an opportunity to explain;
 - ii. Failing to carry out independent enquiries;
 - iii. Taking into consideration purely political matters;
 - iv. Failing to meet with the Applicant before making decisions relating to the 46 Acre parcel of State lands.
 - v. Exceeding the limits of its authority in the exercise of its powers;
 - vi. At all material times the Applicant represented the interests of the Oropune Villagers affected by the Piarco Airport Development and was charged with others with the planning/distribution/allocation of houses, housing lots and compensation payable to those

affected by the Piarco Airport Development;

- vii. The Respondents have deprived the applicant of procedural fairness.”

There is a measure of duplication in the grounds and I will deal with them in terms of the focus placed on each ground in the arguments and under the following heads:-

Illegality (see grounds 1 and 5);

Irrationality (see grounds 1 and 5)

Deprivation of a Legitimate Expectation (see ground 6)

Breach of Natural Justice (see grounds 2, 3 and 4);

Bad Faith, improper purpose and/or irrelevant considerations (see ground 7)

ILLEGALITY:

12. The arguments advanced on the ground of illegality have raised several issues, the most crucial of which is the following (which issue itself proceeds upon an assumption):-

- Assuming that the cabinet or a Minister who had, authority so do to, did actually direct that the 46 acre parcel of land (being a portion of the 150 acre portion owned by ODL) was to be vested in the Applicant, were UDECOTT and ODL bound, as a matter of law, to carry out such a directive?

13. On behalf of the Applicant it was submitted as follows:-

Section 75(i) of the Constitution of the Republic of Trinidad and Tobago provides that “There shall be a cabinet for Trinidad and Tobago which shall have the general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament.”

Section 85(i) of the Constitution provides that “where any Minister has been assigned responsibility for any department of Government, he shall exercise general direction and control over the department; and subject to such direction and control the department shall be under the supervision of a Permanent Secretary whose office shall be a public office.”

Accordingly, by virtue of these two provisions, a Minister acting under the authority of the Cabinet could give directions and exercise control over those bodies which fell under his Ministry. It was submitted that the term “department

of government” ought to be given a liberal interpretation in keeping with the general purposive interpretation which is usually applied to a Constitution, (see Fisher v Minister of Home Affairs 1980 A.C. 319) so that all government agencies which included wholly and partly owned companies, could fall under the control of a specified Minister.

By Gazette Notice dated 4th January 2001, Mr. John Humphrey was assigned the portfolio of Minister of Integrated Planning and Development etc and UDECOTT was placed under this Ministry as a “Wholly Owned Enterprise.”

This being the case, UDECOTT, and its wholly owned subsidiary, ODL, became subject to the general direction and control of the Minister and the Cabinet and were legally bound to follow any directives issued by the Cabinet and/or the Minister.

Additionally, it was submitted that there were other factors here which pointed to the conclusion that UDECOTT and ODL were, as agents of the government, subject to the directives of Cabinet or the line-Minister. These were:- all the shares in UDECOTT were held by or on behalf of the State; the only real asset of ODL was the 150 acre parcel of land which was obtained through the State; both companies were exercising public functions on behalf of the Government, and more specifically were involved in the exercise of the relocation of displaced villagers to facilitate the relocation of the Piarco Airport Terminal; and, even the C.E.O. of UDECOTT, Mr. Winston Agard gave evidence that he felt obliged to follow the directives of the Minister as he did not want to get in a quarrel with the Minister.

14. In the circumstances, when the cabinet, in Minute 1, gave directions, inter alia, for the 46 acres to be distributed to the displaced villagers, and when the Minister, (as it is alleged) gave directions as to having the entire 46 acre parcel of land vested in the Applicant, both UDECOTT and/or ODL were bound, as a matter of law, to carry out these directives, and could not venture to sell, dispose of or otherwise part with possession of the 54 vacant lots which formed part of the 46 acre parcel of land.

15. On behalf of UDECOTT and ODL it was submitted that the very section 85(1) of the Constitution offers guidance as to what constitutes a department of government; namely, it is a department of government “under the supervision of a Permanent Secretary.” In the present matter it was clear that neither UDECOTT nor ODL were under the supervision of a Permanent Secretary but instead were governed by the provisions of the Companies Act. A fortiori, they were managed by a Board of Directors, had shareholders and were a private company. Therefore, neither UDECOTT nor ODL qualified as a department of government.

In support of this proposition Counsel made reference to the fact that if the Government wished to make a corporation subject to its control, there were several ways of doing so, as, for instance, in the case of the Water and Sewerage Authority, which was established and incorporated by Act of Parliament and which Act contained provisions like “It is the duty of the

Authority to carry out the policy of the Government...” (see section 9 (1) of the Water and Sewerage Act Ch 54:50) and, “In the exercise and performance of its functions, powers and duties under this or any other written law the Authority shall act in accordance with any special or general directions of the Government, given to it by the Minister...” (see section 10 of the same Act). Similarly, in the case of the National Petroleum Company Act (Ch 62:04) there were provisions allowing the relevant Minister to give Orders to limit the exercise of the powers of the Company (see section 7) and in section 17 it was specifically provided that “the Board shall at all times comply with the directions of the Minister.”

The failure to retain such powers suggested strongly that UDECOTT and ODL were not to be subject to the dictates, direction and control of a Minister or of the Cabinet.

Counsel also cited authority to buttress his argument. In Tamlin Hannaford (1950) 1 K. B. 18, the Transport Act 1947 (U.K.) established the British Transport Commission as a Statutory Corporation. The relevant Minister had several powers, such as the power to appoint directors and fix their remuneration, and to give the Board directions of a general nature in certain matters. At pages 24 and 25 of the judgment of the Court of Appeal Denning L.J. stated:

“... These are great powers, but still we cannot regard the corporation as being his (the Minister’s) agent any more than a company is the agent of the shareholders or even of a sole shareholder... It is not the Crown and has none of the immunities and privileges of the Crown. Its servants are not civil

servants and its property is not crown property. It is as much bound by Acts of Parliament as any subject of the king. It is of course a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government...when Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly... In the absence of such express provision, the proper inference, in the case, at any rate of a commercial corporation, is that it acts on its own behalf even though it is controlled by a government department." (my emphasis).

Counsel also referred to Hughes Aircraft Systems International v Airservices Australia (1997) 558 7CA where there were provisions in an Act of Parliament of Australia, similar to those in the National Petroleum Act of Trinidad and Tobago. In that case, Finn J. stated that:

"Where a ministerial communication could, because of its tenor or context, reasonably be interpreted by those to whom it is made either as being akin to a direction (whether or not it formally disclaims such an intent) or as manifesting an intent to contrive a decision to be taken, it properly can be regarded as offending the purposes (constitutional and statutory) which inform the legislative creation of bodies whose decisions are intended by Parliament to be freed from ministerial control save where the minister as contemplated by the statute in question, assumes responsibility for a particular decision in the manner envisaged by the statute."

16. In the circumstances, even if UDECOTT and ODL were State Corporations and were subject to some measure of control by a Minister, that alone did not make them a department of government. A Fortiori here, where there was no Act of Parliament nor regulations giving any Minister or other

government official control over the affairs of UDECOTT and ODL nor was any such provision made in their Articles and Memoranda of Association, it could not be suggested that UDECOTT and ODL were departments of government or in any way bound to follow the directions of any Minister or even of the Cabinet.

17. Counsel for the Third Respondent supported the arguments of Counsel for UDECOTT and ODL on this issue and offered further arguments in support of the fact that these were private companies governed by the provisions of the Companies Act. In particular, Counsel made reference to the dichotomy which would befall any member of the Board of Directors of a wholly owned state company if such a director and/or the Board felt he or they were bound to follow the directions of a Minister or other government official. Under section 99 of the Companies Act, every director is mandated to exercise his powers and duties honestly in good faith and in the best interests of the company and this duty is owed to the company alone. Directors are also personally liable for breaches of the Companies Act and by section 101 thereof, the Company is to indemnify its directors in respect of actions to which they are made parties. If a director acted in a way which, though in accordance with the directions of a Minister or other government official to whom he felt responsible but which was not in the best interests of the company itself, he could expose himself to personal liability for such actions.

In the circumstances, by being subject to the provisions of the Companies Act alone, the directors were not bound by law to follow the dictates of any minister or government official or even of the cabinet.

18. I agree with the arguments of the Respondents on this issue. Even assuming that UDECOTT and ODL were exercising public functions, they were not departments of government under the control of a Permanent Secretary. They had no privileges or immunities of the State, their property was not State property, their employees were not members of the public service and like any other private corporation they were not exempt from the general laws of the land and especially so from the payment of tax.

For whatever the reason, the government preferred to have these entities run as private companies under the Companies Act and the Companies would therefore also benefit from insulation from the government. Perhaps this in itself was a reason why government divested itself of some aspects of its powers, namely, that a private corporation, being free from the bureaucracy of the public service may be able to perform such functions more efficiently, and probably more profitably than the public service.

If, however, it were alleged that the divestment of government functions were a sham and that a private company was merely a front for the government itself exercising its power, then that would itself raise justiciable issues and be subject to challenge (see e.g. Martha Perch & Ors. v The Attorney General P.C.

Appeal No. 57 of 2001 at pages 7 and 8); however, such an argument has never been raised on the facts, the grounds nor in the submissions.

19. Being free from Ministerial or government control, it does not necessarily mean that the State is powerless over these corporations, but if the State wished to exercise such control it must do so indirectly through the mechanisms of the Companies Act; in this case, being the sole shareholder in UDECOTT (which itself was the main shareholder in ODL) it could, for example, remove such directors who it felt were acting contrary to its policies. Further, if Parliament had intended the State to retain direct control over these companies it could have enacted legislation to do so, as in the case of the Water and Sewerage Authority or the National Petroleum Company or as was done in Tamlin v Hannaford and the Hughes Aircraft Systems case (see paragraph 15 above).

20. I also accept the force of the submissions by Counsel for the 3rd Respondent that if the directors or the Board of a State Owned Company felt obliged to follow the dictates of a Minister or other state official it could place them in a precarious position in so far as personal liability for their actions is concerned.

Finally, a telling factor in this case can be gleaned from Minute 1 at paragraph b (iv) and Minute 2 at paragraph (b) where the cabinet made it plain that UDECOTT and/or ODL were to be responsible for the repayment of the

money spent on the housing development at the New Oropune Village. If UDECOTT and ODL were merely departments of government, then such expenditure would have been provided from state funds through the necessary appropriations, but this was not the case and the government mandated that these companies accept and repay the debt incurred in the development.

21. In all the circumstances, I find that UDECOTT and ODL were not bound as a matter of law to follow any Ministerial or cabinet directive (if indeed any such directive existed) to vest the 46 acre parcel of land in the Applicant and the challenge to UDECOTT and ODL's actions on this issue must fail.

22. Even though my decision at paragraph 21 above is sufficient to deal with the issue of illegality, there was a lot of argument addressed to other issues which dealt with the legality of the decisions of UDECOTT and ODL with respect to the 46 acre parcel and/or the 54 vacant lots, and in deference to Counsel involved in the matter I will examine these submissions, which proceed on the assumption (which I have already held to be incorrect) that as a matter of law, the cabinet or the relevant minister could mandate the Boards of UDECOTT and ODL to vest the 46 acre parcel of land in the applicant. However, I propose to deal with these other issues in a more summary manner.

These issues are:

- (a) Was there ever such a valid directive or mandate to vest the 46 acre parcel of land in the Applicant which UDECOTT and ODL had to follow?
- (b) Was the decision of UDECOTT and ODL to sell, transfer or howsoever otherwise part with possession of the 54 vacant and/or surplus lots (which formed part of the 46 acre parcel) on the open market rather than to the applicant a decision that was amenable to judicial review and/or to review by this applicant?

23. With respect to the issue of whether there was ever a valid directive or mandate to vest the 46 acres of land in the Applicant, Counsel for the Applicant submitted that the evidence of the former Minister of Integrated Planning and Development, Mr. John Humphrey, who was not cross-examined, was to the effect that it was he who piloted Minute 1 to Cabinet and that the 46 acre parcel was intended to benefit the former residents of Oropune Village so that the former villagers (“householders, tenants and squatters”) would be kept together to preserve the Community; in that regard, 150 houses were to be distributed free of charge to “primary householders” and when this was done, the 54 lots were “earmarked” to be sold to “villagers”, which would include the extended families (e.g. sons, daughters etc) of primary householders. It was clearly not intended to sell those 54 lots on the open market:

It was also submitted that by virtue of the gazette notice, No. 2 of 2001 dated 4th January 2001 (referred to in paragraph 13 above), Mr. Humphrey was the

line Minister for UDECOTT/ODL and was the one, in any event, who could validly give a directive as to the sale of the 46 acre plot to the Applicant.

24. The Respondents contended that Mr. Humphrey was not the line Minister for the relocation exercise. The evidence of Victoria Mendez-Charles, the Permanent Secretary in the Ministry of Integrated Planning and Development, (who was also not cross-examined) was to the effect that up to late 2001 (when the government changed, which was in December 2001) the line Minister for this project was the Minister of Housing and Settlements. Counsel submitted that insofar as Mr. Humphrey purported to give directions as to the vesting of the lands, these directions were not lawful. Further, it was submitted that the lots on the 46 acre parcel were intended for “displaced villagers”, which, despite the extensive cross-examination and extensive submissions, remained a fluid and undefined class of persons and definitely did not point solely to the Applicant; once it was determined that these displaced villagers had been accommodated in the new Oropune Village, then any extra lots left over could be disposed of by UDECOTT/ODL as they saw fit. According to Counsel, there was uncontroverted evidence from an attorney-at-law acting on behalf of the Applicant (See the affidavit of Dianne Balla filed 30th April 2002, exhibits D.B. 16 and D.B. 18) that all displaced villagers had received homes in the New Oropune Village, so that the purpose of the relocation exercise having been completed, the surplus 54 lots could be dealt

with by UDECOTT/ODL who themselves were the owners of the houses and the lands in question.

25. As Counsel for the Applicant himself stated, the resolution of this issue turned upon a strict reading of the cabinet minute, since this was the source of the power. Minute 1 merely referred to distributing lots to “displaced villagers” on the 46 acre plot and Minute 2 referred to allocating and distributing houses to “displaced villagers”. Neither Minute purported to give the Applicant any entitlement to lots or houses. Further, cabinet did not purport to define who was a displaced villager nor did they appoint anyone to decide the issue, and what was more important, there was no decision by cabinet to vest the 46 acre parcel of land in anyone other than UDECOTT/ODL. Therefore the decision by UDECOTT/ODL to sell the remaining 54 lots after relocating “displaced villagers” was not, in my view illegal. Even though Mr. Humphrey may have had a different interpretation of the cabinet minute, his opinion could not override or contradict that of the cabinet, and since the decision of cabinet as recorded in the minutes was open to the interpretation placed on it by UDECOTT/ODL, their actions in furtherance of their interpretation of the decision of cabinet were not illegal.

26. Further, since neither Mr. Humphrey nor Mrs. Mendez Charles were cross-examined, it posed a problem in deciding who was the line Minister in this case. While UDECOTT was “assigned” to Mr. Humphrey by the gazette notice

of the 4th January 2001 (referred to above), the undisputed facts are that up to December 2001, it was the Ministry of Housing and Settlements which was taking responsibility for the construction of houses and handing them over to the Applicant. Further, according to Minute 2 (c) it was the Ministry of Housing and Settlements who had to advise on, monitor and ensure the implementation of the arrangement agreed between Government and UDECOTT/ODL for the repayment of the indebtedness in respect of the construction of the houses. These factors suggest that the Minister of Housing and Settlements had a lot of input into the relocation exercise and could have been the line Minister. On the other hand, because the corporation sole (the Minister of Finance) was the main shareholder in UDECOTT, the company would also have been answerable to him; in fact, in cross-examination, Mr. Agard at one point stated categorically that the corporation sole was the Line Minister and later on stated that when the houses were built Mr. Humphrey was the Line Minister.

In this state of uncertainty, it seems that there was no one line minister for the relocation exercise whose sole directive would bind UDECOTT/ODL. Given this situation, it would have been necessary or at least, the prudent course of action, to have a cabinet decision on such a fundamental issue as the divestment on the 46 acre parcel to parties other than UDECOTT/ODL.

27. In the circumstances, even upon the assumption that UDECOTT/ODL were bound to follow cabinet and Ministerial directions (which I have found was not the case) there was never any clear government policy and/or directive

from the cabinet or from an undisputed Line Minister with respect to the divestment of the 46 acre parcel to the applicant which UDECOTT/ODL would have had to follow. In that case, it was not illegal for them to sell the lots that had previously been vested, in them on the open market.

28. With respect to the issue of whether the decision of UDECOTT/ODL to sell the 54 vacant lots on the open market rather than to have it vested in the applicant was one that was amenable to judicial review, the question to be dealt with was whether UDECOTT/ODL were exercising a public law or private law function in making this decision?

29. The Respondents contended that the decision to sell the 54 vacant lots was made to recoup money that was necessary for the financial viability of UDECOTT/ODL. This was a management decision of a private company with respect to its own lands and as such was a decision made in their private law capacity which did not attract any public law element that would make it amenable to judicial review. A fortiori, the public law function in relation to the land had already been discharged by having displaced villagers settled in the 149 houses that were built on the 46 acre parcel. Counsel for UDECOTT and ODL cited three authorities in support of this argument namely, Industrial Risks Consultants Ltd v Petrotrin H.C.A. 536 of 1995, Bruno Maraj & Ors v National Fisheries Co. Ltd. H.C.A. S1947 of 1992 and Wijeratne v People's Bank (1985) LRC (Const) 349. These cases affirmed the proposition that private law

functions exercised by companies which perform public law duties, are not amenable to judicial review.

30. Counsel for the Applicant referred to the several factors mentioned at page 4 of the National Fisheries case cited above (which itself was a reference to Clive Lewis on Judicial Remedies in Public Law), which detailed the various factors to be examined. Counsel submitted that when one examined these factors and applied them to the case at hand, it would be seen that this decision did indeed enter the realm of public law and was amenable to judicial review.

31. Having examined the authorities and applying them to the present matter I find that the decision to put the 54 vacant lots on the open market was bound up with issues that arose out of decisions already made and yet to be made with respect to the larger 46 acre parcel of land, which decisions involved issues that could only be dealt with in a public law forum. These decisions involved questions like whether UDECOTT and ODL were agents of or departments of government, and the effect of cabinet/and/ ministerial decisions on the sale of the parcel of land; even though I have already decided on these issues contrary to the Applicant's case, they raised issues that had to be dealt with in a public law forum. Further, there are other issues which are yet to be dealt with which cannot be entertained in a private law forum but which if resolved in favour of the Applicants may give them certain rights in the 46 acres and/or the 54 vacant lots or may at least cause a reversal of the decision to put

up the 54 lots for sale on the open market; these issues include, the legitimate expectations of the Applicant, the alleged irrationality of the decisions, matters like bad faith, improper motives, irrelevant considerations and alleged breaches of natural justice; these issues are clearly public law issues and must be dealt with accordingly.

In the circumstances I find that the decision to put the 54 vacant lots on the open market rather than to have them vested in the Applicant is one that, on the facts of this matter, is amenable to judicial review.

IRRATIONALITY

32. In the Re-Amended Grounds (see paragraph 11 above) the challenge to the decisions of UDECOTT/ODL based on irrationality was mixed in with the ground of illegality and the question for decision could be simply stated as whether the decision not to vest the 46 acre parcel of land in the Respondent (and by implication, the decision to put the vacant 54 lots for sale on the open market) is irrational.

33. The difficulty with this ground is that in the Applicant's second set of written submissions which were voluminous and extensive, one of the first points stated is that the Applicant's case "resolves itself" into two issues – namely (1) The entitlement to a lease of the 46 acres of land and (2) whether the applicant enjoyed a legitimate expectation to certain matters. The question of the irrationality of the decision not to vest the 46 acre parcel of land in the Application was not addressed; neither did Counsel make reference to it in the course of oral submissions, hence one could assume that the ground was abandoned. Even in the first set of written submissions, there were no clear references to irrationality as a separate ground of review nor was a section devoted to this.

Even though it seems that the ground was not pursued by Counsel for the Applicant, I still, propose to deal with it for the sake of completeness.

34. The Applicant submitted that UDECOTT and ODL'S stated reason for wanting to put the 54 vacant lots on the open market was to recover the expenditure made on the relocation project. However, given the cabinet decision in Minute 1 at b (ii), that the remaining 104 lots of the entire 150 acre parcel vested in ODL was to be developed and sold on a private commercial basis, UDECOTT/ODL could and should have sought to recoup their expenditure from a sale of these 104 acres of land. It was further submitted that no attempt was even made to examine ways of raising money by dealing with these 104 acres of land and therefore, the decision to resort to a sale of part of the 46 acres which were earmarked for displaced villagers as a first resort, was unreasonable.

The Applicant also submitted that UDECOTT/ODL could, and should, have even gone back to the government or the cabinet to seek the further financing and/or refinancing of their expenditure and even to seek cabinet approval for a sale of the 54 vacant lots before making this decision and their failure to refer to the government and/or cabinet was unreasonable.

35. Counsel for UDECOTT and ODL contended that the ground of irrationality is now commonly described as Wednesbury unreasonableness and that the court must bear in mind the statement of Lord Greene M.R. in that case to the effect that "the power of the court to interfere in each case is not as an appellate authority, but as a judicial authority which is concerned and concerned only to see whether ...(a body or decision maker has) contravened

the law by acting in excess of the powers which Parliament has conferred on them.” (See Associated Provincial Picture House Ltd. v Wednesbury Corporation 1948 1 K.B. 223. Counsel went on to state that the Court is not supposed to substitute its own views for those of the decision maker but only to see whether the matters considered by the decision maker were reasonable in the sense of being one which any reasonable person could arrive at.

36. Counsel then referred to the facts of the case and noted the factors considered by UDECOTT and ODL namely; (a) the financial constraints under which they operated including the mandate to repay the government and other creditors and the threat of litigation and (b) the fact that the relocation of displaced villagers had been completed by the use of 26.7 acres of the 46 acre parcel, thus leaving the remaining 19.3 acres to be dealt with by UDECOTT/ODL. Given these reasons, counsel submitted that the decision was not irrational in the sense of being unreasonable.

In support of the reasonableness of the financial factors considered, Counsel referred to R v Westminster City Council ex p Monahan 1990 1 Q.B. 827 where it was held that “since in reality financial constraints on the economic viability of desirable planning developments were unavoidable, it would be unreal and contrary to common sense to exclude them from the range of considerations which might properly be regarded as material in determining planning applications.”

37. I agreed with the submissions of Counsel for UDECOTT and ODL on the issue of the reasonableness of the matters considered, especially so the financial constraints, which argument has strong precedent in the Ex P Monahon case cited above. With respect to the reasonableness of the consideration of the satisfactory relocation of displaced villagers, I noted that even though the cross-examination of the deponents on affidavits filed on behalf of UDECOTT and ODL revealed some divergence as to who was a displaced villager it was clear that all of them were of the view that extended families did not per se qualify as displaced villagers and Mr. Agard's opinion that the relocation exercise had been completed, remained unshaken. Further, as was stated before, (see paragraph 24 above) there was uncontroverted evidence from an attorney-at-law, acting on behalf of the Applicant which stated that all displaced Oropune villagers entitled to relocation had been relocated.

In these circumstances, I would be wrong to substitute my preference of what was reasonable over that of UDECOTT/ODL in light of the fact that the matters they considered were not irrational in the sense of Wednesbury unreasonableness referred to earlier, and the challenge to the actions of UDECOTT and ODL on this ground fails.

LIGITIMATE EXPECTATION:

38. The allegations with respect to the deprivation of a legitimate expectation vary as against UDECOTT/ODL and as against the 3rd Respondent.

Even as against UDECOTT/ODL, the allegations made were changed as between the written submission and the oral arguments.

In the second set of written submissions of the Applicant filed on 13th January 2003 at page 24, it was alleged that the expectations created by UDECOTT/ODL were to be gathered from two letters written by UDECOTT dated 17th October 2001 and 6th December 2001, and these were (1) An expectation that the Applicant would be granted a lease of the 46 Acre parcel of land (2) an expectation that the grant of the lease would not be denied without the right to a fair hearing being exercised in the Applicant's favour. Further it was stated that the "expectation" at (1) was a substantive expectation and the "expectation" at (2) was merely procedural.

In oral submissions on the 17th February 2003, it was submitted that the Applicant would be contending that it was entitled to rely on the 4 expectations as mentioned in the grounds (see paragraph 11 above) and that, of these, 6 a,b and c were substantive expectations, and 6d was procedural.

39. As against the 3rd Respondent, it was contended that the decision of the Minister and/or his officials to exclude the Applicant from further participation in the allocation of houses in conjunction with UDECOTT/ODL without giving the

Applicant a hearing, was a clear breach of their legitimate expectation to a fair hearing.

40. A fair amount of argument had been addressed to the question whether the doctrine of legitimate expectation only applied to procedural matters, e.g. to expectations to be given an opportunity to be heard or to have a point of view properly considered (see e.g. A.G. for Hong Kong v Ng Yuen Shui (1983) 2A.C. 629) as opposed to a substantive legitimate expectation, whereby a promise may have induced an expectation of a substantive benefit being granted, and to frustrate that expectation could be so unfair that it could amount to an abuse of power, in which case, the Courts would give effect to the expectation unless there was a sufficient overriding interest not to do so (see e.g. R v Secretary of State, Ex Parte Hamble (1995) 2All ER 714).

However, upon further consideration of the case R v North and East Devon Health Authority, Ex Parte Coughlan (2001) 2 WLR 622, which was cited by Counsel for the Applicant, all Counsel agreed that the doctrine of legitimate expectation applied to both procedural and substantive expectations.

41. An interesting twist of argument was propounded with respect to ground 6(c) namely, the expectation that the Applicant was to have equity holding in UDECOTT/ODL. In the written submissions and even in oral submissions made on the 17th February, 2003, Counsel for the Applicant suggested that this expectation as stated in the Amended Grounds was the same as that

mentioned in Minute 1 at (b) (v). However, on the 18th February 2003, Counsel for the Applicant stated in oral submissions that the expectation was to have the equity holding in UDECOTT/ODL satisfied by a grant of the 46 acre parcel of land to the Applicant.

42. On behalf of UDECOTT/ODL, it was contended that the letters mentioned at paragraph 38 above contained no clear and unambiguous representation; in fact the representations in the letter were contradictory and could not give rise to any legitimate expectation. Secondly, the applicant did not satisfy the criteria of having been induced by the representation to assume any sufficient or any commitments as a result of such representations so as to make it unfair for UDECOTT/ODL to resile from them. Thirdly, assuming that any expectations were created this was a case where there were overriding factors which allowed for the reversal of the policy which created the expectations.

43. On behalf of the 3rd Respondent it was argued that there was never any representation from the Minister which could create a legitimate expectation. In so far as any representations were made by or on behalf of the State, these emanated from the Cabinet and since the Attorney General was not a party to these proceedings, it followed that no relief could be obtained against the State in this matter. Counsel referred mainly to the Privy Council decision in C.O.

Williams Construction Ltd v Blackman [1995] 1 WLR 102 in support of this contention.

Counsel also argued that in so far as it was now being alleged that the 3rd Respondent was somehow involved in the decision to prevent the Applicant from further participation in the allocation of houses in the New Oropune Gardens, the case was ill founded as no relief was sought against the 3rd Respondent in respect of this allegation. Such relief as was sought was to be found in relief (d) of the Amended and Re-Amended Statement in support of this application which related only to the cabinet decision.

44. In reply to the contentions of Counsel for the 3rd Respondent, Counsel for the Applicant referred to a letter written by the Permanent Secretary in the Ministry of Integrated Planning and Development dated 4th April 2002 which advised that the Applicant was to cease with immediate effect from the allocation of any houses at the New Oropune Gardens, which decision, it was alleged, was later confirmed by cabinet on the 11th April 2002. It was submitted that this letter being written by an agent of the Minister, was evidence of a decision by or behalf of the 3rd Respondent to exclude the Applicant from the distribution of houses, which decision was reviewable. Counsel also indicated that he would Amend the reliefs to ask for the necessary Relief against the 3rd Respondent (which was never done) and further, submitted that, in any event, the Court could of its own motion grant relief as against the 3rd Respondent if it saw that a proper case was made out against it.

45. Even though the expectations are stated cumulatively in the Amended grounds, ground 6 (b) (to have vested in the Applicant 46 acres consisting of 149 housing units on 26.7 acres as well as the remaining 18.3 acres) covers ground 6 (a) (to have the 54 lots vested in the Applicant to sell the displaced Oropune villagers); further, in so far as it was also alleged that ground 6(c) (to have an equity holding in UDECOTT) was to be met by the vesting of the 46 acre parcel in the Applicant, this ground is virtually the same as ground 6(b).

Legitimate Expectations as against UDECOTT/ODL

46. With respect to UDECOTT and ODL, as was previously stated, Counsel for the Applicant submitted that the source of the expectations was the representations contained in the letters from UDECOTT dated 17th October, 2001 (hereafter referred to as “the First Letter”) and 6th December, 2001 (hereafter referred to as the “Second Letter”). Since they are very material for the decision in the case they are set out hereunder:-

“October 17, 2001

Ms. Diane Balla
President
Oropune Village Co-operative Soc. Ltd.
C/o Office of the Honourable Minister
Ministry of Integrated Planning & Developemnt
Eric Williams Finance Building
Independence Square,
Port-of-Spain.

Dear Ms Balla:

Oropune Gardens – Phase 1

I acknowledge receipt of your letter dated October 15, 201 conveying decisions taken at a meeting with Honourable Minister John Humphrey on September 27, 2001.

Please be advised that it is UDECOTT's intention to lease the parcel of land comprising 46 acres to the Oropune Village Co-operative, on terms and conditions to be agreed, and to authorize the Co-operative to attend to the sale of the additional 54 lots.

Formal authorization will be conveyed to the Co-operative as soon as the Board of Oropune Development Limited has determined the terms and conditions of the lease and arrangements for the receipt of payments for the additional lots have been finalized.

Yours sincerely
URBAN DEVELOPMENT CORPORATION
OF TRINIDAD AND TOBAGO LIMITED

/sgd.
WINSTON AGARD
CHIEF EXECUTIVE OFFICER

WA:mag
c.c. Hon. Minister John Humphrey
Mr. Ameed Edoe
Mr. Keith Maharaj

"December 06, 2001

Mr. Chan Chadeesingh
R.C. Chadeesingh & Company
Attorneys-at-Law & Notary Public
29 Ramsaran Street
Chaguanas

Dear Mr. Chadeesingh:

Oropune Development

The Board of Oropune Development Limited (ODL) has approved the lease of 46 acres of developed land at Oropune Village to the Oropune Village Co-operative for a period of 99 years.

The lands are to be distributed to the displaced villagers of Oropune Village in accordance with the decision recorded at Cabinet Minute No. 383 dated February 23, 2000.

As part of this arrangement the Board of ODL has agreed to sell fifty-four (54) single family residential lots on 18.8 acres, being part of the 46-acre parcel, to members of the Oropune Village Multi-Purpose Co-operative Society Limited at \$5.00 per square foot. ODL will establish an account at a commercial bank, which will be managed by both ODL and the Co-operative. Purchasers must build their houses within two (2) years. They will not be permitted to resell the lots. If houses are not constructed within 2 years, the deeds will be cancelled and the lots in question re-purchased by ODL by ODL at \$5.00 per square foot.

Please prepare an appropriate lease to effect the transfer of the land to the Co-operative. All legal charges will be met by the Co-operative.

Yours sincerely
URBAN DEVELOPMENT CORPORATION
OF TRINIDAD AND TOBAGO LIMITED

WINSTON AGARD
CHIEF EXECUTIVE OFFICER
Wa:MAG

cc: Honourable John Humphrey
Mr. AmeerEdoo
Ms. Diane Balla

47. From a reading of both letters, it is clear that UDECOTT/ODL were not making a promise to have an equity in either or both of them vested in the Applicant as was understood in Minute 1 at (b) (v). The mere transfer of land owned by a company is not the granting of an equity in the company. Such an equity in UDECOTT/ODL could have been achieved by, for example, granting shares to the Applicant in them or by creating a charge over the company to

secure the equity to be granted according to Minute 1; the letters contained no representation by UDECOTT/ODL as was contended in ground 6(c).

Neither can it be said that the letters were evidence of a representation by UDECOTT/ODL that the Applicant was to distribute housing units on the 18.3 acres of land in conjunction with them as is stated in ground 6(d); according to paragraph 3 of the Second Letter, the Board was to sell 54 residential lots to members of the Applicant with no mention of UDECOTT/ODL retaining a power or the right to distribute such housing lots in conjunction with the Applicant.

48. With respect to the representations at grounds 6(a) and (b) and, assuming that the representation at ground 6(c) could be interpreted to include a representation that the vesting of the 46 acres of land in the Applicant was the mechanism to be used to satisfy its equity "entitlement" (see paragraph 41 above), an examination of the first letter showed that it only referred to an "intention" on the part of UDECOTT to lease the 46 acres to the Applicant. As such it was not enough to bind the Boards of UDECOTT/ODL as a representation made by them to the Applicant.

Even if one assumed that the First Letter could be read as a representation, it had to be read in conjunction with the Second Letter, which itself, and when read together with the First Letter, revealed certain ambiguities and contradictions:-

(a) While it was stated that the Applicant was to get a 99 year lease of the entire 46 acre parcel of land, the second paragraph of the second letter indicated that the lands were to be “distributed to the displaced villagers of Oropune Village” in accordance with Minute 1.

Was the Applicant supposed to pay for the 99 year lease? If so, what was the price or rate to be applied? In what manner was the land to be distributed to the displaced villagers? What area of land would a displaced villager get? What kind of interest in land was a displaced villager to get? Was it to be by way of a sub-lease of the land, a licence to occupy, or an assignment of the entire remaining leasehold interest of the Applicant in the particular portion of land? What was the term of years, if any which such a villager was to get?

The Second Letter also provided that if a house was not constructed by the purchaser of the land, ODL would repurchase the land at \$5.00 per square foot?

From whom would ODL re-purchase the land? The sub-purchaser, the Applicant or from both pro-rated? Was the lease to such a sub-purchaser to be forfeited to the Applicant in the event of his failure to build a house?

(b) An examination of the bye-laws of the Applicant which were exhibited to the affidavit of Radha Carrie Maharaj, showed that membership of the Applicant Society was determined as follows:-

“Membership shall be voluntary and open to:

- (a) all persons of good character aged 16 years and over who are residents or hold

lands, property and other interests in Oropune Village. (my emphasis).

- (b) Permanent employees of the Society who are 16 years of age and over; and
- (c) Other registered Co-operative Societies in Trinidad and Tobago”

This grouping was sufficiently wide to include persons who were not displaced villagers and since it was stated in the 3rd paragraph of the Second Letter that the members of the Applicant were entitled to a residential lot, it now meant that even persons and Societies who were not displaced villagers would now be entitled to claim to a lot on the 18.3 acres of land, contrary to the intention of cabinet as stated at paragraph 2 of the Second Letter, that the lands were to be distributed to displaced villagers.

Additionally, this situation left open the important questions, as to who, of this new class of persons, (members of the Applicant) were to get the lots? and who was to decide on the disqualification or on the choosing of entitled Applicants?

Further, since a new class was being created, whose interests may have conflicted with those of the displaced villagers, UDECOTT/ODL could never feel secure in selling any lots to displaced villagers since this could trigger litigation by persons who were also part of the larger class of “members of the Applicant” who were not necessarily displaced villagers, yet who felt they were entitled to purchase a lot; similarly, a sale to a person who was not a displaced

villager could see UDECOTT/ODL being faced with litigation by a displaced villager or villagers to set aside such a sale.

Finally assuming that this thorny issue could somehow be sorted out, and UDECOTT/ODL could proceed with the sales of the lots, (as was stated before) what interest would vest in the purchasers and what interest would remain for the Applicant?

(c) Even among the “displaced villagers” there now is and, even at the time of the letters, when the 149 houses were distributed, was, a serious division. There are some persons who claim to have been displaced villagers, who were excluded from the relocation exercise and who, are not members of the Applicant. Their interests are so violently opposed to those of the Applicant that they have since formed themselves into an action group to fight the alleged irregularities committed by the Applicant with respect to the allocation of the 149 houses. They too, as displaced villagers, could be the source of similar problems as were just mentioned at (b) above.

49. There is no necessary commonality of interest among persons who may now be entitled to apply for a housing unit on the 18.3 acre parcel of land. In fact, some of the interests of those so entitled are in conflict with each other. This factor works against the inference of a legitimate expectation in this case.

In the Coughlan case (cited above) the relevance of a commonality of interest was referred to by Lord Woolf M.R. when he stated at page 650 (a) that “when a promise is made to a category of individuals who have the same

interest, it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict....”

50. In all the circumstances, the First and Second letters which were relied on by the Applicant as the source of representations, not only failed to address many fundamental issues and conflicts but also created new conflicts and ambiguities to the extent that any representations allegedly contained in them are to be considered as nugatory and so, they cannot be the source of any legitimate expectations for the Applicant.

51. Assuming that I am wrong in my interpretation of the effect of the letters and that there were representations from UDECOTT/ODL which could possibly found a legitimate expectation, I next consider the submissions of Counsel for UDECOTT/ODL that there was no induced reliance on the representations which would now make it unfair for UDECOTT/ODL to resile from them.

52. Before considering the issue, it may be apt to refer to the facts of Re Coughlan; in summary, the Applicant was a tetraplegic, doubly incontinent, partially paralysed in the respiratory tract and suffered severe headaches. She and seven other comparably disabled persons had been moved from a hospital to a facility known as Mardon House, which the health authority assured them would be their home for life. Some years later, the health authority purported to

close Mardon House and this decision prompted the application to the Courts.

Part of the ratio of the case which is cited in the headnote is:-

“where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not merely procedural ... the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power.” (See pg 645 C-D). (my emphasis).

Further, one of the important factors in the case was the promise that Mardon House was to be the Applicant’s home for life and that based on that promise (inter alia) the Applicant had been moved out of the hospital where she had been. At page 656(B). Lord Woolf M.R. stated “The promise was relied on by Mrs. Coughlan. Strong reasons are required to justify resiling from a promise given in those circumstances.”

53. Counsel for the Applicant agreed that he could not point to anything that they had done in reliance on the alleged representations. However, he argued that in this case it was not necessary to point to any such action since the Applicant’s failure to do anything was a direct result of the failure by UDECOTT/ODL to take the necessary first steps that would have allowed the Applicant to act, for example, the opening of an account at a commercial bank and the execution of a lease to the Applicant.

Counsel for the UDECOTT/ODL responded by referring to citations from Re Coughlan (see paragraph 52 above) and stating that there were several things which the Applicant could have done, such as applying for financing to

purchase the extra 54 lots. Counsel also submitted that the fact that the Applicant did nothing suggested that they too realized that the representations in the letters were not sufficiently clear to encourage such reliance.

54. I hold that the Applicant could and should have taken steps to follow up on the alleged representations in the letters. For example, they could have approached financial institutions for funding, they could have followed up on UDECOTT/ODL to grant the lease or to clarify the terms of any new lease or other arrangements for the vesting of the land, they could have started the process of selecting the persons who would be the beneficiaries of the housing lots and generally do acts to put things in place for the eventual grant of an interest in the lands. Their failure to do anything suggested that they did not place much reliance on the letters in such a manner as to suggest that it would now be unfair for UDECOTT/ODL to resile from any alleged representations made in the letters.

55. Even if I am wrong on this issue of the effect of a lack of inducement or reliance on the alleged representation in the letters, there is still another hurdle for the Applicant to overcome.

In Re Coughlan the starting point for the consideration of a substantive legitimate expectation (which is re-iterated in the headnote) was stated in paragraph 55 thereof (pg 644 G):

“Legitimate expectation – the court’s role

it is necessary to begin by examining the court's role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function." (my emphasis).

Also, at paragraph 82, page 664D, this point was re-inforced at the end of the consideration of the authorities

"82. The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardizing the important principle that the executive's policy making powers should not be trammelled by the courts... Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data in other words, as not ordinarily open to judicial review."

These are a clear statements (and reasons why) the doctrine of substantive legitimate expectation applies only to public bodies when they are exercising a statutory function.

Therefore, even assuming that UDECOTT/ODL can be described as public bodies, all Counsel admitted in this case that UDECOTT/ODL were not exercising a statutory function when they made the alleged representations. In the circumstances, it does not seem that the substantive legitimate expectations in grounds 6(a), (b) and (c) would arise for consideration in this case.

56. Even if the Applicant could establish a substantive legitimate expectation to have the entire 46 acre parcel of land vested in it, the decision in Re

Coughlan indicates that such a promise may be resiled from when there is a sufficient overriding interest.

In the present matter there are allegations that there may have been serious abuses by the Applicant and its members in the allocation and distribution of the 149 houses on the 26.7 acre portion of the 46 acre plot parcel of land; these include, the sale of houses for profit, nepotism in the distribution of the houses and that other bona fide displaced villagers were excluded from the distribution and allocation process. In fact there is evidence filed on behalf of UDECOTT and ODL that when they attempted to investigate these allegations the Applicants not only refused to assist in the investigations but adopted an obstructionist attitude to the investigations. Further, despite the cross-examination on the deponents of affidavits filed on behalf of UDECOTT/ODL the investigations conducted so far have revealed that the allegations of abuse may not be unfounded and, at least, that further investigation is necessary. In particular, there seems to be clear evidence that at least 16 or 17 of the completed houses which were purportedly allocated to displaced villagers were unoccupied and vandalized and had to be secured by UDECOTT/ODL.

57. In these circumstances, it would be foolhardy for UDECOTT/ODL to vest the entire 46 acre parcel of land in the Applicant at this time, since this could expose them to litigation by the alleged displaced villagers who have been excluded from the distribution of lots and who are supposed to be a

fundamental part of the future distribution of housing lots. What is worse, is that these “disgruntled” and displaced villagers would be able to allege that UDECOTT/ODL had knowledge of and/or even participated in a fraud perpetrated on them.

Needless to say it would also not be in the public interest and/or contrary to the duties of UDECOTT/ODL to hand over the housing units under the cloud of such serious and disturbing allegations of impropriety, which seem to have some merit, without at least following up on the investigations.

Therefore, it seems to me that in addition to the matters raised previously there is a sufficient overriding interest at this stage which would entitle UDECOTT/ODL to resile from any promise which it may have made that could have given rise to any substantive legitimate expectations.

58. Another aspect of legitimate expectation as against UDECOTT/ODL was dealt with by the Applicant.

In oral submissions on the 17th February, 2003, it was stated that grounds 6a, b, and c were substantive legitimate expectations and ground 6d was a procedural legitimate expectation.

For the sake of clarity it is worth repeating that ground 6(d) referred to a legitimate expectation of the Applicant “to distribute housing units on the 18.3 acres of land being the remaining portion of the 46 acres in conjunction with the first/second Respondents (UDECOTT/ODL)” (my emphasis). This was a reference to dealings with the 54 vacant lots on the 18.3 acre parcel of land.

However, in the second set of written submissions of the Applicant, at page 24, it was stated that the second legitimate expectation which the Applicant was deprived of and which was stated to be a procedural expectation, was “an expectation that the grant of the lease (of the 46 acre parcel) would not be denied without the right to a fair hearing being exercised in its favour.” This was a shift of argument which was not covered by the Amended Grounds. Nevertheless, in deference to Counsel I will deal with both arguments.

59. In so far as the submissions dealt with the expectation of a right to distribute housing units on the 18.3 acres of land in conjunction with UDECOTT/ODL, as was stated to be the position in ground 6(d), I have already found that no such representation was made in the two letters. (See paragraph 47 above).

Assuming that I am wrong on this and assuming also that the argument in the second written submissions (relating to the entire 46 acre plot) was the case that was really being pursued by the Applicant, it would be necessary to consider whether either or both of the two arguments that were now being advanced in support of a procedural legitimate expectation were in fact made out. In this regard it would be helpful to refer to Re Coughlan again for a statement as to the Juridical basis of a procedural legitimate expectation. At page 645, paragraph 54, Lord Woolf divided this procedural expectation in two categories as follows:-

“(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see In re Findlay [1985] A.C. 318; Reg. V. Secretary of State for the Home Department, Ex parte Hargreaves [1997] 1 W.L.R. 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentionous that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.”

60. With respect to the first type of procedural expectation which is based upon “Wednesbury” principles, this has already been dealt with under the heading “IRRATIONALITY” at paragraphs 32 to 37 above.

With respect to the second type of procedural expectation, it should be observed that this expectation is usually framed in terms of there being a duty to have proper consultation rather than in terms of there being a fair hearing. In any event, in the present matter, the fair hearing allegation was pursued in terms of the duty to have proper consultation.

61. Since the alleged procedural expectations were said to have arisen from the two letters cited at paragraph 46 above, my previous findings that the letters were not such as contained clear and unambiguous representations which could give rise to legitimate expectations in favour of the Applicant, would also apply to these alleged procedural expectations (see paragraphs 47 to 50 above); hence there would also be no such procedural expectation to consultation upon matters where no legitimate expectations were created.

62. Nevertheless, assuming that the Applicant could get past this hurdle and could rely on a representation as to the grant of a lease of the 46 acre parcel, and/or the right to distribute housing units on the 18.3 acre parcel of land in conjunction with UDECOTT/ODL the question would arise as to whether there was any proper consultation before the decision was made to resile from the alleged representations?

63. Even on the evidence of the Applicant, it is clear that they were consulted before any decision was made with respect to the use of the entire 46 acre parcel of land (which would also encompass any proposals with respect to the 18.3 acre parcel which was part of the 46 acre parcel). In Ms. Balla's first affidavit of the 30th April, 2002, paragraphs 12 to 21 and the supporting documents (D.B. 7 to D.B. 18) give a history of UDECOTT/ODL giving notice of the proposed change of decision in respect of the land use

plans, along with the Applicant's responses. This process of notification and response or consultation covered a period from May 2001 to March 2002.

64. Further, the evidence of Mr. Agard in his first affidavit at paragraphs 23 to 26 shows that UDECOTT/ODL not only kept the Applicant apprised of the proposed land use change, but also invited them to comment on it. Additionally, he stated that when UDECOTT/ODL began to discover serious allegations of irregularities in the allocation and distribution of houses and attempted to investigate these allegations, the Applicant pursued a policy of non-co-operation and obstruction (see also the affidavit of Mr. Nigel Williams). This indicates that, having been given the opportunity for further consultation, the Applicant willfully refused the same. How then can they be heard to complain about the lack of consultation when they are, in part, the authors of this complaint?

65. In the circumstances, assuming that the Applicant could establish a procedural legitimate expectation to consultation before any change of decision was made with respect to the use of the all or any part of the 46 acre parcel of land in question, then, on the evidence, there was consultation with the Applicant before the decision was finally reversed, and, if there was a shortcoming in the consultation process, it arose from the deliberate acts of the Applicant in this regard so that there is no merit in the complaint that there was a breach of their procedural legitimate expectations.

Procedural Legitimate Expectation as against the Third Respondent

66. There has been much confusion in the way that the Applicant has put forward the case on the ground of legitimate expectation as against the Third Respondent.

67. The Applicant's case on grounds 6(a) (b) and (c) were allegations against UDECOTT/ODL only; they were based on the letters emanating from UDECOTT (cited at paragraph 46 above). This was re-iterated in the second set of written submissions of the Applicant at pages 24 and 29. Further, there was no evidence that the Third Respondent held out any of the promises alleged to have been made at 6 (a), (b) and (c) of the grounds. The only case made out against the Third Respondent in so far as legitimate expectations were concerned, was in respect of ground 6 (d).

Ground 6 (d) stated the allegation of an expectation by the Applicant "to distribute housing units on the 18.3 Acres of land being the remaining portion of the 46 acres....." (my emphasis).

In the second set of written submissions of the Applicant at page 31, the case was made out as follows:- The decision of the Third Respondent to exclude the Applicant from the allocation and distribution of completed houses at the New Oropune Gardens was a clear breach of the Applicant's legitimate expectation to a fair hearing." (my emphasis). The case had now changed focus from the decision in respect of housing units on the vacant lots on the

18.3 acre parcel of land to a decision in respect of houses on the 46 acre parcel.

68. In further elaboration of the second set of submissions by the Applicant (at page 47 thereof), the alleged decision of the Third Respondent was said to have been communicated to the Applicant by letter dated 4th April 2002 and confirmed by Cabinet minute of 11th April 2002.

The letter of the 4th April 2002 written by the Permanent Secretary in the Ministry of Planning and Development referred to Minute 2 and spoke of the decision in respect of the distribution of houses and concluded “I advise that Oropune Multi-Purpose C-operative Society Limited shall cease immediately to allocate any of the houses at the new Oropune project.” (Again, it should be noted that the case was being pursued with respect to the distribution of houses and not housing units).

The cabinet minute of 11th April 2002 (just referred to) provided:

- “(a) with immediate effect the allocation and distribution of the completed houses at the new Oropune Village Project be no longer managed by the Oropune Multi-purpose Co-operative Society Limited, in conjunction with the Urban Development Corporation of Trinidad and Tobago Limited (UDECOTT)/Oropune Development Company Limited;
- (a) UDECOTT/Oropune Development Company Limited manage the allocation and distribution of the houses at the said Oropune Village Project and take the necessary

measures to provide, as soon as possible, the required tenure to bona fide villagers displaced by the Piarco Airport Construction Project.’
(my emphasis)

Both the letter of 4th April 2002 and the cabinet minute of 11th April 2002, referred to houses at the site and not housing units. Further, they were written at a time when the only houses in existence at the site were on the 26.7 acre parcel of land and not on the 18.3 acre parcel (the 54 vacant lots). The evidence also revealed that at the time, some 17 completed houses on the 26.7 acre parcel had been abandoned and/or vandalized.

Therefore, the case as argued in the written submissions related to the completed houses which were standing on the 26.7 acre parcel and not to housing units on the 18.3 acre parcel (the vacant lots).

Further, no relief was sought as against the Minister in relation to anything stated at ground (6d); such relief was sought against the cabinet decision, and the Attorney General was never made a party to the action (and see C. O. Williams v Blackman Op. cit).

Given these matters, it appears to me that ground 6(d) (and the case against the 3rd Respondent) had been abandoned.

69. Nevertheless, in deference to Counsel, and the time devoted to this new argument, I will still address it in a summary way.

70. As was submitted by the Applicant, S75 of the Constitution provides that the general direction and control of government is vested in the cabinet. Assuming that the Minister (the Third Respondent) made a decision that abrogated the legitimate expectations of the Applicant, as is alleged in ground 6(d), his decision was made on the 4th April 2002 and the cabinet decision to the same effect (see paragraph 68 above) was made on the 11th April 2002. This later decision superceded the earlier one and there has been no evidence nor allegations of prejudice suffered in between the short time span between the decisions. That being the case, the decision which really affects the Applicant is the later cabinet decision. No useful purpose would be served in granting any relief from the decision of the Minister. At page 41 of the second written submissions, the Applicant even recognizes that this is a valid ground for the refusal of relief and the cases Williams v Home Office [1981] 1 All E.R. 11 21 and R v Governors of Fairfield School ex parte W (1998) COD 10b, are cited in support of the proposition.

71. Even worse than this, is the fact that despite all the time and argument devoted to this matter from as early as the injunctive stages, no attempt has been made to join the Attorney General as a party to the proceedings so as to get relief against the cabinet decision.

72. In all the circumstances, the Applicant's case as against the The Respondent on this ground must fail.

NATURAL JUSTICE

73. With respect to the breach of natural justice as alleged in the Amended grounds 2, 3 and 4 (see paragraph 11 above), Counsel for the Applicant, in response to questions by me on the opening day of the last set of oral submissions on the 17th February 2003, candidly admitted that he did not pursue these grounds in his submissions as a separate attack on the decisions made. He stated that in so far as there was any breach of the rules of natural justice, it related solely to the breach of the Applicant's legitimate expectations to a fair hearing as was stated at 6(d). That being the case, I have already dealt with this aspect of the case at paragraphs 58 to 72 above and have found that the case failed.

Even assuming that there can be some oblique reference to grounds 2, 3 and 4, in the written submissions of the Applicant, I, have already found that there was proper consultation by the Respondents and hence they were accorded a fair hearing (see paragraphs 63 – 65 and paragraphs 70 above).

In the circumstances the challenge on this aspect of the case must fail.

BAD FAITH, IMPROPER PURPOSE, IRRELEVANT CONSIDERATIONS

74. This composite ground of challenge is set out at ground 7 of the Amended grounds (see paragraph 11 above) and for ease of reference the main paragraph is set out again:-

“The First and Second Respondents are motivated by bad faith/improper purpose and/or irrelevant considerations inter alia:-“

There then follow 7 “particulars” of such action.

What is of note is that neither in the main paragraph just quoted nor in the 7 “particulars” which follow is there a reference to any decision, action or omission which is alleged to have been made, taken or omitted in bad faith, for an improper purpose or taking into account irrelevant considerations. What is even worse is that there is no relief claimed from any decision, action or omission which is specifically tied in to those “grounds”.

In such a case the very vague allegations in this amended ground do not refer to anything which can be struck down by a court.

75. In deference to Counsel, I nevertheless, propose to infer from the written submissions of the Applicant that the allegations of bad faith, improper purpose and irrelevant considerations are an attack on the investigations conducted and yet to be conducted by UDECOTT/ODL into the allegations of impropriety that have been made against the Applicant. (See the first written submissions of the Applicant at pages 14 -17 and the second written submissions of the Applicant at pages 36-39).

Upon reading these paragraphs in the written submissions of the Applicant, it appears that the Applicant is dis-satisfied with the purpose behind the investigation and the methods being used to conduct the investigation. Even assuming, for the moment, that the complaints of the Applicant are well founded, there is no relief sought against UDECOTT/ODL that flows from the investigation e.g. to stop it, to quash its decisions or to ensure that the rules of fairness are followed. All the reliefs in this matter are related to the grant of the entirety or part of the 46 acre parcel of land to the Applicant. In the circumstances this “ground” is irrelevant to the case.

76. Further, my previous findings that the decisions of UDECOTT/ODL to change the land use plans for the vacant lots were not irrational (see paragraphs 32 to 37 above) significantly affects this composite ground No. 7, since any complaint that the decisions which have flowed from the investigations to date were actuated by irrelevant considerations have been shown to be ill founded.

77. Assuming that I am wrong on all this, I now propose to examine the particulars of the allegations of bad faith/improper purpose and irrelevant considerations in a summary way.

Allegation 7(i) “Acting on rumour and/or upon allegations without first investigating them and/or giving the Applicant an opportunity to explain”

This allegation is contradictory, since UDECOTT/ODL acted quite correctly, in my view, by attempting to investigate the very serious allegations of nepotism, financial irregularity etc being made against the Applicant (see paragraph 56 above) rather than by simply acting upon such rumours without an investigation.

As for the allegation that UDECOTT/ODL failed to give the Applicant an opportunity to explain, as was stated before, these are not the true facts. What actually happened here is that the allegations were put to the Applicant and the opportunity given to them to respond and then when UDECOTT/ODL attempted to do further investigations the Applicant became un-co-operative and obstructionist (see D.B. 16 - 21, the first affidavit of Winston Agard paragraphs 23 - 26 and the affidavit of Nigel Williams).

78. Allegation 7(ii) “Failing to carry out independent investigations.”

This complaint cannot be sustained as the evidence is that UDECOTT/ODL have been trying to carry out such investigations and have referred matters to the Police; they have even gone to other neutral parties such as the Electricity Commission, The Elections and Boundaries Commission and the Licensing Authority of the Ministry of Transport to the ascertain facts.

79. Allegation 7(iii) "Taking into consideration purely political matters."
No evidence has surfaced of this allegation.

80. Allegation 7 (iv) "Failing to meet with the Applicant before making decisions relating to the 46 acre parcel of State lands."

One wonders immediately which "State lands" are concerned since the lands belonged to Orange Grove National Company Ltd. In any event assuming that the reference is to the lands in question in this matter, this allegation has already been dealt with at paragraphs 58 –65 above under the section relating the Legitimate Expectations and had been shown to have no merit.

81. Allegation 7(v) "Exceeding the limits of its authority in the exercise of its powers."

This allegation has been dealt with at paragraphs 12 – 27 above, under the heading "Illegality" and was shown to have no merit.

82. Allegation 7 (vi) "At all material times the Applicant represented the interests of the Oropune Villagers affected by the Piarco Airport development and was charged with others with the planning/distribution/allocation of houses, housing lots and

compensation payable to those affected by the Piarco Airport development;”

This is a rolled-up statement of fact, opinion and allegation, some of which is irrelevant and unsupported by evidence. In any event it is not a complaint nor allegation of bad faith, improper purpose or irrelevant considerations against any decision or any person which merits any investigation.

83. Allegation 7(vii) “The Respondents have deprived the Applicant of procedural fairness.”

This has already been dealt with in 7(i) above, and in so far as it purports to go beyond the ambit of 7 (i) there have been no separate arguments except for those encompassed under Legitimate Expectation which have been dealt with and shown to have no merit.

CONCLUSION:

84. In all the circumstances this application is dismissed and I will entertain argument on the issue of costs.

Dated this 28th Day of May 2003

Justice Gregory Smith
JUDGE