THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-00715

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES, 1995 (AS AMENDED) AND PURSUANT TO SECTION 6 OF THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE DECISION OF THE TRINIDAD AND TOBAGO CIVIL AVIATION AUTHORITY CONTAINED IN THE LETTER DATED MARCH 8, 2016 WRITTEN BY THE DIRECTOR OF CIVIL AVIATION

BETWEEN

PHI AMERICAS LIMITED

Claimant

AND

THE TRINIDAD AND TOBAGO CIVIL AVIATION AUTHORITY

Defendant

Before The Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Jeremie SC and Mr. Garcia instructed by Ms. Lutchman for the Claimant
2. Mr. Martineau SC and Mr. Reid instructed by Mr. Lawson for the Defendant

Date of delivery: April 27, 2016

DECISION

1. Before the Court for its determination is an application for judicial review of the Defendant's decision, as contained in a letter dated March 8, 2016, whereby it refused to grant to the Claimant a journey permit or concession to operate aircrafts for commercial air transport operations in Trinidad and Tobago, pending the determination of its application for an Air Operator's Certificate ("AOC").

2. The Court therefore had to determine inter alia whether it should order and direct that temporary permission for the Claimant to operate until the determination of its application for an AOC be granted.

3. By Order dated March 11, 2016, the Court granted leave to the Claimant, in chambers, to apply for judicial review and scheduled the hearing of the Claimant's request for interim relief for March 15, 2016. On the 15th March, after hearing Counsel for the respective parties, the Court, in addition to setting time frames for the parties to deal with the substantive application for judicial review, directed the Defendant's Director-General to issue temporary permission to the Claimant to operate until April 27, 2016 or until further order. The Defendant on the 15th of March placed no affidavit evidence before the Court for its consideration.

4. The Claimant filed its Fixed Date Claim Form seeking judicial review of the Defendant's decision on the March 18, 2016. The evidence in support of its application is set out in the affidavit of David Stepanek, which was filed in support of the application for leave and interim relief and the Court ordered that same was to stand as the affidavit in support of the application for judicial review.

5. The Claimant contends that it will experience financial ruin if it is not granted temporary permission to conduct commercial air transport pending the determination of its application of an AOC and further contends that it has already lost one contract with an

energy company and stands to lose other contracts that it has secured with the major energy companies that operate in this jurisdiction.

6. The Claimant also filed on March 31, 2016, in support of its application and in opposition to the affidavits that were filed on behalf of the Defendant, affidavits of: Captain Barun Singh, its Project Manager for the processing of the AOC; David De Gannes, the Account Manager; David Machado, the Area Manager; Gerald F. Murphy and Javier Rodriguez, consultants. By its Fixed Date Claim Form, the Claimant sought the following reliefs:

    a. a declaration that the said decision is illegal/and or ultra vires and/or unreasonable and/or irrational and/or made in bad faith and/or contrary to the provisions of the Civil Aviation Act and/or in breach of Claimant's legitimate expectation and is null and void and of no effect;

    b. an order of certiorari to remove into this Honourable Court and quash the said decision;

    c. an Order of mandamus directed to [the Defendant] directing [the Defendant] to issue to the Claimant (i) a Foreign Operator Certificate; or (ii) a Licence for a Scheduled Journey; or, (iii) Provisional Licence for a Scheduled Journey; or (iv) and Emergency Licence; or (v) any such of other licence or permit or permission or approval which will permit the Claimant to operate in Trinidad and Tobago an aircraft in commercial air transport operations, pending the grant of the Claimant of the Air Operator Certificate;

    d. costs; and

    e. such other orders, directions, declarations and writs as the Court considers just and as the circumstances warrant.

7. The Defendant filed the affidavits of Ramesh Lutchmedial, its Director-General; Francis Regis, its Executive Safety Manager; Anthony Wittier, its Manager Flight Standards; and Glenn Wicks and John Waltz, consultants with The Wicks Group.

THE ISSUES

8. The main issues to be determined are:

    i. Whether the **Civil Aviation Act** (hereinafter referred to as "the Act") vests in the Director General a discretion to permit the Claimant to engage in the operation of commercial helicopter transport pending the grant of an AOC; and/or whether the Director General can, in the interim, permit the Claimant's parent company PHI Incorporated to operate pursuant to **Civil Aviation [(No. 10) Foreign Operator] Regulations** (hereinafter referred to as "TTCAR No. 10"), **Civil Aviation [(No. 17) Economic] Regulations** (hereinafter referred to as "TTCAR No. 17") and/or under the **Civil Aviation [(No. 3) Air Operator Certification and Administration] Regulations** (hereinafter referred to as "TTCAR No. 3");

    ii. Whether the Claimant has a legitimate expectation that it would have been allowed to operate pending the grant of an AOC;

    iii. Whether, in the event that the Court finds that the Director General has a discretion to issue temporary operating permission to the Claimant and the Claimant has a legitimate expectation that it would have been allowed to operated pending the receipt of its AOC, the Court can compel the Director-General to exercise that discretion in favour of the Claimant;

    iv. Whether the Defendant has acted in 'Bad Faith'; and

v. Whether there has been any unreasonable delay in processing the Claimant's application.

9. The Claimant, through David Stepanek, stated that the Defendant and in particular the Director General, has the discretion to allow it to operate within Trinidad and Tobago pending the determination of its application for an AOC and the Claimant contends that on past occasions the Defendant has granted concessions to other aircraft operators to operate pending the obtaining of their respective AOCs. The Claimant contends that the Director-General, during meetings with representatives of its parent company, promised and/or assured those representatives that he would allow the Claimant and/or its parent company to operate notwithstanding the fact that an AOC had not been obtained. In relation to the allegation that the Defendant previously allowed aircraft operators to operate without an AOC, the Claimant referred to Caribbean Airlines Limited, BWIA West Indies Airways Limited, Bristow Caribbean Limited, Cobham Aviation Services, National Helicopters Services Limited and Evergreen International Inc.

10. Mr. Stepanek, on behalf of the Claimant, alleged, that assurances were given by Mr. Lutchmedial that the Claimant would be allowed to operate while the AOC application was being processed. This position has been refuted by the Defendant and Messrs. Lutchmedial, Regis and Wittier all deny that any assurances or promises were given in the terms as advanced by the Claimant. They all contend that the representatives of the parent company were assured that the Defendant will work with them to achieve certification and that does not and cannot mean that the Defendant promised that it was willing to circumvent the terms of the Act or the relevant regulations so as to permit the Claimant to operate pending the processing of its AOC application.

11. By a notice of evidential objection filed on the April 4, 2016 the Defendant invited the Court to strike out aspects of the Claimant's affidavits. The Defendant contended that several portions of the affidavits were objectionable on the grounds inter alia, that statements were either hearsay statements, they were not relevant to the issues for the Court's determination and/or that they were frivolous and/or vexatious. While no formal

directions were issued by the Court for the filing of evidential objections, the Court ultimately has an obligation to disregard information which eviscerates the rules of evidence and does not accord with the provisions of the **Evidence Act Chap 7:02**. Having reviewed the various aspects of the Defendant's notice of application the Court formed the view that the objections raised by the Defendant were without merit and that the evidence as contained in the respective affidavits filed on behalf of the Claimant should stand and the Court therefore proceeded to consider the evidence as presented by the Claimant together with the evidence as contained in the Defendant's affidavits and applied the relevant law in its determination of the issues that had to be resolved. The Court however did note that at paragraphs 17, 18, 19, 21, 22, 24, 27 and 29 of Mr. Stepanek's affidavit and at paragraphs 14, 18 and 19 of Mr. Machado's affidavit, references were made to PHI Incorporated which is the Claimant's foreign parent company. The said references sought to create the impression that the Claimant and PHI Incorporated were one and the same and the Court remained acutely aware of this circumstance when it considered and applied the evidence as against the relevant law.

12. The Claimant, by way of its submission, asked the Court to adopt the approach taken by Lord Steyn in **R v Secretary of State for the Home Department, ex p Pierson (1998) AC 539, at 585-D** and suggested that the Court should treat and consider the substance of the Claimant's complaint as opposed merely to the form. In support of its application the Claimant advanced four primary grounds, namely, that the decision to refuse to grant the Claimant a journey permit or concession (1) is illegal and/or ultra vires; (2) is unreasonable and/or irrational; (3) was made in bad faith; and (4) is in breach of the Claimant's legitimate expectations. The Claimant also submitted that the Court ought to have regard to the practical and commercial nature of the circumstances that prevail in this case.

The Regulatory framework

13. The relevant legislation provisions at sections 2(1), 4, 5, 6, 7, 8, 33, 35 and 55 of **the Act**, provides as follows:

*"**2(1)** …"air operator" means any person, organisation or enterprise which undertakes to engage in domestic commercial air transport or international commercial air transport, whether directly or indirectly or by a lease or any other arrangement;*

***4.** There is hereby established a body corporate to be known as "the Trinidad and Tobago Civil Aviation Authority" (hereinafter referred to as "the Authority").*

***5.** The functions of the Authority are—*

(a) to maintain a standard of safety and efficiency in the civil aviation system that is at least equal to the standard of safety prescribed by the Chicago Convention and any other aviation convention, agreement or understanding to which Trinidad and Tobago is a party;

(b) to regulate, in accordance with this Act or other written law—

(i) civil aviation operations in Trinidad and Tobago;
(ii) the operation of Trinidad and Tobago aircraft; and
(iii) the operation of maintenance organisations in respect of aircraft on the Trinidad and Tobago register;

(c) to license aerodromes with or without conditions to regulate the same;

(d) to provide technical advice, assistance or training for any person in respect of any matter in which the employees of the Authority have the requisite skill or training;

(e) to issue, renew, vary, extend and amend licences and other aviation documents in respect of Trinidad and Tobago aircraft in any part of the world, and to collect fees in respect thereof;

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(f) to provide an adequate system of air traffic services in the Piarco Flight Information Region and such other airspace as may be the subject of a treaty or an agreement between Trinidad and Tobago and any other State or organisation;

(g) to carry out an investigation of any aircraft accident occurring in or over Trinidad and Tobago or in relation to any Trinidad and Tobago aircraft;

(h) the development of civil aviation and the maintenance of a civil aviation system that is consistent with national security policy;

(i) to advise the Minister on matters relating to civil aviation;

(j) to utilise the property of the Authority in such a manner as may appear to the Authority to be requisite, advantageous or convenient with a view to making the best use of any of the property of the Authority in relation to its functions under the Act; and

(k) such other functions as are for the time being conferred upon it by virtue of this Act or any other written law.

6. *The Authority has the power to do all things necessary and convenient for, or in connection with, the performance of its functions specified in section 5.*

7. *Without limiting the generality of section 6, the Authority may—*

(a) engage in any activity that promotes and develops civil aviation, either alone or in conjunction with other civil aviation authorities, international agencies or organisations;

(b) enter into contracts for the supply of goods, services or materials or for the execution of works or any other contracts as may be necessary for the discharge of its functions under this Act;

(c) charge fees for the use of any facility or service provided by the Authority; and

(d) make rules and regulations prescribing all matters that are necessary, required or permitted by this Act to be prescribed.

8. *(1) In performing its functions and exercising its powers, the Authority shall have as its paramount consideration the safety of aviation.*

33. *(1) For the purpose of carrying out and giving effect to the Chicago Convention, and any other related Protocols, the Authority shall, with the approval of the Minister make Regulations for—*

(a) the licensing, inspection and regulation of navigation aerodromes;

(b) a system for the national registration of aircraft;

(c) the issuing of certificates of airworthiness and for prohibiting aircraft from flying unless such certificates, whether issued or validated are in force;

(d) the certification of air operators;

(e) the certification of airmen;

(f) the certification of aviation schools, approved maintenance organisations and repair stations;

(g) the conditions under which passengers may be carried by air and under which aircraft may be used for other commercial, industrial or gainful purposes;

(h) the conditions under which goods may be carried by air;

(i) securing the efficiency and regularity of the operations of air navigation and the safety of aircraft and of persons and property carried thereon, and of persons and property on the ground;

(j) prohibiting the carriage by air, such goods as may be specified by the Regulations;

(k) conferring on such persons as may be specified, powers relating to the enforcement of any such condition or prohibition including powers to examine, take samples of, seize and detain any goods, powers to open any baggage or packages containing goods after obtaining from a Magistrate a warrant to do so or to require them to be opened and powers to require the production of any documents;

(l) prescribing the fees to be paid in respect of the issue, validation, renewal, extension or variation of any aviation document or the undergoing of any examination or test required by, or in pursuance of the Regulations, or in respect of any other matter for which it appears to the Minister to be expedient to charge fees;

(m) ensuring that foreign air carriers operating in Trinidad and Tobago comply with the safety and security requirements of the Chicago Convention;

(n) registration of mortgages and any other liens on aircraft;

(o) giving effect to the Rules of the Air; and

(p) for any other matters required by or necessary to implement this Act.

***35.** (1) The Authority shall issue Air Operator Certificates to persons qualified in the manner prescribed.*

(2) A certificate issued under subsection (1) shall specify the minimum safety standards for the operation of the air operator.

***55.** (1) No person shall –*

…

(d) operate as an air operator without an air operator's certificate or in violation of the terms of such certificate;

(2) Any person who contravenes this section is guilty of an offence and is liable on summary conviction to a fine of one hundred thousand dollars."

14. The Court also had to consider the **Civil Aviation [(No. 3) Air Operator Certification and Administration Regulations** which provides as follows:

3. *(1) A person shall not operate an aircraft in commercial air transport operations in Trinidad and Tobago, unless he—*

(a) holds a Trinidad and Tobago Air Operator Certificate issued by the Authority, (hereinafter referred to as a "national air operator"); or

(b) holds an Air Operator Certificate issued by another contracting state which is accepted by the Authority under Civil Aviation [(no. 10) foreign operator] regulations, (hereinafter referred to as a "foreign air operator"), for the operations being conducted.

4. *(1) Where a person (hereinafter referred to as "the applicant"), wishes to apply for a Trinidad and Tobago Air Operator Certificate, he shall—*

(a) make such application to the Authority in the form and manner prescribed by the Authority; and

(b) pay the prescribed fee.

(2) An application under subregulation (1), shall contain—

(a) a detailed statement showing how the procedures and manuals required by these regulations are complied with; and

(b) any information the Director-general requires the applicant to submit.

(3) An application under subregulation (1), shall be accompanied by—

(a) documentation showing that the applicant has or can obtain use of at least one aircraft and has or can obtain appropriate facilities in respect of such operation;

(b) any partial or completed manuals required by these regulations;

(c) an aviation security programme in accordance with Civil Aviation [(no. 8) Aviation security] regulations;

(d) curricula, syllabi of personnel training; and

(e) a schedule of events."

15. The Court also considered the **Civil Aviation [(No. 10) Foreign Operator] Regulations** which provides as follows***:***

*"**5.** (1) An air operator who does not hold an Air Operator Certificate issued by the Authority shall not operate an aircraft to and from Trinidad and Tobago unless he holds an Operations Specifications issued to him by the Authority.*

(2) Where an air operator under subregulation (1), wishes to apply to operate to and from Trinidad and Tobago he shall—

(a) make such application to the Authority in the form and manner prescribed; and
(b) pay the prescribed fee.

(3) An application under subregulation (2), shall be accompanied by—

(a) a copy of a valid air operator certificate or equivalent document issued by the foreign authority;

(b) a copy of the licence or authorisation granted to the air operator by the appropriate authority of the State of the air operator to operate an air transport service to and from Trinidad and Tobago;

(c) a copy of a Company Operations Manual including the Cabin Attendant Manual where it is published as a separate document;

(d) a copy of the approval page for a Minimum Equipment List for each aircraft type intended to be operated by the air operator in Trinidad and Tobago;

(e) a copy of a valid Certificate of Airworthiness for each aircraft type intended to be operated by the foreign air operator in Trinidad and Tobago;

(f) a representative copy of a Certificate of Registration issued for the aircraft types proposed to be operated by the air operator in Trinidad and Tobago;

(g) a copy of a document identifying the maintenance checks that are required to be carried out for aircraft of the air operator while they are operated in Trinidad and Tobago;

(h) a copy of the maintenance contract between the air operator and the Approved Maintenance Organisation, where the maintenance under

subparagraph (g), is carried out by an Approved Maintenance Organisation approved by the foreign authority;

(i) a copy of the lease agreement for any aircraft operated by the air operator who does not hold an Air Operator Certificate issued by the Authority which is not registered by the foreign authority;

(j) a copy of any equivalent Operations Specifications issued by the foreign authority for any specialised flight operations specifications requested by the foreign air operator for operations in Trinidad and Tobago;

(k) a proposed Aircraft Operator Security Programme for the foreign air operator who does not hold an Air Operator Certificate issued by the Authority which meets the requirements of the Civil Aviation [(No. 8) Aviation Security] Regulations, for the acceptance and subsequent approval of the Authority; and

(l) any other document the Authority considers necessary to ensure that the intended operations will be conducted safely.

(4) An applicant under these Regulations shall apply for the initial issue of a foreign air operator Operations Specifications at least ninety days before the date of commencement of intended operation.

***6.** (1) The Director-General may recommend that the Authority issue Operations Specifications to an air operator who does not hold an Air Operator Certificate issued by the Authority to conduct commercial air operations to and from Trinidad and Tobago where he is satisfied that such air operator—*

(a) has a valid Air Operator Certificate issued by a foreign authority;

(b) has had his Aircraft Operator Security Programme approved under the Civil Aviation [(No. 8) Aviation Security] Regulations;

(c) meets the applicable requirements of the Civil Aviation [(No. 2) Operations] Regulations, the Civil Aviation [(No. 5) Airworthiness] Regulations, and the Civil Aviation [(No. 7) Instruments and Equipment] Regulations;

(d) meets the standards contained in the Annexes of the Chicago Convention;

(e) has sufficient financial resources to conduct safe operations; and

(f) meets the requirements of these Regulations.

(2) A foreign air operator shall not commence commercial air transport operations to and from Trinidad and Tobago unless such foreign air operator has been issued by the Authority—

(a) Operations Specifications under the Regulations; and

(b) a licence under the Civil Aviation [(No. 17) Economic] Regulations."

16. Finally, the Court considered the **Civil Aviation [(No. 17) Economic] Regulations**, which provide as follows:

*"**23.** (1) The Director-General of Civil Aviation may grant to any person applying for a permit to use aircraft for the provisions in Trinidad and Tobago of such*

services [other than such service as is referred to in regulation 4(1)] for such period and on such conditions as may be specified in the permit.

(2) The Director-General of Civil Aviation may attach such conditions to any permit as he may think fit having regard to the nature and circumstances of the application therefore.

(3) There shall be charged for the issue of every such permit the sum of one hundred dollars and for each day or part thereof for which the permit is to remain in force after the date of issue.

***24.** Applications for permits shall be made in the form prescribed in Schedule 8 and shall contain such information as the Director-General of Civil Aviation may require."*

Analysis of Facts, Application of the Law and Determination of the Issues

Issue 1 - Whether the Civil Aviation Act (the Act) vests in the Director General the discretion to permit the Claimant to engage in the operation of commercial helicopter transport pending the grant of an AOC in Trinidad and Tobago; and/or whether the Director General can permit the Claimant's parent company PHI Incorporated to operate pursuant to TTCAR No. 10 and TTCAR No. 17 and/or under TTCAR No. 3.

17. The Claimant accepted that there were no direct regulations that specifically outlined the process or procedure in relation to the grant of temporary operating permission pending the grant of an AOC but relied on **section 6 of the Act** and submitted that this power could be implied by virtue of the said section and that it was in fact so implied in relation to the manner in which previous operators were allowed to operate.

18. It is trite law that legislation is intended to reflect the intention of the Parliament and therefore the onus is on the Claimant to establish that the implied power to grant temporary operating authority can be gleaned from the Act.

19. When called upon to determine the manner in which a statutory provision should be interpreted the first question to be addressed is: what is the natural and ordinary meaning of the particular word or phrase in the context of the statute? This has been described as the plain meaning rule which Lord Reid in **Pinner v. Everett (1969) 1 WLR 1266** at page 1273-C set out as follows:

> '*In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in the context of the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of legislature that it is proper to look for some other possible meaning of the word or phrase.'*

20. In **Bennion on Statutory Interpretation 5th ed. (2008) at page 1155**, the author outlined that the general principle of governing statutory interpretation is that the statute under scrutiny, in this case the Act, must be read as a whole.

21. Having considered the provisions of the Act, the Court is of the view that the language is pellucid and unambiguous. **Section 55(1) d** expressly prohibits persons from operating as air operators without an AOC and anyone convicted of operating as an air operator, without an AOC, is liable to a fine of $100,000.00. This is a penal section and confers no power to the Director General or any agent of the Defendant to grant any permission to operate. However the Act clearly provides that the operation as an air operator without an AOC is unlawful.

22. The Claimant submitted that the general wording of **section 6** could, by implication, authorise the Director General to issue temporary operating authority as the office holder

is empowered to do all things that are necessary or convenient for or in connection with the performance of the functions specified. It cannot be, however, that the section empowers the Director General to make a decision that is outside the ambit of the Act or contrary to relevant and applicable regulations.

23. In **R v Secretary of State for Education and Employment, ex p Begbie [2000] 1 WLR 1115** the English Court of Appeal considered an argument that the Secretary of State was required to exercise his discretion to continue to fund a primary school pupil's education at a private school until her secondary education was complete under an assisted places scheme which the government had abolished by legislation because an announcement by the governing party when in opposition had created a legitimate expectation to a substantive right.

24. The Court rejected the submission and the rationale adopted by Gibson JJ, Sedley LJ and Laws LJ was that no legitimate expectation could arise in a circumstance where the Secretary of State would be called upon to act contrary to a statute.

25. This rationale was endorsed and applied in **Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius and others [2015] UKPC 1*5*** at paragraph 52.

26. **By virtue of the express wording of Section 6 of the Act, any discretion conferred upon the Director General must relate to, and has to be limited to, the matters as set out in the Act; the Act does not provide for the grant of any permission to operate pending the processing of an application for an AOC.**

27. **Hazell v Hammersmith and Fulham London Borough Council and Others [1991] 2 WLR 372** is an authority for the proposition that, where a statute has set out a comprehensive code which defines and limits the powers of an authority in the carrying out of its functions, there can be no room for incidental power or discretion. The House of Lords considered whether a local authority had the power to enter into financial

transactions as being incidental to the express powers of the statute i.e. the Local Government Act 1972 [UK]. Lord Templeman stated at page 387-G, that:

> *"Schedule 13 [of the Local Government Act 192] establishes a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing. The Schedule is in my view inconsistent with any incidental power to enter into swap transactions."*

28. In **<u>Crédit Suisse v Waltham Forest London Borough Council[1996] 3 WLR 943 at 953 G-H</u>,** Neill L.J. stated**:**

> *"In my judgment in Crédit Suisse v. Allerdale Borough Council [1996] 3 W.L.R. 894, I pointed out that it is necessary, when considering the implied powers of a local authority under section 111 of the Act of 1972, to identify the relevant statutory functions. It is also necessary to examine the context in which the implied powers are to be exercised."*
>
> *…*
>
> *I am afraid that I have come to the conclusion, as I did in the Allerdale case, that where Parliament has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of additional powers which lie wholly outside the statutory code."*

29. **Having considered the relevant legislative provisions, the Court finds that the Claimant's argument in relation to the implied powers vested in the Director General to grant a temporary operating permission pending the grant of an AOC is fundamentally flawed. A discretion cannot exist so as to authorise the performance of action that would contravene Section 55 (1) d of the Act and the Director General is not vested with the authority to exercise any discretion, pursuant to Section 6 of the Act, to grant any temporary permission to operate pending the grant of an AOC. Parliament laid down comprehensive provisions in the Act and the Court cannot in the circumstances, imply and import the existence of additional powers**

and vest same in the Director General. Section 6 cannot enable the Director General to act in a manner that would be inconsistent with the provisions and intent of the Act.

30. **The Claimant has, by virtue of the evidence contained in the joint affidavit of Messrs Murphy and Rodriguez, also argued that permission can be granted to PHI Incorporated to operate helicopters on behalf of the Claimant on an interim basis until the Claimant receives its AOC. The Claimant contends that this process is permissible under the Regulations, specifically the grant of an operations specification pursuant to TTCAR No.10, coupled with the licence issued pursuant to TTCAR No. 17 and/or permission to operate as a foreign air operator under TTCAR No.3. To enable the obtaining of Operation Specifications as outlined by the Claimant in its principle submissions at paragraphs 80-85 and 137-147, the process, as outlined under Regulations 5 and 6 of TTCAR No. 10, has to be followed. The Claimant's parent company PHI Incorporated must have applied in the prescribed form and all the requirements as set out in TTCAR No. 10 Reg. 5(2), 5(3) and 6 must have been followed. In the instant matter there is no evidence before the Court to establish that the requirements and/or procedure laid out so as to obtain an operations specifications has been compiled with.**

31. To obtain a licence under TTCAR No. 17 (5) or a permit under TTCAR No.17 (23), an application in writing in the form set out in Schedule 1 has to be made and there is also no evidence that any such application has been made. Further any such application must be advertised.

32. TTCAR No. 17 provides for the grant of an emergency licence upon the receipt of an application in the prescribed form and again there is no evidence that any such application has been made by PHI Incorporated.

33. For a permit to be issued under TTCAR No. 17(23) to (28), an application in the form prescribed in Schedule 8 has to be made and must be supported by the stipulated accompanying documents. There is no evidence that any such application has been made.

34. In its submissions the Claimant at paragraphs 30 and 38 referred to a possible grant of permission under a Master Services Agreement as between it and its parent company PHI Incorporated; however there is no evidence of any such Master Services Agreement before this Court.

35. **The Claimant is and must be treated as a distinct legal entity that is protected by its veil of incorporation. Notwithstanding the fact that its parent company PHI Incorporated (PHI Inc.) may have an interest in it, PHI Inc. is a distinct legal entity. The party that has invoked the Court's jurisdiction is PHI America Limited and not PHI Incorporation and there is no judicial review application made by PHI Incorporated.**

36. **The Claimant submitted that, because this is a public law case "nice distinctions based on common law fictions of separate legal personalities should not be permitted to visit injustice upon the commercial interests of the parties involved". This is an argument that the Court is bound to reject. PHI (Inc) is not a party to the proceedings before this Court and can seek no relief from this Court. The very protection of its commercial interests as advocated by the Claimant, should have guided the approach that it adopted so as to minimize the risk of financial fallout. In order to determine whether the decision taken by the Defendant on March 8, 2016 was reasonable and lawful, the review of the said decision must be premised upon consideration of the information and documentation that was before the Defendant as at that date. The reliefs sought at paragraphs 155 of the Claimant's submissions before this Court and the documents referred to in this regard by the Claimant were not before the Defendant as at the March 8, 2016 and the Defendant had no opportunity to consider same. The Claimant has, in the circumstances, failed to establish that the Defendant's decision in not allowing it temporary permission to**

operate is unlawful in any way, or that the Act and/or the Regulations allow for the grant of such temporary permission as requested. Further no application has been made pursuant to the regulations for any permit pursuant to TTCAR No. 17 or TTCAR No. 10.

Issue II - Whether the Claimant has a legitimate expectation that it would have been allowed to operate pending the grant of an AOC.

37. The issue as to whether or not the Director General made the representations alleged by the Claimant is in dispute. The parties did not elect to cross examine any of the witnesses and there is before the Court two diametrically opposed positions. In Mr. Stepanek's affidavit at paragraphs 23 and 27 and at paragraph 30 of Mr. Machado's affidavit both witnesses said that the Director General clearly and unambiguously indicated that PHI Incorporated had no cause for any anxiety because the Defendant would always grant to them a temporary permit to operate in Trinidad pending the granting of an AOC.

The Claimant's Evidence

38. The Claimant's evidence is that on November 3, 2014, representatives of PHI Incorporated met with the Director General and other representatives of the Defendant. At that meeting, the Director General told the Claimant's representatives that the Defendant would work with them so as to ensure that they would be able to operate in Trinidad and Tobago. At that meeting, the Director General was informed about the PHI Incorporated and/or the Claimant's potential contractual arrangements and he informed PHI Incorporated's representatives that the Defendant would work with PHI Incorporated and/or the Claimant to ensure that it would meet its deadlines in order to service the contractual obligations. The Claimant's evidence is that the Director General said that PHI Incorporated had no cause for any anxiety because the Defendant could always grant to the Applicant a temporary permit to operate in Trinidad pending the granting of the AOC.

39. On April 9, 2015 PHI Incorporated's representatives again met with the Director General and other representatives from the Defendant and when a PHI Incorporated representative inquired about the Foreign Operators Permit (FOP) and AOC, the Director General said that he was not willing to entertain the FOP application "at this time" and he indicated that there was enough time to complete the AOC process so as to enable the commencement of operations in January 2016. In addition to giving PHI Incorporated assurances that the Defendant would work with PHI Incorporated and/or the Claimant so as to ensure that the Claimant would meet its deadlines in order to service its contractual obligations, the Director General suggested that they should speak to Briko and Evergreen (now Erikson) with a view to obtaining their suspended rotary AOCs.

40. Further at a meeting held on June 10, 2015 the Claimant's case is that the Director General once again assured PHI Incorporated's representatives that the Defendant would work with them so as to ensure that the Claimant would meet its deadlines in order to service its contractual obligations.

41. The Claimant was advised by Mr. Whittier, at a mid-July 2015 meeting at the offices of the Defendant, to 'keep it simple' regarding the aircraft that the Claimant intended to use and so the S-92 and the EC-135 were removed from the initial POPS form. These changes to the POPS were made based on the guidance of representatives of the Defendant, namely Mr. Anthony Whittier and the then project manager, Mr. Nigel Gomez, and they indicated that it would be possible to add them after the AOC approval. The Claimant operated on the premise that the removal of those aircraft types would make it easier to keep the AOC process on schedule.

42. At paragraph 30 of his affidavit Mr. Stepanek deposed that on November 11, 2015 the Claimant's representatives met with the Director General and others and expressed concern that the AOC might not be ready in time to enable it to service its contractual obligations which were due to commence in January and February 2016. He said that the

Director General told them not to worry and said "I will expedite the registration of any American registered aircraft onto a Trinidad registration" so as to ensure that the Claimant would be able to meet its contractual obligation in 2016.

43. The Claimant submitted that the Director General's words amounted to an assurance to the Claimant which engendered a legitimate expectation that it would be able to operate and meet its contractual obligations to Shell, BHP Billiton and EOG, pending the approval of its AOC.

44. At paragraphs 34 and 35 of Stepanek's affidavit and paragraph 22 of Singh's affidavit as well as paragraph 17 of David De Gannes, the Claimant's evidence was to the effect that at a meeting on January 15, 2016, at which the Director was present only at intervals, they said they expressed their concern about its ability to meet its imminent deadlines to fulfill its contractual obligations in relation to its contracts with EOG, BHP and Shell and they told Mr. Francis and Mr. Gomez, that based on the delay in getting the AOC, the Claimant would have to adjust its deadline to April 15, 2016. Furthermore, they enquired whether this was feasible and the Defendant's representatives clearly and unambiguously told them "yes".

45. Further at the said meeting the Claimant said it asked whether it would be granted a concession pending the grant of the AOC to operate its aircraft in Trinidad and Tobago under a Foreign Operating Permit (FOP) and the Director General said, "I will certainly consider it".

46. The Claimant's evidence is that it subsequently learnt that on the very date that the Director General said that he would consider a FOP, the Defendant was in the process of drafting proposed amendments to the Act, which it proposed to forward to the responsible Government Ministry for passage. The Claimant also subsequently learned that the Defendant intended to advocate for the Trinidad and Tobago Civil Aviation Regulations (TTCAR No. 17), 2011 to be amended and the amendments were intended to "protect

local operators from foreign operators who may seek to provide commercial air transport operations within Trinidad and Tobago".

47. By letter dated January 21, 2016, the Claimant said it wrote to the Defendant restating its request for an FOP and by letter dated February 3, 2016 the Defendant replied and indicated that the TTCAR No. 10 (6) did not facilitate the issue of a "Foreign Permit" to operate in Trinidad and Tobago.

The Defendant's Affidavit Evidence

48. Mr. Lutchmedial admitted that the Defendant was told that the Claimant was bidding for contracts in Trinidad and Tobago but he said that the Defendant was never provided with details of the terms and conditions of the Claimant's contracts. Mr. Lutchmedial also stated that the Claimant removed from its application, the Prospective Operators Pre-Assessment Statements ("POPS"), the S92 helicopter, and did not apply to have the Airbus EC-135 helicopter. Further he stated that the use of this aircraft was not discussed with the Defendant and that without certification and registration, these aircrafts cannot be allowed to fly in Trinidad and Tobago.

49. Mr. Lutchmedial said that he was aware that the Claimant's parent company was bidding for contracts to operate in Trinidad and Tobago, but he denied giving any assurances to either the parent company or the Claimant that they would be given a permit to operate. At paragraph 17 of his affidavit Mr. Lutchmedial stated that the Claimant's parent company was made aware as early as May 2015 that the Defendant is not permitted under the existing regulatory regime to grant temporary permission to operate in circumstances where an aircraft operator does not have an AOC.

50. **Further Mr. Lutchmedial denied that he told the representatives of the Claimant's parent company that they had no cause for anxiety because the Defendant can always grant temporary permission to operate in Trinidad and Tobago pending the grant of the AOC and he stated that they were told that the Defendant, "will work**

with you to ensure that you achieve certification" and "we will work with you to make sure that you comply with the regulations and so meet your commercial objectives". Mr. Lutchmedial opined that he does not have the power under the regulations to grant any foreign aircraft operator permission, temporary or otherwise, to carry out domestic commercial operations in Trinidad and Tobago nor does he have the power under the regulations to allow a local air operator to carry out domestic commercial operations without an AOC.

51. With respect to paragraph 30 of Mr. Stepanek's evidence, where Mr. Stepanek deposed that Mr. Lutchmedial told them not to worry and that "I will expedite the registration of any American registered aircraft onto a Trinidad registration" so as to ensure that the Claimant would be able to meet its contractual obligation in 2016, Mr. Lutchmedial admitted that he did agree to expedite the registration process for the aircraft and he stated further that this is a relatively simple process which could be completed within a few days provided that the Claimant has all the relevant documents to prove ownership of the aircraft and to establish that the aircraft is not registered in any other country and that it complies with all other requirements for registration.

52. Mr. Lutchmedial went on to deny that he said he would consider the request to operate under a "Foreign Operator's Permit" and further stated that the Defendant's regulations makes no provision for any permit that is known as a "Foreign Operator's Permit".

53. Mr. Lutchmedial accepted that Bristow, BWIA and National Helicopters Services Limited were in operation prior to the coming into effect of the Civil Aviation Regulations 2004 but he advanced that these operations were in compliance with the regulations in force at the time and stated that no concessions were granted as alleged by Mr. Stepanek.

54. With respect to paragraph 40 of Mr. Stepanek's affidavit, Mr. Lutchmedial denied that Cobham was allowed to operate using Bristow's AOC while its application was pending. Bristow he deposed had a partnership with Cobham's predecessor, FB Heliservices, and

it continued to use its own AOC in the performance of its operations until Cobham obtained its own AOC.

55. Additionally, Mr. Lutchmedial stated that Evergreen Helicopters International Inc., the holder of a US FAA AOC, was issued a journey permit in 2007 to conduct commercial operations in Trinidad and Tobago from 2007 up until 2009. There were no regulations at the time prohibiting the granting of journey permits to Evergreen Helicopters International Inc. In 2011, TTCARs No. 17 came into effect. TTCARs No. 17 states that in granting a permit to an operator consideration must be given to the Air Services Agreement between Trinidad and Tobago and the State of the operator. The essence of the Air Services Agreement and TTCARs No. 17 is to prevent the practice of cabotage, which is the carriage, by a foreign operator, of mail, cargo and passengers from one point to another within the territory of another sovereign state for commercial purposes. Article 2, paragraph 4 of the said Air Services Agreement and TTCARs No. 17 comply with Article 7 of the Chicago Convention.

56. Mr. Lutchmedial noted that the process of obtaining an AMO is as involved as the process of obtaining an AOC and he said that even if the Claimant were to say that it no longer wished to pursue an AMO but intended to contract the services out to a third party, it would still have to undergo a certification process to ensure that the party to whom it contracted out its maintenance services was qualified to do so.

57. Mr. Lutchmedial's evidence is that it is not true that the Claimant is required to revert to older technology. He stated that Trinidad and Tobago Civil Aviation Regulations (TTCAR) are in compliance with the international standards and best practices as enshrined in the Chicago Convention. Mr. Lutchmedial further stated that it is untrue to say that the Claimant has completed phases 1 and 2 as suggested by Mr. Stepanek in his affidavit.

58. The Defendant also relied on the evidence of Mr. Anthony Whittier (who is the Manager-Flight Standards) and Mr. Regis and they both admitted that on January 15, 2016, they

did have a meeting with representatives of the Claimant including Mr. Stepanek. They stated that the Claimant's representations were concerned about meeting their contractual obligations and was thinking of adjusting its deadline to April 15, 2016 as the date when the AOC could be obtained. Both Mr. Regis and Mr. Whittier deny that they responded "yes" to the Claimant on whether April 15, 2016 was a feasible date when the AOC could be obtained. However, they said they indicated that they would work with the Claimant, but that the achievement of such a deadline was dependent upon the Claimant providing the required documentation under the TTCARs, in addition to completing phase 4, the demonstration and inspection phase.

59. Mr. Wittier also noted that the Claimant alleged or inferred at paragraph 54 of Mr. Stepanek's affidavit that he is in some way biased against it, in light of the fact that his wife is an employee of National Helicopter Services Limited ("NHSL"), who the Claimant says is its competitor. Mr. Whittier stated that the fact that his wife is employed with NHSL has nothing to do with the Claimant's certification process, and in any event, his wife is employed in NHSL's Accounts Department as an Accounting Assistant – Special Projects. Additionally, Mr. Whittier denied that he verbally expressed an interest in applying for a job with the Claimant.

<u>The Law</u>

60. In **<u>R v Board of Visitor of Hull Prison, Ex parte St Germain and Others (N0.2) [1979] 1 WLR 1401</u>** at page 1411, the Court held that where the matter has to be decided on affidavit evidence without the benefit of cross-examination the Court is obliged to take the facts, in issue, as they are deposed to on behalf of the Defendant.

61. Cross-examination is not a circumstance that would readily occur in the course of the determination of judicial review proceedings. Where however there are factual disputes and the evidence by the parties are diametrically opposed they should generally be resolved in favour of the Defendants. This approach was adopted in **<u>Sasha Seeprsad v.</u>**

<u>Her Worship, Magistrate Marcia Ayers Caesar et al CV 2015-02944</u> and in **<u>Grannum v. The Attorney General of Trinidad and Tobago HCA No. 1891 of 2002</u>**.

62. **For a legitimate expectation to arise there must be a clear and unambiguous promise, or a settled practice must exist. On the facts, there are assertions that relate to the recall of what was said at meetings and there is no documentary evidence that confirm that any assurances were given by the Director General as advanced by the Claimant. At paragraph 8 of Barun Singh's affidavit, Mr, Singh deposed that the Claimant was tasked with the responsibility to drive the process forward. There is no evidence let that reflects that the Defendant's evidence in relation to the circumstances that prevailed in relation to Caribbean Airlines, BWIA, Bristow, Cobham, National Helicopter Services and/or Evergreen International Inc. is inaccurate and the Court is of the view that the Claimant has not been able to establish that it is similarly circumstanced to any of these entities. There is therefore no clear and unambiguous evidence of any settled procedure that supports the position advanced by the Claimant.**

63. **Further, even if there were in existence air operators who operated in this jurisdiction in breach of the provisions of the Act or contrary to the Regulations, this can never be the basis upon which a claim of legitimate expectation can be premised.** In **<u>Rainbow</u>** (supra), Lord Hodge at paragraph 52 stated as follows:

> *"The courts will enforce an expectation only if it is legitimate. There is an established line of authority that nobody can have a legitimate expectation that he will be entitled to an ultra vires relaxation of a statutory requirement: R v A-G, ex p ICI plc (1986) 60 TC 1 at 64 per Lord Oliver; R v Inland Revenue Comrs, ex p MFK Underwriting Agents Ltd [1990] 1 All ER 91 at 110–111 and 114 per Bingham LJ and per Judge J, Al Fayed v Advocate General for Scotland 2003 SLT 747 at [135] per Lord Justice Clerk Gill, 2004 SLT 798 at [115]–[119] per Lord President Cullen. Those cases are all*

concerned with tax legislation and the Board recognises that, as Judge J stated in MFK, the correct approach to legitimate expectation in any particular field of public law depends on the relevant legislation. But what is at stake here is the principle of legality. In R v Dept of Education and Employment, ex p Begbie [2000] 1 WLR 1115 the Court of Appeal considered an argument that the Secretary of State was required to exercise his discretion to continue to fund a primary school pupil's education at a private school until her secondary education was complete under an assisted places scheme which the government had abolished by legislation, because an announcement by the governing party when in opposition had created a substantive right legitimate expectation. The court's principal reason for rejecting that submission was that an undertaking to allow all children in the position of the claimant's child to continue in an assisted place was contrary to the limited discretion which the statute had given the Secretary of State. There could be no legitimate expectation that the Secretary of State would act contrary to the statute ([2000] 1 WLR 1115 at 1125, 1129 and 1132 per Peter Gibson LJ, Laws LJ and Sedley LJ; see also R (on the application of Sovio Wines Ltd) v Food Standards Agency [2009] All ER (D) 182 (Oct) at [95]–[98] per Dobbs J)."

64. In the application of **<u>Sabita Jagessar and Others H.C.S 2053 of 2002</u>** at page 12, Dean Armorer J said:

> *"I respectfully agree with the law as stated by the learned first instance Judge in the case of Adolphus Mondesir v AG HCA No. 1903 of 1997. The failure to cross-examine does not produce an automatic effect and certainly not one in favour of the Respondent. Where however, there are direct conflicts of evidence, without cross-examination and the Court derives no assistance from the flaws in the evidence of either party, it is my view that the Court can allude to a litigant's failure to cross-examine*

and therefore to discharge their burden of proof by cross-examination and find in favour of the party which does not carry the burden of proof. It requires emphasis that the burden of proof, in respect of any given allegation, rests on the party who substantially asserts the affirmative of the issue. See Phipson on Evidence (12th Edition) paragraph 91. Where the allegation is made by the Respondent, the burden of proof also lies on the Respondent and in the event of a direct conflict, it will, in my view, be the obligation of the Respondent to call the other side to be cross-examined. In such cases, the available authorities suggest that the Court may take into account the failure of the Respondent to cross-examine and find in favour of the Applicant".

65. **Having considered the evidence, this Court is of the view there are direct conflicts on the evidence as it relates to the effect, nature and purport of the alleged representations and the Court is unable to conclude that there are flaws in the evidence of either party that are manifest. In an attempt to engage a speedy resolution of the substantive issues, the Court issued expedited directions, which did not include any direction as to cross-examination. It was however open to every party to apply for leave to cross-examine but no such application was advanced.**

66. There is a significant level of consistency by both sides as to the fact that several meetings and/or discussions were held. However, in relation to the specific assurances alluded to by the Claimant, the Defendant has distanced itself and denied that any such assurances were advanced. The Claimant suggested that the Director admitted that he said he would work with them and ensured that "you comply with the regulations and so meet your objective" and contended that this admission supports its contention that the representations alleged by it were in fact made. The Claimant further stated the assurances by the Director General were clear and unambiguous.

67. The assurance outlined at paragraphs 24 and 25 of the Stepanek affidavit, if taken at its highest, is an assurance that the Director had the power to grant interim permission to the Claimant to operate. However the statement was not devoid of qualification as the Claimant's case is that the Director said that he 'could' grant it as opposed to a definitive statement that he 'would do so'.

68. The assurance contained at paragraphs 30 of the Stepanek affidavit is as follows:

> "The Director General was cordial and reassuring and told Mr. Bospflug and me that we should not worry, as the Respondent would work with the Applicant to ensure that you all [i.e. the Applicant/the Intended Applicant] would be able operate within a timely fashion" and that "[he] will expedite the registration of any American registered aircraft unto a Trinidadian registration so as to ensure that the Applicant/Intended Applicant would be able to service its contractual obligations in 2016"

69. In response at paragraph 17 of his affidavit Mr. Lutchmedial said:

> "it is true that I agreed to expedite the registration process for the aircraft. This is a relatively simple process and can be completed within a few days provided that the Applicant has all the relevant documents to prove ownership of the aircraft and to establish that the aircraft is not registered in any other country and that it complies with all other requirements for registration."

70. The Claimant's assertion that the Defendant promised to work with it cannot be viewed as a promise to grant or issue any interim licence. Similarly the alleged assurance referred to at paragraph 33 of the Stepanek affidavit cannot be reasonably construed to be a promise to grant interim permission to operate. If taken at its highest, it is a statement that an adjustment to April 15, 2016 may have been a

feasible date and it was possible that the certification process could be completed and on AOC issued by that date. Any such representation however had to be contingent upon the Claimant fulfilling the necessary criteria as laid down under the Act.

71. At paragraphs 34 and 36 of his affidavit Mr. Stepanek said:

> "I asked for the Applicant/Intended Applicant to be granted a concession, pending the grant of the AOC, to operate its aircraft in Trinidad and Tobago under a Foreign Operator's Permit, or if not, under some other kind of licence or permit or approval which would permit the Applicant to operate in Trinidad and Tobago as aircraft in commercial air transport operations, pending the grant to the Applicant of the AOC. … In response to my request the Director General said "I will certainly consider it.""

72. This statement if taken at its highest is not a promise that permission to operate could have been granted; it is a promise to consider any such request and as outlined earlier any such request had to be by way of an application in the prescribed form as provided for under the regulations.

73. **Having undertaken the aforementioned assessment, the Claimant's case if taken at the highest, and if the statements alleged by the Claimant were in fact made by the Defendant, these statements were not so clear, unambiguous and devoid of qualification that they could have created a legitimate expectation that some interim certification or licence would have been issued. Further the Court is also of the view that the Defendant's evidence as it relates to the various 'assurances' is the version that must be preferred given the absence of cross examination and the absence of any other evidence that has demonstrated manifest flaws in the Defendant's assertions.**

74. **It has already been determined by this Court that the Director General has no power under Section 6 to grant any temporary permission to operators pending the grant of an AOC. Therefore, there can be no legitimate expectation that the Director General should or can act contrary to provisions of the Act and no legitimate expectation can arise if the representations that were made contradicts or contravenes the law and/or is inconsistent with the provisions and regulations as laid down under the Act. Ultimately, as outlined by the Privy Council in the <u>Attorney General of Hong Kong v. Ng Yuen Shiu (1983) 2 ALL ER 346 at 351,</u> a promise can only be implemented if it does not interfere or conflict with a statutory duty or obligation.**

75. Having regard to the Court's finding that there does not exist a legitimate expectation as outlined by the Claimant; the Court did not proceed to consider the third issue in detail. If such legitimate expectation did exist and the representations were in fact made by the Director General, the Director would have acted outside the ambit of his authority and the Court must always exercise caution when exercising its supervisory jurisdiction so as not impose its will upon regulators. The Court in judicial review proceedings must focus on the issues related to the process that was engaged in arriving at a decision and not place primary focus upon the merits or substance upon which the decision was premised. The substitution of the Court's opinion as to the efficacy or accuracy of the decision made over that of the decision maker is not a course that should be adopted.

Issue IV - Whether the Defendant has acted in 'Bad Faith'.

76. At paragraphs 96 to 105 of its principal submissions, the Claimant contends that the Defendant exercised bad faith in its dealings.

77. At paragraph 97 of its principal submission the Claimant stated that its affidavit evidence

"overwhelmingly establishes bad faith on the part of the Respondent. It shows a lack of any attempt – to say nothing of an honest or genuine attempt – by the Respondent to undertake the task of considering what permission other than a "journey permit" or "concession" might enable the Applicant to service its contractual commitments."

78. In its determination of this issue the Court first had regard to the allegation that the Claimant had "contractual commitments" which were known to the Defendant.

79. The contractual commitments referred to by the Claimant were in relation to BHP Billiton, BG and EOG.

80. The alleged EOG contract was not made with Claimant but with PHI Inc. Further, that alleged 'contract' may not amount to a contract as same was dependent upon negotiations of a mutually agreeable form of contract as well as the acquisition of the relevant license to operate.

81. The alleged BG contract was again made with PHI Inc. and not the Claimant and it was conditional upon PHI Inc., and not the Claimant, obtaining the necessary licences to operate.

82. The BHP contract was made with the Claimant but this was also conditional upon the Claimant obtaining the requisite licences and complying with the legal requirements for conducting business in Trinidad and Tobago.

83. The Claimant's contention that it had contractual commitments appears therefore to have been overstated.

84. At paragraph 97 of the its submissions the Claimant also stated that the Defendant showed *"a lack of any attempt – to say nothing of an honest or genuine attempt – ... to undertake the task of considering what permission other than a "journey permit" or*

"concession" might enable the Applicant to service its contractual commitments." The Defendant however denied this and by its affidavit evidence sought to establish that it gave careful and genuine consideration to the Claimant's concerns.

85. Upon reading paragraphs 24, 25, 27, 28, 29, 32, 34, 35, 37, 29, 40, 47, 48 and 49 of Mr. Stepanek's affidavit it appears that the Claimant's request for temporary permission to operate, was initially restricted to obtaining a "foreign operator's permit" or a "journey permit" so as to allow PHI Inc. to operate on its behalf while its application for an AOC was pending. By letters dated March 8, 2016 from Alexander, Jeremie & Company, which was referred to at paragraph 49 of Mr. Stepanek's affidavit, the Claimant sought some other type of concession. Mr. Francis Regis addressed the issue of the request for a "foreign operator's permit" in his affidavit at paragraphs 25 and 26 and by his annexure "F.R. 18". Regis's evidence was as follows:

    (i) By email of 15th May, 2015, Mike Foley of PHI Inc. asked the Director General to consider two proposals: (1) a request for PHI Inc., not the Claimant, to operate 1 to 2 helicopters for an initial period of 12 months under a foreign air operator agreement while (2). A local company made the appropriate application for a local AOC. Mr. Foley sought to clarify his request by email dated May 18, 2015 to Mr. Lutchmedial. Mr. Lutchmedial requested Mr. Regis' advice and, in giving consideration to the request of Mr. Foley, Mr. Regis, by email of May 25, 2015, responded to his email indicating that option (1) is vague and that further comment on that was not contemplated at this time, as additional information was required for a more comprehensive response. He also said that option (2) appeared to hinge on arrangements being made with another person or organization that held a valid AOC which has been suspended and that if that understanding was valid, PHI will be required to follow the certification process.

(ii) Subsequently, on May 26, 2015, Mr. Foley responded saying that he will respond to clarify PHI Inc.'s, requirements to operate using its US Part 135 certificate until completion of its TTCAA AOC. On May 28, 2015, Mr. Foley, by email, indicated that PHI Inc., not the Claimant, wished to formally seek approval from the Director General set up operations as a foreign air operator to conduct offshore helicopter support operations under its United States FAA Part 135 certificate. Later, Mr. Regis replied to Mr. Foley to say that TTCAR No, 10.3 (1) applies only to a foreign air operator operating into Trinidad and Tobago from a foreign county and that operating in accordance with FAR Part 135 is not contemplated by the regulation.

(iii) On the said May 28, 2015, Mr. Foley indicated to Mr. Regis that he understood and asked whether the regulations allowed temporary operation within Trinidad and Tobago territory under PHI Inc.'s U.S. Part 135 certificate until completion of the TTCAA AOC. Mr. Regis responded and advised that the regulation did not make provision for the operation of foreign aircraft in public transport by an organization that does not hold a Trinidad and Tobago AOC.

(iv) By email dated May 29, 2015, Mr. Foley once again indicated that he understood and requested a meeting with the Defendant to discuss the TTCAA AOC and a possible interim wet lease option as PHI Inc.'s operations, not the Claimant's, were planned for the end of December 2015. Mr. Regis suggested dates in the week following May 29, 2015 or a day during the week of June 8 to 12, 2015. Mr. Foley, then suggested a tentative date for the meeting in the week of June 8, 2015.

86. The email train clearly establishes that the Defendant, through Mr. Regis, gave careful consideration and addressed its mind to the requests of PHI Inc.

87. Even prior to the email exchange between Mr. Regis and Mr. Foley, there were meetings between representatives of PHI Inc. and the Defendant to discuss the certification process**.**

88. **With respect to the Claimant's assertions there was an attempt by the Director General to have legislative change effected so as to protect local operators. The information upon which the said assertions were premised is speculative and the Director General cannot direct Parliament as to how it should exercise its right to a negative resolution in accordance with section 33 of the Act. In the circumstance this assertion cannot be viewed as being so cogent or compelling and indicative of bad faith.**

89. In **Civil Appeal 12 of 99, The Police Service Commission v. Wayne Hayde**, Sharma JA (as he then was) outlined at page 9 that to prove bad faith it would be very difficult to do so by the affidavit evidence alone unless the facts are clearly undisputed and bad faith can be unquestionably inferred.

90. **The evidence in this case suggests that the Defendant afforded the Claimant's requests in relation to the certification process due consideration and also considered the request for a concession to operate while its AOC application was pending and the Court found that there is no undisputed, cogent and compelling evidence upon which the allegation of bad faith can be premised.**

Issue V – Whether there has been any unreasonable delay in processing the Claimant's application.

91. The Claimant stated at paragraph 98 of its submissions that although the Defendant knew of its commercial obligations, its evidence establishes that the Defendant was guilty of unnecessary delay.

92. The allegations in relation to delay were raised in the Claimant's affidavits as follows:

Barun Singh's affidavit at paragraphs 18, 20, 21, and 22;

The Machado affidavit at paragraphs 22 and 45;

The De Gannes affidavit at paragraphs 20, 21, 22, 23, 24, 26, 31, 33 and 34; and the joint affidavit of Murphy and Rodriguez at paragraph 72.

93. The Defendant outlined its position relative to the time line and issue of delay as follows:

The Regis affidavit at paragraphs 15, 16, 17, 19, 20, 21 and 22; and

The Lutchmedial affidavit at paragraph 17 (iv), (xii) and (xxvii).

94. **Having reviewed the evidence, the Court cannot conclude that there were periods of unnecessary or unreasonable delay as advanced by the Claimant. While it cannot be said that the Defendant acted with expedition, the evidence establishes that the Defendant did not act in bad faith, offered advice to the Claimant and communicated its commitment to work with the Claimant. While administrative efficacy appears to be an elusive objective in this Republic, the Defendant did not act in a reprehensibly dilatory or inefficient manner.** Mr. Regis pointed out that it can take between 6 months to 3 ½ years for an AOC to be issued and there is no evidence to suggest that prior to the instant proceedings that the Claimant ever complained that the Defendant's instructions were unclear or conflicting.

95. Accordingly the Court found that there is no evidence to suggest that the Claimant has operated with unreasonable delay in its processing of the Claimant's application.

96. The evidence in this matter reveals a regrettable circumstance and although the Claimant has not demonstrated any intention to disregard the provisions outlined under the Act, there is no legal basis to grant the concessions and/or temporary

permission that have been sought. It is unfortunate that the procedure to obtain an AOC has and is taking a long time. The Director General should steadfastly adhere to his assurance to work with the Claimant so as to achieve certification. However, until the process has been fully engaged, the Claimant has to wait and cannot operate in this jurisdiction. The process and procedure that govern the grant of an AOC has to be shielded from any form of commercial pressure and the Claimant's contention that it stands to lose millions of dollars if it is not allowed to operate on a temporary basis pending the grant of an AOC, is of no moment; the law must always be followed to the letter. The Claimant and/or PHI Inc. secured contracts when it was not in a position to discharge those contractual obligations, this is a circumstance that was of its own making and neither the Claimant nor its parent company can expect that they can dictate the pace and process that ought to be adopted in this jurisdiction.

97. **On the other hand, against thebackdrop of the call for diversification of this nation's economy, the need to attract both local and foreign investors is paramount. Accordingly all procedures, regulatory frameworks and relevant laws must be reviewed so as to ensure that bureaucracy, red tape, antiquated processes and outdated legislation do not act as a deterrent to potential investors.**

98. **For the reasons that have been outlined the Claimant's case is hereby dismissed the interim order issued on the 15th March is hereby discharged and the Claimant is to pay to the Defendant costs certified fit for a Senior Counsel, which will be assessed in default of agreement**.

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FRANK SEEPERSAD
JUDGE