APPENDIX

TABLE OF CONTENTS

Page

Appendix A — Court of appeal superseding opinion and rehearing order (November 5, 2025) 1a

Appendix B — Court of appeal opinion (September 10, 2025) 18a

Appendix C — Circuit court order (May 15, 2023) 35a

Appendix D — The Republic of Trinidad and Tobago High Court of Justice opinion (November 7, 2011) 38a

APPENDIX A

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Opinion filed November 5, 2025.

No. 3D23-880
Lower Tribunal No. 04-11813

STEVE FERGUSON,
Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO, ET AL.,
Appellees.

SUMMARY ORDER

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

León Cosgrove Jiménez LLP, and Scott B. Cosgrove and William A. O'Leary; The Law Office of Stephen James Binhak, P.L.L.C., and Stephen J. Binhak; Ropes & Gray LLP, and Douglas Hallward-Driemeier and Isaac C.H. Sommers (Washington, DC) and Philip P. Ehrlich (Chicago, IL), for appellant.

White & Case LLP, and Raoul G. Cantero and James N. Robinson and Ryan A. Ulloa and Wyatt R. Smith (New York, NY), for appellees.

Before LOGUE, GORDO and LOBREE, JJ.

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION

LOBREE, J.

We deny Appellant's motion for rehearing, rehearing en banc, and certification but withdraw our previous opinion and substitute the following opinion in its stead.

Following nineteen years of litigation, with six related interlocutory proceedings and a month-long trial, Steve Ferguson ("Ferguson") appeals from a final judgment rendered upon a jury verdict finding that he committed civil fraud, conspiracy to commit fraud, and violated Florida's Civil Remedies for Criminal Practices Act, sections 772.103(3) and (4), Florida Statutes (portions of "Florida's Civil RICO Act"). Upon our thorough review of the voluminous record evidence viewed in the light most favorable to the jury verdict, we affirm on all grounds. See Alvarez v. All Star Boxing, Inc., 258 So. 3d 508, 512 (Fla. 3d DCA 2018) ("We review the jury's award . . . to see if it is supported by substantial competent evidence viewing the facts and all reasonable inferences in the light most favorable to the verdict."). We write simply to address Ferguson's argument that no domestic injury to the Republic of Trinidad and Tobago, et al. (the "Republic") occurred.[1]

---

[1] While the concurrence asserts that this is a case of first impression as to whether Florida's Civil RICO Act may be applied extra-territorially, this is not how Ferguson presented the issue to the trial court. Instead, Ferguson contended that the Republic failed to prove it suffered a domestic injury. Because the specific issue was not raised below, we decline to address whether Florida's Civil RICO Act may be applied extra-territorially. See Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (emphasis added) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985))).

Florida's Civil RICO Act is patterned after its federal counterpart, so Florida courts look to federal cases for guidance. See Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc., 881 So. 2d 565, 570 n.1 (Fla. 3d DCA2004). Federal civil RICO claims require a "domestic injury." See Yegiazaryan v. Smagin, 599 U.S. 533, 543–44 (2023) ("[D]etermining whether a plaintiff has alleged a domestic injury [for purposes of RICO] is a context-specific inquiry that turns largely on the particular facts alleged in a complaint." (quoting Smagin v. Yegiazaryan, 37 F.4th 562, 570 (9th Cir. 2022))). "Specifically, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States. . . . [T]hat means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity." Id.

Here, domestic injury was shown where many parts of the conspiracy and racketeering activity occurred in Florida. Most importantly, the payment of the overinflated bids and bribes to co-conspirators Raul Guiterrez and Brian Kuei Tung, and the destruction of evidence. Ferguson hatched the conspiracy in Miami, and executed parts of the conspiracy in Miami, where he met with conspirators to ensure selection of the project consultant, concealed transfers through an agreement that he fabricated, reviewed documents relating to conspirators' illicit payments, and transferred over $1 million to Miami accounts held by Gutierrez. Among other things, the evidence showed that Ferguson's co-conspirators lived in and orchestrated the scheme from Florida, where fake invoices and backdated contracts were created and a hard drive containing incriminating evidence was destroyed. Florida-based companies pushed

through overpriced bids and funneled kickbacks to Miami-based accounts, and co-conspirator Gutierrez funneled millions of dollars from accounts in Miami to Ferguson's shell accounts at a Bahamian bank and paid another co-conspirator using checks from a business located in Miami. Thus, we hold that a domestic injury occurred in Florida where, over multiple years, wrongful acts and plans were devised, initiated, and carried out through acts and communications initiated in and directed towards Florida. See Yegiazaryan, 599 U.S. at 545–46.

Affirmed.

GORDO, J., concurs.

Ferguson v. Republic of Trinidad and Tobago

Case No. 3D23-0880

LOGUE, J., concurring

Florida's Civil Remedies for Criminal Practices Act ("Florida Civil RICO"), section 772.104, Florida Statutes, contains no language limiting its extraterritoriality. Nor does it contain language requiring proof of a "domestic injury." As framed in his initial brief, however, Ferguson argues that "Florida Civil RICO, which is patterned after federal RICO, . . . incorporates the same presumption against extraterritoriality" as its federal counterpart and therefore requires proof of a "domestic injury." This is the necessary premise to his further argument that Trinidad and Tobago failed to prove a domestic injury.

In making this argument, Ferguson relies on RJR Nabisco, Inc. v. European Community, 579 U.S.

325 (2016). In RJR Nabisco, Justice Samuel Alito, writing for the majority, found that the federal counterpart to Florida Civil RICO had no extraterritorial application and therefore required proof of a domestic injury. Id. at 346. In doing so, he set forth "a two-step framework for analyzing extraterritoriality issues." Id. at 337. "At the first step," he held, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. "If the statute is not extraterritorial," he wrote, "then at the second step we determine whether the case involves a domestic application of the statute," i.e. a "domestic injury." Id.

Whether this same analysis applies to Florida Civil RICO is a case of first impression for a district court in Florida. Accordingly, while I concur with my colleagues that the judgment should be affirmed, I believe a discussion of the "two-step framework for analyzing extraterritoriality issues" is warranted.

BACKGROUND

Steve Ferguson appeals a final judgment after a jury trial in the amount of $131,318,840.47. The jury found that Ferguson and his co-defendants engaged in a decades-long scheme to fraudulently overcharge the Republic of Trinidad and Tobago for contracts to build a new airport.

Because this appeal comes to us after a jury trial, the facts are viewed in the light most favorable to the jury's verdict. In 1996, Trinidad and Tobago decided to build a new airport in Port of Spain—the Piarco International Airport. The project was funded by Trinidad and Tobago and was supervised by its entities.

Appellant Ferguson is a citizen and resident of Trinidad and Tobago. Among other things, he heads a group of companies known as the Maritime Group. From 1996 to 2001, while the airport was being built, he served as Chairman of Trinidad and Tobago's National Gas Company, which provided Trinidad and Tobago most of its revenues. In Miami, Ferguson recruited Birk Hillman Consulting, a Florida corporation, to apply to become the lead consultant on the airport project. Ferguson then used his political and economic influence to assist Birk Hillman in being awarded the contract.

Having steered Birk Hillman to the consulting contract, Ferguson warned Birk Hillman that it could "still lose the deal" and demanded a kickback of $1 million. During the course of the arrangement, Birk Hillman or its principals paid Ferguson over $1.1 million. At Ferguson's direction, Birk Hillman or its principals took pains to conceal the payments by transferring the moneys through front firms owned by them to front firms owned by Ferguson.

Regarding a contract to build certain interiors at the airport, a consultant of Trinidad and Tobago estimated the cost to be $20 million. The conspirators arranged to have Northern Construction Corporation, based in Miami, submit an inflated bid for $29 million. Ferguson directed Birk Hillman to recommend the inflated bid despite the price differential. On Birk Hillman's advice, the bid was accepted.

After receiving the contract, Northern then paid $2 million to a Bahamian shell company controlled by Ferguson. Ferguson transferred $335,000 of that money "for no apparent legitimate reason" to one of Trinidad and Tobago's officials who voted to award the contract to

Northern. Ferguson also used that money to buy two residential properties for that official in Miami. That official, Brian Kuei Tung, was one of Ferguson's co-defendants in this case.

Regarding a contract to obtain and build systems like baggage handling and jet bridges, a consultant of Trinidad and Tobago estimated the cost to be $15 million. The conspirators arranged to have Calmaquip Engineering Corporation, a Florida corporation, submit an inflated bid for $30 million. To make this bid appear reasonable, they had a Florida subsidiary of Soares da Costa SDC, a Portuguese company, present a larger bid of $35 million. The Florida subsidiary used faux corporate stamps to make it appear the Portuguese company was making the bid rather than its Florida subsidiary. The Florida subsidiary that submitted the faux bid was thirty percent owned by Calmaquip, shared space with Calmaquip in Miami, and had as a director the principal of Calmaquip. Ferguson provided the required bond for this faux bid. Although Hillman-Waller, a principal of Birk Hillman, later testified "there was no justification for a price that high for either bid," the consulting firm recommended Trinidad and Tobago accept Calmaquip's $30 million bid for what was in essence $15 million worth of work.

After receiving the contract, the principal of Calmaquip transferred millions of dollars to various shell accounts owned by Ferguson in the Bahamas. The principal of Calmaquip, Raul Gutierrez, was a co-defendant in this case. He pled guilty to federal charges of criminal conspiracy for his part in this arrangement and was sentenced to six years in prison. At trial in the instant civil case, he testified at length and admitted that his involvement in this bid-rigging was "probably the biggest mistake in my life."

Regarding another contract concerning maintenance, the jury ultimately found Trinidad and Tobago overpaid by $8.7 million due to similar fraudulent collusion. During construction, moreover, the companies with contracts sometimes paid subcontractors inflated prices in return for kickbacks shared with the other conspirators.

Over time, payments made to Ferguson exceeded $12 million which Ferguson then funneled in part to various government officials and members of the conspiracy. When United States law enforcement began investigating this matter, the parties began creating fake invoices and back-dated contracts to explain the payments. Ferguson directed various individuals to destroy evidence.

During the time at issue, the principals met routinely in Miami to coordinate their efforts. Many of the actions taken to effectuate the conspiracy occurred in Miami. And many of the payments to advance the conspiracy were wired from Miami or to Miami, and sometimes from accounts in Florida to other accounts in Florida. Members of the conspiracy, including one of Ferguson's co-defendants, were charged in federal court in Florida with, and pled guilty to, violating federal laws against fraud.

To pay for part of the project, Trinidad and Tobago obtained a loan in the form of a letter of credit from a bank in Miami. The letter of credit was an asset of Trinidad and Tobago located in Miami and depleted in part by the conspiracy in which Ferguson played a central role.

In 2004, Trinidad and Tobago filed the lawsuit at issue. The operative fifth amended complaint named over 40 defendants. As the case proceeded, all but three settled or were dismissed. The case ultimately went to trial

against Ferguson and two co-defendants. The four causes of action against Ferguson were: (1) pattern of criminal activity to obtain proceeds in violation of section 772.103(3), Florida Statutes; (2) conspiracy to obtain proceeds through criminal activity in violation of section 772.103(4), Florida Statutes; (3) common law fraud; and (4) conspiracy to commit fraud.

The case was tried before a jury for a month. During the trial, Ferguson preserved the issue on appeal that I discuss below by moving for a directed verdict, which was denied. The jury ultimately entered a verdict finding Ferguson and his co-defendants liable on all four causes of action. The jury assessed damages in the amount of $32,385,988, for which Ferguson and his two co-defendants were jointly and severally liable. As section 772.104(1) provides for treble damages, the trial court entered a judgment awarding Trinidad and Tobago $97,157,964, plus an additional $38,792,567.72 in prejudgment interest. The trial court offset that amount by $4,631,691.25 from paid settlements and restitution provided to Trinidad and Tobago. Accordingly, the total judgment was entered for $131,318,840.47. This appeal followed.

DISCUSSION

On appeal, Ferguson raises multiple points. While the panel affirms on all grounds, I write only to address his claim, as he framed it in his initial brief, that "Florida Civil RICO, which is patterned after federal RICO, . . . incorporates the same presumption against extraterritoriality" as its federal counterpart and therefore requires proof of a "domestic injury."

A. Florida Civil RICO

Florida Civil RICO authorizes a civil cause of action with threefold damages for any person injured by a violation of its substantive prohibitions. § 772.104(1), Fla. Stat. Florida Civil RICO's substantive provisions provide it is unlawful for any person to use the proceeds "from a pattern of criminal activity." §§ 772.103(1), (4), Fla. Stat. A "[p]attern of criminal activity" is defined as "engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission . . . and are not isolated incidents . . . ." § 772.102(4), Fla. Stat.

Florida Civil RICO is modeled after the federal Racketeer Influenced and Corrupt Organizations Act ("federal RICO"), 18 U.S.C. §§ 1962, 1964. Florida, however, separated its version of the federal RICO into two parts located in different chapters of the Florida Statutes. The part at issue here provides damages in actions brought by private parties and has been named by the Legislature as Florida's "Civil Remedies for Criminal Practices Act." §§ 772.101-.19, Fla. Stat. For convenience, this act is referred to as "Florida Civil RICO." The other part provides criminal penalties, forfeitures, and civil remedies in proceedings commenced, for the most part, by investigative agencies and has been named by the Legislature as "Florida RICO(Racketeer Influenced and Corrupt Organizations) Act." §§ 895.01-.06, Fla. Stat. The name "RICO," however, is often applied to both laws in the caselaw.

Thus, the "Florida RICO statute requires the same elements as a federal RICO claim, but 'violation of the Florida RICO statute requires allegations

of predicate acts that violated Florida law, rather than Federal law.'" Drummond v. Zimmerman, 454 F. Supp. 3d 1210, 1217 n.1 (S.D. Fla. 2020) (quoting Asbury v. Slider, No. 8:19-cv-874-T-36SPF, 2020 WL 871097, at *3 n.1 (M.D. Fla. Feb. 21, 2020)). "The elements of a RICO offense under the Florida RICO Act have been described as (1) the existence of an enterprise, which the defendant was employed by or associated with in committing the crimes, (2) a pattern of racketeering activity, and (3) at least two 'incidents' of racketeering or racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents." Shimek v. State, 610 So. 2d 632, 634–35 (Fla. 1st DCA 1992) (footnote omitted). Without belaboring the point, I believe the evidence before the jury, interpreted in the light most favorable to its verdict, contains sufficient competent substantial evidence to support a finding that these three elements were established.

B. Extraterritoriality

Because the Florida laws are modeled after federal law, court interpretations of one often shed light on understanding the others. Mese v. State, 824 So. 2d 908, 912 (Fla. 3d DCA 2002) ("[T]he Florida RICO statute is patterned after the federal RICO statute, [and] Florida courts look to federal courts for guidance in construing RICO provisions."); Moorehead v. State, 383 So. 2d 629, 631 (Fla. 1980) ("The Florida legislature incorporated the federal case law by explicitly defining 'pattern of racketeering activity' to include interrelated incidents that are not isolated."). As Ferguson points out, Florida's reliance on federal interpretations of the federal RICO statute raises another point. Under federal RICO, claims

for damages brought by private parties are barred if those claims "rest entirely on injury suffered abroad." RJR Nabisco, 579 U.S. at 354.

In RJR Nabisco, the Supreme Court dismissed a claim filed by the European Union for triple damages under federal RICO. The European Union alleged RJR Nabisco allowed its tobacco products to be used as a method of payment for illegal drugs trafficked into Europe. RJR Nabisco responded by arguing that the federal RICO statute providing for civil damages did not apply extraterritorially to its conduct at issue which occurred outside the territory of the United States. Its argument was based on the canon of statutory construction that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." Id. at 335.

The Court assumed, without deciding, that the European Union's allegations of the involvement by American companies and the use by the alleged conspirators of "the U.S. mails and wires," among other things, sufficiently alleged ties to American commerce to bring the extraterritorial racketeering activity of the conspiracy within the reach of U.S. criminal laws at issue without offending the presumption against extraterritoriality. Id. at 345. The U.S. criminal laws at issue served as the required predicate offenses necessary for application of RICO's civil remedy including the substantive criminal prohibitions contained in RICO itself. Id.

Regarding the federal RICO's civil remedy for damages, however, the Court conducted a different analysis. Writing for the majority, Justice Alito found that the fed-

eral counterpart to Florida Civil RICO had no extraterritorial application and therefore required proof of a domestic injury. Id. at 346. In doing so, he set forth "a two-step framework for analyzing extraterritoriality issues." Id. at 337. "At the first step," he held, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. "If the statute is not extraterritorial," he wrote, "then at the second step we determine whether the case involves a domestic application of the statute." Id.

The Court went on to hold the presumption against extraterritoriality required the conclusion that the federal RICO's civil remedy had no extraterritorial reach. Therefore, federal RICO's civil remedy was not available for damage claims that "rest entirely on injury suffered abroad." Id. at 354. Because federal civil RICO had no extraterritoriality reach, to obtain the civil remedy of damages, a private plaintiff must "allege and prove a domestic injury." Id. at 346.

Having determined that the federal civil RICO is not extraterritorial, the Court then proceeded to "the second step," namely whether "the case involves a domestic application of the statute." In RJR Nabisco, the plaintiffs had waived any claim of a domestic injury. Therefore, the Court held that the claim against RJR Nabisco was properly dismissed. Id. at 354. Ferguson argues that this analysis applies to Florida Civil RICO.

Like Congress, Florida's sovereign powers allow it to legislate extraterritorially, provided its action is not preempted by federal law and does not run afoul of federal Constitutional limitations: "If the United States may control the conduct of its citizens upon the high seas,

we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (recognizing Florida's legislative authority to limit the use of diving equipment "for the purpose of taking commercial sponges from the Gulf of Mexico, or the Straits of Florida" outside Florida waters). See S.E. Fisheries Ass'n v. Dep't of Nat. Res., 453 So. 2d 1351, 1354 (Fla. 1984) ("At the outset we recognize that the state can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided, however, that the federal government has not preempted state regulation."). Indeed, the Florida Legislature continues to legislate extraterritorially in some instances.[1]

Like the United States, however, Florida has a presumption against extraterritoriality. See, e.g., Young v. Norwegian Seafarers' Union, 138 So. 3d 1189, 1192 (Fla. 3d DCA 2014) (citing to federal decisions based on the

[1] See, e.g., § 379.365(2)(a), Fla. Stat. (2025) ("A person may not use an expired tag or a stone crab trap tag not issued by the [Fish and Wildlife Conservation Commission] or possess or use a stone crab trap in or on state waters or adjacent federal waters without having a trap tag required by the commission firmly attached thereto."); § 379.3671(2)(c)1., Fla. Stat. (2025) ("A person may not possess or use a spiny lobster trap in or on state waters or adjacent federal waters without having affixed thereto the trap tag required by this section."); § 847.0135(7), Fla. Stat. (2025) ("A person is subject to prosecution in this state pursuant to chapter 910 [of the Florida Statutes] for any conduct proscribed by this section which the person engages in, while either within or outside this state, if by such conduct the person commits a violation of this section involving a child, a child's guardian, or another person believed by the person to be a child or a child's guardian.").

presumption against extraterritoriality and holding, "we similarly decline to extend Florida statutory or common law to reach such disputes, absent an express statement by the Legislature otherwise"); Burns v. Rozen, 201 So. 2d 629, 631 (Fla. 1st DCA 1967) ("Extraterritorial effect of an enactment is not to be found by implication.").

Like the federal civil RICO statute, the Florida Civil RICO statute has no express indication that it is intended to apply extraterritorially. Following the reasoning of the Supreme Court and applying Florida's own presumption against extraterritoriality, the Florida Civil RICO statute does not extend extraterritorially. Because it does not extend extraterritorially, we recognize that the Florida Civil RICO statute, like its federal counterpart, does not apply to claims that rest entirely on injury suffered abroad. Therefore, a plaintiff seeking damages under Florida Civil RICO must show a "domestic injury."

C. Proof of Domestic Injury

As mentioned above, the Supreme Court in RJR Nabisco did not examine the nature of the required domestic injury because that issue was waived. The Court, however, did address the nature of the required domestic injury in Yegiazaryan v. Smagin, 599 U.S. 533 (2023). Smagin was a resident of Russia. He obtained a multi-million dollar judgment in California against Yegiazaryan who lived in California. Smagin ultimately sued Yegiazaryan under federal RICO for alleged racketeering activities occurring in part in the United States but mainly occurring abroad to hide assets to prevent Smagin's ability to collect the California judgment.

Yegiazaryan argued that Smagin failed to allege a domestic injury because the purely economic injury to Smagin occurred where he lived – in Russia.

The Court rejected such "a bright-line rule . . . that locates a plaintiff's injury at the plaintiff's residence." Id. at 543. Instead, the Court held that the analysis to determine if a plaintiff has alleged a domestic injury under RICO "means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity." Id. at 544 (footnote omitted). The Court ultimately determined that Smagin had alleged a domestic injury given "Smagin's interests in his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California." Id. at 546. Because interpretations of federal RICO guide this Court's interpretation of Florida's RICO statutes, this federal analysis also applies to the Florida statutes.

Turning from this law to the instant case, one of the first, major acts to advance the conspiracy occurred in Miami—Ferguson's meeting with and recruiting of Birk Hillman, a Florida corporation, to apply to be Trinidad and Tobago's lead consultant on the airport construction. The conspiracy was advanced by meetings among the key conspirators in Florida occurring regularly throughout the conspiracy. Key evidence was located and destroyed in Florida. Some payments to advance the conspiracy occurred entirely in Florida and funds to advance the conspiracy flowed into and out of Florida. The conspiracy involved United States citizens and United

States firms. Finally, to pay for part of the project, Trinidad and Tobago obtained a loan in the form of a letter of credit from a bank in Miami. The letter of credit was an asset of Trinidad and Tobago located in Miami and depleted in part by the conspiracy. These circumstances establish that the injury at issue did not "rest entirely on injury suffered abroad." RJR Nabisco, 579 U.S. at 354.

Florida is a world destination for finance, business, and construction. In interpreting Florida's presumption against extraterritoriality, the sovereign state of Florida has a clear interest in preventing, punishing, and providing a remedy for those damaged in part in Florida and in part abroad, as occurred here, by this type of criminal enterprise operating out of Florida. Here, Trinidad and Tobago sufficiently established a domestic injury under Florida Civil RICO.

APPENDIX B

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Opinion filed September 10, 2025.

Not final until disposition of timely filed motion for rehearing.

No. 3D23-880
Lower Tribunal No. 04-11813

STEVE FERGUSON,
Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO, ET AL.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

León Cosgrove Jiménez LLP, and Scott B. Cosgrove and William A. O'Leary; The Law Office of Stephen James Binhak, P.L.L.C., and Stephen J. Binhak; Ropes & Gray LLP, and Douglas Hallward-Driemeier and Isaac C.H. Sommers (Washington, DC) and Philip P. Ehrlich (Chicago, IL), for appellant.

White & Case LLP, and Raoul G. Cantero and James N. Robinson and Ryan A. Ulloa and Wyatt R. Smith (New York, NY), for appellees.

Before LOGUE, GORDO and LOBREE, JJ.

LOBREE, J.

Following nineteen years of litigation, with six related interlocutory proceedings and a month-long trial,

Steve Ferguson ("Ferguson") appeals from a final judgment rendered upon a jury verdict finding that he committed civil fraud, conspiracy to commit fraud, and violated Florida's Civil Remedies for Criminal Practices Act, sections 772.103(3) and (4), Florida Statutes (portions of "Florida's Civil RICO Act"). Upon our thorough review of the voluminous record evidence viewed in the light most favorable to the jury verdict, we affirm on all grounds. See Alvarez v. All Star Boxing, Inc., 258 So. 3d 508, 512 (Fla. 3d DCA 2018) ("We review the jury's award . . . to see if it is supported by substantial competent evidence viewing the facts and all reasonable inferences in the light most favorable to the verdict."). We write simply to address Ferguson's argument that no domestic injury to the Republic of Trinidad and Tobago, et al. (the "Republic") occurred[1].

Florida's Civil RICO Act is patterned after its federal counterpart, so Florida courts look to federal cases for guidance. See Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc., 881 So. 2d 565, 570 n.1 (Fla. 3d DCA 2004). Federal civil RICO claims require a "domestic injury." See Yegiazaryan v. Smagin, 599 U.S. 533,

[1] While the concurrence asserts that this is a case of first impression as to whether Florida's Civil RICO Act may be applied extra-territorially, this is not how Ferguson presented the issue to the trial court. Instead, Ferguson contended that the Republic failed to prove it suffered a domestic injury. Because the specific issue was not raised below, we decline to address whether Florida's Civil RICO Act may be applied extra-territorially. See Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (emphasis added) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985))).

543–44 (2023) ("[D]etermining whether a plaintiff has alleged a domestic injury [for purposes of RICO] is a context-specific inquiry that turns largely on the particular facts alleged in a complaint." (quoting Smagin v. Yegiazaryan, 37 F.4th 562, 570 (9th Cir. 2022))). "Specifically, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States. . . . [T]hat means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity." Id.

Here, domestic injury was shown where many parts of the conspiracy and racketeering activity occurred in Florida. Most importantly, the payment of the overinflated bids and bribes to co-conspirators Raul Guiterrez and Brian Kuei Tung, and the destruction of evidence. Ferguson hatched the conspiracy in Miami, and executed parts of the conspiracy in Miami, where he met with conspirators to ensure selection of the project consultant, concealed transfers through an agreement that he fabricated, reviewed documents relating to conspirators' illicit payments, and transferred over $1 million to Miami accounts held by Gutierrez. Among other things, the evidence showed that Ferguson's co-conspirators lived in and orchestrated the scheme from Florida, where fake invoices and backdated contracts were created and a hard drive containing incriminating evidence was destroyed. Florida-based companies pushed through overpriced bids and funneled kickbacks to Miami-based accounts, and co-conspirator Gutierrez funneled millions of dollars from accounts in Miami to Ferguson's shell accounts at a Bahamian bank and paid another co-conspirator using checks from a business lo-

cated in Miami. Thus, we hold that a domestic injury occurred in Florida where, over multiple years, wrongful acts and plans were devised, initiated, and carried out through acts and communications initiated in and directed towards Florida. See Yegiazaryan, 599 U.S. at 545–46.

Affirmed.

GORDO, J., concurs.

Ferguson v. Republic of Trinidad and Tobago

Case No. 3D23-0880

LOGUE, J., concurring

Florida's Civil Remedies for Criminal Practices Act ("Florida Civil RICO"), section 772.104, Florida Statutes, contains no language limiting its extraterritoriality. Nor does it contain language requiring proof of a "domestic injury." As framed in his initial brief, however, Ferguson argues that "Florida Civil RICO, which is patterned after federal RICO . . . incorporates the same presumption against extraterritoriality" as its federal counterpart and therefore requires proof of a "domestic injury." This is the necessary premise to his further argument that Trinidad and Tobago failed to prove a domestic injury.

In making this argument, Ferguson relies on RJR Nabisco v. Eur. Cmty., 579 U.S. 325 (2016). In RJR Nabisco, Justice Samuel Alito, writing for the majority, found that the federal counterpart to Florida Civil RICO had no extraterritorial application and therefore required proof of a domestic injury. Id. at 346. In doing so, he set forth "a two-step framework for analyzing extraterritoriality issues." Id. at 337. "At the first step," he

held, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. "If the statute is not extraterritorial," he wrote, "then at the second step we determine whether the case involves a domestic application of the statute," i.e. a "domestic injury." Id.

Whether this same analysis applies to Florida Civil RICO is a case of first impression for a district court in Florida. Accordingly, while I concur with my colleagues that the judgment should be affirmed, I believe a discussion of the "two-step framework for analyzing extraterritoriality issues" is warranted.

BACKGROUND

Steve Ferguson appeals a final judgment after a jury trial in the amount of $131,318,840.47. The jury found that Ferguson and his co-defendants engaged in a decades-long scheme to fraudulently overcharge the Republic of Trinidad and Tobago for contracts to build a new airport.

Because this appeal comes to us after a jury trial, the facts are viewed in the light most favorable to the jury's verdict. In 1996, Trinidad and Tobago decided to build a new airport in Port of Spain—the Piarco International Airport. The project was funded by Trinidad and Tobago and was supervised by its entities.

Appellant Ferguson is an American citizen active in Trinidad and Tobago. Among other things, he heads a group of companies known as the Maritime Group. From 1996 to 2001, while the airport was being built, he served as Chairman of Trinidad and Tobago's National Gas Company, which provided Trinidad and Tobago most of

its revenues. In Miami, Ferguson recruited Birk Hillman Consulting, a Florida corporation, to apply to become the lead consultant on the airport project. Ferguson then used his political and economic influence to assist Birk Hillman in being awarded the contract.

Having steered Birk Hillman to the consulting contract, Ferguson warned Birk Hillman that it could "still lose the deal" and demanded a kickback of $1 million. During the course of the arrangement, Birk Hillman or its principals paid Ferguson over $1.1 million. At Ferguson's direction, Birk Hillman or its principals took pains to conceal the payments by transferring the moneys through front firms owned by them to front firms owned by Ferguson.

Regarding a contract to build certain interiors at the airport, a consultant of Trinidad and Tobago estimated the cost to be $20 million. The conspirators arranged to have Northern Construction Corporation, based in Miami, submit an inflated bid for $29 million. Ferguson directed Birk Hillman to recommend the inflated bid despite the price differential. On Birk Hillman's advice, the bid was accepted.

After receiving the contract, Northern then paid $2 million to a Bahamian shell company controlled by Ferguson. Ferguson transferred $335,000 of that money "for no apparent legitimate reason" to one of Trinidad and Tobago's officials who voted to award the contract to Northern. Ferguson also used that money to buy two residential properties for that official in Miami. That official, Brian Kuei Tung, was one of Ferguson's co-defendants in this case.

Regarding a contract to obtain and build systems like baggage handling and jet bridges, a consultant of

Trinidad and Tobago estimated the cost to be $15 million. The conspirators arranged to have Calmaquip Engineering Corporation, a Florida corporation, submit an inflated bid for $30 million. To make this bid appear reasonable, they had a Florida subsidiary of Soares da Costa SDC, a Portuguese company, present a larger bid of $35 million. The Florida subsidiary used faux corporate stamps to make it appear the Portuguese company was making the bid rather than its Florida subsidiary. The Florida subsidiary that submitted the faux bid was thirty percent owned by Calmaquip, shared space with Calmaquip in Miami, and had as a director the principal of Calmaquip. Ferguson provided the required bond for this faux bid. Although Hillman-Waller, a principal of Birk Hillman, later testified "there was no justification for a price that high for either bid," the consulting firm recommended Trinidad and Tobago accept Calmaquip's $30 million bid for what was in essence $15 million worth of work.

After receiving the contract, the principal of Calmaquip transferred millions of dollars to various shell accounts owned by Ferguson in the Bahamas. The principal of Calmaquip, Raul Gutierrez, was a co-defendant in this case. He pled guilty to federal charges of criminal conspiracy for his part in this arrangement and was sentenced to six years in prison. At trial in the instant civil case, he testified at length and admitted that his involvement in this bid-rigging was "probably the biggest mistake in my life."

Regarding another contract concerning maintenance, the jury ultimately found Trinidad and Tobago overpaid by $8.7 million due to similar fraudulent collusion. During construction, moreover, the companies with

contracts sometimes paid subcontractors inflated prices in return for kickbacks shared with the other conspirators.

Over time, payments made to Ferguson exceeded $12 million which Ferguson then funneled in part to various government officials and members of the conspiracy. When United States law enforcement began investigating this matter, the parties began creating fake invoices and back-dated contracts to explain the payments. Ferguson directed various individuals to destroy evidence.

During the time at issue, the principals met routinely in Miami to coordinate their efforts. Many of the actions taken to effectuate the conspiracy occurred in Miami. And many of the payments to advance the conspiracy were wired from Miami or to Miami, and sometimes from accounts in Florida to other accounts in Florida. Members of the conspiracy, including one of Ferguson's co-defendants, were charged in federal court in Florida with, and pled guilty to, violating federal laws against fraud.

To pay for part of the project, Trinidad and Tobago obtained a loan in the form of a letter of credit from a bank in Miami. The letter of credit was an asset of Trinidad and Tobago located in Miami and depleted in part by the conspiracy in which Ferguson played a central role.

In 2004, Trinidad and Tobago filed the lawsuit at issue. The operative fifth amended complaint named over 40 defendants. As the case proceeded, all but three settled or were dismissed. The case ultimately went to trial against Ferguson and two co-defendants. The four causes of action against Ferguson were: (1) pattern of

criminal activity to obtain proceeds in violation of section 772.103(3), Florida Statutes; (2) conspiracy to obtain proceeds through criminal activity in violation of section 772.103(4), Florida Statutes; (3) common law fraud; and (4) conspiracy to commit fraud.

The case was tried before a jury for a month. During the trial, Ferguson preserved the issue on appeal that I discuss below by moving for a directed verdict, which was denied. The jury ultimately entered a verdict finding Ferguson and his co-defendants liable on all four causes of action. The jury assessed damages in the amount of $32,385,988, for which Ferguson and his two co-defendants were jointly and severally liable. As section 772.104 provides for treble damages, the trial court entered a judgment awarding Trinidad and Tobago $97,157,964, plus an additional $38,792,567.72 in prejudgment interest. The trial court offset that amount by $4,631,691.25 from paid settlements and restitution provided to Trinidad and Tobago. Accordingly, the total judgment was entered for $131,318,840.47. This appeal followed.

DISCUSSION

On appeal, Ferguson raises multiple points. While the panel affirms on all grounds, I write only to address his claim, as he framed it in his initial brief, that "Florida Civil RICO, which is patterned after federal RICO, . . . incorporates the same presumption against extraterritoriality" as its federal counterpart and therefore requires proof of a "domestic injury."

A. Florida Civil RICO

Florida Civil RICO authorizes a civil cause of action with threefold damages for any person injured by a violation of its substantive prohibitions. § 772.104(1), Fla. Stat. Florida Civil RICO's substantive provisions provide it is unlawful for any person to use the proceeds "from a pattern of criminal activity." § 772.103(1), (4) Fla. Stat. A "[p]attern of criminal activity" is defined as "engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission . . . and are not isolated incidents . . . ." § 772.102(4), Fla. Stat.

Florida Civil RICO is modeled after the federal Racketeer Influenced and Corrupt Organizations Act ("federal RICO"), 18 U.S.C. §§ 1962, 1964. Florida, however, separated its version of the federal RICO into two parts located in different chapters of the Florida Statutes. The part at issue here provides damages in actions brought by private parties and has been named by the Legislature as Florida's "Civil Remedies for Criminal Practices Act." §§ 772.101-.19, Fla. Stat. For convenience, this act is referred to as "Florida Civil RICO." The other part provides criminal penalties, forfeitures, and civil remedies in proceedings commenced, for the most part, by investigative agencies and has been named by the Legislature as "Florida RICO (Racketeer Influenced and Corrupt Organizations) Act." §§ 895.01-.06, Fla. Stat. The name "RICO," however, is often applied to both laws in the caselaw.

Thus, the "Florida RICO statute requires the same elements as a federal RICO claim, but 'violation of the Florida RICO statute requires allegations of predicate acts that violated Florida law, rather than Federal law.'"

Drummond v. Zimmerman, 454 F. Supp. 3d 1210, 1217 n.1 (S.D. Fla. 2020) (quoting Asbury v. Slider, No. 8:19-cv-874-T-36SPF, 2020 WL 871097, at *3 n.1 (M.D. Fla. Feb. 21, 2020)). "The elements of a RICO offense under the Florida RICO Act have been described as (1) the existence of an enterprise, which the defendant was employed by or associated with in committing the crimes, (2) a pattern of racketeering activity, and (3) at least two 'incidents' of racketeering or racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents." Shimek v. State, 610 So. 2d 632, 634–35 (Fla. 1st DCA 1992) (footnote omitted). Without belaboring the point, I believe the evidence before the jury, interpreted in the light most favorable to its verdict, contains sufficient competent substantial evidence to support a finding that these three elements were established.

B. Extraterritoriality

Because the Florida laws are modeled after federal law, court interpretations of one often shed light on understanding the others. Mese v. State, 824 So. 2d 908, 912 (Fla. 3d DCA 2002) ("[T]he Florida RICO statute is patterned after the federal RICO statute, [and] Florida courts look to federal courts for guidance in construing RICO provisions."); Moorehead v. State, 383 So. 2d 629, 631 (Fla. 1980) ("The Florida legislature incorporated the federal case law by explicitly defining 'pattern of racketeering activity' to include interrelated incidents that are not isolated."). As Ferguson points out, Florida's reliance on federal interpretations of the federal RICO statutes raises another point. Under federal

RICO, claims for damages brought by private parties are barred if those claims "rest entirely on injury suffered abroad." RJR Nabisco, 579 U.S. at 354.

In RJR Nabisco, the Supreme Court dismissed a claim filed by the European Union for triple damages under federal RICO. The European Union alleged RJR Nabisco allowed its tobacco products to be used as a method of payment for illegal drugs trafficked into Europe. RJR Nabisco responded by arguing that the federal RICO statute providing for civil damages did not apply extraterritorially to its conduct at issue which occurred outside the territory of the United States. Its argument was based on the canon of statutory construction that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." Id. at 335.

The Court assumed, without deciding, that the European Union's allegations of the involvement by American companies and the use by the alleged conspirators of "the U.S. mails and wires," among other things, sufficiently alleged ties to American commerce to bring the extraterritorial racketeering activity of the conspiracy within the reach of U.S. criminal laws at issue without offending the presumption against extraterritoriality. Id. at 345. The U.S. criminal laws at issue served as the required predicate offenses necessary for application of RICO's civil remedy including the substantive criminal prohibitions contained in RICO itself. Id.

Regarding the federal RICO's civil remedy for damages, however, the Court conducted a different analysis. Writing for the majority, Justice Alito found that the federal counterpart to Florida Civil RICO had no extraterritorial application and therefore required proof of a

domestic injury. Id. at 346. In doing so, he set forth "a two-step framework for analyzing extraterritoriality issues." Id. at 337. "At the first step," he held, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. "If the statute is not extraterritorial," he wrote, "then at the second step we determine whether the case involves a domestic application of the statute." Id.

The Court went on to hold the presumption against extraterritoriality required the conclusion that the federal RICO's civil remedy had no extraterritorial reach. Therefore, federal RICO's civil remedy was not available for damage claims that "rest entirely on injury suffered abroad." Id. at 354. Because federal civil RICO had no extraterritoriality reach, to obtain the civil remedy of damages, a private plaintiff must "allege and prove a domestic injury." Id. at 346 (emphasis in original).

Having determined that the federal civil RICO is not extraterritorial, the Court then proceeded to "the second step," namely whether "the case involves a domestic application of the statute." In RJR Nabisco, the plaintiffs had waived any claim of a domestic injury. Therefore, the Court held that the claim against RJR Nabisco was properly dismissed. Id. at 354. Ferguson argues that this analysis applies to Florida Civil RICO.

Like Congress, Florida's sovereign powers allow it to legislate extraterritorially, provided its action is not preempted by federal law and does not run afoul of federal Constitutional limitations: "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not

likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (recognizing Florida's legislative authority to limit the use of diving equipment "for the purpose of taking commercial sponges from the Gulf of Mexico, or the Straits of Florida" outside Florida waters). See S.E. Fisheries Ass'n v. Dep't of Nat. Res., 453 So. 2d 1351, 1354 (Fla. 1984) ("At the outset we recognize that the state can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided, however, that the federal government has not preempted state regulation."). Indeed, the Florida Legislature continues to legislate extraterritorially in some instances.[1]

---

[1] See, e.g., § 379.365(2)(a), Fla. Stat. (2025) ("A person may not use an expired tag or a stone crab trap tag not issued by the [Fish and Wildlife Conservation Commission] or possess or use a stone crab trap in or on state waters or adjacent federal waters without having a trap tag required by the commission firmly attached thereto."); § 379.3671(2)(c)1., Fla. Stat. (2025) ("A person may not possess or use a spiny lobster trap in or on state waters or adjacent federal waters without having affixed thereto the trap tag required by this section."); § 847.0135(7), Fla. Stat. (2025) ("A person is subject to prosecution in this state pursuant to chapter 910 [of the Florida Statutes] for any conduct proscribed by this section which the person engages in, while either within or outside this state, if by such conduct the person commits a violation of this section involving a child, a child's guardian, or another person believed by the person to be a child or a child's guardian.").

Like the United States, however, Florida has a presumption against extraterritoriality. See, e.g., Young v. Norwegian Seafarers' Union, 138 So. 3d 1189, 1192 (Fla. 3d DCA 2014) (citing to federal decisions based on the presumption against extraterritoriality and holding "we similarly decline to extend Florida statutory or common law to reach such disputes, absent an express statement by the Legislature otherwise"); Burns v. Rozen, 201 So. 2d 629, 631 (Fla. 1st DCA 1967) ("Extraterritorial effect of an enactment is not to be found by implication.").

Like the federal civil RICO statute, the Florida Civil RICO statute has no express indication that it is intended to apply extraterritorially. Following the reasoning of the Supreme Court and applying Florida's own presumption against extraterritoriality, Florida Civil RICO statute does not extend extraterritorially. Because it does not extend extraterritorially, we recognize that Florida's Civil RICO statutes, like its federal counterpart, does not apply to claims that rest entirely on injury suffered abroad. Therefore, a plaintiff seeking damages under Florida Civil RICO must show a "domestic injury."

C. Proof of Domestic Injury

As mentioned above, the Supreme Court in RJR Nabisco did not examine the nature of the required domestic injury because that issue was waived. The Court, however, did address the nature of the required domestic injury in Yegiazaryan v. Smagin, 599 U.S. 533 (2023). Smagin was a resident of Russia. He obtained a multi-million dollar judgment in California against Yegiazaryan who lived in California. Smagin ultimately sued Yegiazaryan under federal RICO for alleged racketeering activities occurring in part in the United States

but mainly occurring abroad to hide assets to prevent Smagin's ability to collect the California judgment. Yegiazaryan argued that Smagin failed to allege a domestic injury because the purely economic injury to Smagin occurred where he lived – in Russia.

The Court rejected such "a bright-line rule . . . that locates a plaintiff's injury at the plaintiff's residence." Id. at 543. Instead, the Court held that the analysis to determine if a plaintiff has alleged a domestic injury under RICO "means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity." Id. at 544 (footnote omitted). The Court ultimately determined that Smagin had alleged a domestic injury given "Smagin's interests in his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California." Id. at 546. Because interpretations of federal RICO guide this Court's interpretation of Florida's RICO statutes, this federal analysis also applies to the Florida statutes.

Turning from this law to the instant case, one of the first, major acts to advance the conspiracy occurred in Miami—Ferguson's meeting with and recruiting of Birk Hillman, a Florida company, to apply to be Trinidad and Tobago's lead consultant on the airport construction. The conspiracy was advanced by meetings among the key conspirators in Florida occurring regularly throughout the conspiracy. Key evidence was located and destroyed in Florida. Some payments to advance the con-

spiracy occurred entirely in Florida and funds to advance the conspiracy flowed into and out of Florida. The conspiracy involved United States citizens and United States firms. Finally, to pay for part of the project, Trinidad and Tobago obtained a loan in the form of a letter of credit from a bank in Miami. The letter of credit was an asset of Trinidad and Tobago located in Miami and depleted in part by the conspiracy. These circumstances establish that the injury at issue did not "rest entirely on injury suffered abroad." RJR Nabisco, 579 U.S. at 354.

Florida is a world destination for finance, business, and construction. In interpreting Florida's presumption against extraterritoriality, the sovereign state of Florida has a clear interest in preventing, punishing, and providing a remedy for those damaged in part in Florida and in part abroad as occurred here, by this type of criminal enterprise operating out of Florida. Here, Trinidad and Tobago sufficiently established a domestic injury under Florida Civil RICO.

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Case No: 2004-011813-CA-0l
Section: CA30
Judge: Reemberto Diaz

Republic Of Trindad Of Tobago The
Plaintiff(s)

v.

TUNG, BRIAN KUEI
Defendant(s)

FINAL JUDGMENT

Pursuant to the jury verdict rendered in this action on March 29, 2023, IT IS ORDERED AND ADJUDGED that:

1. The Court hereby enters **FINAL JUDGMENT** in favor of Plaintiff The Republic of Trinidad and Tobago (Address: Kent House, Long Circular Road, Maraval, Trinidad & Tobago, West Indies) and against Defendants Steve Ferguson (Address: Lot No. 6, Santa Barbara Blvd, Santa Cruz, Trinidad & Tobago, West Indies), Brian Kuei Tung (Address: 14 St Andrews Terrace, Maraval, Trinidad & Tobago, West Indies); and Raul Gutierrez, Jr. (Address: 357 Almeria Avenue, Unit 906, Coral Gables, FL 33134), jointly and severally, in the amount of:

a. Ninety-seven Million One Hundred Fifty-seven Thousand Nine Hundred Sixty-four and 00/100 Dollars

(**$97,157,964.00**), which constitutes treble damages of the jury verdict amount of Thirty-two Million Three Hundred Eighty-five Thousand Nine Hundred Eighty-eight and 00/100 Dollars ($32,385,988.00); plus

b. Thirty-eight Million Seven Hundred Ninety-two Thousand Five Hundred Sixty-seven and 72/100 Dollars (**$38,792,567.72**), which constitutes prejudgment interest on the jury verdict amount; minus

c. Four Million Six Hundred Thirty-one Thousand Six Hundred Ninety-one and 25/100 Dollars (**$4,631,691.25**), which constitutes setoff from paid settlements and restitution to Plaintiff;

d. For a total judgment amount of One Hundred Thirty-one Million Three Hundred Eighteen Thousand Eight Hundred Forty and 47/100 Dollars (**$131,318,840.47**) (the "Final Judgment Amount"), for which let execution issue.

The Final Judgment Amount in favor of Plaintiff against Defendants Steve Ferguson, Brian Kuei Tung, and Raul Gutierrez, Jr. is joint and several. The Final Judgment Amount shall continue to bear interest at 6.58% commencing on the day following entry of this Final Judgment, through and including the date on which Defendants Steve Ferguson, Brian Kuei Tung, and Raul Gutierrez, Jr. satisfy the Final Judgment Amount. The interest rate will be adjusted annually "in accordance with the interest rate in effect on January I of each year as set by the Chief Financial Officer until the judgment is paid…." *See* 55.03 (2) & (3), Fla. Stat.

2. It is further ORDERED AND ADJUDGED that the three judgment debtor Defendants shall each complete under oath Florida Rule of Civil Procedure Form

1.977 (Fact Information Sheet), including all required attachments, and serve it on the Plaintiff judgment creditor's attorney within forty-five (45) days from the date of this Final Judgment, unless the Final Judgment is satisfied or post-judgment discovery is stayed.

3. The Court retains jurisdiction over this matter to enter further orders or judgments that are proper, including, without limitation, awarding such attorney's fees and costs as Plaintiff may be entitled to pursuant to any timely-filed motion, as well as orders regarding any future setoffs.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 15th day of May, 2023.

2004-011813-CA-0l 05-15-2023 11:03 AM
Hon. Reemberto Diaz

CIRCUIT COURT JUDGE
Electronically Signed

APPENDIX D

THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE

CV 2010 - 04144

Between

STEVE FERGUSON
ISHWAR GALBARANSINGH
Claimants

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
Defendant

Before The Honourable Mr Justice Ronnie Boodoosingh

APPEARANCES:

Mr Edward Fitzgerald QC and Mr Fyard Hosein SC leading Mr Rishi Dass, Ms Sasha Bridgemohan, and Ms Annette Mamchan; instructed by Ms Nyree Alfonso for the first Claimant

Mr Andrew Mitchell QC leading Mr Rajiv Persad; instructed by Ms Nyree Alfonso for the second Claimant

Mr Avory Sinanan SC leading Mr Kelvin Ramkissoon, Ms Sunita Harrikissoon and Ms Deowattee Dilraj-Battoosingh; instructed by Ms Janelle John for the Defendant

Delivered: 7 November 2011

JUDGMENT

1. Steve Ferguson and Ishwar Galbaransingh are citizens of Trinidad and Tobago. They are businessmen.

Mr Ferguson is a principal of Maritime General Insurance Company Limited and related companies. Mr Galbaransingh is the principal of Northern Construction Limited. In the 1990s, the government of Trinidad and Tobago began to build a new airport terminal building and do related works. The airport terminal was eventually completed and kept the same name as the previous airport called the Piarco International Airport. The construction of the new airport came about with much controversy and many allegations of improper conduct, notably corruption, involving several persons including contractors and government officials.

2. Both these men (the claimants) and their companies, benefitted from the award of contracts related to the construction and outfitting of that new airport. From 2002, the claimants and their companies, along with other persons, mainly citizens of Trinidad and Tobago, were charged with crimes related to the award of contracts in the construction of the airport. Among the persons charged were business colleagues, government officials and persons who were Cabinet Ministers at the time. Colloquially, the events are referred to as the Piarco Airport corruption scandal.

3. Proceedings in the Magistrates' Court began by the laying of charges on 22 March 2002. On 9 July 2007, the claimants were discharged by the Chief Magistrate on the original charges, but they were committed on additional and substituted charges on 7 January 2008. These proceedings have colloquially been called Piarco 1. An indictment has not yet been filed.

4. In 2004, new charges were laid against the claimants and their companies along with other persons. These proceedings also began in the Magistrates' Court

and are referred to as Piarco 2. The United States government, through the Department of Justice, began investigations and later charged persons including the claimants and other persons, some of whom were citizens of the United States. In 2006, the United States made an extradition request for the claimants. Those proceedings have been ongoing with several stages under the extradition legislation having been completed. The claimants, as was their right, challenged these proceedings along the way.

5. They have asserted throughout that they do not wish to be extradited to the United States, but they wish to be tried in Trinidad and Tobago where they have been prosecuted for many years and where they have invested significant personal and financial resources to defend themselves. The proceedings have reached the final stage when the Attorney General, in exercise of the powers given by section 16 of the **Extradition Act Chap. 12:04,** has decided to order their return to the United States.

6. The claimants have applied for judicial review of this decision of the Attorney General. They have challenged the order on three bases for which the Court of Appeal has given permission. It is on these three challenges that I am called to decide. These challenges can be briefly labelled as follows:

- The Forum Decision
- The Representations Argument
- The Bias Argument

7. Both claimants filed affidavits in support of the application. The Attorney General responded through two affidavits of Ms Sunita Harrikissoon, who is a legal

officer in the Attorney General's office attached to the Central Authority, and who has been involved with this extradition request from the beginning. There was also an affidavit of Ms Elaine Greene, an attorney-at-law involved in prosecuting the criminal matters. Written submissions were filed and exchanged on behalf of each of the claimants and on behalf of the Attorney General. Oral hearings were then held and the parties supplemented their oral submissions with further written submissions. Although the claimants filed separate submissions and have been represented by different counsel, they have deployed their cases together and have relied on each other's evidence. I will, therefore, consider their claims together although I am mindful of the need to arrive at a decision in each case. I should add that no issue has been raised that they are in different positions. They are both in the same boat as far as this issue is concerned. One significant fact, however, is that Mr Galbaransingh was also at the material time a public official as head of the Tourism and Industrial Development Corporation.

8. I will address the submissions in turn.

THE FORUM DECISION

9. The main thrust of the claimant's arguments related to the Attorney General's decision on the issue of forum. They say that his decision is unreasonable and irrational when all the factors relevant to making such a decision are considered.

10. Extradition to a foreign state where the appropriate forum is the defendant's home state falls under the rubric of "any other sufficient cause" under s. 13(3) of the **Extradition Act.** This requires that extradition may be

refused on the mandatory grounds set out in s. 16(3) of the Act, under which a wide discretion is permitted.

11. The present section 16 decision brought into play the mandatory duty of refusal where extradition would be "unjust or oppressive". The question for the Attorney General was, would the extradition have been fair in all the circumstances. The section **16** decision required that question to be answered in relation to the appropriate forum. The court's responsibility is to review this decision in accordance with judicial review principles.

12. The starting point in deciding this issue, as acknowledged by all of the parties, are the factors set out in the decision of **The United States v Cotroni [1989] 1 SCR 1469,** the so called **Cotroni** factors. The Attorney General in the decision letter dated 9 October 2010, signed by Ms Harrikissoon, noted that these factors were considered and applied. It is important to consider the approach of the Attorney General as reflected in the decision letter. I note this in particular since the Harrikissoon affidavit referred to the statement of reasons in this letter as being detailed.

13. The claimants have submitted that when the **Cotroni** factors are looked at, the decision points clearly in one direction only and that direction is Trinidad and Tobago is the appropriate forum to try them. They say the Attorney General's decision that the appropriate forum is the United States of America is clearly irrational.

14. The Attorney General accepted that he should apply the **Cotroni** factors. It is necessary, therefore, to consider the Attorney General's decision against these factors.

15. Few extradition cases will be the same. The weight to be given to relevant factors will differ from case to case. It is also to be noted that **Cotroni** was not expressed to be exhaustive. That case was decided in its factual context. Other factors, not present in **Cotroni,** could feature prominently in other cases.

16. The factors listed in **Cotroni** can be summarised as follows:

- Where was the impact of the offence felt or likely to be felt?
- Which jurisdiction has the greater interest in prosecuting the offence?
- Which police force played a major role in the development of the case?
- Which jurisdiction has laid charges?
- Which jurisdiction has the most comprehensive case?
- Which jurisdiction is ready to proceed to trial?
- Where is the evidence located?
- Is the evidence mobile?
- The number of accused involved and whether they can be gathered together in one place for a trial.
- In which jurisdiction were most of the acts in furtherance of the crime committed.
- The nationality and residence of the accused.
- The severity of sentence the accused is likely to receive in each jurisdiction.

The Attorney General also indicated in the decision letter that he had regard to the Eurojust Guidelines in

making his decision. The particular factors considered were not identified, but I will return to this later.

17. The claimants further advanced that the **Cotroni** factors must be seen in the context of the facts of that case and this case presented significantly different or additional factors which had to be recognised and considered. Primary among these factors is that the claimants had been engaged in defending themselves and their respective companies in Trinidad and Tobago in criminal proceedings related to corruption allegations at the airport for several years before this request had been made, and, they had continued to do so even after the request had been made. Such a significant factor, they suggested, did not feature in the **Cotroni** case, nor indeed, according to their research, has it featured in any case in the Commonwealth. In fact, no party was able to refer the court to any case in which an extradition request had come after an accused had for many years been defending himself in one set of proceedings before a request was made and that the request was favourably considered. In the United Kingdom, in fact, the law is that once a local charge has been made, the request cannot go forward. This is an approach mirrored elsewhere, the claimants advance, which illustrates the point that it would be wrong to surrender them in these circumstances.

18. In examining the Attorney General's decision, the court is entitled to give significant weight to his decision and to the reasons given. This, however, does not pre-empt an analysis of the facts as related to the factors considered. Such an analysis is at the nub of the court's power to judicially review a decision whether it is an administrative, executive or quasi-judicial decision. The

emphasis or level of "deference" to the decision may vary, but an independent analysis is both relevant and expected. The law on judicial review advances all the time and the hallmark of any good decision is that it must be fairly arrived at, rational in content, and conducive to good administrative practice. In this jurisdiction, judicial review must also be mindful of the separation of powers underlying the Constitution. But judicial review must also be considered against the backdrop of the protection of fundamental human rights in a Constitution expressed to be the supreme law. Extradition matters have far reaching consequences as pointed out by Kangaloo JA in the constitutional motion brought by the claimants against the Attorney General in **CV 2008-00639, Civil Appeal 2010-185** at paragraph 37 of the court's judgment, when he said:

> "It is axiomatic that extradition represents a serious interference with personal liberty as it involves a person being taken from this country and returned to a foreign jurisdiction to face criminal prosecution or to serve a term of imprisonment. It is not in dispute that the right to life, liberty and security would automatically be triggered when a person's extradition to a foreign jurisdiction is proposed."

19. The approach of the courts is to give anxious scrutiny to the decision. At paragraph 62 of the judgment given by Mendonca JA in the leave appeal in this matter, the Court of Appeal said:

> "62. It has been argued that the AG is under no duty to give reasons for his decision. However in a case such as this where he has chosen to give reasons, the reasons should provide an

> adequate explanation. Further as the AG's decision impacts on the fundamental rights of the Appellants it is, in my judgment, appropriate to subject the decision to the most anxious scrutiny to ensure that it is not flawed (see **Bugdaycay v Secretary of State for the Home Department** [1987] 2WLR 606)."

The court must, therefore, look carefully at the decision giving such weight to the factors considered as the law and facts demand, and according the Attorney General's reasons due consideration.

20. It is also clear that the forum issue had never been conclusively pronounced upon by any court of Trinidad and Tobago. I have found no decision by any court definitively on the issue, the obiter remarks notwithstanding. The decision on forum was expressed to be one for the Attorney General at the section 16 consideration. When the Attorney General made his decision, therefore, it was his fresh consideration of the issue that mattered and for the first time. His decision therefore is fully well open to the anxious scrutiny of the court.

21. The next point of importance is that while the forum point was not the only matter which the Attorney General was entitled to consider when deciding if to order the return of the claimants, it was an important one. Mendonca JA had described the forum point as "critical". The Attorney General had to consider the matters in the round, but he had to squarely deal with the forum issue.

22. Several matters were raised in the Attorney General's decision letter. I will now go on to consider the Attorney General's reasons as contained in the decision letter and then go on to other matters raised in the decision letter.

The Attorney General's Reasons

23. The reasons were given by the Attorney General in the letter dated 9 October 2010, signed by Ms Harrikissoon, who also swore the main affidavits on the defendant's behalf. The letter noted that reasons were being given notwithstanding there was no "statutory requirement" to do so. The letter purported to identify the "main reasons for his decision whilst reserving the right to supplement these reasons if it becomes necessary". Ms Harrikissoon's affidavit of 16 February 2011 at paragraph 8 noted: "the reasons for the Honourable Attorney General's decision were set forth in a detailed and comprehensive letter which was sent to their legal representatives on 10 October 2010". It is taken, therefore, that the Attorney General did not consider it necessary to supplement the reasons except where the Harrikissoon affidavits may have made direct reference to his reasoning.

24. The letter set out what was considered. Among the materials he carefully considered were the representations advanced by the claimants, including the opinions of Sir Ellis Clarke QC, and the expert opinion of M. Cherif Bassiouni of 27 August 2011. It set out that he had received representations of the United States and the DPP and he was satisfied there was no need for a further round of representations. He noted his general discretion to order return, "and will decline if it would be wrong, unjust or oppressive to do so..." He then noted that one of the principal issues raised by the claimants was, where was the appropriate forum for them to be tried, and that he directed himself by reference to the **Cotroni** decision and the legal materials provided by the claimants including the Eurojust Guidelines. He said he

considered the submissions, the representations put forward and the materials put before the courts. He considered the offences were extremely serious. He decided that none of the features were such that he should refuse extradition under the statutory test or the **Atkinson** test.

25. Turning to the forum issue, he concluded there was no material overlap between the Piarco 1 charges and the US charges against the claimants. He also did not see any substantial or material overlap relative to the Piarco 2 conduct. He then specifically referred to the DPP's undertaking to discontinue all the local charges against the claimants if they were extradited, the views of the former and present DPP that the United States was the proper forum to try the conduct **"set out in the extradition request",** and the DPP's view that there was now no possibility of reinstating the discontinued CP 9 and CP 13 charges. He then went on to consider the matter in the alternative assuming there was substantial overlap and assuming that "the DPP would continue with the extant other domestic charges **which adequately covered the criminality alleged in the request"** (emphasis supplied).

26. To the extent that the Attorney General confined himself to considering the criminal conduct in the United States request as against the similar conduct here, this would have been a too narrow construction having regard to the comprehensive local charges. This was a case different from **Cotroni** and other cases. The criminal conduct alleged here was far greater than the subject of the extradition request and this had to be weighed in the decision on forum.

27. Then came these three paragraphs:

> *"On that assumption the Attorney General directed himself on this issue by reference to the decision of La Forest J. in the Cotroni case and the factors set out above. He considered the submissions and evidence filed for the defendants and considered the submissions and evidence filed for the government of the United States of America in the extradition proceedings. He considered the representations and further representations made on behalf of the defendants and the various legal opinions. He took into account the representations of the United States of America and the DPP.*
>
> *The Attorney General considered the representations about the former extradition request for Eduardo Hillman-Waller, but taking into account the timing of the request in relation to the American Indictment, and the fact that Eduardo Hillman-Waller was in fact convicted in the United States of America on the very same charges the United States of America seeks the defendants' extradition, he did not find it a sufficiently compelling point to alter his decision on the appropriate forum.*
>
> *He also considered the matter in the round, but in the end found the reasons on forum, set out in the evidence of Assistant United States Attorney Gregorie filed in the extradition proceedings (as confirmed in the representations of the United States of America), more compelling on this issue than the representations of the defendants."*

He then concluded that the United States was the appropriate forum even if there was substantial overlap in

respect of the conduct covered by the extradition request.

28. The claimants have submitted that the reasons of the Attorney General are wholly inadequate to justify his decision in this case. Mr Sinanan argued, at first, consistent with the statement in the Attorney General's decision letter that the Attorney General was under no statutory obligation (given the extradition regime) to provide reasons, and that further the Attorney General was under no obligation to give reasons. However, he submitted, that the Attorney General having set out what he considered, due deference ought to be given to his reasoning.

29. If there was doubt of the position of a public official, this position was clarified in **Patrick Manning and Another v Feroza Ramjohn [2011] UKPC 20** when the Privy Council, considering the exercise of the power of veto of the Prime Minister over appointments to certain offices including foreign postings in diplomatic missions, noted that where a public duty is being performed, section 20 of the **Judicial Review Act, Chap 7:08,** required those duties to be performed "in accordance with the principles of natural justice or in a fair manner" (paragraph 29). It follows from the applicability of natural justice or fairness principles to decisions of a public official carrying out a public duty that the giving of **adequate** reasons is an essential part of the process. Those reasons must be such that a reviewing court can understand the rationale for the decision. In cases where anxious scrutiny is called for, there is a particular obligation to say what was considered. Where there are competing contentions on the same point, the decision maker will

generally be obliged to say why one contention was preferred. Otherwise, a reviewing court will be handicapped in being able to evaluate whether the decision was irrational or unreasonable. The absence of proper reasons can point the court directly towards irrationality. It cannot be in doubt that the Attorney General, in this instance, was performing a public duty.

30. The Attorney General's decision letter set outs what was considered by him and his conclusions. It set out his preference for the reasons set out in the Gregorie affidavit and the United States representations. What the letter lacks is his reasons for disagreeing with the representations of the claimants and of their experts and the reasons for accepting those of Mr Gregorie and the United States. To give an example, Professor Bassiouni had set out international law arguments which favoured Trinidad and Tobago as the appropriate forum. At paragraphs 9 and 10 of his opinion he said:

> "9. The Government of Trinidad and Tobago has the greatest interest in pursuing prosecution for this alleged crime. To forego national prosecution in favour of extradition when the alleged foundational crime was committed in the requested state, and only the derivative crimes were committed in the requesting state, is in a certain way placing the cart before the horse. If there is a foundational crime committed in Trinidad and Tobago then that country has the greatest interest in prosecuting that crime. If Steve Ferguson and/or Ishwar Galbaransingh are not found to have committed this foundational crime

in Trinidad and Tobago, then the basis for the derivative crimes charged in the United States no longer exist.

10. Trinidad and Tobago is jurisdictionally seized of the foundational crime allegedly committed in that country. The eventual prosecution of Steve Ferguson and/or Ishwar Galbaransingh will be jurisdictionally based on the fact that the alleged crime occurred on the territory of Trinidad and Tobago, and that Steve Ferguson and Ishwar Galbaransingh are nationals of that country. In this eventuality, there is a conflict of criminal jurisdiction between Trinidad and Tobago and the United States. The resolution of this conflict of criminal jurisdiction is unquestionably in favour of Trinidad and Tobago because, under customary international law, the territorial state has primary jurisdiction over other jurisdictional bases. Moreover, the second ranking basis of criminal jurisdiction is the active nationality principle, and in this case Trinidad and Tobago jurisdiction also has priority in that Steve Ferguson and Ishwar Galbaransingh are nationals of Trinidad and Tobago. The other jurisdictional bases recognised under customary international law are passive personality, which in this case does not apply because there are no victims of the crimes charged by the United States who are nationals of the United States. The fourth basis is that of the so-called "protected interest" theory of jurisdiction, and that is what the United States can claim. But as the last basis in the hierarchy of theories of jurisdiction, it cannot supersede the first two, particularly

> when these first two theories combine to give precedence to the criminal jurisdiction of Trinidad and Tobago. The interests of Trinidad and Tobago in this case supersede the interests of the United States on two grounds: the first being the priority of territoriality and active nationality, and the second being that the crimes charged in the requesting state are derivative of the crime allegedly committed in the requested state."

31. Did the Attorney General disagree with these arguments? If so, why? The alleged conduct of the claimants as a whole was raised, which, it was suggested, favoured Trinidad and Tobago. What were the reasons for not looking at the conduct of the claimants as a whole and preferring to divorce the United States charges from that of their entire alleged conduct? There is no gainsaying that substantial arguments were advanced by the claimants which merited a statement of the reasons why they were being rejected somewhat more than merely saying that Mr. Gregorie's analysis was preferred. As Mendonca JA in the leave appeal judgment at paragraph 64 noted:

> "64. It seems to me that a case can be made that the **Cotroni** factors favour this jurisdiction as the appropriate forum. It is therefore arguable on the facts of the case before this Court that this is the appropriate forum. This, seems to me, to require an explanation from the AG as to how the **Cotroni** factors favoured the US. This however is not apparent from the reasons of the AG. He said, of course, that he considered the various submissions, representations and evidence but this does not amount to an explanation. What

> the reasons of the AG seem to come down to, in the end, for favouring the US as the appropriate forum, is that he found the reasons on forum set out in the evidence of Assistant United States Attorney Gregorie filed in the extradition proceedings more compelling than the representations of the Appellants."

32. Further, in an earlier extradition request made for Eduardo Hillman Waller by the Trinidad and Tobago government of the United States of America, where, among other offences, he was wanted here for a conspiracy to defraud charge, a contrary position was advanced regarding similar foundational conduct to that alleged against the claimants. At paragraph 167 of his affidavit filed in support of that request, the then DPP, Mr Henderson, had deposed: "The important factor is the place where the victim is to be defrauded, not the place where the agreement is to be carried out." An explanation was called for as to why this seemingly contradictory position was being departed from by the State in deciding to return the claimants.

33. Additionally, an interesting analysis, which was not disputed, was put together by the first claimant in his affidavit filed on 11 March 2011, Core Bundle, Volume 2, pages 558 to 561. This shows what the various United States' defendants were charged with in the United States and what they were eventually convicted for under plea bargaining agreements.

34. Raul Gutierrez had 66 charges including conspiracy to defraud the government of Trinidad and Tobago, wire fraud, conspiracy to defraud, bank fraud (16 charges), money laundering (23 charges), and engaging in monetary transactions in unlawful property (23

charges). He pleaded guilty to one count of conspiracy to defraud the government of Trinidad and Tobago and one count of bank fraud. The other 64 charges were discontinued. Eduardo Hillman Waller had 7 charges. He pleaded guilty to one count of conspiracy to defraud the government of Trinidad and Tobago. All the other charges were discontinued. Regarding Mr Hillman Waller, the Attorney General in his reasons said he had taken account that Mr Hillman Waller had been convicted in the United States of the same charge for which the claimants are being sought. He had pleaded under a plea bargaining agreement, which is different of course from a finding of guilt by a court. There can be many reasons why a person may plead under a plea bargaining agreement. Armando Paz had 24 charges. He pleaded guilty to one charge of bank fraud. The other charges were discontinued. Calamquip Engineering Corporation had 31 charges. They pleaded guilty to one count of conspiracy to defraud the government of Trinidad and Tobago and one count of bank fraud. The other 29 charges were discontinued including 15 charges of bank fraud and 6 charges of money laundering. Thus, no one has been convicted or prosecuted to conclusion for money laundering to date.

35. Against Mr Ferguson in the United States are 55 charges of which one is for conspiracy to defraud the government of Trinidad and Tobago (the foundational charge), one is for wire fraud, one is for conspiracy to launder monetary instruments, 26 are for money laundering, and 26 are for engaging in monetary transactions in unlawful property. Against Mr Galbaransingh are 9 charges of which one is for conspiracy to defraud the government of Trinidad and Tobago (the foundational charge), one is for wire fraud, one is for conspiracy to

launder monetary instruments, 3 are for money laundering, and 3 are for engaging in monetary transactions in unlawful property.

36. By contrast, in Trinidad and Tobago, there remains pending before the Magistrate, charges relating to Piarco 2 against both claimants for conspiracy to defraud and corruptly receiving. There are 9 against Mr Ferguson and 13 against Mr Galbaransingh. These are in addition to those for which they are awaiting indictment for Piarco 1.

37. The claimants have submitted that given the apparent approach of the United States to charges relating to money laundering and property offences having regard to their plea bargaining agreements, an explanation was also called for on the preference for Mr Gregorie's analysis. I agree with the claimants' submission.

The DPP's Views and Decisions

38. The Attorney General not only solicited the views of the DPP, but expressly considered them. It, therefore, arises for scrutiny the impact of the DPP's views and decisions on the return of the claimants.

39. The DPP's letter raised the matter of whether the forum issue had effectively disappeared. The DPP had noted that certain specified charges were discontinued. He also indicated that if a decision was taken to return the claimants, he would follow the practice existing here and discontinue all the charges against the claimants. This, in my view, was significant. The claimants had never been told this. Nothing has been advanced before me that there had been a settled practice that would be well known that local charges are discontinued if extradition proceedings are successful. I doubt, in any

event, that there have been sufficient extradition requests made over the years to lead to a practice being developed. As far as the claimants were concerned, therefore, they could not have known that this would be the approach of the DPP. And they may well have wanted to have their views considered on this.

40. Further, the DPP's view, which the Attorney General accepted in concluding that the forum issue had effectively disappeared, was that any attempt to reinstate the charges previously discontinued would be met by a challenge of abuse of process and that such a challenge was likely to be successful. Further, the DPP said, given his position as a minister of justice, he would have found it difficult to advance that the charges could be reinstated.

41. It is significant that when the then DPP, Mr Henderson, had discontinued the charges, it was expressly premised on the existing extradition proceedings. The Notice of Discontinuance stated this.

42. Throughout the history of the extradition proceedings, the claimants had advanced before several courts that the proper forum for them to be prosecuted arising from the Piarco Airport corruption scandal was Trinidad and Tobago. The fact that no court made a definitive finding on it is not of moment in this respect. The claimants had maintained throughout that they wished to defend any charges arising from their alleged conduct here. This is significant. If what the present OPP suggested could happen, that is, that the claimants could now advance that any reinstatement of the charges would be an abuse of process, then it follows that the claimants would now have to mount a position contrary

to what they had advanced throughout. For the claimants to do that, in itself, could constitute an abuse of process. It is by no means a foregone conclusion, as the DPP's letter suggested, that a court would find a reinstatement decision to be an abuse of process.

43. This was expressly relied on in coming to the conclusion that the forum point had effectively disappeared.

Had the Forum Issue Disappeared?

44. The Attorney General was required to decide this issue fairly and squarely. The courts had said it was his decision to make.

45. The Attorney General could not fetter himself by the decision of the previous Director of Public Prosecutions to discontinue the local CP 9 and CP 13 charges on the basis that the DPP had formed the view that the United States was the appropriate forum. The Attorney General had to make his own independent decision - after his own careful examination of the relevant facts.

46. The then Director of Public Prosecutions in any event had not given any substantial reasons for discontinuing the charges in the **Cotroni** sense except to say the United States had "a much more comprehensive case **on this limited aspect** of the allegation of criminality in what is referred to as the Airport Fraud" (emphasis supplied): see his letter of 15 November 2006 to Mr D. West. This statement, in itself, was arguably ambiguous. But how did this mesh with the impact of the crimes being here, the claimants being citizens here, and that there would be a strong public interest factor in them being tried here? These were for the Attorney General's independent consideration.

47. An issue raised by Mr Sinanan in submissions was the failure of the claimants to challenge the decision of the Director of Public Prosecutions to discontinue the CP 9 and CP 13. I did not consider this to be of any great moment. No rational person against whom charges are discontinued would demand to be prosecuted. A rational person may say prosecute me "here" instead of "over there." But given a choice of prosecution versus no prosecution at all, it would be an irrational person who would challenge that he not be prosecuted. The fact is the claimants have never agreed with the DPP's reasoning. To the extent that the Attorney General considered that this failure to challenge was a matter of weight, then his decision would be infected by an irrelevant consideration. He had made reference to this failure to challenge in the decision letter.

48. It was also not correct to suggest that there was no substantial overlap. This was demonstrated in the representations of Kier Starmer QC (Core Bundle Vol. 2, Tab 20, p. 573 - 592). The Attorney General did not address the substantial matters raised in that analysis. The claimants' companies remain defendants and the claimants are before the court locally on other matters.

49. The Attorney General also appeared to place some significance on the Director of Public Prosecutions' opinion that the charges could not be reinstated. I have concluded that the position is certainly not as clear as the Director of Public Prosecutions has set out. Again, the Attorney General's reliance on this impacts negatively on the rationality of his decision.

50. The Attorney General was in the position to decide if an extradition should take place. The DPP's stated intention, which was not told to the claimants,

that he would discontinue the local charges if they were extradited, was not relevant to the forum decision. The forum decision had to be made on the facts available to the Attorney General.

51. The forum issue had not accordingly disappeared.

In the Alternative

52. The Attorney General in the reasons then went on to consider the matter in the alternative, that is, to assume that the forum issue was yet still very much alive and a matter for him to decide. It is difficult to gauge, however, how much his attention to the forum issue may have been driven by the fact that he had already come to the conclusion that the forum issue had disappeared. In other words, might he have considered the forum matter through different lens if he did not have at the back of his mind that the forum issue had disappeared? The answer to this is difficult to speculate on. But it cannot be ignored that this was his first conclusion. How different may his consideration have been without having been led to conclude that the forum issue had disappeared cannot just be brushed aside.

53. The court, as indicated before, will give deference and weight to a decision such as this made by the Attorney General. But the degree of deference is contextual. Where a decision is driven by say, economic or social policy considerations, greater deference will be given to the decision maker's opinion. Where it is driven by legal considerations, that is, by the application of legal principles to facts, the court is entitled to look carefully at the decision and indeed the reasons advanced for the decision. In this case, the Attorney General himself, quite correctly, considered that the **Cotroni** factors should inform his decision, and the court is therefore entitled to

consider whether his decision was a rational one in the factual context.

54. The first point is whether there ought to have been focus on the charges laid as against the conduct in question. Each case will stand on its own. For example, in a case of an extradition request of someone alleged to have committed a murder, the charge and conduct are likely to mesh. No real issue would therefore arise. However, where the factual matrix is far more complex, such as in this case, the relevance of conduct and charges becomes of far greater significance. Here the allegations related to obtaining contracts by fraud, execution of the contracts by fraudulent means, defrauding the government of Trinidad and Tobago and local entities in the manner in which the contracts were performed, and finally, seeking to spirit away the funds unlawfully obtained. The bulk of the charges in the United States relate to the last aspect, that is, what was done with the funds allegedly illegally obtained. To prove these charges, a base charge would have to be proved in the United States, called bid rigging. And this bid rigging related to events taking place largely in Trinidad and Tobago, concerning the airport in Trinidad and Tobago, involving government officials in Trinidad and Tobago, and concerning the money of the people of Trinidad and Tobago. United States Attorney, Mr Richard Gregorie, had as much accepted the foundational aspect of the big rigging charges when he said in his affidavit at paragraph 4:

> *"In the present case there are no identical charges in either Trinidad and Tobago or the USA; there is, however, criminal conduct of bid rigging that is common to both charges in Trinidad and Tobago and the USA. It is not possible*

to prosecute the American charges without proving the bid-rigging of contracts CP 9 and CP 13."

55. In deciding this matter, the Attorney General had placed much weight on the views of Mr Gregorie in his affidavit of 8 January 2007. The focus of the Gregorie affidavit was the money laundering charges and the allegations relating to wire fraud. But, as advanced by the claimants, the foundation to prove the money laundering charges is the proof of bid rigging. In Trinidad and Tobago, the equivalent charge would be one of defrauding the government or any conspiracy so to do. Money laundering, put simply, could not be proved without proof that the money was obtained by some illegal means. The essence of the charge requires some unlawful action in obtaining the money. It could never be money laundering to open bank accounts and put money which has been legally obtained into those accounts.

56. It is clear that the focus had to be the conduct alleged and not the charges laid. At other parts of Mr Gregorie's affidavit there appeared to be some straining to justify the United States to be the appropriate forum. Again the focus was on the consequences of the alleged fraud and not of the fraud itself. At paragraph 5 he said: "The Airport Authority in Trinidad and Tobago and banks in Miami were defrauded." The claimants rightly ask, which banks were defrauded? At paragraph 6 Mr Gregorie said: "While it is true that Ferguson and Galbaransingh are charged in the United States with **"conspiring to defraud the government of Trinidad and Tobago"** the object and purpose of the conspiracy charged in the USA is to **"unjustly enrich** [the conspirators] through the **receipt** of proceeds from **excessively in-**

flated contracts and to **transfer** those proceeds in interstate and foreign commerce in order to **conceal and disguise** the nature and location of those proceeds." The clear intention of the conduct must have been to defraud the government and its institutions in Trinidad and Tobago and thus receive illegally gotten gains. And that was to enrich the defrauders. Transferring the money must have been for the secondary purpose of concealing the funds. At paragraph 9 it is noted: **"The proceeds from the fraudulent activity** has all **ended up** in the United States or been **processed** through accounts in the United States and has been **used** to purchase goods, services and real property in the United States." This begs the questions, from where did the proceeds originate and whose money was it that was taken (emphasis supplied).

57. There is some concession by the defendant that the US charges are framed in a much narrower compass than the Trinidad and Tobago charges, at least impliedly. At paragraphs 13 to 26, Ms Harrikissoon details the charges in Piarco 1, Piarco 2 and the US charges.

Local Charges - Piarco 1 and 2

58. The local charges allege bid rigging and conspiracy to defraud the government of Trinidad and Tobago. In essence, the claimants are alleged to have committed corrupt acts in Trinidad and Tobago in order to obtain contract packages for the Piarco Airport Development Project which later resulted in the illegal movement of funds through the United States.

Piarco 1

59. A total of 8 other persons or companies were charged along with the claimants. They are: Amrith Maharaj, Russell Orlando Huggins, John Henry Smith, Barbara Gomes, Northern Construction Ltd (NCL), Fidelity Finance & Leasing Company Ltd, Brian Keui Tung and Maritime General Insurance Company Ltd (Maritime).

60. The charges involved obtaining by fraud/ deception money and compensation from the Government arising out of the award of contracts for the Airport Project and the subsequent distribution of this money to the claimants and others from July 2000 onwards. The allegations specified the giving and receiving of corrupt payments in exchange for the award of contract packages. The charges for which they were eventually committed to stand trial span the period 1 March 1997 to 21 December 2000. It is alleged that the claimants:

- During this period conspired together and with others to defraud the State of Trinidad and Tobago to gain for themselves and others monies dishonestly said to be due to NCL in connection with the CP6 contract for the Piarco Airport Project.
- On 27 July 2000, with intent to defraud, obtained a valuable security from the Airports Authority of Trinidad and Tobago (AATT) in the sum of $ 28,898,720.65 for the benefit of NCL by falsely pretending that NCL had incurred a genuine non-refunded cost of $ 20,789,012.20 in procuring bonds and insurance from Maritime in relation to the CP6 contract and was entitled to compensation plus interest for the termination of that contract, contrary to section 34(1) of the **Larceny Act Chap. 11:12.**

- Between 26 July and 21 December 2000 corruptly provided funds to Brian Keui Tung, a State agent, totalling at least $ 7,652,842.69 as an inducement or reward for favouring the interests of the said NCL in the Piarco Airport Project in which the State and other public bodies were concerned while NCL held contracts with NIPDEC, contrary to section 3(2) of the **Prevention of Corruption Act, Chap.11:11.**
- Between 6 November and 21 December 2000 conspired together and with others to convert, possess or receive in contravention of section 46 of the **Proceeds of Crime Act, 2000**, the sum of $ 445,581.32, which they knew were proceeds of fraudulently obtained compensation from the Government of Trinidad and Tobago.

Piarco 2

61. The charges in Piarco 2 concern an alleged overall conspiracy to defraud the Airports Authority of Trinidad and Tobago, NIPDEC and the Government of Trinidad and Tobago by the fraudulent manipulation of the bid process for various Piarco Airport construction packages including CP9 and CP13. Regarding CP9 and CP13, in particular, the allegations were that the claimants conspired with other persons to defraud the State with a view to gain for NCL and the US Corporation Calmaquip Engineering those contracts and payments.

62. The claimants were charged along with 17 other persons including US nationals Raul Gutierrez, Ronald Birk, Eduardo Hillman and Calmaquip. A total of 30 or more other charges were laid including a further series of bid rigging conspiracy charges. On 9 January 2007, the DPP discontinued charge number 6406 of 2004 relating to CP9 and CP13 against the claimants. These

charges however remain extant against the other defendants.

The US Charges

63. The US charges essentially involve the illegal movement of funds through the U.S. The offences alleged to have been committed by the claimants are money laundering, wire fraud. The basis of the charges is an alleged conspiracy by the claimants and others to rig the bids for the award of the CP-9 and CP-13 contracts for the Piarco Airport Project in Trinidad.

64. The United States indictment contains up to 84 counts which provide particulars of the wire fraud and money laundering charges. The allegations are set out generally under *Count 1.* This states that from around September 1996 to January 16, 2001 in Miami, Florida, and elsewhere, the claimants, for the purpose of executing a scheme to defraud and obtaining money by false pretences, knowingly conspired with each other and others and did engage in the transmission of money in interstate and foreign commerce, knowing same to have been obtained by fraud in violation of United States law.

65. The indictment sets out the purpose of the conspiracy as being to defraud the government of Trinidad and Tobago by manipulating the bid process for the CP9 and CP13 airport construction packages so that the claimants and their related companies would unjustly enrich themselves through the proceeds from excessively inflated contracts and to transfer those proceeds in interstate and foreign commerce in order to conceal and disguise the nature and location of those proceeds. The allegations under the various other counts in the indictment are as follows:

Count 2 - having devised a scheme to defraud and for obtaining money by false pretences, the claimants wire transferred money in the sum of $ USD 588,287.62 from a New York bank to a Cayman Island's bank.

Count 3 - the claimants knowingly engaged in financial/monetary transactions from criminally derived property - the specified unlawful activities being wire fraud and bank fraud.

Counts 21 to 53 and 54 to 84 - between the dates 24 November 2000 to 28 March 2002, the claimants wire transferred several hundreds of thousands of US dollars to various Florida banks in order to disguise the nature, location and source of the proceeds of unlawful activity. The transactions are said to have taken place on 26 different dates during this period.

66. Under the "overt acts 24. through 47" set out in the indictment, it is alleged that between 30 August 2000 and 16 January 2001, the claimants carried out several wire transactions to bank accounts in Nassau, Bahamas and Florida. There were 8 transfers to Florida bank accounts totalling $USD 801,000.00. There were 5 transfers to Nassau bank accounts in the sum of $USD 2,445,000.00. The ultimate source or origin of these transfers is not stated, but must be Trinidad and Tobago since it is wholly in connection with the Piarco Airport project that the funds were obtained.

67. A comparison of the US charges and the local charges and the possible indictments that can be filed, clearly shows that when conduct is considered, the local charges are more comprehensive. The US charges relate to only two of the packages and the transfer of funds occurring from those packages in Piarco 2. The decision to return the claimants, given the DPP's stated intention

to discontinue all the local charges if the claimants are extradited, means that the claimants will not be called on to answer charges relating to Piarco 1 as well as other charges relating to Piarco 2. The Piarco 1 charges involve bribery and fraud allegations involving high government officials at the time. They also involve the alleged use by the claimants of their political influence and connections to facilitate corruption. The claimants, as it were, would not be held accountable for the bulk of their alleged conduct and particularly of conduct going to the heart of corruption, that is involving government funds and high government officials. The sums of money concerned in the local charges are also significantly more than the US charges. The failure to address the preference for return instead of local accountability for serious charges already in train by the Attorney General's reasons gives rise to a conclusion of an irrational decision.

68. Then at paragraph 34 of Ms Harrikissoon's affidavit, dealing with overlap, this is said:

> "*Insofar as it is alleged that there is overlap in the underlying bid rigging, the agreements alleged to constitute the conspiracies in Trinidad and Tobago and the USA are not the same. The case brought by the United States is based on the obtaining of proceeds and financial dealings in respect of those proceeds from contracts CP 9 and CP 13* ***while in Trinidad and Tobago those contracts are merely two of many examples of the agreement to rig the bids for the construction of the airport*** *(emphasis supplied).*

As to precisely why, in these circumstances, it was decided to surrender the claimants has not been answered in the reasons letter. What about the public interest in

prosecuting the claimants here, for their alleged wrong doing here, given that the Attorney General was privy to the DPP's statement that he would discontinue all the local charges if the claimants were returned? What about the public interest of the citizens of this country that the claimants be answerable here for more comprehensive charges of defrauding the government of Trinidad and Tobago?

69. In relying on Mr Gregorie's 8 January 2007 affidavit, the Attorney General would have seen, based on an analysis of it, that the focus of the United States charges was the money laundering allegations. The essence of the United States charges had to be conspiracy to defraud the Trinidad and Tobago government in order to prove the money laundering charges. To suggest that the focus was money laundering was clearly wrong.

70. The finding of the correct forum had to be informed by the underlying substantive conduct. In the Appeal Court, Mendonca JA said at paragraphs 65- 66:

> "65. Mr. Gregorie in an affidavit filed in the extradition proceedings, Argued, on the basis of the Cotroni factors, that the US is the appropriate forum. In doing so he stated, "which jurisdiction is more appropriate to try a defendant only arises if the same charges can be tried in more than one jurisdiction." The Appellants argue that the focus of the Gregorie affidavit on the charges as opposed to the conduct is a narrowing of the Cotroni principles. I think there is clearly merit in this submission and what is relevant is the conduct of the accused. It is significant here to note that in the AG's letter, it was stated that the issue of forum arises if the same conduct is

justiciable and capable of being tried in both this jurisdiction and the US. That seems to me to be the appropriate approach.

66. If the focus is on the charges as opposed to the conduct of the accused that can impact on some of the Cotroni factors. For example, in the Gregorie affidavit in relation to the consideration which jurisdiction has the greater interest in prosecuting the offence, he answered this with reference to the US charges and came, not unsurprisingly, to the conclusion that the US is that jurisdiction. A different conclusion may be arrived at if it is considered that the fraudulent activity itself occurred in this jurisdiction and that the Appellants allegedly defrauded the Government and people of this country of significant sums of money. It is therefore arguable that the Gregorie focus on the similarity of the charges might have resulted in a skewed analysis. A simple acceptance of that analysis by the AG without his own independent analysis could give rise to an argument that the AG's decision is irrational or unreasonable."

71. There is really no answer to this view. It is, therefore, of relevance to note that the Attorney General's reasons merely said he found Gregorie's affidavit more compelling. The Attorney General would have been hard pressed to justify that position. In these circumstances, the Attorney General was wrong to have relied on the reasoning of Mr Gregorie having regard to the substantive underlying conduct being bid rigging.

72. I turn now to scrutiny of the Attorney General's application of the **Cotroni** factors.

Impact and Jurisdiction

73. La Forest J in **Cotroni** noted at page 12: "It is often better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside." The Eurojust Guidelines also state:

> "There should be a preliminary presumption that, if possible, a prosecution should take place where the majority of the criminality occurred or where the majority of the loss was sustained."

74. In **McKinnon v Secretary of State for Home Affairs [2009] EWHC 2021,** although the acts took place in the United Kingdom, the target of the crime was the United States. Stanley Burton LJ, at paragraph 46, said:

> ". . . It is true that the claimant's offending conduct took place in this country. However, it was directed at the United States of America, and at computers in the USA; the information he accessed or could have accessed was US information; its confidentiality and sensitivity were American; and any damage that was inflicted was in the USA."

75. In addition to the reasons letter, Ms Harrikissoon, in her affidavit, dealt with forum mainly at paragraphs 32 and 33. Some of the reasoning here mirror the contentions of Mr Gregorie, such as at 32 i, ii, iii, and iv. At 32 iii the **impact of the offence** of conspiracy was said to have been most felt in Miami, Florida. Ms Harrikissoon continues at 32 iii that: "Not a single transaction listed in the counts charging money laundering involves banking transactions in Trinidad and Tobago". This may

be so but this misses two points. First, the funds originated from Trinidad and Tobago, and second, this statement concerned the money laundering charges, but not the alleged overall conduct of the claimants.

76. At 32 iv Ms Harrikissoon states:

> *"The Claimants' banking misbehaviour in the United States was systematic, involved substantial sums of monies, involved US citizens and Florida Corporations and spanned prolonged periods of time. It is* ***not the position for example, that the Claimants were former Trinidad and Tobago officials who are alleged to have committed offences whilst in office, in which case Trinidad and Tobago would have a greater interest to prosecute them rather than the United States"*** (emphasis supplied).

This also misses two points. Mr Galbaransingh was a public official at the time as Chair of the Tourism and Industrial Development Company and he was being alleged to have used his position as a public official to influence the award of contracts. Further, both claimants were alleged to have used their political influence with senior government officials and to have been in league with them in the corruption scheme. Given this statement on behalf of the defendant, this factor seems to have been omitted from the Attorney General's consideration.

77. In this case the core conduct was aimed at Trinidad and Tobago. The underlying scheme was one to defraud the government of Trinidad and Tobago and the true loss is a loss to the citizens of this country. The conduct giving rise to offences had their primary impact in this jurisdiction. This is clear when conduct as opposed

to specific offences are concerned. It also is the case regarding specific offences when one considers that the bid rigging charge was foundational to proof of money laundering and wire transfer.

78. As set out in Count 2 of the second superseding indictment, the purpose of the scheme was to obtain money for work performed under a contract procured by fraud in relation to the CP 13 contract at the Piarco International Airport. The alleged conduct here also formed part of a much wider scheme of criminal activity of which the foundation was the defrauding of the government and citizens of Trinidad and Tobago. The core issue was where the victim was to be defrauded. The Attorney General's analysis instead focused on the money laundering and property offences m United States charges as opposed to the substantive allegations of misconduct.

79. That Trinidad and Tobago would have had the greater national concern and interest in prosecuting its own citizens is clear. This is more particularly acute since, as said above, the second claimant was himself a public official and both claimants were said to have used their political influence with public officials to obtain these contracts. There was, therefore, a close connection alleged with public officials. It must be more relevant to citizens of Trinidad and Tobago that they should first be called to account, but further, that they be called to account here.

Police Force and Case Development

80. The investigation into the Piarco Airport corruption began with the Trinidad and Tobago police. According to one of the lead investigators, Mr Piggot, the local

police had collated millions of documents. The United States investigation followed.

81. The Harrikissoon affidavit noted that 3 CDs containing 121,459 documents were provided to her by the Director of Public Prosecutions in Piarco 2: "All of these documents were obtained by the investigating authorities of Trinidad and Tobago." The Trinidad and Tobago police, therefore, led the investigations which then helped the United States investigation.

Laid Charges, Comprehensive Case, Ready for Trial

82. The United States authorities have been said to be ready with their charges to go to trial. However, proceedings had begun here regarding both claimants several years before in relation to Piarco 1. They had also begun in relation to Piarco 2. The claimants had been engaged in over 200 days of proceedings in Piarco l and over 200 days in Piarco 2. These are perhaps the longest running proceedings, in terms of court days, in the history of this country.

83. The width of charges before the local courts has been accepted by the defendant in this statement at paragraph 34 of Ms. Harrikissoon's affidavit when she says:

> "*The case brought by the United States is based on the obtaining of proceeds and financial dealings in respect of those proceeds from contracts CP 9 and CP 13 while in Trinidad and Tobago* ***those contracts are merely two of many examples of the agreement to rig the bids for the construction of the airport"*** (emphasis supplied).

84. The domestic charges are clearly inter-related, comprehensive and significantly wider than the scope of the United States charges.

85. The defence of the local charges undoubtedly involved the application of significant resources. Both claimants have had to invest considerable time and effort in this regard. Their involvement before the local courts over the last ten years cannot be easily or arbitrarily dismissed.

Location of Evidence, Mobility, Other Defendants

86. At 32 vi of Ms Harrikissoon's affidavit, the statement was made that the United States authorities have certain witnesses who are not available in this jurisdiction, but nothing further is added. Who are these witnesses and why can't they be made available? In the year 2011, it is difficult to conceive that the prosecution could have difficulty in moving its evidence from one jurisdiction to another. The witnesses can be moved through the cooperation of the prosecuting authorities. In the case of the bid rigging or conspiracy to defraud allegations, such evidence would be available in Trinidad and Tobago since it is here that the bulk of the conduct took place. These are the foundational charges. The money laundering and wire transfer allegations may largely be based in the United States but it would not be impossible for that evidence to be brought here.

87. The Attorney General has pointed to "evidential hurdles associated with documentary hearsay." That should not, in my view, weigh significantly since it is part of the procedural law of this jurisdiction and it would be inappropriate for the United State authorities to make an issue of it, and even more so for the Trinidad and Tobago authorities to do so. It is part of the corpus of our laws, of the rule of law.

88. What may be more difficult is for the claimants' witnesses, if any, to be available to them in the United

States. There would be no way to compel them to travel to the United States to give evidence. While arrangements could possibly be made to receive their evidence by video and audio link, any potential prejudice would fall on the claimants only. These factors are of less significance but they still too weigh in favour of Trinidad and Tobago regarding the foundational charges.

89. In the Piarco 2 proceedings, charges were brought against several persons. These included the claimants, Amrith Maharaj, Brian Kuei Tung, Raul Gutierrez, Ronald Birk, Eduardo Hillman, Sadiq Baksh, Ameer Edoo, Tyrone Gopee, Peter Cateau, Edward Bayley and Trevor Ramano. Charges were also brought against Northern Construction Limited, Maritime Finance, Fidelity Finance, Maritime Life and Calamquip Engineering Corporation. Edward Bayley and Trevor Ramano have died. Calamquip is United States registered.

90. All the United States citizens were dealt with in the United States, and except for Ronald Birk, the Trinidad and Tobago charges were discontinued against the American citizens. It is implicit from this approach that the United States citizens were dealt with there and the Trinidad and Tobago citizens were being dealt with here. The claimants appear to be the exception.

91. Ms Harrikissoon, at paragraph 67 of her principal affidavit, attempts to refute this by noting that the United States did not have sufficient evidence to bring the other defendants there before the limitation period expired. Even accepting this, it is also the case that the conduct which leads to the bid rigging charges in the United States is also the subject of the proceedings

against several Trinidad and Tobago citizens and entities as noted at paragraph 89 above. In other words, the claimants can be before the courts of Trinidad and Tobago together facing trial with other citizens of Trinidad and Tobago in relation to the airport corruption scheme as a whole. The conspiracy to defraud cases can be deployed against all the defendants, including the claimants, together. This ought to have weighed in the Attorney General's decision in this matter. At very least, the decision to depart from the implicit approach of holding local defendants accountable here for Piarco 2, ought to have been explained. In my view, it was not adequately explained.

Where Were the Acts Committed?

92. It is clear that the majority of conduct related to the bid rigging or conspiracy to defraud allegations took place here. The moneys which formed the basis of the wire transfer and money laundering allegations ultimately came from local institutions and was put into United States financial institutions. There was movement of these moneys within the United States. It is also, not in doubt that the origin of the money was Trinidad and Tobago.

Nationality and Residence of the Accused

93. Both claimants are nationals of Trinidad and Tobago. They live here. Their families are here. Their work is here. They are currently being prosecuted here. For much of the time they have been prosecuted they have been confined to remain in Trinidad and Tobago either on bail or in custody. They have been awaiting indictment for the Piarco 1 charges for some considerable time. Given that proceedings have been going on against

them for almost 10 years here, this factor ought to have weighed significantly on the decision.

Severity of Sentences

94. Little turns on this since the charges are serious in both jurisdictions. In this jurisdiction, the penalty for conspiracy to defraud is at large.

Other Considerations

95. As noted, the **Cotroni** factors are only part of the story. There are other significant factors that make this case unique. As the Eurojust Guidelines set out:

> "Each case is unique and consequently any decision made on which jurisdiction is best placed to prosecute must be based on the facts and merits of each individual case. All the factors which are thought to be relevant must be considered.
>
> The decision must always be fair, independent and objective and it must be made applying the European Convention of Human Rights ensuring that the human rights of any defendant or potential defendant are protected."

96. The Eurojust Guidelines enjoin reaching an early decision where criminal cases can be handled in concurrent jurisdictions. The Attorney General was handed these proceedings as they were. This entreaty of the Eurojust Guidelines has special relevance to this case. Arriving at an early decision would have been helpful to both the prosecution and the defendants (claimants). From the claimants' perspective, however, the prejudice is far more apparent.

97. In this case there have been proceedings against the claimants for several years. There have been complex proceedings. They have taken place over hundreds of court days. No doubt the proceedings would have occupied the attention of the claimants for many, many other days researching records, giving instructions to attorneys and preparing for court. The local proceedings would have impacted on their social, domestic and business lives. They have made several challenges in court, which the rule of law in this jurisdiction permits. To suddenly abandon these proceedings - but not fully - in favour of foreign proceedings regarding matters (the conspiracy conduct) which have already been proceeded with here, does suggest unfairness and oppression.

98. It is this acknowledgement that led, without doubt, to the strong comments of Narine JA, which thus far have not been satisfactorily rebutted. The fact that these remarks were made obiter and in a dissenting opinion does not take away from their force. In the habeus corpus proceedings he said:

> " . . . committal for extradition to the state of Florida will mean that they must endure prosecution all over again and a new raft of suffering in America, including: the probable denial of bail or the imposition of conditions equivalent to house arrest, preventing any travel to Trinidad (and therefore severely limiting contact with their families); the substantial expense of instructing a new team of American attorneys, who will inevitably have to duplicate some of the work of the Trinidadian lawyers; possible difficulty in accessing money in Florida, including to

> pay their lawyers, due to freezing orders; exposure to the pressure to plead guilty under the plea bargaining system; much more severe sentences than would be imposed upon conviction in Trinidad, in a far harsher system that denies all possibility of parole, and from which there is no prisoner transfer scheme with Trinidad. It is Mr. Ferguson and Mr. Galbaransingh's contention that it is inhumane and cruel to expose them to this after such time and expense has been invested in fighting these charges in domestic proceedings, and all they have gone through."

Further, Narine JA, speaking of the domestic charges against the claimants, said:

> "The first set of charges was laid in 2002, and the second set of charges in 2004. In 2006, the United States made a request for extradition. The appellants challenged the Authority to Proceed after which three charges were discontinued by the Director of Public Prosecutions".

Later, the learned Justice of Appeal stated:

> "Mr. Lewis argued that the conspiracy charges that are directed to the appellants in their personal capacity have been discontinued, hence there is no overlap with the local charges that subsist, and the charges in the United States. However, this argument ignores the considerable amount of time and expense defending the charges before they were discontinued, and the fact that they are still required to defend essentially the same charges in their capacity as directors of their companies Northern Construction and Maritime Insurance Limited.

> This court was referred to numerous authorities on s 13 issues. None of these cases have dealt with a situation such as the one at hand. It seems to me clearly wrong and unfair, that an accused person should be put through the burden of defending very serious allegations of criminal conduct, spanning a period of seven years and hundreds of days of court hearings, and substantial legal costs, stress, anxiety and loss of reputation, and then be extradited to face charges that are essentially similar and arise out of the same subject matter as the local proceedings, that are so well advanced. In my view, having regard to the peculiar facts of this case, it would clearly be oppressive to extradite the Appellants."

99. The position that these facts represent were also plainly articulated by Kangaloo JA as follows:

> "Before concluding, I would wish to emphasise the powerful dissent of Narine J.A. in the appeal from the habeas corpus proceedings involving these appellants, wherein the peculiar facts and circumstances of this case are usefully highlighted: the stress, the expense, the nature of the charges, the protracted criminal litigation which has been generated and is still winding its way through the magistrate's court. It must be remembered that these appellants are citizens of Trinidad and Tobago whose extradition to the United States was requested while the prosecution against them was still ongoing in the local courts. Despite thorough and exhaustive research, I am unable to discover any analogous situation in the arena of extradition law. These

> are matters which much of necessity weigh heavily in the mind of the Attorney General in coming to his decision on whether to order the surrender of these appellants."

100. With due deference to the Attorney General's reasons, they did not address these considerations. The Attorney General's reasons did not address new factors outside of the **Cotroni** factors - especially that the claimants had spent a long time defending prosecutions arising from the same basic misconduct. The Attorney General has not sufficiently explained his decision on the forum matter given the weighty points in favour of Trinidad and Tobago as the forum. Where forum points overwhelmingly in one direction compelling justification would be expected to show why the decision maker should point to a different direction. The decision is irrational in its result because all the important factors point strongly to the conclusion that the claimants should continue to be prosecuted in this jurisdiction.

101. The absence of adequate justification, can lead to the view that other irrelevant considerations, which are left unsaid, somehow influenced the decision in question. As Kangaloo JA observed in his judgment in the present leave appeal at paragraph 12:

> "In Trinidad and Tobago we are all fully aware of the deficiencies in the administration of justice and in particular the length of time which criminal trials take to be concluded. However these factors cannot ever be a reason, whether consciously or subconsciously, to order the extradition of our nationals to other jurisdictions where the criminal justice system is allegedly more ef-

> ficient and effective. We cannot be seen as shirking our responsibility to our society to ensure that justice is obtained locally, by circumventing our difficulties in the administration of justice, by the extradition of the appellants. Even more so when many developed countries flatly refuse to extradite their own citizens under any circumstance regardless of the consequences which may follow."

102. The arguments of the defendant advanced at this hearing focused more on the appropriateness of the statements made by the learned Justices of Appeal but inadequately on the substance of those statements. I can find no good reason to depart from the views expressed by both Kangaloo JA and Narine JA cited above in the unique factual circumstances of this case.

103. It was also suggested in submissions by Mr Sinanan that the Attorney General may have had regard to wider political considerations in his decision making. The courts are not properly placed to consider such factors. That is an executive function. Such considerations can only be adjudicated upon to the extent they may be considered irrelevant to a decision which affects the legal rights of a citizen to some benefit such as may relate to promotions in the public service, for example. But, it is noteworthy that the Attorney General did not identify any such factors in his decision letter. The decision on this issue was made, as the decision letter said, having considered the **Cotroni** factors, which is the application of legal criteria. This case is not policy driven in the sense of economic or social policy. It is one that the Attorney General decided on legal grounds. It is based on

this decision having been made based on legal criteria that the court is called on to review the decision.

104. Another relevant factor was that the alternative to the Attorney General making the order was not that the claimants would get away from being held accountable. The alternative was not impunity to serious criminal conduct. The alternative is that they would face serious charges here for a broader range of criminal conduct.

105. States do have international treaty obligations to do all they can to ensure that persons who breach the laws of their State and other States are prosecuted and thus called to account. In the several cases cited, the alternative would likely have been impunity. That was a most relevant consideration here which the Attorney General either considered under a misapprehension having regard to the DPP's representations or did not consider at all. Had the alternative been impunity, Mr Sinanan's arguments on international treaty obligations would have had much force. Here, the domestic ongoing prosecutions ought to have had significant impact in the Attorney General's decision. It is significant that in the several cases cited by the defendant including **Birmingham v United States [2007) QB 727; Norris v United States [2010] UKSC 9; Wright v Scottish Ministers 2004 SLT 823;** and **McKinnon,** there were no criminal proceedings in the requested State. That is significantly different from this case. The primary impact or loss of the conduct was also not in the requested State.

106. These cases were in my view distinguishable given the different statutory regime in both States. The Secretary of State has no comparable power as section 16 of our Act regarding consideration of forum. Further,

in none of those cases were any domestic proceedings in existence in the UK for the conduct alleged. Had there been domestic proceedings, extradition would have been barred by section 88 of the UK Act which prohibits extradition where any prosecution is ongoing in England. The challenge in those cases was to a refusal to prosecute and the courts held the real impact of the offences was in the requesting States.

107. The defendant's argument on international comity and co-operation would also have had much force if there had not been local charges going on for so long. The international arrangements contemplate co-operation. They are not a one way street to facilitate traffic one way. Both States would have a strong interest in ensuring that the courts can evaluate the merits of an extradition decision according to the rule of law. International comity is in no way inconsistent with respect for the domestic legal processes of each jurisdiction and for the legal entitlements arising from the domestic law.

108. Having given anxious scrutiny to the decision and the reasons given for it, the fair decision is that the decision of the Attorney General to order the return of the claimants must be quashed. I would also declare that the appropriate forum to try the claimants for the existing charges resulting from the Piarco Airport investigations is Trinidad and Tobago. It would be unjust and oppressive to surrender the claimants. Based on the evidence, the Attorney General ought not to have reached any other decision.

109. It follows that it would be a matter for the DPP to consider whether he should pursue the charges which were discontinued against the claimants pursuant to the extradition request.

THE REPRESENTATIONS ARGUMENT

110. Section 16 of the **Extradition Act** allows the Attorney General to decide whether the claimants should be returned to the United States. In making this decision, the Attorney General is entitled to consider several factors. It is part of his duty of fairness to solicit and consider the representations of the parties: to hear their side.

111. In this matter the claimants had the opportunity on more than one occasion to advance representations on why their clients should not be returned. The claimants submitted detailed representations including the opinions of various experts. These were referred to in the Attorney General's decision letter.

112. In addition, the Attorney General, by letters dated 30 August 2010, sent from his office, signed by Mr Timothy Affonso, invited representations from both the Director of Public Prosecutions and the United States. The letters enclosed the claimants' representations and solicited the views of the DPP and the United States on them. Thus, both the DPP and the United States authorities were given the opportunity to comment on the claimants' representations.

113. These elicited replies from the Director of Public Prosecutions and the United States authorities through Lystra Blake, Associate Director, Criminal Division, United States, Department of Justice. It is not disputed that the terms of the request to the United States and the DPP were not disclosed to the claimants at the time the views were sought. It is also not disputed that the Attorney General did not invite the claimants to comment on the views expressed by the United States and the DPP. The claimants' attorneys had also written to

the Attorney General on 9 August 2010 indicating that they would wish to respond to any written representations received from the DPP or the United States' authorities.

114. Further, it is not in dispute that the Attorney General considered these views expressed. The Attorney General in his reasons letter (9 October 2010) noted that he had received representations, but he did not disclose them on the basis that he had before him sufficient material to make a reasoned and fair decision without a further need for a round of representations from the claimants.

115. The claimants have suggested that it was important for them to have been given the opportunity to respond to these representations since their reply may have made a difference to the decision of the Attorney General.

116. The Attorney General, through Mr Sinanan, has submitted that the claimants had already been treated fairly in having been given more than one opportunity to make representations. The Attorney General was not obliged in these circumstances to give the claimants any further opportunity to comment. Even if he did, then it would have had to be on a relevant or material matter or some new matter upon which the claimants would have had no opportunity before to make representations on. Mr Sinanan has advanced there was nothing new raised by these replies. He has suggested there was nothing material or relevant. The claimants, he says, had already given extensive representations and the Attorney General was fully well entitled to go on to make the decision that he did.

117. I was referred to a number of authorities on how the court should approach the review of a decision such as this on the aspect of representations. At issue is, were the claimants given an adequate opportunity to be heard as part of the requirements of a fair process. Put another way, the issue is whether the claimants ought to have been given the opportunity to reply to these representations submitted at the request of the Attorney General. The claimants say the rules of natural justice were breached by the failure of the Attorney General to allow them to comment.

118. The United States response itself sets out to add to the representations previously made. The final sentence of paragraph 2 reads:

> "*Further, the United States offers the* ***following additional comments and arguments in response*** *to the representations of Mr. Ferguson and Mr. Galbaransingh on the issue of forum.*"

The US, therefore, was being given an opportunity to respond to the arguments of the claimants, but the claimants were not given that similar opportunity at this final and crucial stage. Ultimately, it would be the claimants' liberty that would be affected.

119. The claimants made a detailed written submission on what they may have advanced to the Attorney General had they been told of the United States and Director of Public Prosecutions' representations. In summary they would have advanced:

l. Information No. 1874/05 alleged the equivalent of bid rigging in the local courts. Not all of the CP 9 and CP 13 charges had been dropped, as suggested by the DPP.

2. On 13 January 2010, the Director of Public Prosecutions had laid a charge against Ronald Birk (Information No. 987/10) which was a foundational charge similar to the foundational charge in Piarco 2. These were based on similar types of conduct set out in the United States indictment.

3. That the charges in Piarco 2 and the charges in the United States superseding indictment both comprised foundational charges relating to conspiracy to defraud. There were subsidiary counts of money laundering and wire fraud in the United States.

4. The United States Attorney, Mr Gregorie, had said that success of the bid rigging charges were a condition precedent to proving the money laundering charges.

5. The DPP's position was that he would withdraw all other charges if the claimants were extradited. This was not disclosed to the claimants.

6. The Director of Public Prosecutions' assertion that the previously discontinued charges could not be reinstated was wrong in law. They would have pointed out law to the effect that discontinued charges could be reinstated. The effect of the DPP's representation meant that the Attorney General was being wrongly told that the only place to call the claimants to account would be the United States. This was crucial to the Attorney General's decision.

7. That the reinstitution of the charges would not be an abuse of process.

8. That the statements in the United States representations which alleged the impact of the offences in the United States did not manifest in the way the

other United States defendants were dealt with in the United States court system. Specifically, that none of the United States defendants were called to account for money laundering since these charges were discontinued against them.

9. That the investigations into the Piarco project had begun since 2000 and the charges in both Piarco 1 and Piarco 2 were laid well before an extradition request was made.

10. That mobility of the prosecution evidence from the United States to Trinidad and Tobago was not a significant issue, but lack of mobility of the defence evidence from Trinidad and Tobago to the United States may jeopardise the claimant's fair trial rights.

11. Piarco 2 contained several foundational charges.

12. No local court had yet decided the forum issue contrary to Mrs Blake's assertion.

13. The bid process for the tendering and award of contracts for the Piarco Airport project was approved by the Cabinet of Trinidad and Tobago and Cabinet had established tender procedures. These were not appropriate to be pronounced upon in a foreign court. Further, that a Trinidad and Tobago jury would be better placed than a United States jury to pronounce on this aspect of the case.

120. Some of these arguments have more force than others. Some of these had been previously pointed out in the claimants' representations, but some had not been. Also, there is the matter of focus. The arguments may have been far more trenchantly put given the focus of the present representations of both the DPP and the United States.

121. A decision maker is obliged to hear both sides of a dispute. This is particularly so in matters where the liberty of an individual is at stake. In **Kanda v Malaya [1962] AC 322,** at page 337 Lord Denning said:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case that is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice, sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing."

122. Further, in **Re: Application of Ramda v Secretary of State for the Home Department [2007] EWHC 1278 at paragraph 25** it was said by Sedley LJ:

> "As to the fairness of the process, two principles come into potential conflict. One is that there has to be finality in decision-making as much as in litigation: the Home Secretary is not required to be drawn into a never-ending dialogue whenever his decision proves unacceptable to a wanted person. The other is that he must not rely on potentially influential material which is withheld

> from the individual affected. This is a simple corollary of Lord Loreburn's axiom that the duty to listen fairly to both sides lies upon everyone who decides anything **(Board of Education v Rice [1911] AC 179)** and of Lord Denning's dictum that if the right to be heard is to be worth anything it must carry a right in the accused man to know the case against him **(Kanda v Government of Malaya** [1962] AC 322). An individual facing a sentence of thirty years if he is extradited and convicted can be entitled to no less consideration." Once it is accepted, as very fairly it is, that the decision letter threw up genuine issues requiring reconsideration, the principle of finality is not breached; but once it is seen that the Home Secretary made use, in reconsidering the case, of materials which were and in at least one critical respect still are unknown to the Claimant, in our judgment the principle of fairness is breached.
>
> In these circumstances there is in our judgment no option but to quash the decision recorded in the Home Secretary's letter of 8 October 2001."

123. A third authority of significance is **R v Secretary of State for the Home Department ex p. Hickley No. 2 [1995] IWCR 734 at 744,** per Simon Brown LJ, where it was noted that a decision letter ought not to rely on potentially influential material which is not disclosed to the person affected. If, however, the material addressed nothing new and no unfairness resulted then the court could uphold the decision.

124. These were matters pronounced on by the Court of Appeal at the leave hearing and nothing has been advanced to take away from the force of the Court of Appeal's reasoning on this point.

125. I note that the requests and responses were disclosed in these proceedings after the leave application.

126. I also note that whether the decision here is classified as a quasi-judicial decision or an executive one, makes no real difference in this case. The Attorney General was obliged to be fair to the claimants in making this decision. It is for the courts to decide what fairness entailed. This case is concerned with procedural fairness, of which the court remains the ultimate arbiter.

127. The defendant raised issues about the need for finality of decision making and that the Attorney General had to prevent the process from continuing on beyond that which was required to secure "basic fairness." Given the facts presented, there was little danger of the proceedings continuing on for too long. The claimants had put in very detailed representations and the Attorney General had before him the material contained in the Attorney General's file including the United States views and information from the prosecuting authorities. As the claimants contend, it would have required one more round by giving the claimants the opportunity to respond to the views expressed in the new responses of the DPP and the United States. Had the Attorney General sought these responses from the claimants, it may have lengthened the process by a few weeks or a month or two.

128. As noted above, the Attorney General took the deliberate decision to invite comments from both the United States authorities and the Director of Public

Prosecutions on the claimants' representations. They both provided responses. The substance of those responses is relevant. It must be considered that the United States was actively pursuing extradition of the claimants. Further, a previous Director of Public Prosecutions had taken decisions to, in effect, aid the facilitation (albeit partly) of the extradition request by discontinuing certain charges. These positions were at complete odds with the position of the claimants who were actively advancing that if any trial was to take place, it should happen here.

129. In this regard there was an active debate on the applicability of the approach of the respective courts in **R v Secretary of State for the Home Department ex p. McGuire CO/385/95** as opposed to it in **R (on the application of Ramda) v Secretary of State for the Home Department [2002) EWH 1278.** In my view **Ramda** appears to be more consistent with the position in this case. In any event, even if **McGuire** is accepted, for the representations to be not subject to disclosure, they ought to have yielded nothing new or virtually nothing new. What then did the United States and the DPP's responses yield?

Director of Public Prosecutions

130. The Director of Public Prosecutions had said that all the CP 9 and CP 13 proceedings had come to an end in this jurisdiction. That matter has been contested by the claimants. They have noted that charges continued against the companies of which they are principals and that certain aspects of the case are still alive against them.

131. The Director of Public Prosecutions expressed the strong view that the CP 9 and CP 13 charges could

not be reinstated as such a course would be met by a successful abuse of process application. Having expressed that view, the DPP indicated that as a minister of justice he would have to act appropriately. This too was hotly disputed. For one, the claimants had maintained all along that the proper forum for them to have been tried is Trinidad and Tobago. It would be odd; to say the least, to suppose they would now seek to argue against that position if a favourable decision to them was made on the forum point. For the claimants to advance such an argument could well itself be seen as an abuse of the court's process by them.

132. This was an important matter. Although the Attorney General expressed in his decision letter that he had considered the issue of overlap in the alternative, it is difficult to conceive that this statement would not have had some significant impact on his mind. He would have been entitled to think that the claimants would get away from answering any allegations relating to these contracts. As an Attorney General with an avowed public position of wanting to bring to justice persons accused of serious wrongdoing against Trinidad and Tobago, this must have weighed in his consideration.

133. At very least, the Attorney General would have benefitted from hearing the claimants who may have undertaken not to advance such an argument, or who may have pointed out that the position was not as clear cut as suggested by the Director of Public Prosecutions. The Attorney General would have then had in mind that the claimants could yet be held accountable before the local courts for their conduct in relation to the Piarco 2 investigations. Further, these intimations may have led the

Attorney General to engage the DPP on the issue recognising of course that the matter of prosecutions was one for the DPP.

134. The failure to disclose this representation was, in my view, a critical omission that substantially affected the fairness of the Attorney General's decision.

135. A third matter raised was that, for the first time, the DPP had articulated the view that in accordance with "practice" he would discontinue the remaining local charges against the claimants, if they were extradited. The claimants have disputed that there is any such settled practice and the defendant has not advanced any evidence to suggest that such a practice exists. That the Attorney General accepted this position when there is no evidence that such a settled practice is well known also impacted on the claimants. That too may have been a matter the claimants may have wished to advance a position on.

136. It is not for the court to speculate on the effect that the claimants' comments would have had on the decision. It is sufficient that it may have had an effect. It is the lack of opportunity to be heard that is critical and that constitutes the breach of natural justice. As Megarry J said in **John v Rees [1969] 2 WLR 1294, 1335**:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. "Those who take this view do not, I think, do themselves justice. As everybody

> who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

137. Further, Lord Hoffman in **Dr Anneliese Diedrichs-Shurland, Excalibur Investments Holdings Ltd v Talanga-Stiftung, Franz Wilhelm Kohlrautz, Privy Council Appeal No. 22 of 2005**, stated:

> "37 Their Lordships therefore consider that if the judge read the letter but did not send it to Mrs Diedrichs-Shurland and it did not come to her attention in any other way before judgment was delivered, she is entitled to an order for a new trial. They would arrive at this decision with considerable regret, because, as they have said, the judge conducted the trial with conspicuous fairness and ability and there were ample grounds for his rejection of her evidence. Even if he read the letter, it is unlikely that it had the slightest effect on his judgment. It would however be contrary to the principle stated by Lord Denning in Kanda's case to speculate on such matters. Mr Kohlrautz would have only himself

to blame for snatching defeat from the jaws of victory."

The US Representations

138. One of the matters raised in the United States representations was that the issue of forum had been raised in the local courts and those courts "were not persuaded by the arguments" of the claimants.

139. This suggested that the issue of forum had been finally dealt with by the local courts, when the local courts had said it was for the Attorney General to decide the forum issue at a later stage, subject to judicial review. There had been no decision by the local courts on the forum issue. This was an erroneous suggestion. The claimants argue they would have been able to clear up this "misleading suggestion."

140. The United States representations also referred to the Gregorie affidavit about bank fraud charges having been levelled against the claimants. There was also strong reference to the money laundering charges and how these were perceived in the United States. The claimants contend that they would have been able to point out that no money laundering charges had been pursued against the United States citizens and that there were no bank fraud charges laid against the claimants.

141. To what extent the views of the claimants may have affected the Attorney General is difficult to gauge. That is precisely why the court ought not to speculate too much on these matters. It is enough that the claimants had no opportunity to comment on significant material because the claimants were unaware that these rep-

resentations were being made. At very least, the Attorney General would have had before him a balanced perspective on the attitude of the United States authorities to the money laundering activities as it affected the Piarco Airport project. He may have then been able to compare the extent of all the charges against the claimants here as against those they were likely to face in the United States.

142. The tone and substance of the United States' representations was also relevant. The case for extradition was argued in Mrs Blake's letter. The claimant's argument on the location and mobility of their evidence was described as falling flat: "this argument falls flat..." The claimants were said to "have failed to articulate a compelling reason why they should be treated differently than any other person accused of wrongdoing in a country other than his homeland." Their arguments were described as "still not persuasive". Clearly the United States had considered the claimants' arguments and sought to rebut them. The letter was not in neutral tones. It was vigorously arguing the case for extradition. This was all the more reason to hear the claimants' response. All the claimants ask is that they should have been allowed to reply. This was also not an after the fact request. The claimants had specifically written on 9 August 2010 asking to be given an opportunity to respond if further representations were forthcoming from the United States or the Director of Public Prosecutions.

143. When the United States representations are taken together with the failure to disclose the Director of Public Prosecutions' letter, there is sufficient evidence before this court to hold that important representations were not disclosed to the claimants and they

were therefore denied the opportunity to put their case on these matters before the Attorney General for his consideration.

144. There was, therefore, unfairness to the claimants in this regard. For this reason also the Attorney General's decision must be quashed.

THE BIAS ARGUMENT

145. The claimants' submission on this point concerns the role played by Mr James Lewis QC in his interaction with the Attorney General as the Attorney General made his decision.

146. Mr Lewis had been retained by previous Attorneys General to advise and assist the government in dealing with the extradition request made by the United States. The present Attorney General retained his services as he embarked on the final aspect of the extradition process.

147. It is not in doubt that Mr Lewis had been involved from the early days of the extradition request. His previous involvement was a matter of public record. He was intimately involved in advising on the extradition process, in representing the Trinidad and Tobago government, and in advancing the United States government's request for extradition. He was involved in the cases litigated in our courts as the claimants challenged the various stages of the extradition process.

148. Then came the Attorney General's final decision. The claimants submit that Mr Lewis should have been excised from the process at this stage. What was called for now was an independent decision by the Attorney General untainted and unbiased. And the Attorney General should not have had advising him a person so deeply

entrenched in the advancement of the extradition request. His involvement, without more, led to a case of apparent bias, which, in itself, is sufficient to taint the Attorney General's decision. It has not been advanced that there was any actual bias in this case.

149. The test for the court to consider as clearly articulated by the Court of Appeal at the permission stage was set out by Mendonca JA at paragraph 36 as follows:

> "36. It is well established that those who sit in an advisory capacity to an adjudicating body ought not to serve, or appear to serve, an adverse interest. (*See* ***R v Sussex Justices, ex parte McCarthy*** *[1924] 1KB 256.* So too is the test for the appearance of bias well established. In ***Porter v Magill*** *[2002] AC 357* it was held that the test is whether the fair minded and informed observer having considered the facts would consider there is a real possibility that the decision maker was biased (*see also Privy Council Appeal 9 of 2003* ***Meerabux v The Attorney General****).* To relate this specifically to this case the question is whether the fair minded and informed observer having considered the facts, would consider that there was a real possibility that Mr. Lewis had improperly influenced the decision of the AG."

150. The case on the claimants' submission is at that every stage of the decision making process in relation to the section 16 decision Mr Lewis had given extensive advice. He had represented the interests of the United States throughout the extradition process and vigorously advocated that the US was the appropriate forum.

Mr Lewis had been involved in the extradition process by:

1. He had travelled to the United States to liaise with the US authority before the formulation of the extradition request;

1. He had appeared at the committal proceedings before the Magistrate;

2. He had appeared in the judicial review proceedings CV 2006 - 2959 and the appeal CV 60 of 2007;

3. He had appeared in the habeus corpus proceedings CV 2008 - 2849/2848 and the subsequent appeals;

4. He had put forward the US position in the judicial review and habeus corpus proceedings on the forum issue.

151. It is clear that the Central Authority under the extradition scheme is expected to act as attorneys for the requesting State. Mr Lewis was the team leader in this regard. In that position he would have been involved intimately in the extradition process, as a lawyer. He had engaged in a lengthy campaign on behalf of the Central Authority Which in effect represented the United States in their request.

152. It is also the law that a legal adviser to a tribunal or decision maker must not serve an adverse interest. In **R v Sussex Justices, Ex Parte McCarthy (1924) 1 KB 256** the clerk to the law justices advised on the law relating to the case. He retired with the law justices to consider the case. The accused was convicted. The clerk was a member of a firm of solicitors who were acting in a civil case arising from the same motor collision. The

justices deposed they had not consulted the clerk. Nonetheless the conviction was quashed. Lord Hewart CJ, in quashing the conviction noted:

> "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

153. At the time of the permission application no evidence had as yet been put by the defendant. It is necessary to consider that evidence now in some detail. The affidavit of Ms Harrikissoon gave some details of Mr Lewis' role. Paragraphs 75 to 77 of this affidavit state as follows:

> *"75. Mr. Lewis again in the discharge of his function of Team Leader of the Central Authority, was called upon to advise the Attorney General in relation to the exercise of his power under s.16 of the Act. I worked closely with Mr. Lewis on this exercise and I am privy to the advice*

which the Central Authority tendered lo the Attorney General. The essential points of this advice involved the following-

a) directing his attention to the provisions of s.16 (3) and in particular to consider whether it would be wrong, unjust or oppressive in all the circumstances to issue a warrant of surrender in respect of the Claimants,

b) that he must consider any representations of the Claimants very carefully and not rush his decision,

c) that the representations made by the Claimants on the issue of forum, the relevant principles as distilled from the case law and other relevant material (and in particular the ***Cotroni*** *principles) which he ought to consider and apply,*

d) that the decision whether to order the surrender of the Claimants was a separate and distinct state of proceedings; and

e) that this decision was an independent one and was for him and him alone.

76. In response to a final invitation for representations from the Attorney General, the Claimants submitted voluminous representations and materials for the consideration of the Attorney General. Upon receipt of those representations, the Attorney General was further advised by the Legal Team of the Central Authority and headed by Team Leader Mr. Lewis as follows:

a) He should write to the DPP and to the United States Authorities and solicit their views on the representations made.

b) It was underscored that he would be required to make an independent decision on all the materials before him (which included the extensive representations received, letters and opinions that the Claimants had sent to him) and on all the materials before him.

c) He must not return the Claimants if he was prohibited from so doing under s. 8 of the Act or if it appeared to him that it was unjust or oppressive to do so as set out in s.13(3) of the Act.

d) He could take into account the decisions and judgments of the courts but at the end of the day, he must come to his own independent decision.

e) The courts ruled that they had no jurisdiction to make any decision on the issue of forum and the decision on this issue was entirely a matter for the Attorney General, taking into account all the materials before him and all the circumstances.

f) That the approach he should adopt in relation to the forum issue was firstly, to consider if there was a material overlap in the conduct charged in both jurisdictions. If he decided that there was no material overlap, then the forum issue will not arise. However, in order to ensure finality, even if he so decided, he should consider making a decision on the alternative basis that such a material overlap

> *did in fact exist. In such a case, he must consider all the materials before him and apply the principles set out in the* ***Cotroni*** *case.* ***Neither Mr. Lewis QC nor anyone in the Central Authority gave the Attorney General any advice or opinion on what the decision should be and their advice was limited to legal matters*** *(emphasis supplied).*
>
> *77. Having received a letter from the Claimants requesting an opportunity to make yet further representations, in response to any representations received from the DPP or the United States of America, the Attorney General was advised on the correct approach to this request. The gist of the advice Mr. Lewis QC gave the Attorney General on this point was that if the Attorney General was satisfied he had sufficient material to make a reasoned and fair decision the essence or import of which was, if there was nothing significantly new or adverse to the Claimants in the representations of the DPP or the United States of America which were not previously dealt with, there would be no need for a further round of representation. The germaine matters having been adequately dealt with, he would not need lo consult further. He was referred to the decision of Stoughton LJ in* ***R v Secretary of State for the Home Department, ex parte McGuire C0/385/95, 14/11/1995"*** *(emphasis supplied).*

154. I have also looked at the written advice tendered by Mr Lewis to the Attorney General. Essentially, he outlined the procedure that should be followed by the Attorney General when making a decision. He noted the

decision was of a quasi-judicial nature and must as a matter of law be reasoned and fair. He advised that this was a difficult and complex matter which should not be rushed and the Attorney General should proceed with caution bearing in mind that the proceedings "have a backcloth of political circumstances..." He also indicated that the Attorney General should invite representations from the claimants as well as the United States authorities and the Director of Public Prosecutions. His written advice, however, did not address whether each side should be permitted to comment on the new representations submitted by other parties.

155. There was nothing, therefore, from the written advice tendered from which the fair minded informed observer might find cause for concern. It was not a smoking gun. I note, however, that I do not have evidence of any oral advice given by Mr Lewis to the Attorney General. What I have is Ms Harrikissoon's word that no one, including Mr Lewis, gave any advice on the actual decision by the Attorney General.

156. How should Ms Harrikissoon's account of what he did be viewed in light of the authorities? Mr Lewis was a professional adviser. He was paid as a lawyer. He was hired for his expertise in extradition matters by previous Attorneys General. The present Attorney General kept his services. Ms Harrikissoon sets out what he advised on. When his advice was disclosed under a court order, his advice showed it was written in neutral tones. It advised on the process. He urged the Attorney General to see his function as a quasi-judicial one, advice which was either not followed or has since then been resiled from, considering the submissions advanced in this

hearing. How would the fair minded informed observer look at this?

157. On the other hand, the claimants have submitted that the practice in England is for separate advisers to be used for the extradition hearings and for the final decision. They commend this because it allows for the Attorney General to be independently advised at this last, but crucial stage.

158. On the one hand is the view that the Attorney General would have benefitted from Mr Lewis' background knowledge of the case. Would the fair minded informed observer think that there was a real possibility that Mr Lewis would have used his position to improperly influence the decision? Such an observer may have considered that the Attorney General would have benefitted from Mr Lewis' background knowledge, especially considering that this was a new Attorney General. On the other hand, the observer may have thought that the Attorney General would also have benefitted from a new person having a fresh look at what had gone on before and give advice based on a fresh analysis of the issues without the baggage of all the previous dealings and knowledge. But the issue really turns on whether the fair minded informed observer would see a real possibility of Mr Lewis using his position to improperly influence the Attorney General. Mr Lewis was first an advocate paid by the State to advance the extradition request. He was also a professional legal adviser advising the Attorney General on the section 16 decision.

159. The scheme of the extradition legislation, as pointed out by Mr Sinanan, contemplates that the Attorney General, whoever may hold the position at the time, should oversee and have overall control over advancing

the process. A different office holder to make decisions at different stages is not contemplated. It could well be, therefore, that the same Attorney General would make all the decisions at the various stages. The fair minded informed observer would know this. Would there necessarily be apparent bias in such a case? How then to look at a professional adviser? Mr Lewis would really not have been in a much different position from say Ms Harrikissoon, except that he led the team of which she was a part.

160. The point can be tested in this way. Suppose the Attorney General had relied exclusively on one paid employee of his department to advance the request throughout and later to advise him on the section 16 decision, without outside help. Could this lead to apparent bias, that is to say, consistent with the Court of Appeal's test, that there was a real possibility that such a person would improperly influence the final decision? In my view, the answer is no. The only difference with Mr Lewis is that he was a paid outside adviser who functioned on behalf of the Central Authority. While I acknowledge the benefit that fresh eyes would have brought to the process, I do not think that a fair minded informed observer would necessarily see the lack of this as infecting the decision.

161. The claimants refer to the Attorney General's reported remarks that Mr Lewis was "rebutting" the representations of the claimants. I also do not think that that would necessarily have troubled the fair minded informed observer. Mr Lewis could have been following the instructions of the Attorney General. The Attorney General may have spoken in general terms, or loosely.

162. The Attorney General would have had to be advised and would have been entitled to seek professional advice. He did so. Ms Harrikissoon noted that neither did Mr Lewis nor did anyone in the Central Authority give advice to the Attorney General on what the decision should have been. The advice given was confined to legal advice. This must be taken at face value in the absence of evidence to the contrary. The fair minded observer would likely have seen Mr Lewis' involvement as a professional legal adviser to facilitate the extradition request in keeping with the Attorney General's instructions. I do not think from the evidence before me that the conclusion can be drawn that there was a real possibility that Mr Lewis had improperly influenced the Attorney General's section 16 decision because of his past involvement in the case. This ground, therefore, fails. Nonetheless, I observe that it may be a good practice in general to adopt the practice that applies in England in relation to separate representation.

Endnote

163. A final note: The long proceedings to extradite the claimants have generated much public interest and comment. The Piarco Airport corruption scandal has been a hot topic over the years. Strong views have been expressed by many citizens. The court in deciding the issues raised must do so by the application of law to the facts of the case as presented in a fair and reasoned way fully mindful of the whole factual context. That context includes that this was our airport and our money spent on it. The claimants are citizens of this country accused of defrauding our government in a comprehensive conspiracy involving government officials and several other citizens. These facts operate against a backdrop of a

written Constitution which is the supreme law and which provides protection of the fundamental rights of all citizens, including the claimants. The decision to return the claimants must, therefore, have been driven primarily by legal considerations after proper analysis of the facts in a dispassionate way, eschewing emotional reactions and irrelevant considerations. It is about making a decision based on the rule of law. From a legal standpoint, we ought not to shirk our responsibility for calling them to account here before local jurors responsible for making the ultimate decision on if they are guilty or not.

Order

164. The decision of the Attorney General to order the extradition of the claimants to the United States of America is quashed.

165. It is declared that the appropriate forum to try the claimants in relation to the award of contracts for the construction of the Piarco Airport, and in particular contracts CP 9 and CP 13, is Trinidad and Tobago.

166. It is declared that it would be unjust, oppressive and unlawful to order the extradition of the claimants and that extradition is debarred by the operation of section 16 (3) of the **Extradition Act** of Trinidad and Tobago. Having regard to my clear finding on this issue I do not think it necessary to make an order of prohibition. The effect ought to be the same.

167. The defendant must pay the costs of the claimants to be assessed if not agreed.

168. Finally, I wish to record my thanks to Counsel on all sides for the depth of their research, the clarity of their submissions and their overall assistance in this

matter. I am also grateful to my Judicial Research Assistant.

/s/ Ronnie Boodoosingh
Ronnie Boodoosingh

Judge