[2013] JMSC Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV00480

IN THE MATTER OF THE TERMINATION OF NATIONAL HEALTH FUND PROVIDER AGREEMENT

AND

IN THE MATTER OF THE TERMINATION OF JAMAICA DRUGS FOR THE ELDERLY PROGRAMME PROVIDER AGREEMENT

AND

IN THE MATTER OF LETTERS DATED 8TH DECEMBER 2010 FROM THE CEO OF THE NATIONAL HEALTH FUND TO CORNERSTONE PHARMACY

AND

IN THE MATTER OF THE NATIONAL HEALTH FUND ACT

BETWEEN	CARLISLE HOWSON (trading as Cornerstone Pharmacy)	1ST CLAIMANT
AND	ANDREA SENIOR-HOWSON (trading as Cornerstone Pharmacy	2ND CLAIMANT
AND	THE NATIONAL HEALTH FUND	DEFENDANT

Ms. Jeroma Crosbourne, instructed by Scott Bhoorasingh & Bonnick for the Claimants

Mr. Lackston Robinson, instructed by Director of State Proceedings for the Defendant.

Judicial Review – National Health Fund Act – Statutory Corporation – Health Fund Provider Agreements – Agreements to Implement Full Statutory Function – Whether Termination of Agreement – Susceptible to Judicial Review – Source of Power – Public Bodies

Heard: 8th December 2011, 18th, 19th and 20th April 2012 and 1st February 2013

Campbell, Q.C., J.

[1] The Claimants are registered pharmacists and husband and wife. Since 2007, they have operated a pharmacy, which is registered under the Pharmacy Act, and trade under the business name of Cornerstone Pharmacy (Cornerstone). Cornerstone was a provider under the National Health Fund (the Fund) and the Jamaica Drugs for the Elderly Programme (JDEP). On the 10th December 2010, the National Health Fund purported to terminate both Agreements with the Claimants.

[2] The Respondent is a statutory corporation established under the National Health Fund Act, (the Act) empowered to perform such functions as are necessary to give effect to the objective of the Act; these include, inter alia;

(d) providing health benefits for residents with specified diseases and specified medical conditions;

(e) making prescribed drugs and other benefits available to residents at government-owned and other health facilities;

(f) arranging and providing mechanisms for the utilization of benefits under the Fund;

(i) entering into agreements with other persons for the better administration of the Fund, and

(j) doing or causing to be done such other things as are necessary or expedient for or in connection with the proper performance of the functions of the Fund.

[3] The Act which came into effect on the 1st April 2003 had, among its principal objects, the following;

(a) Provide prescribed health benefits to all residents regardless of age, gender, health or economic status.

(b) Provide greater access to medical treatment and preventative care for specified diseases and specified medical conditions.

(c) Secure improvements in the productivity of residents by reducing time lost on the job that is attributable to personal and family health care problems.

[4] The Fund has implemented two Programmes in pursuance of these objectives (1) The Fund, under its National Health Fund Programme, provides subsidies to beneficiaries on a range of prescribed drugs relevant to fifteen chronic illnesses. (2) Jamaica Drugs for the Elderly Programme (JADEP), the Fund provides eighty (80) items of drugs covering 910 chronic illnesses for beneficiaries 60 years and over. Under the NHF programme, each beneficiary receives a subsidy when he purchases a prescribed drug that falls under that programme. The prescribed drugs under JADEP are free.

[5] Registered Pharmacies with licensed pharmacists, interested in participating in the programme, may enter into a Provider Agreement with the Fund, upon execution of the Agreement, the Pharmacy is assigned a unique number and account number which will facilitate the processing of the transactions electronically. The Pharmacy is then designated a Provider.

[6] A qualified resident, who wishes to have the benefit of either programme, must complete an application form, which is verified and processed and a benefit card issued. The details of every benefit provided by the pharmacy, under NHF, should be transmitted to the Fund. When the benefit card is swiped, the provider then becomes entitled to claim the equivalent of the subsidy provided.

[7] The range of drugs provided free under the JADEP programme is ordered from the Fund by the provider and is delivered directly to the provider by the drug

distributor, on the directions of the Fund. These arrangements are in accordance with Agreements between the Fund and the provider and the Fund and the drug distributor respectively. The provider dispenses the drugs to the beneficiaries in return for a specified fee payable by the beneficiaries. The details of each transaction are electronically transmitted to the Fund when the benefit card is swiped.

[8] By virtue of an Adjudication Agreement between the provider and the adjudicator, the latter ensures that the drug on the list and the beneficiary is registered with the fund. For these services, the Fund is authorized by the provider to deduct the fee payable and pay same to the adjudicator. Mr. Hugh Lawson, Chief Executive Officer, of the Fund, in his affidavit, filed the 14th December 2011, complains at paragraph 14, inter alia;

> "However the Fund has had ongoing concerns about the activities of some pharmacies participating in the programmes. These include the improper filling of prescriptions, fraudulent claims submitted by providers and unlawful retention and use of beneficiaries' card. As regards the misuse of cards, the Fund has had to place advertisements in the daily newspapers and to write to the providers. Prior to December, an applicant for benefits would obtain the application form from the pharmacist, have his doctor complete the form, certifying his conditions, then return the form to the pharmacists who would deliver the form to the Fund. The benefit card produced as a result of the application would be delivered by the Fund to the pharmacist, who would be expected to deliver the card to the named beneficiary. That practice has been discontinued."

[9] On the 17th September 2007, Cornerstone became signatories to both the NHF and JADEP programmes. Accounts were established to facilitate the processing of the transactions. In 2010, the Audit Department of the Fund commenced investigations into the claims submitted by Cornerstone, and irregularities were discovered. Among the irregularities were claims submitted for drugs not prescribed, alteration and non-provision of records. A list of these irregularities is catalogued in the affidavit of Mr. Hugh Lawson at paragraphs 19 – 34. It is

sufficient to say of these allegations, for example the case of beneficiary Valerie, on whose behalf Cornerstone submitted a claim for a designated drug, Tramacet tablets. The investigations of the Fund reveal that she visited the Pharmacy and was provided with the drugs, Daonli, Enam, Simvastatin and Apo-Hydro. Tramcet was not dispensed to the beneficiary. Valerie's doctor has confirmed that Tramacet was not prescribed for her. Moreover, Tramacet, contends Mr. Lawson, is usually prescribed for Arthritis, Breast or Postate cancer. Valerie had been diagnosed with Hypertension, Diabetes, High Cholesterol and Arthritis. Mr. Lawson further alleged at paragraph 19, "The pharmacy did not provide the Fund with the prescription and the drug bill for the Tramacet Tablets, which it purportedly dispensed to Valerie on the 18th November 2009 and for which it submitted a claim, therefore verification was not possible. I exhibit a copy of the NHF application form and NHF transaction report marked 'HL-4'."

[10] On the 24th March 2011, as a result of the termination of the NHF and JDEP Agreements by the Fund, Cornerstone filed a Fixed Date Claim Form, seeking:

(1) An Order of Certorari to quash the decisions of the National Health Fund as contained in two letters dated the 8th December 2010 and signed by the CEO of the National Health Fund, Mr. Hugh Lawson.

(2) A stay of the decision of the National Health Fund as the application for judicial review is heard and determined.

(3) Damages

(4) Costs to Claimants.

(5) Such other and further reliefs as this Honourable Court shall deem fit.

[11] The 1st Claimant, Mr. Carlse Howson, in his affidavit in support of the application for Judicial Review, states at paragraph 11;

> "That in September 2007, I, on behalf of the business, entered into two Agreements with the NHF, (1) National Health Fund (NHF) Provider Agreement and (2) Jamaica Drugs for the Elderly Programme (JADEP) Provider Agreement, for the provision of pharmaceutical services to persons who are entitled to health benefits under the NHF insurance scheme."

And at paragraph 14,

> "Participating pharmacies also benefit from the NHF Provider Agreement and are more competitive than no-participating pharmacies. This is because participating pharmacies are able to attract and maintain their client base as they are able to supply the prescribed drugs on which many Jamaicans depend, at a more affordable rate than the non-participating pharmacies."

[12] Mr. Howson states that on the 10th December 2010, he was visited by three representatives of the NHF and was handed the two termination letters, which were to take effect that same day. He complains that he was not provided with any particulars of the allegations; this is despite his repeated requests. Further, he was not given an opportunity to be heard. He was not given any reasons, "I have not been informed of the reasons which constitute the reasonable grounds" on which the termination letters were based. Prior to the termination, he says he was not informed of any adverse allegations against himself or his agents. He was not given an opportunity to make representations to NHF in response to the allegations. If he had, he would have been able to address the concerns of NHF. He says the termination of the agreements have had a debilitating effect on the business of Cornerstone. He estimates he has lost about half of his client-base and anticipates a further decline.

[13] Mrs. Howson, in her affidavit filed on the 24th March 2011, states at paragraph 8, among other things;

> "Based on my knowledge of our operations, I am confident that we would have been able to address any concern that the NHF had. At no time however, were we invited or even given the opportunity to be heard on the decision to terminate the Agreements notwithstanding or several requests for an explanation."

On the 10th November 2011, the Claimants Amended the Fixed Date Claim Form to add the following grounds on which the application relied. That the decisions of the Fund were in breach of the principles of natural justice and fairness and are unjust, capricious, arbitrary, null and void in that;

(1) The National Health Fund failed to give any reasons or any adequate reasons for its decision to terminate the Claimants 'Jamaica Drugs for the Elderly Programme (JADEP)'.

(a) The National Health Fund failed to give adequate reasons for its decision to terminate the Claimants 'National Health Fund (NHF) Provider Ageement'.

(b) The Defendant failed to give the Claimants a fair hearing or any hearing at all prior to the termination of the Claimants 'National Health Fund Provider Agreement and Jamaica Drugs for the Elderly Programme Provider Agreement.

(2) That there is no alternative form of redress available to the Claimants.

(3) The Claimants are personally and directly affected by the decisions made by the National Health Fund.

(4) The Claimants have suffered loss and damage as a result of the decisions made by the National Health Fund.

[14] The issues for determination, is the decision of the National Health Fund amenable to judicial review. If the decision is amenable to judicial review,

(a) Whether the National Health Fund failed to act with procedural fairness when the decision was taken to terminate the two agreements.

(b) Whether in all the circumstances the court ought to exercise its discretion to grant the orders sought.

Claimant's Case

[15] It was submitted on behalf of the Claimants that not all actions of and decisions of public bodies are amenable to judicial review, and the court must determine whether there is sufficient public law element to the particular decision to . make it susceptible to the supervisory jurisdiction of the Court . Is the NHF decision one that concerns public law? In order to answer this, the court should examine the nature of the power being exercised by the public body in entering into the contract the National Health Fund was created by statute and discharged public functions. The decisions taken are in the realm of public law and are therefore amenable to judicial review. The Claimants provided services to JADEP and NHF

programmes, which provided beneficiaries with drugs. The two agreements were providing public law programmes. Counsel sought to demonstrate the public law element of the programmes by reference to the Act which, at S5 (e) of the Act, which mandates the Fund, "making prescribed drugs and other benefits available to residents at government-owned and other health facilities" and S5 (f), provided for the NHF, "arranging and providing mechanisms for the utilization of benefits under the Fund."

[16] Counsel submitted that the NHF was providing mechanisms by entering into the Provider Agreements. The Agreements were designed to carry out a specific function that is prescribed by the statute of making the drugs available at the Claimant's pharmacy, on that basis excess of powers in the exercise of that arrangement falls under the supervisory jurisdiction of the court. The Provider Agreements are substantially different from, for example, a contract that NHF might enter for the supply of stationary, in such a case the public law element is missing. The Provider Agreement is not merely an exercise of a commercial or administrative function, but concerns the essence of NHF statutory duty, not incidental, as would a supply or employment contract (See R v East Berkshire Health Authority, exp Walsh (1985) QB152.

[17] The manner of termination amounted to a breach of natural justice. The Claimant should be notified of allegation being made against them and afforded an opportunity to respond. Conceded that there is no general duty to give reasons on the part of the Fund, to give reasons. No person should be condemned without a fair opportunity to be heard. The principles of fairness required that the Claimants be notified of the factors that informed the Fund's decisions, that they be given particulars of any allegations and they be afforded a hearing in respect of the allegations against them.

Defendant's submission

[18] Mr. Lackston Robinson for the Respondent submitted that judicial review is the process by which the court corrects the errors of public bodies and inferior tribunals when they exercise their powers within the sphere of public law.

Certorai is a public law remedy, issued in exercise of the court's supervisory jurisdiction, where the power is derived from public law. The court's supervisory jurisdiction extends to these bodies in their exercise of statutory power, both primary or subordinate and a prerogative power. The law has constantly been that the supervisory jurisdiction of the court does not extend to the exercise of a power derived from private law.

[19] Although the source of the power is decisive in the determination of whether a public body is amenable to judicial review also, of importance is the nature of the power. If the source of the power is statutory, the body is susceptible to judicial review, however, if the source is contractual, it will not be subject to judicial review.

[20] The functions being performed by the body may be decisive in determining whether it is subject to judicial review. The functional approach is not applicable where a public body has statutory underpinning the only issue is whether a particular decision is reviewable. There is a distinction between the reviewability of **a decision** and the **reviewability of a body**. The Claimants remedies lie in private law. There is no general duty to give reasons.

Analysis

[21] The Claimants seek the remedy of Certorari to quash the decisions of the Fund contained in letters dated 8th December 2010, terminating the Provider Agreements between themselves and that body. Certorari is an ancient remedy which is issued to bring up the record of an inferior statutory tribunal to have it quashed. It was essentially a royal demand for information, the King wishing to be certified of some matter, orders that the necessary information be provided for him. It formed part of a trilogy of prerogative writs, certiorari, prohibition and mandamus, the learned authors of **de Smiths, 'Judicial Review of Administrative Action'** Fourth **Edition**, page 25, describes it as "the most important non-statutory judicial remedy in administrative law."

[22] From its historical roots of organizing government, the range and scope of Certiorari have been extended, it nonetheless has maintained its essential feature of being directed at public bodies, exempting private or domestic tribunals from its reach. In **R v Criminal Injuries Compensation Board, ex parte Lain {1967} 2 All E.R 770**, The Compensation Board was established by way of the prerogative. Counsel had argued that, it having not been established by statute, it was not amenable to judicial review. Diplock L.J, sitting in the Queen's Bench Division, said at page 779, letter D;

> "The jurisdiction of the High Court as successor of the Court of Queens Bench to supervise the exercise of their jurisdiction of inferior tribunals has not in the past been dependent on the source of the tribunal authority to decide issues submitted to its determination, except where such authority is derived solely from agreement of parties to the determination. The latter case falls within the field of private contract and thus within the ordinary civil jurisdiction of the High Court supplemented where appropriate by its statutory jurisdiction under the Arbitration Act."

and at letter G;

> "If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based. "See also Lord Parker CJ, page 778, letters B-C."

[23] The decision in ex parte Lain, was applied in the House of Lords in **Council of Civil Service Union v Minister for the Civil Service (1984) 3 ALL E.R 935**. Where Lord Roskill described the judgments in **ex parte Lain** as "which may without exaggeration be described as a landmark in the development of this branch of the law." In CCSU case, the Court was not concerned with control of inferior courts or tribunals but with the control of executive action, on the grounds of, "illegality", "irrationality" and "procedural impropriety".

[24] In CCSU, it was noted that the susceptibility of the decision to judicial review required an empowerment in what Lord Diplock, described as "public law", the

judgment recognized the distinction between such decisions and decisions made as a result of private agreements, which would not invoke the supervisory jurisdiction of the court at page 949, letter j, he said;

> "For a decision to be susceptible to judicial review, the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or the other of the consequences mentioned in the preceeding. The ultimate source of the decision making power is nearly always nowadays a statute or a subordinate legislation made under the statute, but in the absence of any statute regulating the subject-matter of the decision the source of the decision-making power may still be the common law itself, i.e. that part of the common law that is given by lawyers the label the prerogative"

[25] It was argued by the Claimant that the NHF was a body set up by statute to carry out specific functions which were prescribed by law. That the Provider Agreements were not incidental to the functions of the statute. In entering into the Provider Agreements with the Claimants, the Fund was not merely exercising a commercial function. The Provider Agreements were arrangements made to execute the express functions of the statute and on that basis the exercise of the powers of that arrangement fell under the supervisory jurisdiction of the Court. The Provider Agreements were the vehicles by which the express functions of the statute were to be implemented.

[26] In **R v Panel on Mergers and Takeovers Ex Parte Datafin (1987) 1QB 815**, an application for judicial review was sought against the Panel, which enforced a Code of Ethics voluntarily subscribed to by members. The Code did not have the force of law. It regulates the securities market and can sanction members leading to expulsion from the securities market and reference to the Department of Trade and Industry, the Stock Exchange or other appropriate bodies. The Panel has no direct statutory common law source and is not in a contractual

relationship with the financial market or those who deal in the market. It was argued that the function performed by the Panel was a public law function; it was regulatory in a public rather than a private sense. The court held that the supervisory jurisdiction of the High Court was adaptable and could be extended to anybody which performed or operated as an integral part of a system which performed public law duties. The judgment of Lloyd LJ, after recognizing that the source of power was not the only test as to whether a body is subject to judicial review continued at page 847;

> "Of course the source of power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If on the other end of the scale, the source of power is contractual, as in the case of arbitration, then clearly the arbitrator is not subject to judicial review. (See **Reg v National Joint Council for the Craft of Dental Technicians Disputes Committee), Ex. Parte Neale (1953) 1QB 704**.) But in between these extremes there is an area which it is helpful to look not just at the source but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review."

[27] Mr. Lackston Robinson submitted that the functional approach is not applicable where the public body, as in this case, has statutory underpinning and the only issue is whether a particular decision is reviewable. The applicants contend that on an examination of the Provider Agreements, they represent arrangements to execute the express functions of the Fund Act, in **Datafin Ltd.**, the court found that the Panel was operating in the public interest, "wholly in the public domain," as the Claimants here contend. The panel jurisdiction extended throughout the United Kingdom. However, it lacked a direct statutory base or the prerogative. In ex. Parte **Datafin**, the applicants' counsel met the submission that the panel lacked statutory base or the prerogative source, with the submission that, "that was too narrow a view that regard had to be had not only to the source of the body's power, but also as to whether it operates as an integral part of a system

which has a public law character and is supported by public law. In that public law, sanctions are applied if its edits are ignored and performs what might be described as public law functions."

[28] The Claimants relied on **Mercury v Electricity Corpn. of New Zealand 1994 1 WLR 521.** The applicant was appealing a decision of the Court of Appeal, dismissing Defendant's appeal from a High Court decision striking out parts of his claim and the Defendant's appeal from the High Court's refusal to strike out the Plaintiff's claim for judicial review.

[29] I cannot accept that submission. The decision to terminate the arrangements in Mercury was found by the Board to be unreviewable. Their Lordships Board had identified the first issue for determination as, 'whether the Defendant was **a body** against which relief can be obtained by judicial review.' (Emphasis mine). It is important to note that it was **the body**, the Electricity Corporation, as constituted, that was the subject of the determination. Lord Templeman highlighted the distinction between the body, and that's body's decision, at p 526 B, where he said, "The power of the Defendant to determine the contractual arrangements was derived from the contract and not from statute".

[30] It was the view of the Court of Appeal that the decision of the Defendant to terminate the agreements was no different from any other commercial decision and therefore would not be amenable to judicial review. The Privy Council was of the view that because the decisions was made by the Defendant, a body established by statute, and their decisions could adversely affect private individuals without affording them any redress, their decisions were amenable in principle to judicial review. The decisions naturally that would be amenable were those of the body that had, as its source, the statute. It is my respectful view that in so holding, the Board was merely following the authorities, which was stated in Datafin Ltd., "If the source of the power is statute or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review." (See Lord Diplock's judgment, p847). Datafin was cited in arguments before the Board. In any event, the matter as to the reviewability of the decisions that the

public body takes, is put beyond doubt by Lord Templeman's statement recorded at page 529, B;

> "It does not seem likely that a **decision by a state enterprise** to enter into and determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith (emphasis mine)."

[31] The importance of the common law acceptance of the source of the power, being decisive is embodied in the Board's judgment at 529, letter E,

> "There is nothing in the Act of 1986 which imposes a statutory duty on the defendant to allow the contractual arrangements to continue."

[32] It is clear that in Datafin, the issue was whether the Panel as a body was susceptible to review. Sir John Donaldson, MR., identified the principal issue as being, "whether this remarkable body is above the law." (See p.827 B, 836 B) The issue in the case before us is whether the decision of the public body, the NHF, is susceptible to judicial review. Mr. Robinson's written submission agrees that "the only issue is whether a particular decision or activity is reviewable." NHF has express statutory functions and whether those are reviewable or unquestioned.

Public bodies' decisions

[33] A public body oftentimes achieves its statutory objectives by contractual means; therefore, not every activity of a public body will be amenable to judicial review. Questions as to whether a public body is entitled to enter into certain contractual arrangements is a one of public law, and may be challenged by judicial review, if it can be shown, inter alia, that the public body acted for some ulterior motive. Once the body enters into a contract, issue concerning its enforcement is a commercial matter which can only be determined in private law. The fact that NHF is a public body does not make all its acts and decisions amenable to challenge as a matter of public law. The decision to terminate the Provider

Agreements does not affect the Claimant's rights qua members of the public but as parties to the agreement.

[34] Mr. Robinson submitted that there was no legislative underpinning for the decision taken by NHF to terminate the contract. The power to terminate the Agreement is found in the Provider Agreements. The Act does not address any specific contract that is entered into by the NHF. The statutes are not in the statute or any regulation. Everything resides in the Provider Agreements. The rules of termination are embodied in the Provider Agreements and that the Claimants are required to show that the action of terminating the agreement are ultra vires the statute; this, they are unable to do. In East Berkshire Health Authority, exp Walsh 1985, 1QB 152, the applicant was dismissed by the authority. The contract under which he was employed incorporated terms of Whitely Council agreement. Statutory restrictions were placed on the Authority's ability to employ on such terms as it saw fit. The applicant sought certiorari to quash his dismissal on the ground that the district officer had no authority to dismiss him and that his dismissal was in breach of the rules of natural justice. The Court of Appeal, in allowing the Authority's appeal, held that an applicant for judicial review had to show that a public law right that he enjoyed had been infringed. That where the terms of employment by a public body were controlled by statute, its employee might have rights both in public and private law to enforce those terms but a distinction had to be made between an infringement of statutory provisions giving rise to public rights and those that arose solely from a breach of the contract of employment.

[35] The Claimants are unable to show that "anything more than mere private contractual rights" are alleged as having been breached. If the Claimant's contractual terms of service had differed from those approved conditions in the regulations, then he would have been entitled to judicial review. (The relationship of the Claimants and the NHF are based solely on contract). See the judgments of May L.J. p172, at G-H, Purchas LJ, at page 180 C-E. I find that the Provider Agreements contained all the contractual terms between the Claimants and the

NHF. I find that there was not any element of public law in the agreements rendering it susceptible to judicial review.

[36] Although a finding that the termination was not amenable to judicial review excludes a finding of breach of natural justice, the Claimants have alleged that the Agreements were terminated in breach of the rules of natural justice, in that the Claimants were not told of the allegations against them and afforded an opportunity to respond. Also, the NHF failed to give reasons or any adequate reasons for the termination of the Agreements, although counsel for the Claimants did concede that there was no general duty to give reasons. See **R v Higher Education Funding Council, ex parte Institute of Dental Surgery {1994} 1 All E.R 651. 651,** at page 652, held a – e. The judgment in **R v Civil Service Appeal Board, exp. Cunningham {1991} 4 All ER 92 w**as considered in which a prison officer was unfairly dismissed, reinstatement ordered, which was not effected. The compensation ordered was inordinately low. The Board refused to give reasons. The applicant challenged the Board's decision on the basis of irrationality. The Court of Appeal held that the Board should give reasons. Because there was no appeal from the Board's decision. The Board was carrying out a judicial act, and in this case, there would be an appeal to the Court of Appeal in the civil action. The NHF was making a commercial decision provided for under the contract. The NHF, unlike the Board, was not susceptible to judicial. The procedure employed by the Board was insufficient to achieve fairness. The claimants would have a trial procedure that the matters could be ventilated. The duty to give reasons is inconsistent with the law of contract.

[37] The complaint concerns the infringement of the claimant's private law rights contained in the commercial arrangements between the claimant and the Fund over which this court has no supervisory jurisdiction. The application is refused. Costs to the respondent to be agreed or taxed.