



COMMISSION OF INQUIRY  
ON  
DISPOSAL OF SHARES  
OF  
BAI COMPANY (MAURITIUS) LTD  
IN BRITAM HOLDINGS LTD  
(KENYA)

**REPORT OF THE  
COMMISSION OF INQUIRY  
ON  
THE DISPOSAL OF SHARES OF BAI COMPANY  
(MAURITIUS) LTD  
IN BRITAM HOLDINGS LTD (KENYA)**

**JUNE 2021**

Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.

**Source: United Nations Economic and Social Commission  
for Asia and the Pacific**

## Contents

FOREWORD.....	5
COMMISSION OF INQUIRY UNDER THE COMMISSIONS OF INQUIRY ACT RE: DISPOSAL OF SHARES OF BAI COMPANY (MAURITIUS) LTD IN BRITAM HOLDINGS LTD (KENYA) .....	8
CHAPTER 1.....	8
PRELIMINARIES .....	8
CHAPTER 2.....	11
THE STRUCTURE OF OUR REPORT.....	11
CHAPTER 3.....	14
DEPOLITICIZING THE COMMISSION .....	14
CHAPTER 4.....	19
INDEPENDENCE AND IMPARTIALITY ISSUES .....	19
SECTION I – THE LAW .....	19
SECTION II - THE CONTEXT.....	20
CHAPTER 5.....	38
APPLICATION OF LAW OF BIAS TO FACTS .....	38
CHAPTER 6.....	49
THE INHERENT RIGHT OF THE PUBLIC TO KNOW .....	49
CHAPTER 7.....	60
RULINGS OF THE COMMISSION .....	60
CHAPTER 8.....	62
FACTS FROM THE DEPOSITIONS .....	62
CHAPTER 9.....	154
FACTS FROM DOCUMENTS .....	154
CHAPTER 10.....	195
WHAT THE FACTS REVEAL.....	195
CHAPTER 11 .....	204
COMMENTS ON REPLIES TO SALMON NOTICES .....	204
CHAPTER 12 .....	234
FACTS WHICH GIVE A LIE TO THOSE SERVED WITH SALMON NOTICES.....	234
CHAPTER 13 .....	248
NON CO-OPERATION OF FOREIGN WITNESSES .....	248
CHAPTER 14 .....	253
TOR (I) –WAS THE TRANSACTION IN THE BEST INTEREST OF THE SELLER? .....	253
CHAPTER 15 .....	260
TOR (II) – WHAT LED TO THE UNDERSELLING .....	267
CHAPTER 16 .....	279
TOR (III) - NEED OF A TRANSACTION ADVISOR? .....	279
CHAPTER 17 .....	291
TOR (IV) - HAVE ALL SALE PROCEEDS BEEN RECEIVED? .....	291
CHAPTER 18 .....	295
TOR (V) - HAVE FUNDS BEEN TRANSFERRED OTHERWISE? .....	295
CHAPTER 19 .....	298
TOR (VI) - ANY FRAUD, MALPRACTICE, CORRUPTION, UNDUE INFLUENCE OR MISDEED/S? .....	298
CHAPTER 20 .....	304
TOR (VII) – CHOICE OF KENYAN SHILLING FOR SALE? .....	304
CHAPTER 21 .....	306

## Commission Report – Sale of Britam Shares

CRIMINAL AND CIVIL RESPONSIBILITY OF THOSE INVOLVED.....	306
CHAPTER 22 .....	311
THE SALE OF THE BRITAM SHARES - A MANOWARI PROJECT .....	311
CHAPTER 23 .....	317
REALITY CHECKS FOR RECOMMENDATIONS.....	317
CHAPTER 24 .....	326
LESSONS LEARNT, RECOMMENDATIONS.....	326
AND RATIONALE.....	326
ANNEXES .....	349
GLOSSARY OF TERMS .....	350
ACKNOWLEDGEMENTS .....	<b>Error! Bookmark not defined.</b>

## FOREWORD

*The pursuit of truth and beauty is a sphere of activity in which we are permitted to remain children all our lives – Albert Einstein*

### THE APPROACH OF THIS COMMISSION TO THE INQUIRY

The Commission has adopted a number of necessary basic principles in the conduct of the inquiry.

The first principle has been that of objectivity and impartiality. The adherence of that principle led to the second principle.

The second principle has been to base its conclusions on facts and nothing but facts. The Commission had to be critical on not only the deposition of witnesses and the contents of the documents but also whether those facts represented a complete or a partial picture. It had to fill the gaps to complete the picture before reaching its conclusions inasmuch as half-truth is as much a lie as speaking near the truth but not the whole truth.

The third principle has been to ensure that the Commission does not become a political weapon for anyone involved in the matter. It is not the objective of a Commission of Inquiry to grill any person who may not have grilled himself on the facts as ascertained and as evaluated.

The fourth principle is one of attitude. The Commission has no illusion that there will be some who would wish to draw their own conclusions with added unascertained material. But that is their right. We live in a society where people thrive on the right to differ. However, their right to differ should be based on their own credibility and the authenticity of facts. It is all too easy to pass the foul as fair and the fair as foul in a society as ours. The Commission was pleasantly surprised to note that there is an up-coming generation of right-thinking people in our Mauritian society aspiring to engage in a more scientific, logical and dispassionate way of engaging in public debates. Only that will ensure that our country will not produce neurotics. Adolf Hitler was not born. Adolf Hitler was created. The society in which he lived created him. We need no sociologist or philosopher to remind us that Rome is what Rome created. We get what we create.

## THE CONSTRAINTS OF THE COMMISSION

The comments, inferences, findings and conclusions contained in this report are based on the information made available to the Commission by the witnesses during their depositions and those extracted from the documents produced or dug out *suo motu*. The media had generated a host of materials which the Commission had sight of. It had to be wary of their source and motive. A number of them were self-serving, *ex post facto* materials designed to create a public opinion along certain partisan view. The Commission had to be particularly circumspect of media manipulation and rely on its own research, enquiry, examination and scrutiny of materials relevant to its TOR for its conclusions.

Following the Communiqué issued by the Commission inviting any person/s to submit information or interested to depose before it on the transaction, not a single witness came forward. It was not until much later that a couple of them volunteered, well after the Commission had started its work. By and large, the Commission had to rely on its own to convene the witnesses who could throw light on the subject-matter. Some of them had to be summoned more than once in an exercise of ascertaining the veracity of what they stated.

One of the major constraints faced by the Commission was the lack of records at the level of the MFSGG&IR relating to the sale of Britam Shares and also at the level of the SA, BDO and all those involved at the material time. Yet, there had been meetings upon meetings relating to the transaction at that Ministry. A couple of witnesses spoke of the singular way in which the Ministry's affairs were being conducted at the time, with minimum input from public officers and maximum reliance on political advisers. Witnesses confirmed that all exchange of correspondence took place by way of emails. Public affairs unlike private affairs are matters of public record. When the Commission called for the file, it contained next to nothing regarding the sale. It boggles the mind how could that be. Lack of record, however, has not prevented the Commission from re-constructing the events which led to the sale. Records existed elsewhere. Absence of traces or wiped traces do not prevent a scientific reconstruction of events.

This was a complex Commission of Inquiry, unlike any other. The conventional type involves local witnesses. This inquiry included foreign witnesses. As far back as March 2018, the Commission, through the office of the Attorney General in Mauritius, sought the assistance of the Kenyan Authorities to hear identified witnesses in Kenya and who in one way or another were involved in the sale of Britam shares. Those who have an experience with the procedure for seeking assistance under mutual legal co-operation between different jurisdictions will know how protracted and how frustrating the procedure is. More than that, the time it takes to initiate the very process and the number of times it has to send reminders. Foreign witnesses are not bound by the coercive measures of the Commission of Inquiry Act so effective in the case of local witnesses. When the normal channel began to falter, the Commission resorted to the diplomatic channel to obtain responses. After an initial commitment from the Kenyans and a first written communication, they conveniently moved out of the radar. Finally, the Commission issued a Salmon notice to each of them, to no avail. It is still awaiting their response.

It is a matter of regret that the Kenyan witnesses were all talk and little walk. However, their relative reticence to collaborate and co-operate has not stopped the Commission from getting to the bottom of things even if a *viva voce* hearing of them would have made the conclusions of the Commission doubly certain. The number of facts which the Commission had in hand to confront the Kenyan witnesses were many. But this was an inquiry on the Mauritian side of things.

It is a matter of deeper regret that when Kenyan authorities sought the co-operation of Mauritius to sell to the Kenyan shareholders, Mauritius had bent backwards to please. But when Mauritius sought to find out what happened and how, the Kenyans failed to reciprocate. Yet reciprocity is the rule in bilateral relations between two friendly countries.

Fairness and due process are the principles which should characterize a Commission of Inquiry. Individuals whose conduct may call for further scrutiny need to be afforded the opportunity to make their comment and were respectively served Salmon Notices. The Commission had to wait for those answers, consider their replies and, thereafter, weigh them before reaching its final conclusions.

The Commission was almost ready to release its report in 2019. However, there was the announcement of the National Assembly General Elections. It would have been inappropriate to do so when some of the witnesses were standing as candidates in the General Elections. The Report would have been politicized, by all and sundry. That is not the objective of a Presidential Commission of Inquiry. Its objective is to go to the bottom of things and hand down the truth to the people and not end up making a controversy many times more controversial.

Between the first draft and the last draft, there have been two major events of no mean consequence which have had a bearing on our Recommendations. One had been national, the National Assembly General Elections of 2019 and the second global, the pandemic of Covid 19 sending the world, as we knew it, to its knees, with over 3.9m deaths across the world following a lockdown of almost three quarters of the globe for weeks upon weeks, with recurrent surges. The society of every single country in the world has been put to an acid test of survival of the fittest. The lasting lessons to learn from these events guide our Recommendations.

The first missed opportunity to release the report occurred with the first lock-down due to Covid-19 pandemic. No sooner were we getting organised to deliver than ensued another lock-down. The nature of the work which involved scrutiny of materials under safe custody of a physical office could not be carried out online.

The comments, conclusions and recommendations as set out in this report are limited to matters that are relevant to the TOR and revolve round a specific transaction, the sale of the Britam shares to the Kenyans. And no other. If it has missed out anything relating to the BAI matter, it is because that did not form part of its TOR.

# COMMISSION OF INQUIRY UNDER THE COMMISSIONS OF INQUIRY ACT RE: DISPOSAL OF SHARES OF BAI COMPANY (MAURITIUS) LTD IN BRITAM HOLDINGS LTD (KENYA)

## CHAPTER 1

### PRELIMINARIES

*One of the primary functions of public enquiries is fact finding. They are often convened in the wake of public shock, horror, disillusionment or scepticism, in order to uncover “the truth” - Phillips v. Nova Scotia (Commission of Inquiry [1995] 2 S.C.R. 97, pp 137-38.*

### INTRODUCTION

1. On 8 April 2017, Government set up a Presidential Commission (“the Commission”) to inquire into the facts and circumstances in which Mauritius had sold the shares which BAI Company (Mauritius) Ltd and its related entities (“BAI”) held in Britam Holdings Ltd (Kenya) (“Britam shares”). The shares were sold at MUR2.4bn when there had been buyers interested a couple of months earlier to purchase them, and one of which had agreed, at nearly double the price: i.e. MUR4.3bn. Cabinet had decided that these shares be transferred to a newly created dedicated entity, the NPFL, a private company set up for the purpose. But this is not what happened. Whoever was involved sold the shares first at a seemingly low price and then transferred the proceeds to the NPFL. Was that in order? What went wrong?
2. The members appointed to constitute the Commission have been: Mr Satyabhooshun Gupt DOMAH, retired judge of the Supreme Court (Chairperson), Mr Sattar HAJEE ABDOULA, Chartered Accountant (Assessor) and Mr Imrith RAMTOHUL, Chartered Financial Analyst and Chartered Certified Accountant (Assessor).

### Swearing-in-Ceremony

3. The members took their oath of confidentiality as per the Commissions of Inquiry Act. The Swearing-in-Ceremonies in respect of the Chairperson and Assessors of the Commission were held on Thursday 27 April 2017 and Friday 12 May 2017 respectively at the State House, Le Réduit. (**Annexes 1 & 2**)

### Press Communiqué

4. A Press Communiqué was issued with wide publication on 15 May 2017 inviting any person who wished to submit information or wished to depose before the Commission to inform the Secretary of the Commission in writing, together with a brief statement on the specific issue on which he/she wished to do so not later than **Wednesday 31 May 2017**. (**Annex 3**)

### First Meeting prior to the Hearings

5. A first Meeting of the Commission was held on 18 May 2017 at 11.00 hrs in the Boardroom of the Financial Reporting Council, Port Louis. The purpose was to decide on the procedure to be followed as per Section 9 of the Commissions of Inquiry Act. It is important to note that the conduct of an inquiry such as the one we had is governed



by an Act of Parliament, its scope and limitations are statutory, the procedure is laid down and it also lays down that the law of evidence shall apply.

### **Office of the Commission**

6. The Secretariat of the Commission was accommodated on the 3<sup>rd</sup> Floor of SICOM Tower, Ebene and later moved to the 11<sup>th</sup> Floor.

### **Hearings of the Commission**

7. The hearings of the Commission were held in public at Court No. 11, Supreme Court, Port Louis. The Court No. 11 is equipped with a digital recording system and transcription facilities. We also heard some other witnesses in confidence at SICOM Tower, Ebene whose information we cross-checked by formal hearing. We also sought clarifications and/or rebuttals where that proved necessary by formal communication by post.

### **Second Meeting**

8. A second meeting of the Commission was held on 6 June 2017 on the 3<sup>rd</sup> Floor of SICOM Tower at Ebene after logistics had been more or less set up to decide the order in which witnesses would be heard and the summons that would be issued as well as the dates of the first set of hearings.

### **Declaration of Witnesses**

9. Witnesses summoned to appear before the Commission were requested to swear to or solemnly affirm to speak the truth, the whole truth and nothing but the truth at the start of the Hearings. (**Annex 4**)
10. The Commission was supported by a Secretariat. Under Section 6 of the Commissions of Inquiry Act, Mr Iswardeo SEEBALUCK, then DPS at the Ministry of Technology, Communication and Innovation was appointed Secretary to the Commission.

### **Support Staff**

11. The support staff comprised:
  - (i) Mr Kaviraj REEDDY;
  - (ii) Mrs Nundeeny BHOYROO;
  - (iii) Ms Sumantee JOYEJOB;
  - (iv) Mrs Premila SUNKUR;
  - (v) Mr Lutchmee SOOUMBUR; and
  - (vi) Mr Ravi GONESS

The staff, in turn, took their oath of confidentiality before assuming their respective tasks.

### **Type of Hearing**

12. The hearings were in public except in cases where a couple of good samaritans sought to pass to us some information which they reckoned could give us some lead in our probe. The public hearings were in one of the Court Rooms graciously put at the disposal of the Commission by the Supreme Court on formal request made. We express our gratitude to the Judiciary for having lent us such a hand.

13. Those few informants in confidence to the Commission wanted their anonymity to be preserved. We heard them at the premises of the Commission, 3<sup>rd</sup> Floor and 11<sup>th</sup> Floor, SICOM Tower, Ebene. Of this discreet information, only some were worth inquiring into. This led us to recall some witnesses, sometimes more than once for ascertaining the veracity or otherwise of the information received in confidence. We used the information passed on to us in confidence as leads to call witnesses or recall witnesses either to confirm or infirm the pieces of information, careful that we subjected them to the closest scrutiny before relying on them, if at all.
14. There had been in all 25 sittings at the Supreme Court and 12 sittings in confidence at the venue of the Secretariat of the Commission.
15. A couple of articles appeared in the media and social media. The Commission had to be circumspect in not adulterating its formal proceedings with the informal proceedings undertaken by the media. A number of materials in the media were noted by the Commission to be self-serving, account taken of the dates of their posting and other factors. Some were from credible sources. But whichever was the case, the Commission was careful in not taking them at their face-value and subjecting them to the closest scrutiny and relying on them, if at all, only after they were corroborated by independent evidence.
16. A copy of the Terms of Reference of the Presidential Commission is found at **(Annex 5)** of this Report.

### **Terms of Reference**

17. For ease of reference, the Commission, as per its TOR, is to inquire and report into: -

- (i) *whether the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller;*
- (ii) *the circumstances in which the Special Administrators, Messrs Yacoob Ramtoolah and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of MUR4.3bn offered by a potential buyer, namely, MMI Holdings Ltd (South Africa) and, instead proceeded to sell the said shares to the existing shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only MUR2.4bn;*
- (iii) *whether there was any transaction advisor for the said sale and to inquire into the role of BDO in the said transaction and to inquire whether there was any conflict of interest in relation to BDO's involvement;*
- (iv) *whether all proceeds from the said transaction have been received to date, including dividend, if any, prior to the said sale;*
- (v) *whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third-party account, the currency in which it was so received, and any amounts retained as fees or commissions by or paid to other parties;*
- (vi) *whether in relation to the above transaction there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of said shares and whether any financial prejudice has thereby been caused to any person in Mauritius;*
- (vii) *whether Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred to USD;*

*and report on any matter ancillary to (i) to (vii) above and to establish responsibility both criminal and civil, of all persons, entities, companies involved in the said transaction and make recommendations thereon.*

## CHAPTER 2

*All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident - Arthur Schopenhauer*

### THE STRUCTURE OF OUR REPORT

18. What is this BAI Group? How did it serve the country? Why did it collapse? Who was responsible? What has the revocation of the banking licence of the BBCL to do with the sale of the Britam shares? What was the relationship between the banking sector and the non-banking sector? How did government cope with getting the pieces together in the aftermath of the collapsed empire of BAI? What mechanism did it set? Was this mechanism appropriate? Did everyone all along the line – investors, oversight institutions, professionals – play according to the rules? What happens when investors lose their money? Is there a legal responsibility resting on the State? Is there a public interest involved in ensuring that people do not lose their investment? What legal mechanism is in place so that a responsible government undertakes some damage control? How is it that the assets of a conglomerate are acquired by a Government to pay investors part of their investment? Is this right in a free market economy? How much did it realize? How did it realize it? Were there takers of the assets at MUR4.3bn some three months before they were sold at MUR2.4bn? What are the lessons learnt? What are the measures we need to take so that the country is spared the trauma of the collapse of the BAI caused so that what happened does not happen again? Neither civil proceedings, nor criminal proceedings nor quasi-criminal proceedings, this is a Presidential Inquiry to find some answers. To find the answers, the Commission heard witnesses and scrutinized the documents.
19. To probe into the above issues raised by the TOR, the Commission has adopted the structure as hereunder in its Report.
20. Certain witnesses had attempted in their depositions to use the Commission as a forum to settle political scores. **Chapter 3** details how the Commission has proceeded to inoculate itself against such incursion.
21. Unlike other Commissions of Inquiry hitherto conducted which delved straight into the meat of the matter, the present one had an upfront challenge with regard to its very composition. The Commission welcomed that challenge because it was thereby afforded an opportunity to deal with the jurisprudence of an essential matter not settled in our case-law. What is a Commission of Inquiry? How does it differ from other avenues of resolving societal issues in a democratic set up? In the absence of our own jurisprudence on the matter, the Commission carried out a comparative basic study on what obtains in other Commonwealth countries both as regards laws and cases. We attempt to give the essentials of what is a Commission of Inquiry in **Chapter 4**.
22. Two witnesses made strong exceptions on the composition of the Commission. They raised doubts as to the possible conflict of interest regarding the Chairperson and one Assessor of the Commission. The arguments raised by them have been examined by the Commission and **Chapter 5** extensively deals with the issue of conflict of interest in the context of a Commission of Inquiry.

23. There is a meaning and purpose for the setting up of a Presidential Commission of Inquiry. The public needs to know what happened because if there has been a wrong, that should not happen again. That is the ultimate purpose of the Recommendations which follow the conclusions on the facts. To be meaningful and purposeful, the picture has to be completed with respect to the TOR. To be completed, we need to look at the background as well as the foreground. We give a gist of the background relevant to our TOR in **Chapter 6**.
24. Counsel appearing for some witnesses convened by the Commission to depose before it made certain representations regarding the eventual depositions of their clients. The Commission had therefore to hear the arguments of counsel and give its ruling. The rulings of the Commission have been explained at **Chapter 7**.
25. **Chapter 8** the Commission summarizes the depositions of the witnesses and the facts emerging therefrom.
26. **Chapter 9** summarises facts emerging from documents.
27. **Chapter 10**, deals with conclusions arrived at by the Commission on the facts arising out of the depositions made by all witnesses and scrutiny of documents submitted.
28. **Chapters 11 and 12**, are an overview of the assessment of the role of main actors involved in the sale of Britam shares.
29. Unlike other Presidential Commissions of Inquiry, this Commission involved hearing of depositions from some foreign witnesses. We deal with what they said and what they withheld from us in **Chapter 13**.
30. Thereafter, each of the elements of the TOR will be dealt with in a separate Chapter. **Chapter 14** will deal with the question “*whether the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller.*”
31. **Chapter 15** will deal with the question of “*the circumstances in which the Special Administrators, Messrs Yacoob Ramtoolah and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of Rs 4.3 billion offered by a potential buyer, namely, MMI Holdings Ltd (South Africa) and, instead proceeded to sell the said shares to the existing shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only Rs 2.4 Billion*”.
32. **Chapter 16** will deal with the question “*whether there was any transaction advisor for the said sale and to inquire into the role of BDO in the said transaction and to inquire whether there was any conflict of interest in relation to BDO’s involvement*”.
33. The issue of “*whether all proceeds from the said transaction have been received to date, including dividend, if any, prior to the said sale*” will be dealt with in **Chapter 17**.
34. “*Whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third-party account, the currency in which it was so received, and any amounts retained as fees or commissions by or paid to other parties*” will be a matter we shall address in **Chapter 18**.

35. In **Chapter 19**, we shall address the issue “*whether in relation to the above transaction there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of said shares and whether any financial prejudice has thereby been caused to any person in Mauritius.*”
36. A regional commercial transaction between a Mauritian entity and a Kenyan entity seemingly involving the two Governments was done in Kenyan shillings. We have been commissioned to find out “*whether Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred to USD.*” We shall report on that in **Chapter 20**.
37. The wrap-up Chapter on the TOR will be **Chapter 21** where we “*report on any matter ancillary to all the above and to establish responsibility both criminal and civil, of all persons, entities, companies involved in the said transaction and make recommendations thereon.*”
38. In **Chapter 22**, we shall make some concluding comments on what characterized the transaction: was it above board?
39. In **Chapters 23**, we bring the attention of the public to a number of realities at the grass-roots which need to be pondered upon and addressed by one and all.
40. In **Chapter 24**, we shall deal with the ultimate objective of a Commission of Inquiry: the lessons learnt, the Recommendations and the rationale behind our Recommendations.

## CHAPTER 3

### DEPOLITICIZING THE COMMISSION

*I sell my professional time, not my  
conscience – Abraham Lincoln*

41. One major pre-occupation of the Commission has been to de-politicize its process and the subject-matter. It took the view that the only way in which it could deliver on its mandate sticking to its fundamental of independence and impartiality is by de-politicizing it. It had to go about its task, as it were, removing political writings on the wall, graffiti on the road, festoons in midair, partisan comments through the press, and self-serving media links etc. Independence and impartiality are a state of mind. Professionals who are used to them know how to apply them. Refereeing is at once an easy job and a difficult job. On the one hand, if the professional focuses on the rules of the game and apply them in the way the game is played, it is easy. On the other hand, if the professional focuses on the behavior and conduct of the fans, the professional, destabilized by it, stops being a professional.
42. This Commission took the view that it was not set up to provide a forum for any witness to come forward to settle political scores. The origins of commissions in its history in other countries have shown that time was when some had been set up for political purposes until the advent of full democracy in those countries. But we are not aware of such an occurrence in our democracy and we did not want to be hijacked into that outdated phenomenon. An inadvertent slip which was so easy to make if we give into the attempts of a couple of the witnesses.
43. This Commission took and stuck to the view all through that its role is quintessentially apolitical. As such, it had to cull out facts from wherever they lay and reach conclusions which are warranted on those facts. That is the end all and be all in public interest of all Presidential Commissions. In such a society as ours where, alas! there is politics, politics and politics everywhere and the public thirst for the truth barely ever quenched, public interest lies in delving into the bottom of things and bringing the truth to the surface for the good of one and all and for posterity.
44. At least two local deponents and all the Kenyans witnesses tried to play politics. We are not referring here to the ethical issues raised by ex-Minister Bhadain on perceived bias about the Chairperson and one assessor whose independence and impartiality he challenged. This the Commission will address fully in **Chapter 5**. Many things are sold under the false labels! Many sins are committed in the name of good deeds! In this case, political ink was being ejected to screen misdeeds. The sea octopus when faced with a threat ejects a blue ink to screen itself.
45. The application of the principle of independence and impartiality has meant, inter alia, two things: one, sticking to the nature, object and purpose proper of a Presidential Commission and two, going to the facts and nothing but the facts. This meant a discipline not to be muddled in the blue ink of politics which two of the deponents sought to divert and hijack us into. That is evident by the tone, the overtone and the undertone with which they deposed as well as the notably selected materials they produced. Our discipline was to go behind it as per the law as read and properly applied.

46. The two persons are: ex-Minister Bhadain and Mr Deerpalsingh. Together they confabulated a saleable picture for a part of the public prone to gullibility. The Commission is being kind to them when it states that they should have been kinder to themselves and their kinder selves. Had they taken it objectively and purely professionally, it is more likely that they would have earned the beneficent warmth of the process rather than the scalding heat thereof.
47. It is also unfortunate that ex-Minister Bhadain, for all the impressive 60 achievements mentioned in his publication “60 Significant Achievements” (Jan 2015 – Oct 2016) adopted a political approach to the Commission, more to filibuster the Commission than to assist it in going to the bottom of the subject matter.

### **Politicizing of the Commission by ex-Minister Bhadain**

48. Ex-Minister Bhadain stated to us that had he not left Government, this Inquiry would not have taken place. He would have gone to the then Prime Minister who would have put an end to the matter in an instant. Assuming that what he stated is true, it shows a number of things: *inter alia*, that he had the ears of the then Prime Minister who trusted him. But to us it is a shocking admission that he exuded so much power in the then government that he could prevent the setting up of a Commission of Inquiry. A commission has a public interest to serve in a democracy. It is the duty of all politicians that the public be made aware of all the facts relating to a subject-matter which has evoked public concern. That one Minister could hold so much power as to prevent a Commission of Inquiry from being set up is anything but good governance.
49. The setting up of a Commission of inquiry cannot depend upon the “*bon vouloir*” of one politician any more than the power of another to prevent it. And, after it has been set up, it is only right in public interest that everyone assists in coming clean in it, neither politicise nor filibuster it. When government decided that they needed to go to the bottom of things in this matter where a sale agreed upon at MUR4.3bn some four months earlier was sold at MUR2.4bn ultimately, the public has a right to know why. It may have been right. It may have been wrong. It may have been in between. But there should be a public accountability of the transaction and scrutinize the reasons as well as the reasoning.

### **Politicization of the Commission by Mr Deerpalsingh**

50. The extent of politicization can be gauged by the ease with which Mr Deerpalsingh, after he was served with a Salmon Notice, communicated to us a document which he stated the Leader of the Opposition had sent to the Director of Insolvency Service on 4 May 2020 as regards Mr Hajee Abdoula. How did Mr Deerpalsingh procure a copy of this communication between the then Leader of the Opposition and Director of Insolvency Service? As per the document, that communication between the then Leader of the Opposition and the Director was not copied to anyone at all. The extent to which people go to politicize issues in Mauritius is alarming.
51. After the Salmon Notice was served, the attacks on the Commission became more scathing. They verged even on threats.
52. What is a Salmon Notice? It is a notice sent to a deponent in an inquiry which affords him an opportunity to react to any fact which may be found implicating him or her. It is a principle of fairness which guides all enquiries in that no comment which may be adverse to someone may be made without affording that person an opportunity to explain. The service of Salmon Letters upon Messrs Bhadain and Deerpalsingh, made

them more acrimonious. Mr Deerpalsingh focused on Mr Sattar Hajee Abdoula's involvement in certain matters related to the BAI matter. They predated the setting of the Commission. It is our view that as professionals they should not have succumbed to the temptation of politicizing what is essentially the work of an Ad Hoc independent institution in a democratic system of government. We shall, accordingly, make an abstraction of the unbridled political passion with which both adopted.

53. This Commission is a Presidential Commission whose work is to serve no political party but to serve the public on an issue of public interest. The public interest in this matter was the sale of the Britam shares to Kenyans at MUR2.4bn when there had been an agreement with one potential buyer a few months earlier for MUR4.3bn. That is a legitimate public interest.
54. It is only an ill wind which blows nobody any good. But for the politicization, we are grateful to ex-Minister Bhadain, joined later by Mr Deerpalsingh, to have raised a couple of ethical objections and thereby afforded us the opportunity of dotting the i's and crossing the t's on what is a Commission of Inquiry. It is fashionable in Mauritius to use loose language or to use language loosely, to abuse institutions or use institutions abusively, to misuse our professions or to put our professions to misuse and above all to use politics wrongly or to make wrong use of politics.
55. The Commission needed to stay away from politics, from vilification and from media manipulation too in our search for the truth. In the digital age, there is no limit to the exteriorization of the *"perilous stuff in the hearts of men."*
56. Mr Deerpalsingh cited press Reports in support of his political stand going as far as stating that *"it is of general public knowledge that Mr Abdoula is referred to as and is a political nominee, arguing that a political nominee is a biased person."*
57. We have looked at the Press Reports. They are from sources of doubtful credibility and most of them self-serving. We like to think that the less vociferous public is well aware of the extent to which those who want to trade in a lie can go, in the pursuit of their design.
58. In the Salmon Notice served upon Mr Deerpalsingh the word "political" has been mentioned 7 times.
59. Now as regards ex-Minister Bhadain, his narrative focus on personality rather than facts: that of his one-time brother in arms turned brother at arms: ex-Minister Lutchmeenaraidoo.
60. His deposition may be characterized as a personal attack: Bhadain v Lutchmeenaraidoo, Bhadain v Pravind Jugnauth because they became eventually his political opponents. Later, it was Bhadain v Lutchmeeparsad because the latter produced a document compromising to their version. It was produced by Mr Deerpalsingh, used by Mr Bhadain which on the face of it may well be a forgery.
61. Very little light may be gained from our own local jurisprudence as regards the fact that a Presidential Commission of Inquiry has a specific role to play in a democratic society. Yet so much exists in emerged jurisdictions as regards its apolitical nature and the public interest it serves. In certain political systems, such a creature would not exist at all albeit there would be rampant public issues. For that reason, this Commission considered it



important to sensitize public opinion of what it is so that the virus of politics does not enter into such a valuable democratic institution by use or misuse.

62. This has become important for us because there have been attempts at taking it for what it is not. Some witnesses - albeit lawyers - came behaving like defendants and as defendants they behaved as though they were bound by the right to their silence. Rulings were sought as if we were in a court of law. Hearsay was freely bandied around as facts.
63. A Commission of Inquiry should not be confused with a judicial body or a quasi-judicial body. It is not a Tribunal. It has an autonomous existence in a democratic legal and judicial system of a democratic country. It is and should regard itself as no more and no less than an inquiry.
64. No one is on trial. Nor should anyone feel that he is on trial. We are not judging anyone. We have been commissioned to conduct an inquiry which will establish facts from which conclusions may be reasonably drawn with respect to certain matters which form part of our TOR. We are to enquire into what happened and bring it out to the public because the public has a right to know, not the partial truth one has, not the partial truth the other has, not the official truth of the politician, not the technical truth of the expert but the complete truth comprising all the pieces put together. It is not within our mandate to determine the guilt or lack of guilt of anyone. What is within our mandate is to place the facts and make such comments as seem reasonable on the facts in context. Those facts – just like police investigation – will be derived from witness depositions, documents and other materials as may be necessary. Reasonable inferences are drawn from the facts as weighed and evaluated.
65. Our credibility lies on the impartiality and independence of our inquiry which is very different from the impartiality and independence of a judicial or quasi-judicial body. The constitutional principle of the independence and impartiality is an overarching principle which also applies to a Commission of Inquiry. However, there is settled jurisprudence on how it should be applied. That is the reason for which we have taken the pains to explain lengthily but pertinently on both what a Commission of Inquiry is and how it should be applied in **Chapter 4**. A proper understanding of it, we believe, may lead to its proper use; and, an improper understanding of it would lead to its abuse and misuse.
66. The TOR itself is clear. It is impersonal. It targets no named person in particular. Certain shares were to be sold at MUR4.3bn but a couple of months down the line they were sold at MUR2.4bn? The public has a right to know. Was there a transaction advisor? If not, why not? The public has a right to know. If they were sold at MUR2.4bn, have we received all the proceeds of sale? If not, where has the difference gone? As a transaction between two countries, why was Kenyan Shillings chosen for the sale? Why not USD or any other international currency? Or, if national currency was to be chosen, why not Mauritian rupees? After all, the seller was Mauritius. The public has a right to know. If things have gone wrong, is there any case for fraud, malpractice, corruption, undue influence or other misdeeds which may be a subject-matter of criminal investigation and prosecution? The public has a right to know. Who were involved in the transaction? Did they play according to the rules applicable? The public has a right to have all the answers to all those questions.
67. Our task is to gather facts, hard facts and nothing but facts from which clear answers may be obtained for all the clear questions raised above. Where the facts contradict what

they say, we say it. Where the facts reveal omissions by anyone involved and/or failures, we point them out. Where the facts reveal misconduct of anyone, we give them an opportunity to explain. But we do not decide civil or criminal liability. We investigate. We do not judge. We uncover truth from the very bottom of things.

68. The ethical issues as applied to a Commission of Inquiry are embedded in jurisprudence, even if not local. It is sufficient to say that the challenge may be made on grounds such as: that the conclusions reached were unwarranted on the facts or that someone intimately connected with the subject-matter was in charge so as to misdirect it to protect himself. A detective forms part of a team of investigators in a crime but he is himself involved in committing the crime so that the likelihood of his leading the investigation astray is real rather than theoretical. The key word is “interest.” His private interest is involved when he is doing a public duty. But, on the other hand, if he knows the persons whom they are enquiring, he knows the locality, the mores, the habits and the customs he is more qualified as an asset than disqualified as a threat. There is no private interest involved with his public duty. His public duty is enhanced by his knowledge of people, locality, places, manner of doing things and the way of his dealing with that world in which he has expertise.
69. We decided to elaborate on the character of a Commission of Inquiry and the ethical principles applicable to it because of the important role inquiries have played and are playing in emerged jurisdictions. They provide persuasive authority for our local jurisprudence. Many are conversant with what it is. But there will still be a few who will take it for what it is not, or knowing what it is and should be, will want to exploit the ignorance of the rest. Those few may belong to all category of people, professional and lay alike. Amongst, there will be self-interested witnesses steeped deep in politics who will seek to mislead and “*semer la zizanie*” with garbled facts carefully selected to confirm the prejudices of the unwary. A Commission of Inquiry is as careful and watchful of the fact that some of them use the media in various ways in an attempt to influence the outcome of a Commission. Of those, in the digital age, there are many.
70. What ethics apply to a Commission of Inquiry? The Commission believes that in any decision-making process in public affairs, impartiality and independence of decision makers is an absolute from which there should be no derogation. The Commission stands committed to this core principle of independence and impartiality which is the rock-bed of our democracy. Woe the day when such a vital grundnorm in the conduct of our public affairs was either compromised or corrupted through either loose interpretation or loose application. We have felt the dire need to dwell on what a Commission of Inquiry is on account of a misapprehension of law and fact as regards what a Commission of Inquiry is and how the principle of independence and impartiality is applied.

## CHAPTER 4

### INDEPENDENCE AND IMPARTIALITY ISSUES

*What people call impartiality may simply mean indifference, and what people call partiality may simply mean mental activity –  
Gilbert K. Chesterton*

71. Having avoided the blue screen of politics which was meant to take the Commission astray, we shall now deal with the ethical issues raised by ex-Minister Bhadain at first and Mr Deerpalsingh after he was served with a Salmon Notice. The challenge has been directed against the Chairperson and one of the Assessors. The reasons were specified. Some self-serving materials circulated in the media were used in support. The Commission welcomed the challenge. The best guarantee of independence and impartiality of any public institution is to pass the acid test of legality and ethics.
72. How correct are Mr Bhadain and Mr Deerpalsingh in their challenge? We shall give an answer to this question in **Chapter 5** below. The law imposes upon us to look at the context in which the ethical principle applies. The context being a Commission of Inquiry, it is incumbent upon every citizen to be clear about what a Commission of Inquiry is and what it is not. We are in the realm of law as is and law as applied. Nothing more. Nothing less.
73. Accordingly, we shall set out the law on perceived bias as is, in Section I of this Chapter. That law requires us to look at the context in which the issue arises. In Section II, therefore, we shall elaborate on the context: the role of a Commission of Inquiry in the legal system. On the substantive issue of answering the law of perceived bias to the facts, we shall dedicate a whole Chapter – the one which follows, i.e **Chapter 5**.

#### SECTION I – THE LAW

##### THE LAW OF PERCEIVED BIAS AS IS

74. The first exercise, therefore, for putting test of perceived bias is to situate the facts in their proper context, apply the correct law, correctly interpreted.
75. In the case of **Mitchell (Appellant) v Georges (Respondent) [2014] UKPC 43, Privy Council Appeal No 0067 of 2013**, the Law Lords decided that the principle of **Porter v Magill** was of universal application but if applied in very different circumstances, an assessment should be made whether those circumstances have an important and possibly decisive bearing on the outcome. In other words, after the context in which the challenge has been determined, the next exercise is to establish whether there is a relation of cause and effect between the allegation and the outcome. Does the allegation made have an incidence on the outcome? This is the way the Commission will apply the **Porter v Magill**. We shall situate the context. Then see whether there is a relevant link between what is alleged and the outcome.
76. With regard to the context, it cannot be disputed that the challenge has occurred in the context of a Commission of Inquiry. We shall analyze whether there is any relevant link between the allegation and the outcome later below. But for the present consideration,

what is this institution referred to as a Commission of Inquiry and what is its role in a democratic society?

## SECTION II - THE CONTEXT:

### THE ROLE OF COMMISSIONS OF INQUIRIES IN THE LEGAL SYSTEM

77. We are not concerned here with the legal framework of a Commission of Inquiry. It is not the source of its law, its constitution, its procedure, the nitty-gritty of its proceedings and other technical aspects we are concerned with. We are concerned with situating a Commission of Inquiry in its democratic set up. What is its role proper in a democratic society proper?
78. In the previous Chapter, we have striven to de-politicize our task. However, we still need to comment on the view ex-Minister Bhadain and Mr Deerpalsingh took of the motive behind the setting up of this Commission. Ex-Minister Bhadain in his deposition made bold as to say that this inquiry would not have been set up had he still been in government. That view of his, unfortunately, coloured his approach and his attitude to the Commission, amply demonstrated by his language, tone and responses including his attack of two members of the Commission. The Commission needed no reminder that it is a Presidential Commission, set up by the seal of office of the President of the Republic who is above politics and, therefore, essentially apolitical. We would like to think that had the President had the least suspicion that the Commission was politically motivated against ex-Minister Bhadain, with the legal background he has, he would have been the first to take up the matter when he weekly confers with the Prime Minister as per our Constitutional Convention. A Commission of Inquiry is not and should not have any extraneous motive.
79. What then is a Commission of Inquiry? We shall have it from the words of the 7-good men and true? What is it? Why does it take place? Wherefore is it held? When is it held? How is it held? Where is it held? Who holds it? They are all inter-linked but the last one would settle the ethical issues we are presently concerned with. A little knowledge is a dangerous thing for oneself. But it becomes pernicious when those with little knowledge are bent upon exploiting the gaps in the knowledge of others.
80. The Commissions of Inquiry Act of Mauritius is a relatively simple legislation and, in many respects, not so different in nature than any of those of emerged democratic systems. The Mauritian Commissions of Inquiry Act (“the Act”.) gives the power to the President of the Republic to appoint various types of inquiries: from conduct of public officers to conduct of public institutions. But the one that concerns us in this matter is the category of cases where the Commission is to *“inquire into ... any matter of public interest or concern, or any matter in which an inquiry would be for the public welfare.”*
81. As per section 2(2), the manner such a Commission is conducted as per the statutorily specified manner, including the where and the when. As per section 9, both the hours, time and place are to be at the instance of the Commission. As per Section 11, a Commission delves into facts through oral evidence, contents of books, plans or documents. As per section 11A, it has the power to effect search relevant to its TOR. As per Section 13, the law of evidence applies to the Commission subject to the Act.
82. Importantly, Section 12(2) – a provision to be remembered for later consideration - provides for its distinct autonomy from civil or criminal proceedings. Thus, no evidence given before a Commission shall give rise to any civil or criminal proceedings.

## ITS CONSTITUTIONAL ROLE

### *Situating a Commission of Inquiry in the Constitutional Set Up*

83. What role does a Commission of Inquiry play in a democratic set up based on the rule of law? How and where does it fit in our legal and judicial system? In what does it differ from judicial or quasi-judicial proceedings? We are, accordingly, grateful to ex-Minister Bhadain, joined later by Mr Deerpalsingh, to have given the Commission an opportunity to dissect this institution and understand its function in our legal and judicial eco-system.
84. We have stated above that, in the paucity of pronouncement in the Mauritian case-law, it is befitting that we have recourse to persuasive authority from other comparable jurisdictions. Mindful of our readership, we shall use a language not too technical or legalistic.
85. Before we do that let us recall the context in which this issue arises. The context is the impartiality and independence of this Commission of Inquiry. On that matter, we would want to make it clear of the code by which we have worked. The Commission believes that in any decision making in public affairs, impartiality and independence of decision makers are absolute norms from which no derogation is permissible. The Commission stands committed to this core principle of independence and impartiality which is the rock-bed of our democracy. Woe the day when such a vital concept was either compromised or corrupted through either restrictive interpretation, frivolous application or otherwise.
86. In the absence of Mauritian case-law, we can only rely on Commonwealth law to the extent that it constitutes persuasive authority for us. We shall limit ourselves to English, Canadian, Australian, Singaporean and New Zealand law, the jurisdictions which are based on the Westminster model of government. But first to our parent constitutional system: the United Kingdom.

### **United Kingdom**

87. In 1963, Mr Profumo, the Secretary of State for War, made a personal statement in the House of Commons denying that there was any truth in the story that he had a liaison with Miss Christine Keeler. He afterwards admitted that this statement was untrue. The truth was that Mr Profumo had been sharing Christine Keeler as a mistress with no other than a Russian naval attaché. Did the Government know? Ought the Government to have known? How many in government was party to the untruthful personal statement of Mr Profumo? The admitted liaison sent shock waves across the nation on account of the serious security risks it involved. The Secretary of State for War was sharing mistress with a Russian naval attaché! Who in the Government had approved the personal statement of Mr Profumo before it was made? Had they taken any steps to check whether or not it was true? To get to the bottom of it, a Commission of Inquiry was set up to enlighten the nation on these questions. It was entrusted to Lord Denning.
88. Get to the truth of things that evoke public concern: that is basically the role of a Commission of Inquiry. Situating civil and/or criminal liability takes time and may well be beside the point. The history of inquiries in England shows that from time-to-time cases arise concerning rumoured instances of lapses in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety. Such matters can only be dealt with by dedicated bodies custom-made

for the purpose. They are created Ad Hoc. Inquiries of this type are many: a Royal Commission, a Select Parliamentary Committee of Inquiry, an inquiry of the type carried out by Lord Denning in the Profumo Affair, a Departmental Inquiry, an inquiry of the type carried out in the case of accidents to ships or aircraft or an Inquiry of the type carried out by the Security Commission.

89. Apart from the laudable use made of a public inquiry, there can be an abuse of it as well, like with any democratic institution in the hands of political masters. A need had arisen to construct it on a democratic base for the purpose of inspiring public confidence therein. The passing of Tribunals of Inquiry (Evidence) Act 1921 was a timid start in that direction. Thereafter, with the experience gathered over almost half a century including the Lord Denning Commission on the Profumo Affair, a Royal Commission was set up to make recommendation on the very subject-matter of Commissions of Inquiry, chaired by The Rt. Hon. Lord Justice Salmon.
90. The up-front issue the Salmon Commission had to grapple with is how a Commission of Inquiry which is basically inquisitorial in character will sit in a legal system which is adversarial in character. The inquisitorial system prevalent on the Continent is alien to English common law. But the public interest role a commissioned inquiry played could not be underrated.
91. The Salmon Commission, accordingly, grafted such an investigatory institution to the adversarial system independent of existing civil and criminal proceedings but limited to such matters which had raised public concern but which had to be dealt with as such. The Salmon Commission advocated the setting up of an inquisitorial Tribunal possessing the powers of effective investigation conducted under a legal framework, an Act of Parliament, creating a Tribunal to be appointed by Parliament to inquire and report on specified matters. The task of inquiring was not to be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposed its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations, summoning of witnesses and receiving their depositions in order to arrive at the truth. The Salmon Royal Commission on Tribunals of Inquiry 1966 recommended a number of amendments to the then legislation which was Tribunals of Inquiry (Evidence) Act 1921 and eventually culminated in the passing of the Inquiries Act 2005.
92. The Inquiries Act 2005 (UK) replaced approximately 30 laws. Under the new law, inquiries may be established to consider particular events that have caused, or have the potential of causing public concern. A Minister may also establish an inquiry if there is public concern over certain particular events of national concerns. Members are appointed on the basis of ‘suitability’ and ‘impartiality’. Assessors have an advisory role.
93. The reconciliation of the inquisitorial with the adversarial in the common law system was not without teething issues among law practitioners whose minds were wired on the adversarial. The myriad of new issues arising may be gauged from a perusal of the article of Sir Richard Scott V-C entitled: Procedures at Inquiries – The Duty to be Fair, **The Law Quarterly Review Volume III – London Sweet & Maxwell 1995, p.596** - provided to us by Me Desire Basset S.C. in course of one of his submissions before us.
94. Sir Richard emphasizes on the differences between the proceedings in an inquiry and those of a civil or criminal action. The nature of an inquiry is, with very rare exceptions,

investigative or inquisitorial. In an inquisitorial process there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no “case” to plead or defend.

95. On this very important distinction, we may pause a little to point out how at least two of the witnesses deposing mistook both the forum and the forage. They came assuming wrongly that they had a case to plead as well as a case to defend.
96. Be that as it may, Sir Richard made the point forcefully that:  
*“It is inherent in the inquisitorial procedure .... that there is no lis. The Tribunal directs the Inquiry and the witnesses are the Tribunal’s witnesses. There is no plaintiff or defendant, no prosecutor or accused: there are no pleadings defining issues to be tried, no charges, indictments or depositions.”*
97. The end-view of an inquisitorial process is to investigate and, at the end of the investigation, to draw such conclusions as the facts gathered in evidence allow. Inquiries are almost of infinitely variety. There may be some single-issue inquiries in which opposing sides can be readily identified and in which procedures necessary for adversarial litigations, such as the right to cross-examine opposing witnesses, can be usefully applied. At the outset of some inquiries there are no issues. There is only a matter of public concern identified in the terms of reference.
98. Sir Richard further explains how the facts are ascertained. Where witnesses give different, and sometimes inconsistent, explanations of the implications of particular documents or of particular events, ordinary common sense is applied to resolve these differences which may well be differences of opinion. There is no need for an adversarial style cross-examination conducted by or on behalf of the disputants.
99. We may take another pause for another remark. In this inquiry, ex-Minister Bhadain expressed the regret that he could not cross-examine Mr Ramtoola, his one-time collaborator turned discreet denouncer.
100. If it is true that anyone called by the Commission to depose may have an interest in protecting his reputation but his duty to testify as cogently and comprehensively as possible with the Commission remains an overriding consideration. Only if the Terms of Reference are specifically directed at him - which was not the case here – he is permitted to safeguard his interest to the extent law allows him.
101. Whatever be the nature of the investigation, the inquiry is bound by an overarching duty of fairness to the persons summoned or volunteering to assist. In *re Peragamon Press Ltd* Lord Denning M.R., noting that the findings of D.T.I. inspectors had the potential of being “very damaging” in that they might “ruin reputations or careers” of some of the witnesses laid down the rule that “the inspectors must act fairly” and discharge that obligation to act fairly in order to minimise the risk of personal hurt and injustice.
102. In the application of the principle of fairness, if on a few occasions, significant disputes of fact emerge, the evidence should be drawn to the attention of those who have given conflicting accounts and they should be invited to give their comments.
103. In the case of most inquiries, a notice is served which is now referred to as a Salmon Notice. It is a notice served upon a witness against whom there may be some evidence

adverse to him. Its purpose is to afford him an opportunity to offer an explanation. That opportunity may well be coupled with another to make further representation, before any adverse conclusion may be drawn at the end. These are some of the safeguards against unfairness which a Commission of Inquiry should guarantee.

104. The questioning process is, or should be, a part of a thorough investigation to determine the truth. It is not a process designed either to promote or to demolish a “case”. As Lord Denning made it clear:

*“This Inquiry is to be conducted – and I stress it – by myself. This means that all the decisions have to be taken by me. Let me indicate now so that there need be no misunderstanding, what are the implications of what I have just said. First of all, it is I, and I alone, who will decide what witnesses will be called.”*

105. Even the procedure obtaining to receive depositions is flexible. Oral depositions may be substituted for preliminary or concluding written statements not unlike what is now common practice in civil litigation. Witnesses may be re-examined to add to whatever they deposed to earlier by whatever supplemental written statement they wish. Any legal or lay representative may play whatever role he thinks fit in the preparation of these statements with the objective of assisting any party with regard to the TOR.

106. Sachs L.J., too, emphasized that there must be an appropriate measure of natural justice, or as it is often nowadays styled ‘*fair play in action*’. He said that “*In the application of the concept of fair play there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand.*”

107. Another distinctive characteristic of an investigation is that it is an on-going process, developing and sometimes changing direction, as evidence from various sources accumulates. It is, therefore, worth asking on what basis an investigative hearing ought to be a public hearing. The police are not expected to conduct their investigations in public. Be that as it may, the golden rule set is that of procedural flexibility to achieve fairness tailored to meet the demands of the Inquiry as it progresses.

108. If the objective of criminal or civil action is sanction, that of an enquiry is search for truth in public interest. Public interest is to be distinguished from public importance. To satisfy idle public curiosity is not public interest. The Act lays down, rightly in our view, that what is to be inquired into shall be a “definite matter”. Accordingly, it does not serve to set up an inquiry to investigate a nebulous mass of vague and unspecified rumours. What in law is public interest is a legal matter not a social matter. As has been judicially remarked, the mistresses of football players evoke a lot of public interest. But in law that is not public interest.

109. It is the Tribunal that directs the inquiry and the witnesses are necessarily the Tribunal’s witnesses. There is neither any plaintiff nor any defendant, neither any prosecutor nor any accused; there are no pleadings defining issues to be tried; no charges, no indictments etc. The inquiry may take a fresh turn at any moment. It is therefore difficult for persons involved to know in advance of the hearing what allegations may be made against them.

110. Rather than have a rigid set of rules, it is sufficient to lay down general principles to be followed. In view of the inquisitorial nature of the proceedings of the Tribunal, the terms of reference require careful consideration and should be drawn as precisely as possible.



111. Albeit inquisitorial, in carrying out this task, a Tribunal of Inquiry cannot and should not be deprived of the services of solicitors and counsel. Their services are essential. But for them, the Tribunal would have to interview the witnesses personally before hearing their evidence before they descend into the arena at the hearing. As they did in the Budget Leak Tribunal.
112. Inquiries though they are, they are as a rule held in public because of their underlying purpose: that of restoring the confidence of the public in the integrity of public life. And without this confidence no democracy can long survive. Although it is of the greatest importance that the hearing should be in public, it has been generally conceded that there may be circumstances in which the Tribunal should have a discretion to hear some of the witnesses in private to the extent that they may provide important leads for the progress of the inquiry.
113. It is also a rule of propriety that Tribunals should in their report clear the names of witnesses against whom allegations had been made but found to be unfounded at the end of the day.
114. There is no appeal from the findings of a Commission of Inquiry in the UK legal system. In matters of the kind with which Tribunals are concerned, it is of the utmost importance that finality should be reached and confidence restored with the publication of the report. A permanently established Tribunal to conduct inquiries as and when an event in public interest justifies it is perhaps a unique feature of the United Kingdom. Other Commonwealth jurisdictions have other features unique to themselves.

## **Australia**

115. In Australia, Royal Commissions are established on an Ad Hoc basis equally in public interest in matters relating to or connected with the peace, order and good government. Their function is equally to be distinguished from judicial or quasi-judicial proceedings.
116. Even if each state jurisdiction has come up with solutions tailored to its needs, each of them has one thing in common: the fact-finding investigatory nature of the work if with coercive powers resembling the court process but without having to do with the court process. For example, where legal practitioners are engaged, they do so to assist inquiries and perform investigative functions similar to those performed by staff involved in an investigative standing body. This interesting feature in the Australian system shows the extent to which law professionals are expected to help rather than hamper the proceedings. All the lawyers who appeared in this case helped except for one. The Australian system has a number of unique features designed to enhance the role Commissions of Inquiry play in a democratic set up.
117. So that there is no confusion in the minds of people including the professionals of their place and their function, one of the Recommendations of the Commission of Inquiry on the Commissions of Inquiry has been the preparation, development and publication of an Inquiries Handbook to ensure that the institutional knowledge of those that have established, conducted and administered inquiries can be captured and passed on, such is the importance of this institution.
118. It is interesting to note that the ALRC encourages cross-fertilization in models of inquiry set up and conducted in overseas jurisdictions in which the systems of government are comparable to the Australian system.

## New Zealand

119. In New Zealand, Royal Commissions may be set up to carry out inquiries into such subject-matter as the administration of government; the operation, necessity or expediency of any legislation; the conduct of any officer in the service of the Crown; disasters or accidents in which members of the public were, or could have been, killed or injured; or any other matter of public importance.

## Singapore

120. In Singapore, a commission of inquiry may be established by the President of Singapore whenever he or she considers that it would be expedient to do so. Such an inquiry may consider: the conduct of public service officers; the conduct of any public service department or public institution; or any matter, in the opinion of the President, which would be in the public interest. A Commission may be established for the purpose of inquiring into: an occurrence involving death, serious personal injury or serious property damage; an occurrence that may endanger public safety or public health; the conduct of a Ministry, department or statutory body within the Minister's responsibility; or the conduct of an officer employed by, or seconded to, such a body.

## Canada

121. There are two types of inquiries with coercive powers which may be established under the Inquiries Act 1985 in Canada: (i) a 'public' inquiry established by the Governor-in-Council whenever it considers it would be expedient to do so and (ii) a 'departmental' inquiry may set up with the approval of the Governor-in-Council, by a Minister with responsibility for a federal government department.
122. Not only for its legal framework but also for court decisions, Canada provides a rich source of new learning. The constitutional role played by a Commission of Inquiry in a liberal democracy is well amplified in the case of **Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)**, [1997] 3 S.C.R. 440. More than 1,000 Canadians became directly infected with Human Immunodeficiency Virus (HIV) from blood and blood products in the early 1980s. Approximately 12,000 Canadians became infected with Hepatitis C from blood and blood products during the same time period. This tragedy prompted the Federal, Provincial and Territorial Ministers of Health to agree in September of 1993 to convene an inquiry which would examine the blood system. Objections were raised by several entities concerned on ethical grounds. The objections became court cases, some issues of which ended up in the highest court of the land.
123. The Supreme Court of Canada was accordingly given a welcome opportunity to examine and pronounce upon the distinctive role a Commission of Inquiry plays in a democratic society so that it is not confused with other institutions. It decided that it is a fact-finding exercise focusing upon the events of the early 1980s and the purpose was to "*get to the bottom*" of those events. The objective had been made clear by the Commissioner in that:
- "For those purposes it is essential to determine what caused or contributed to the contamination of the blood system in Canada in the early 1980's."*
124. A Commission of Inquiry seeks to focus primarily on facts of an event. It should not be mistaken with other court or related court proceedings which focus on conduct of parties per se. A Commission of Inquiry is not a judicial or quasi-judicial exercise. To dispel the confusion which a couple witnesses and professionals have made before us,

we find it apt to elaborate upon what is a Commission of Inquiry relying also on the persuasive jurisprudence of Canada. This will additionally enable us to situate and deal with the ethical issues that have been raised by ex-Minister Bhadain and Mr Deerpalsingh.

## WHAT IS A COMMISSION OF INQUIRY?

### *Different from judicial or quasi-judicial proceedings*

125. In *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, 1997 CanLII 6346 (FCA), [1997] 2 F.C. 527, at para. 23, the Supreme Court pronounced on the nature of a Commission of Inquiry. It is not a judicial or quasi-judicial proceeding. It is not concerned with the civil or criminal liability as such. It cannot establish either criminal culpability or civil responsibility for damages. It is no more and no less than an inquiry, an investigation into an issue, event or series of events which have provoked public interest.

126. Its objective is to investigate, educate and inform the public on a matter of public interest. It constitutes a learning curve of lessons learnt so that the errors which caused the mishaps are not repeated. The causes may be human error or technical error just like in a plane crash. As has been stated:

*“A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.”*

127. Judges determine rights as between parties. Commissions “inquire” and “report”. Judges may impose monetary or penal sanctions. The only consequence of the findings of a Commission is incidental and social upon any person who was involved. Hence, it would be incorrect to mistake a Commission of Inquiry with a judicial forum and apply judicial principles in the strict sense:

*“A public inquiry is not equivalent to a civil or criminal trial:”* see Canada (**Attorney-General v Canada (Commission of Inquiry into Blood System (1997), 142 D.L.R. 237 (Fed. CA).**

128. A Commission of Inquiry has its own eco-legal environment. Phillips speaks of commissions of inquiry as *ad hoc* bodies which are free of many of the institutional impediments which at times constrain the operation of the various branches of government and play an important distinctive role in good governance.

129. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover “the truth”. Inquiries are, like the Judiciary, independent but, unlike the Judiciary, they are often endowed with wide-ranging powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislature to take a long-term view of the problem presented:

*“Determination as to guilt or innocence, or civil or criminal liability are specifically excluded from its functional description.”* See **Patricia Starr, Tridel Corporation & Ors v The Hon. Mr Justice Lloyd W. Houlden [1990] 1 S.C.R. 1366.**

130. The autonomous nature of a commissions of inquiry has been spelled out in Phillips, *supra*, at pp. 137-38:

*“A commission of inquiry is not a court or tribunal and has no authority to determine legal liability; it does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe. .... A commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals. Further, a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference. In addition, a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability.”*

### **WHEN IS A COMMISSION OF INQUIRY HELD?**

131. Commissions of Inquiry are set up as the need arises when major mishaps occur such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice, friendly fires or issues raising national concerns in public interest. Set up in the wake of public shock, horror, disillusionment or skepticism, they are meant to uncover “the truth.”
132. A Commission of Inquiry then focuses on facts and events surrounding the occurrence to reach conclusions on what happened so that it will not happen again.

### **WHY IS A COMMISSION OF INQUIRY HELD?**

133. A Commission of Inquiry is held in public interest. The spoken and the visual media will project one story. The social media will project another. The party in power will project one, the Opposition will project another. Some NGOs will hold one view. Those directly involved will wish to carry what they know to their graves. Some will want to wipe out the traces. Some will burn or conceal documents. A Commission will seek to gather all the facts in the controversy and nothing but the facts for the purpose of coming up with conclusions to bring a finality in the controversies. The public interest element served by public inquiries has been emphasized in three major studies in Canada: Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission, *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). The benefits flowing from commissions of inquiry are many and various, each as valuable as the other. One major outcome is that it culminates into a list of Recommendations meant to address the mishaps which have emerged in the inquiry so that what happened does not happen again. Measures are, thereafter, put in place for such a purpose. Although the particular advantages of any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to recall the common denominators of commissions of inquiry.

### **HOW IS A COMMISSION OF INQUIRY HELD?**

134. How is a Commission of Inquiry held? It summons witnesses. It hears them under oath or solemn affirmation so that there is the degree of seriousness in its gathering of facts and search for the truth. It is endowed with the coercive powers to search and seize documents and materials which are necessary for the discharge of its functions. It examines documents and may make locus visits, locally or abroad. While in a civil or criminal proceeding, the focus is on misconduct, in a Commission of Inquiry the focus

is on facts. However, the facts should relate to the TOR and not facts relating to anybody's civil or criminal act or omission.

135. In the exercise of its power to call and question witnesses, it critically examines depositions and content of documents, checks for veracity, assesses credibility and weighs evidence.

*The evaluation of facts emanating from depositions and documents and visits etc.*

136. Given that a Commission of Inquiry has its own autonomous existence in the legal and judicial system, it obeys certain rules of caution in the use made of it or the language in which the conclusions are couched. The first is that commissioners endeavour to avoid making evaluations of their findings of fact in terms that are the same as those used by courts to express findings of civil or criminal liability:

*“If this were done it could be taken that a commissioner was finding a person guilty of a crime. This might well indicate that the commission was, in reality, a criminal investigation carried out under the guise of a commission of inquiry”.*

*Language and Style*

137. Commissioners equally avoid a language synonymous with a finding of civil or criminal liability, even if they are not expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.

*The Rules of procedure and evidence*

138. A Commission is careful in applying the rules of evidence and the procedure at the inquiry: it is not in the same manner as they are applied in court proceedings to determine liability. There is no onus of proof or quantum of proof against anyone. However, there is the common-sense application of reasonable inference from ascertained facts. Therefore, findings of fact reached in an inquiry may not necessarily be the same as those which would be reached in a court on account of the adherence to evidential principles of burden of proof and the quantum of proof against a defendant. This may help ensure that the public understands what the findings of a Commission are and what they are not.

## **WHEREFORE A COMMISSION OF INQUIRY?**

139. The objective of a Commissioner relating to that investigation is to make findings from the facts ascertained. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a Commissioner. They do not bind courts concerning the same subject matter.

140. A Commission of Inquiry comes up with Recommendations. As such, it does not seek the head or the skin of anyone involved in it, even if some of those involved may emerge variously scathed at varying degrees when facts are uncovered. But there are no penal or civil consequences. To put it another way, even if a Commissioner's findings could possibly be seen as determinations of responsibility by those involved, they are not and cannot be findings of civil or criminal responsibility.

141. The causes of an occurrence concluded by a Commission may be technical, administrative, logistics or human error or a combination of them. Faults may be

detected at the level of logistics or mechanics, or inattention, failure to follow established standards or procedures which, may be attributable to individuals and organizations. That may impact adversely on reputations of persons affected. But as has been stated:

*“damaged reputations may be the price which must be paid to ensure that if a tragedy such as that presented to the Commission in this case can be prevented, public interest will be served.”*

142. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet these inquiries can and do fulfil an important function in society. In times of public questioning, stress and concern they provide the means for citizens to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. The open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.

*Findings of misconduct against individuals*

143. Sometimes, the TOR itself will enjoin the Commission to look into the conduct of individuals implicated in a given set of circumstances. For example, in the Canadian case of **Patricia Starr & Ors v Lloyd W Houlden [1990] ISCR p.1366**, one of the challenges that was raised was whether it was a breach of the right to life, liberty and security of the person to set up a Commission of Inquiry centered on the conduct of specific individuals. The Court decided that the Commission was correctly constituted so long as its role was not to substitute itself to a police inquiry or a preliminary inquiry. The relevant part of the decision reads:

*“This commission is not a substitute police investigation and preliminary inquiry into a specific allegation and preliminary inquiry into a specific allegation of criminal conduct by named, private citizens; the coercive component is entirely different and there is no threat of incarceration. There is no lis between the state and accused persons; there are no accused. Indeed, the only thing that this commission of inquiry is definitely prohibited from doing is expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization.” P.1371*

144. In the above case, allegations were made in the press that Starr, the President of a section of a registered charity, had made contributions from the charity’s funds to political parties and that there was an association between her and Tridel Corporation Inc. Allegations about the relationship between Starr and various public officials, elected and unelected, mounted in the media and in the Legislative Assembly. Ashworth, the Executive Director of the Premier’s Office, resigned from his position after revealing that Starr had arranged for his family to receive personal benefits at no cost to himself. The province instituted a number of investigations. A commission of inquiry was appointed pursuant to the Public Inquiries Act to inquire into the facts surrounding the relationships between Starr, any person or corporation she may have acted for, including Tridel Corporation Inc., and any elected and appointed officials, including Ashworth.

145. The Court decided that the right to life, liberty and security of the person is not breached inasmuch as *“the Commission is solely a recommendatory and not an adjudicative body. Determinations as to guilt or innocence, or civil or criminal liability, are specifically excluded from its functional description.”*

146. It is also stated that:

*“The mere fact that some subsequent criminal proceeding may take place is far too fragile a hook which to hang a Charter violation.”*

147. Regarding types of alleged conduct, the court stated as follows:

*“The Inquiry does not act as a criminal court or exercise criminal jurisdiction. The conduct of the Inquiry is not part of a criminal prosecution under the Criminal Code nor is it an investigation into a particular crime or transaction which later might be the subject of a criminal charge. We are not here concerned with a criminal trial, structured as a dispute between two sides, the Crown and the accused. The function of the Inquiry is merely to investigate and report; no person is accused; those who appear do so as witnesses; there is no lis; there is no attempt to alter criminal procedure. The proceedings of the Commission are not criminal proceedings in the sense that punishment is their aim. The legislation under attack establishes an inquiry into the nature and prevalence of certain types of illegal conduct within the Province of Quebec....[Emphasis added].”*

148. The following comments from the Court may be helpful for our local jurisprudence on the matter for the purposes of determining issues which arise with respect to Commissions of Inquiry:

*“..... the mandate of an inquiry is completely different in kind from any police investigation. MacKay, in “Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry” (1990), 12 Dalhousie L.J. 29.”*

*“While created by government, one of the major attractions of an inquiry as an instrument of public policy is its independence from the governments of the day. They are special creations of the executive branch but are not answerable to it, as is a regular government department...”*

*“In their procedures and operations, commissions of inquiry sometimes resemble courts but they are not a branch of the judiciary.”*

*“....there is no lis; there is no attempt to alter criminal procedure. The proceedings of the Commission are not criminal proceedings in the sense that punishment is their aim.”*

*“..... there was another purpose to the inquiry just as important as one man’s solution to the mystery and that was to inform the public. .... The public has a special interest, a right to know and a right to form its opinion as it goes along.”*

*“The Commission is not a Court. It is not a branch of the judiciary. It fulfils Executive or administrative functions..... the gulf is wide between “the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative notwithstanding that both hold hearings.”*

*“That such activity may later form the basis of a criminal charge and thus engage federal interests in criminal law and criminal procedure, does not, in my view, undermine this basic principle....The inquiry is mandated to investigate alleged acts of wrongdoing for purpose different from those which underlie criminal law and criminal procedure. The purpose of the inquiry is not to determine criminal responsibility.”*

## **WHERE IS A COMMISSION OF INQUIRY HELD?**

149. Since it is established by Presidential seal as an Ad Hoc institution under the rule of law, it sets its own venue and gives notice of same to the public. It may proceed to any other place for the proper discharge of its functions. It is endowed with a Secretariat which lends it administrative support. A Commission of Inquiry is held anywhere and has no specific venue for hearing. The hearing may take place abroad with arrangements with other jurisdictions. It may move from place to place where it is relevant for the purpose of arriving at the very bottom of its investigation.
150. With this we come to the core issue, who holds a Commission of Inquiry. The fundamental principle is that he who conducts it should be independent and impartial. What is independence and impartiality in the context of a Commission of Inquiry?

## **WHO HOLDS A COMMISSION OF INQUIRY?**

151. The other autonomous characteristic of a Commission of Inquiry relates to the decision-makers. In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the Commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. The rules of evidence and procedure are therefore, considerably flexible when compared to those applicable to court proceedings.
152. In Mauritius, the Commissions of Inquiry Act guarantees that principle. However, it is its application that is the most important rather than what the law says. Those who are entrusted the duties of conducting inquiries are persons who take an oath to be impartial and independent. As per the First Schedule of the Act, they swear or solemnly affirm that they will faithfully, fully, impartially, and to the best of their ability discharge the trust and perform the duties devolving upon them by virtue of the commission.
153. Fairness and impartiality of the Commission are two non derogable overarching rules.

## **THE OVERARCHING DUTY TO BE FAIR**

154. A Commission must ensure that there is procedural fairness in the conduct of the inquiry. An inquiry's duty of fairness is general fairness. Inter alia, the late delivery of the notices is not held to be violations of rules of procedural fairness; a Commission has broad latitude and discretion in determining procedural fairness; a Commission may wait until the end of the hearing to give notices.

### *Issue of Salmon Notice*

155. It is in that perspective that when facts emerge compromising the conduct of certain witnesses, they need to be served with a Salmon Notice before any adverse comment may be made. Fairness demands that where their feathers have been somehow ruffled, they are given an opportunity to groom them, if at all. Notices are to be issued in confidence to the party receiving them. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible adverse findings which may be made against them. The notices are released only to the party against whom the finding may be made. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public. Any harm to reputation would be of its own doing.



*No excess of jurisdiction*

156. The mandate of a Commission of Inquiry is circumscribed by its TOR. When dealing with the subject matter, it should not enter into areas that go beyond the TOR. Even if the content of a Salmon notice appears to amount to a finding which would exceed the jurisdiction of the Commissioner, that does not mean that the final, publicized findings will do so.

*Application of Porter v Magill in the conduct of a Commission of Inquiry*

157. All the above characterization of a Commission of Inquiry shows that the principles applicable thereto cannot be the same as in a civil case or a criminal case, including the ethical principles.
158. In the case of **Beno v. Canada - Gilles Létourneau & Ors v/s Ernest B. Beno & Another [1997] F.C.J. No. 509**, an ethical question had arisen with respect to the perceived impartiality of the Chairperson when he had responded at a breakfast meeting to a criticism made against him. His impartiality to conduct the inquiry was questioned before court. The Court rejected the claim of impartiality in these terms:

*“The reasonable apprehension of bias standard must be applied flexibly. The Commission of the Somalia Inquiry must perform their duties in a way which, having regard to the special nature of their functions, does not give rise to a reasonable apprehension of bias. They should be disqualified for bias only if the challenger establishes a reasonable apprehension that they would reach a conclusion on a basis other than the evidence. .... It could not reasonably be seen as indicating a tendency to decide on some basis other than the evidence. If the Judge disagreed with the Chairman’s assessment of Beno’s demeanour and credibility, that was not a valid reason for questioning the Chairman’s impartiality. In retrospect, it is easy to say that the Chairman ought to have remained silent when criticized at the Calgary breakfast. But when one’s impartiality is challenged, it is normal to offer an explanation. It does not prove partiality.”*

**EX-MINISTER BHADAIN AND THE SALMON NOTICE**

159. After a Salmon Notice was issued to ex-Minister Bhadain, he responded to the bias issue as regards Commission of Inquiry and referred to the following case: **Mitchell (Appellant) v Georges (Respondent) [2014] UKPC 43, Privy Council Appeal No 0067 of 2013**.
160. This was a JCPC appellate decision coming from the appellate decision of the Eastern Caribbean Court of Appeal. The question was whether the Commissioner showed apparent bias in his conduct of a Commission of Inquiry. The court below had held that he had not. The appellant challenged that decision on appeal to the JCPC and sought an order that the respondent play no further part in the Commission.
161. The appellant had been the Prime Minister and Minister of Finance of Saint Vincent and the Grenadines for a long period, having been elected for four successive terms between 1984 and 2000. After he stepped down, there was a change in government as a result of a general election held in April 2001 and the party which had been in opposition since 1984 came to power.

162. By a Commission dated 28 April 2003, the Governor General, acting on the advice of the Cabinet, commissioned the respondent, a retired High Court judge, to inquire into the circumstances which led to the failure of a Project where in the 1990s the government had lost large sums of public money in what was said to be a fraudulent project. It had started as a proposal put to the then government by Dr Aldino Rolla, an Italian engineer and shipyard owner. It comprised the construction of a marina and shipyard. The funding of the Project came from a consortium of banks, secured by, among other things, a sovereign guarantee from the government amounting to over US\$50m. It was agreed between the parties that the loan finance was under the control of Dr Rolla who had diverted large sums for his own purposes. Funds had run out. The development was unfinished. The Project was a disaster. The banks sued the government and obtained judgment on its guarantee. The extent of the responsibility of the government led by the appellant became a major issue between the political parties.
163. The Commission's TOR included an inquiry, inter alia: into all of the facts and circumstances of and relating to the Project and the role played by persons and corporate entities involved therein to establish whether or not any criminal act or offence was or may have been committed in Saint Vincent and the Grenadines.
164. The TOR provided for the three types of report: first, an immediate report; second, an interim report within six months; and third, a final report.
165. At the stage of the Interim Report, a Salmon Notice had been issued against the ex-Prime Minister. It is the objectionable nature of the wording that was challenged. The appellant argued that it disclosed the Respondent's apparent bias.
166. The JCPC referred to the classic formulation of the test to be applied, that stated by Lord Hope in **Porter v Magill [2001] UKHL 67, [2002] 2 AC 357 at para 103**, namely:  
*"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*
167. It subscribed to the view made on behalf of the Respondent that in applying that test, the court must have regard to the context. Context was crucial.
168. In the application of the test to the context of a Commission of Inquiry, the JCPC followed what Rix LJ had explained in **R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746, [2009] 1 WLR 83 at para 93**. In other words, the test is:  
*"applied to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome."*
169. The Board looked at the challenge in the visor of that pronouncement and came to the conclusion that the language used had shown evidence that the mind of the Commissioner had been made up even at the interim stage.
170. The JCPC appreciated that the Commissioner was not presiding over adversarial proceedings but over an inquiry and that the inquiry involved a detailed examination of the conduct of the appellant (among others) over a considerable period. However, both the Salmon letter and the Interim Report made it clear that the Appellant faced serious allegations of impropriety. They were couched in too many firm statements of the

misbehaviour of the Appellant in that “*armed with knowledge of Dr Rolla’s deception*” the Appellant had “continued to provide assistance to Dr Rolla which facilitated his frauds;” that the Appellant had been the moving right behind the Project; that his failure properly to inform the Cabinet and Parliament was inexcusable; that he had taken his decision to exclude senior members of the public service deliberately; that he had engaged in “*a complete misrepresentation ... made without any due diligence having been carried out whatsoever;*” that he had taken no steps to protect the public interest and shut his eyes to the obvious and acted recklessly in the extreme, if not deliberately; that he had permitted or allowed a framework “*which gave total control to Dr Rolla and permitted him to freely execute his fraud; that he had*” publicly extolled the background and business acumen of Dr Rolla and the benefits of the projects well knowing that there was absolutely no independent due diligence to support his wild assertions;” that he had sought “*to coerce or mislead the [trustees] into transferring the land held in trust by them to an empty shell of a company; that Dr Rolla enjoyed complete sway aided and abetted by him and his cohorts who acted without any scruples or compunction;*” that the appellant’s conduct amounted to “*a pattern of gross misbehavior;*” and that appellant’s “misbehaviour” amounted to a total dereliction of duty and to substantial irresponsibility and described the projects (including the Project) as being in substance “a Mitchell thing!”

171. JCPC took the view that the extracts from the Interim Report set out above strongly support the conclusion that, having regard to the context and all the surrounding circumstances, the fair-minded observer would conclude that there is a real possibility that the respondent had made up his mind by the date of the Interim Report that the appellant was at the heart of the wrongdoing which led to the Project and its collapse and would not be willing to change his mind, so that his final report would not be impartial.

- “10. *The lack of transparency and the shroud of secrecy which generally characterized the ..... Project especially in its early stages and the absence of involvement of Cabinet generally and key professional civil servants in particular in the planning and financing stages.*
11. *The absence of due diligence and good governance on the part of the main persons involved in the preparatory stages of both Projects including yourself.*
12. *The palpable absence of proper checks and balances to protect the interests of the Government and people of St Vincent and the Grenadines in the ..... Project thus placing the Government in financial jeopardy and the NCB facing grave financial loss.*
13. *The naked deceit displayed by yourself and others via the media when the people of St Vincent and the Grenadines were led to believe that SACE and not the Government of St Vincent and the Grenadines was the primary obligor for the loan of US\$50m from West LB to CCYY for which a Sovereign Guarantee had been given by you as a prerequisite for the said loan.”*

172. It is eloquent that some people, with good reason, would identify the identical characteristics with regard to the sale of the Britam shares: namely,

1. shroud of secrecy;

2. lack of due diligence;
3. the absence of involvement of Cabinet generally and key professional civil servants;
4. absence of checks and balances, to protect interest of Government and the people;
5. use of media and National Assembly to perpetuate “naked” deceit.

## BASIC PRINCIPLES

173. Perhaps the basic principles applicable to inquiries may be summarized in an overly simplified manner in this way:

- (a)
  - (i) A commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;
  - (ii) A commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe;
  - (iii) It follows from (i) and (ii) above that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise, the public perception may be that specific findings of criminal or civil liability have been made.
- (b) A commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals.
- (c) A commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference.
- (d) A commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability.
- (e) A commissioner must ensure that there is procedural fairness in the conduct of the inquiry.
- (f) Concerning ethical rules with respect to the Commission itself, they will apply where any of the members was directly involved with the subject matter of the inquiry.

## HOW SHOULD THE LAW OF BIAS BE APPLIED?

174. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult.

175. The modern approach is thus that, for the generality of decision-makers governed by public law (and not just judicial decision makers), they should be aware of the dividing line which exists between predisposition and predetermination when they are applying the test of **Porter v/s Magill**. On this, one may derive immense benefit from paras. 40 and 57 of the judgment in **Condron** and the reference to **Gilles v Secretary of State for Work & Pensions [2006] 1 All ER 731**.

### *Distinction between predisposition and predetermination in non-judicial matters*

176. In the application of the apparent bias test, recent cases make a distinction between predisposition and predetermination in non-judicial matters.

*“Non-judicial decision-makers are entitled to have predisposition – they are entitled to express them – and in strong terms. So long as they don’t come to a decision with an entirely closed mind there is no objection to this.”*

177. The Court also referred to the need to reconcile *“the responsibilities of public authorities as decision-makers with the workings of the democratic process and the fact that declarations of policy are frequently made in the course of that process”* but went on to say that this did *“not affect the validity of the distinction between predisposition and predetermination.”*

178. An example is given where the facts suggest a real danger of bias: i.e., where *‘there was... animosity between the Judge and any member of the public’* involved in the case ***Locabail UK Limited v Bayfield Properties Limited*** [2000] QB 451 (CA) at 25. The categories of such danger are not closed, *“if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections”* then recusal would be necessary.

## DECISION MAKERS IN A COMMISSION OF INQUIRY

179. The other autonomous characteristic of a Commission of Inquiry relates to the decision-makers. In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only “inquire” and “report”. Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding is that reputations could be tarnished. Hence, it would be incorrect to mistake a Commission of Inquiry with a judicial forum and apply judicial principles in the strict sense. *“A public inquiry is not equivalent to a civil or criminal trial”*. The context is non-judicial.

## CHAPTER 5

### APPLICATION OF LAW OF BIAS TO FACTS

*A little knowledge is a dangerous thing -  
Alexander Pope*

180. In this Chapter, we shall apply the principles of perceived bias raised by ex-Minister Bhadain and Mr Deerpalsingh to the circumstances of a Commission of Inquiry, a non-judicial, non-quasi-judicial and investigatory process.

#### THE LAW

181. The classic formulation of the test to be applied to the whole spectrum of decision-making, including a Commission of Inquiry, is:

*“whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”*  
As per **Porter v Magill [2001] UKHL 67, [2002] 2 AC 357 at para 103.**

182. Authority for the application of the above to “*the whole spectrum of decision-making*” is found in the case of **R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746, [2009] 1 WLR 83 at para 93.**

183. However, there is an important qualification to the above general application. That qualification is:

*“as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome.”*

184. The application of the above qualification requires us to identify three elements:

- (a) the different circumstances;
- (b) the outcome; and
- (c) the decisive bearing of the circumstances on the outcome.

185. In this case, the circumstances are different in many respects. We are an investigatory body and not a judicial or quasi-judicial body. We investigate facts on which we reach conclusions and make recommendations. We do not judge conduct. Those who come before us are witnesses. None is under trial for any allegation. If some adverse inferences result against anyone, it can only be as a result of facts identified against them. We have no civil or criminal competence.

186. As regards the outcome, the conclusion can only be based on the facts ascertained. Any conclusion which may be adverse to anyone is referred to the relevant authorities for whatever decision they deem fit. Our ultimate task is to make recommendation such that the mishap, if any, does not happen again.

187. As a third element, we also need to consider the bearing which the different circumstances will have on the outcome. In other words, there should be a relationship of cause and effect between what is alleged and its impact on the result. Now that we have explained the law, we shall proceed to apply it to the issue of the independence and

impartiality as pleaded by ex-Minister Bhadain and his political Advisor Mr Deerpalsingh who were mere witnesses before us, as far as we are concerned.

188. It is important for us to recall the other circumstance of this inquiry. It is the sale of the Britam shares which was valued at MUR4.3bn and which, barely 4 months later, were sold at MUR2.4bn. That is the be-all and the end-all of it.

189. First thing first, it should be noted that ex-Minister Bhadain was first called as a mere witness to tell us what he knew about the sale. From his position as witness, he purported to derive a locus standi to challenge two members of the Commission:

1. the Chairman himself; and
2. Mr. Sattar Hajee Abdoula

190. Locus or no locus, we welcomed for our part the challenge. In the type of democratic system, we in Mauritius strive for and aspire to, we do want the construction of a society where our decision makers are to take decisions independently and impartially, at once “*sans peur*” and “*sans reproches*”. It is not in the interest of anyone in Mauritius to envisage a society of decision launderers i.e., where decision makers endorse foregone conclusions; and processes are merely cosmetic to rubber-stamp a pre-determined outcome. The Commission never regarded itself to be or to become such a sausage machine. At the same time, the Commission could not brook all types of challenges without valid grounds. Some challenges are genuine and valid, some genuine but mistaken and some mere abuse of process and frivolous and vexatious. Some are downright political.

191. Ex-Minister Bhadain challenged the Chairperson and Mr Sattar Hajee Abdoula. Later, Mr Deerpalsingh also challenged Mr Sattar Hajee Abdoula. The challenge was based on perception of bias. Ex-Minister Bhadain referred to the case of **Anne v State of Mauritius 2010 SCJ 164**.

192. The decision of **Anne v State of Mauritius** applies to tribunals, judicial or quasi-judicial bodies or proceedings. We reminded him that we were an investigatory body. In the Salmon Notice which was served upon him, we requested him to submit authority for ethical issues relating to investigations. He then referred us to **Mitchell v Georges [supra]**, without analysis as regards its application.

#### MISAPPREHENDING FORUM AND FORAGE

193. We would have expected ex-Minister Bhadain to take a professional approach to this Inquiry. Accordingly, his ambivalent stand has been enigmatic by any standard. He originally requested for a ruling on the ethical issues raised before he could assist further the Commission. It was obvious to the Commission that the ex-Minister Bhadain was confusing forum as well as forage. He had been called as a witness in an inquiry and he was seeing himself targeted as an accused party. Even as a deluded accused party he was standing either as a self-appointed barrister for himself as a client or as a client with himself as a barrister, as a politician in the garb of a deponent or a deponent in the garb of a politician. In any case, each time he was called as a witness to assist, he volunteered but progressively more and more acrimoniously.

194. Mr Deerpalsingh, on being served with a Salmon Notice, equally adopted the stand taken by the ex-Minister Bhadain. As witnesses, they had been called to assist in a public inquiry in public interest. They denied any participation in the sale of the Britam shares.

But because some witnesses and some documents showed that they were involved, in fairness, we needed to have their response through a Salmon Notice.

195. The Commission would not wish to go into the technicalities as to whether in their capacity as witnesses called to enlighten the Commission on its TOR, they had the *locus standi* at all to challenge the Commission as regards its composition. The selected documents they produced and things they said, the attitude they adopted, the Commission could only conclude that they had been quite unfair to themselves. By misapprehending the context, they did a lot of damage to themselves, which could have been avoidable.

196. The case of **Mitchell v Georges [2014] UKPC 43** identifies the *point de depart* nicely. The different circumstances in which **Porter v Magill** applies form the key. The Law Lords found the following circumstances: the issue was being raised on the contents of an Interim Report of a Commission of Inquiry on a previous Prime Minister of St Vincent and Grenadines. The remarks made in that Interim Report against him showed a pre-determination amounting to perceived bias. They then found that the language used had been such that an informed observer having all the facts would conclude that the Commissioner had closed his mind in an Interim Report well before the final outcome on the inquiry.

*“The appellant’s complaint is based on the contents of an Interim Report issued by the respondent, which was dated 18 November 2005. He says that the contents of that report evidence apparent bias on the part of the respondent. Whether that is so or not depends upon the application of the relevant legal principles to the contents of the report considered in its context”* [underlying ours]

197. The first exercise, therefore, for putting the test is to identify the different circumstances in which the principle of **Porter v Magill** applies.

198. What are they? BAI has often been referred to as the Rawat empire. It was an organisation of a myriad of entities, each having an autonomous legal existence with a complex business structure. The BAI story spanned over a number of years and its alleged disease before its death was pronounced was protracted. In the wake of its demise, a myriad of measures had to be taken with respect to each of the entities. Each measure had its own component. Each component had to be addressed according to its own procedural and substantive imperative in law. A number of the measures pre-dated to 2 April 2015 when the banking licence was cancelled. Most of them post-dated that event. It had as many transactions as it had components and as many professionals and regulatory institutions directly or indirectly involved at one time or another, at one stage or another or to one extent or another.

199. One of those transactions – just one from the myriad of components - was the sale of Britam Holdings shares by Mauritius to the Kenyan shareholders. The Commission was set up to inquire into how the Britam shares for which the seller had an agreement for sale at MUR4.3bn was not sold to them but to another party at MUR2.4bn. That is the context in which we have to decide the ethical issue raised by the two protagonists. In point of time, the offer of MMI Holdings was accepted in September 2015. And the sale to the actual buyers made in November 2015 and the sale concluded with them on 12 March 2016. That is the long and the short of it.



200. Now that we have circumscribed our mandate, we shall determine the ethical issue of *“whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”* within that mandate.
201. In point of time, the alleged meeting in Paris between Mr Hajee Abdoula and Mr Dawood Rawat took place on 20 April 2015. On the other hand, the MOU for the sale of the Britam shares was concluded on 12 March 2016. In point of fact, the alleged meeting in Paris had nothing to do with the sale of the Britam shares to the Kenyans at MUR2.4bn. There would have been an ethical issue had Mr Hajee Abdoula been one of the six or seven bidders proposing to buy the Britam shares. But that is far from being the case. Hence, in terms of both time and substance, there is no bearing between the circumstance and the outcome on the authority of **R (Lewis) v Redcar and Cleveland Borough Council [supra]**. The supposedly recorded conversation of Mr Rawat and Mr Hajee Abdoula has no ethical incidence on his membership of the Commission.
202. The phenomenon of putting 2 and 2 together to make it 22 is not a device unknown especially in this digital age. It is trendy to connect pictures and exchanges to events and people and making an enticing saleable story for public consumption with an appetite for such junk food. However, the paradigm shifts when all the pieces are put together. One eloquent example of how context matters is the connection that can be made by the picture where ex-Minister Bhadain is portrayed kissing the hand of Honourable Pravind Jugnauth, as he then was, and conclude from that, that they are fast friends for all eternity.
203. In the type of democratic system, we need to live for, we should ensure that decision-makers are above board and take decisions applying the law with reasons advanced. It is of paramount importance for our democracy that we inspire public confidence in public affairs which can only be construction on a real and perceived solid rock of independence and impartiality. At the same time, much should not be made on every occurrence. Scary kites of “*maldonne*” are freely fielded on a slender string of politics. It takes only the critical mind of the informed observer who has all the facts to call the bluff. That is the objective of a Commission: to complete the incomplete facts and uncover the truth, undeterred by misapprehended misgivings.
204. We did state that the concept of conflict of interest is a lot used and abused in Mauritius on account of the gap in our knowledge on the matter. Had this not been the case, there would have been no need for the Judicial Committee to sort it out for us. Other evolved jurisdictions have the law sufficiently developed so that litigants do not cry out blue murder when there is none as is the case in our jurisdiction.
205. It is to fill that gap in our knowledge that we thought it fit to take each and every point raised by ex-Minister Bhadain and give our views on it because his submissions on the matter stem from a lot of misapprehensions of law and misgivings applied to either questionable facts or facts irrelevant and immaterial to the issue.

## THE CHALLENGE OF THE COMMISSION

206. For enhanced transparency, the Commission will reproduce in toto the objection ex-Minister Bhadain raised at the hearing and the document he submitted in a private communication to the Secretariat of the Commission. The law on the ethics of decision makers did not stop at the date of ex-Minister Bhadain’s decision of **Anne v State of**

**Mauritius** in 2010 still less at **Porter v Magill** in 2002, where the ex-Minister has stopped.

## EX-MINISTER BHADAIN’S CHALLENGE OF THE CHAIRPERSON

207. Orally, this has been his submission. We reproduce it *in extenso*:

*“I have an issue of law Mr. Chairman which I intended to raise but I’ve listened to yourself, I must say that I have never for one minute having known you for so many years I appeared before you and of course had a lot of respect for our judiciary of which you are part. I never thought for one minute that there was going to be any actual bias in terms of the Commission which you are chairing. The issue that I was going to mention was actually in relation to a judgment that you had delivered on appearance of bias where you appeared together with Mr. Guy Ollivry which showed that in that case the DPP, even though she had never worked on the file and that was Mrs. Cheong who later became a Judge of the Supreme Court, even though she had never touched the file but the fact that she was the DPP and the Constitution say that the DPP prosecute that case have gone to the Intermediate Court and the lady, Mrs. Chantal Anne had been found guilty but when she came on appeal, she went on appeal before the Supreme Court, Mrs. Cheong had by then became a Judge and was sitting on appeal and I remember that yourself and the Acting Chief Justice, now Chief Justice Mr. Matadeen had quashed the judgment on the grounds as to what would a fair minded and informed observer concluded as to whether there was a real possibility of bias. I’m not going to go any length on that. I’m just going to submit documents which I had brought with me for your own consideration.”*

208. He produced the following documents in support:

- A. Supreme Court Judgment *Anne v State of Mauritius* 2010 SCJ 164, which he took to the leading authority in cases of ‘appearance of bias’, delivered by the then Acting Chief Justice, K.P. Matadeen and myself, then Judge of the Supreme Court. (**Annex 6**)
- B. Press article from Top FM dated 12 April 2017 with subtitle “*Pravind Jugnauth dit ne pas savoir si l’ex-juge Bushan Domah est client du SCBG*”. (**Annex 7**)
- C. Press article from Le Mauricien dated 13 April 2017 with subtitle “*Empire Rawat – Deux Ans Après : Intérêts Accumulés pour la Commission Britam*”. (**Annex 8**)
- D. Press article from l’Express dated 19 April 2015 with subtitle “*Sattar Hajee Abdoula – je suis le seul maître à bord*”. (**Annex 9**)
- E. Copy of “*mise en demeure*” dated 15 December 2015 from Mr Sattar Hajee Abdoula to:
  - 1.Mr Yacoob Ramtoola
  - 2.Mr Yogesh Rai Basgeet
  - 3.Mr Mushtaq N Oosman (**Annex 10**)
- F. Press article from Défimedia dated 14 April 2017 with subtitle “*pour 18 jours comme administrateur : L’assesseur Sattar Hajee Abdoula en attente de ses Rs 26 Millions*”. (**Annex 11**)
- G. Press article from Le Militant dated 27 May 2017 with subtitle “*Bande sonore dans le sillage de l’affaire BAI*”. (**Annex 12**)
- H. Narrative from Ex-Minister Bhadain on Appearance of Bias. (**Annex 13**)

209. Before we proceed to apply the law, it would be apt to set out the facts first.

### The facts as regards the Chairperson

210. The facts put forward by ex-Minister Bhadain as regards the Chairperson are as follows: that the Chairperson was an SCBG policy-holder who had made a capital investment of MUR1m and that he was repaid between June 2015 and September 2017 the following amount: Rs 500, 000 in June 2015, from a loan contracted by NPFL from the BOM; Rs 125,000 in June 2016, from proceeds of sale of Britam shares; and Rs 125,000 this month in September 2017, whilst being the Chairperson of the present Commission of Inquiry; that he also holds office as the Chairman of the FRC since mid-2014 and he had meetings in the Minister's office, where he made it clear that the FRC had a clear responsibility with regard to the auditors of the BAI Group, which had not notified the FRC of a material uncertainty for the BAI Group to continue as a 'going concern' as reported in the consolidated financial statements of KLAD Investments, filed in the Bahamas, where the shares of Britam were also held, through a complex structure; that the chair is a member of Integrity Reporting Board, appointed on 23 December 2016 together with Mr Jugdish Dev Phokeer; that Mr Phokeer deposed before the Commission and the chair questioned him on matters of Good Governance in his then capacity as PS of the MFSGG&IR; and that the chair did not disclose publicly that relationship with him as members of the Integrity Reporting Board ('IRB') falling under the aegis of the MFSGG&IR.
211. At this stage it would be appropriate to state that all these facts advanced by ex-Minister Bhadain to support his submission of perceived bias can be assumed for the sake of discussion and disposal of the argument to be undisputed. The question of law is whether in law those assumed facts may tantamount to perceived bias.

### DISCUSSION ON THE LAW

212. It is not our intention to discuss the lack of update of ex-Minister Bhadain on the evolution of the law on perceived bias since 2002 it was formulated in **Porter v Magill [2002] 2 AC 357**. This is a Commission of Inquiry and not a court or quasi-judicial proceedings. But those desirous of following its evolution may refer to the following: **Bovis Home Ltd v New Forest Plc [2002] EWHC 483**; **London Borough of Southwark v Jiminez [2003] EWCA Civ 502**; **Georgio v Enfield LBC [2004] BGLR 497**; **R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189**; **Condrion v National Assembly for Wales [2007] LGR 87**; **Gilles v Secretary of State for Work & Pensions [2006] 1 All ER 734**; **AWG Group v Morrison [2006] 1WLR 116**; **Meerabux v A-G of Belize [2005] 2 AC 513**; **Pinochet (No 2)**.
213. For our purposes, it is amply sufficient if we recall that the Law Lords have directed our attention to the context as a *point de depart* in **Mitchell v Georges [supra]**. Then following **R (Lewis) v Redcar and Cleveland Borough Council** which extended **Porter v Magill** to well beyond judicial and quasi-judicial proceedings to "*the whole spectrum of decision-making*," we need to apply it with the inbuilt caution therein.
214. The caution is  
*"as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that these circumstances must have an important and possibly decisive bearing on the outcome."*
215. In the application with the caution, it should be noted that the circumstances must have an important and possibly decisive bearing on the outcome.

## DISCUSSION

216. With regard to the context in which the analysis is to be made, we have seen: that we are in a Commission of Inquiry; that one fundamental difference between a Commission of Inquiry and judicial or quasi-judicial proceedings; that the members called upon to inquire are not decision makers who are involved with the vindication of rights of parties before it; that we are not decision makers involved with the determination of rights of parties before it; that no matter how many witnesses we call, how much those we call consider themselves threatened by the questions we ask of them or the documents they produce, there is no *lis*; that we do not decide anybody's rights in the *lis*; that there are no disputing parties before us; that the persons we call are all witnesses from whom we expect answers to questions we ask; and we weigh all they say and assemble and piece together the facts from which we draw conclusions and make recommendations on facts.
217. The fact that the Chairperson was also a policy-holder was an important fact in relation to the BAI matter but the Commission was not a Commission on BAI Group of companies as such nor on the ins and outs of SCBG. It was on why MUR4.3bn came down to MUR2.4bn in the sale of Britam shares to the Kenyans.
218. There is no connection between the circumstances of the Chairperson's having already been paid his minimal investment of MUR1m as a policy-holder in SCBG and the sale of Britam shares to the Kenyans.
219. Judges keep deciding cases of insurance companies in which they are policy-holders; banks of which they are customers; CEB and CWA of which they are consumers. No fair-minded Mauritian would go so far as to suggest that fact disqualifies them for hearing cases of insurance companies, banks, CEB and CWA, etc. It would be otherwise if he had a special treatment, he had obtained extra benefits and privileges from the insurance company or the bank or the CEB or CWA.
220. On the question of the membership at FRC or IRB, these are public duties as much as the present public duty. There is no such thing as a public duty conflicting with a public duty. There is no connection between the Chair's public duty at FRC or IRB to the sale of Britam shares. No fair-minded person would be able to make a connection between these circumstances and the outcome of this inquiry.
221. It would have been otherwise, had the Chairperson been the Chairperson of one of the companies of the BAI Group or its related entities.

## EX-MINISTER BHADAIN'S CHALLENGE OF MR SATTAR HAJEE ABDOULA

222. Mr Bhadain then challenged Mr Sattar Hajee Abdoula, the other member of the Commission, on the same ground of appearance of bias.

*The facts averred as regards Mr Sattar Hajee Abdoula are: inter alia:*

- (1) that he was supplanted by the Special Administrator on 12 April 2015, after the then directors of BAI had appointed him as 'Administrator' of various companies of the Group, including BAFSL, which held the shares of BRITAM in Kenya;
- (2) that Mr Sattar Hajee Abdoula was sitting as assessor of the Commission, whilst having publicly stated on 19 April 2015 "*Je suis le seul maître a bord*"; (Annex 9)

- (3) that as Assessor, he was now questioning the Special Administrator who had replaced him;
- (4) that he was questioning the FSC which had appointed the Special Administrator by virtue of Insurance (Amendment) Act;
- (5) that he had served a notice '*mise en demeure*' on the Special Administrator who had replaced him, including Mr Yacoob Ramtoola on 15 December 2015, warning them that in case they would act contrary to the notice '*mise en demeure*', they would be personally held responsible for the default and be liable for all prejudice that he, Mr Sattar Hajee Abdoula, might suffer for their default; (**Annex 10**)
- (6) that as Assessor of the Commission, he was putting questions to the Special Administrator who had refused to pay him at the material time;
- (7) that he had claimed fees on a transaction pertaining to the present inquiry and that the FSC had rejected his claim of MUR26.2million for the work he performed for the directors of the BAI Group, following which he, Mr Sattar Hajee Abdoula had publicly stated ***"Payé en millions? J'espere bien. Ça fait quatre jours que je ne dors pas. Je quitte le bureau à 5 heures du matin;"***
- (8) that he was now questioning the FSC which had refused to pay him at the material time;
- (9) that he, ex-Minister Bhadain, had spoken to the then Hon. Prime Minister that these fees should not be paid as they were not contracted by Government and the then Prime Minister had agreed but that after he, ex-Minister Bhadain, left Government on 23 January 2017, Mr Sattar Hajee Abdoula was paid on 9 March 2017;
- (10) that Mr Sattar Hajee Abdoula had a clear bias as '*Assessor*' of the Commission as a close associate of Pravind Jugnauth;
- (11) that Mr Sattar Hajee Abdoula had failed to disclose to this Commission of his meeting with Mr Dawood Rawat in Paris where he was recorded to have said: **"Look, the problem is one part of government knows it's a whole mess. Vishnu doesn't listen to anybody and Aneerood listens to Vishnu because they were together for a long time and no one else can talk to anybody. And Roshi is a loudmouth. I think he is making a name for himself. He's always been a loudmouth whether he was in ICAC or he was somewhere else so it's nothing new as far as Roshi is concerned. The stupid link is the Attorney General; he is not clever enough...."; and "Pravind is in a meeting, he will call me in 15 minutes. You know Dawood, when everybody was against Pravind, I was the only one who stood by him. When Navin wanted to grab the hotel also, I was the only one who stood by him. That's the relationship .... I remain close to Jugnauth very privately."**

## THE APPLICATION OF THE LAW TO THE FACTS

223. The law applicable to the above facts in relation to Mr Sattar Hajee Abdoula is the same as stated above inasmuch as the ground is the same in both cases: “*perception of bias.*”
224. The *point de depart* is the context. In other words, what is the context in which the issue has arisen? The first exercise, then, is to situate the context in which the issue has arisen. Is it a Court? Is it a Tribunal? Is it a disciplinary action?
225. The context in which the issue has arisen in this case is a Commission of Inquiry and the substance of the enquiry is to arrive at the truth of how the Britam shares were sold at MUR2.4bn to the Kenyans when there was a buyer who had agreed to buy them for MUR4.3bn. That is the long and the short of it.
226. In that regard, it does not take long for any reasonable objective person to conclude that the facts advanced in support of the grounds of challenge of Mr Abdoula are political but not legal. That Mr Abdoula may have met or did meet Mr Rawat in Paris in 2015 and disclosed to him his familiarity with Pravind Jugnauth; that he was ousted in April 2015 by law; that he served a legal notice of claim of MUR26m for work done on BAI matter for which he was challenged by ex-Minister Bhadain but still he was paid that sum; that he was questioning the SA who had replaced him under the law- have nothing to do with the core issue of an inquiry where the question is why did you sell at MUR2.4bn? It is the facts and facts only which the public wants to know. From the facts of the actual sale reasonable people – close to power or far removed from power – will draw objective conclusions and take measures so that such things do not happen again in the public affairs if the country.
227. We apply the principle laid down by the persuasive jurisprudence of democratic jurisdictions such as ours to determine and dispose of this: “*Do these circumstances have an important and possibly decisive bearing in the outcome?*” The answer is clearly in the negative.
228. We do not need a reasonable person to say that there is no connection between the circumstances advanced and the outcome. Even a less than reasonable person would say there is none. It would be only a patently unreasonable person who does not know the law and how it is applied to say differently.
229. To recap, if **Porter v Magill** is the test, **R (Lewis) v Redcar and Cleveland Borough Council** is the tool to test. The tool is as has been explained above. “*as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that these circumstances must have an important and possibly decisive bearing on the outcome.*” Put simply, circumstances unconnected or barely connected to the outcome would not tantamount to perception of bias of a decision maker. To constitute a valued perception of bias disqualifying the decision maker, the circumstances averred should have an important and possibly decisive bearing on the outcome.
230. It does not help, accordingly, for one to challenge a decision maker to “*faire le feu de tout bois*” to project a political picture of him, to pick up incident upon incident and connect them into a story line and present the package to show that the person is biased. Such concoctions are easily prepared and as easily sold on the political platform. But on

the legal platform that does not hold. It is incumbent upon him to show whether the circumstances alleged or averred had a decisive impact on the outcome.

## **THE NATURE OF THE MATERIAL AND THE LAW OF EVIDENCE**

231. It should be noted that most of the material come from Press reports. Such press reports are not admissible in a court procedure. A number of them were found to be self-serving. It is so easy for one to go to the Press and make a story and wish to get legal mileage out of it. This has been the weakness in the materials relied on by ex-Minister Bhadain.

## **PREDISPOSITION V/S PREDETERMINATION**

232. This aspect has been further developed in the latest cases not referred to us by ex-Minister Bhadain. The latest cases show that a predisposition to act a particular way cannot succeed as a ground for challenge for perceived bias. Decision makers have all types of predispositions to act a particular way – a predisposition held by position, by profession, by conviction, by policy, by public statement, by ones' personal likes and dislikes.

233. Facts relating to predispositions will not be a valid ground for challenge on perceived bias. If that were not the case, no decision of a public body would pass the test of **Porter v Magill**.

234. All the above averments made against Mr Sattar Hajee Abdoula may well be taken to be matters of predisposition as opposed to pre-determination. The former cannot be a ground of challenge. The latter can be.

235. As a rule, decision makers have predispositions, sometimes overt and sometimes covert. The question is: did the decision maker close his mind to an issue on which there was a difference and which had a decisive impact on the outcome?

236. How does a fair-minded informed observer look at this? That Mr Sattar Hajee Abdoula was only trying all the skills of a Negotiator to sell ice to Eskimos? In negotiations, people use negotiation skills and techniques. As a professional negotiator charged to strike a deal, you adopt the strategy of selling ice to Eskimos, which includes dropping names to show the high importance of the deal and the attractiveness of the outcome.

237. In an investigation into facts to come to a certain conclusion, did any of the member misdirect the inquiry? That Mr Sattar Hajee Abdoula exercised his right to bring an action for unpaid fees is a right of Mr Sattar Hajee Abdoula. That Sattar Hajee Abdoula spoke of his relationship with the Prime Minister in course of his appointment as an administrator may have shown how they mutually trust each other to get the right thing done but does not have an incidence on why assets which were valued at one time at MUR4.3bn were sold at MUR2.4bn?

238. Accordingly, we do not hesitate to state that ex-Minister Bhadain is mistaking his forum. Superior knowledge of facts in an inquiry adds to the quality of an inquiry and does not detract it from its quality.

239. What is it that we are concerned with? We are not concerned with the whole history of BAI, who were involved, what took place before or after, what fees were involved with respect to whom, whether Government was trying to negotiate with Mr Dawood Rawat and who went there for the purpose. We are not involved with that.

240. What are we involved with then? We are involved with the specific issue why was an asset valued at MUR4.3bn sold at MUR2.4bn? That is the long and the short of it. Ex-Minister Bhadain is attempting to “*noyer le poisson*” by bringing in issues which are unrelated and immaterial to the subject-matter of inquiry.
241. Issues of where the duty of disclosure arises? Should the Chairperson have disclosed the fact that Mr Phokeer is a member of the IRB when he was deposing? Duty of disclosure arises when there is a private interest involved which conflict with the public duty. Thus, a person who is to gain in his private capacity from a decision likely to be taken needs to disclose the fact that he is likely to benefit from the decision so that he will either not vote or remove himself or disclose that fact. The Chairperson had no private interest which he holds with Mr Phokeer which private interest he needed to disclose as a matter of law or ethics. If he sits along with him, that is public knowledge to the same extent as he met ex-Minister Bhadain to discuss financial regulatory issues as the Chairperson of the FRC.
242. Conflict of interest arises when there is a private interest unknown to the public which clashes with a public duty. There is no such thing as a public interest clashing with public interest.
243. We would make it bold as to say that a well-informed fair-minded person is more likely to conclude that both ex-Minister Bhadain and Mr Deerpalsingh:
- (1) attempted to raise technical issues of no substance avoiding the facts;
  - (2) misconstrued the law related to perceived bias; and
  - (3) mistook their status as persons on trial.
244. Our aim in having gone to length in elaborating on the law and the facts has been motivated by a concern to show the extent to which a little knowledge is a dangerous thing. As rightly stated by Casca in Julius Caesar:
- “Men may construe things according to their own proper fashion, Clean from the purpose of the things themselves.”*



## CHAPTER 6

### THE INHERENT RIGHT OF THE PUBLIC TO KNOW

*All power is trust - we are accountable  
for its exercise - from the people, and for  
the people all springs, and all must exit -  
Vivian Grey*

245. We shall now deal with the substantive issues. When things go wrong in public affairs, the public has a right to know what happened? How did it happen? Who were involved? Was it above board? Their thirst is not quenched with partial stories but with the complete story. A mixed bag of truths and untruths, assumptions and presumptions, speculations and suppositions do not quench the thirst of the right-thinking Mauritian. He wants the truth, the whole truth and nothing but the truth.
246. Shares of an investment holding company (holding solely Britam shares) for which there was an offer of purchase at MUR4.3bn were sold, on and after being taken over by Government, barely a couple of months later at MUR2.4bn. Was it right? Who were involved and what happened? It aches to delve into the root cause of what happened to be rhymed with how it happened and be reassured that it should not happen again. Otherwise, there would be neither any meaning nor any purpose in instituting a Commission of Inquiry. Judges determine rights as between parties; the Commission can only “inquire,” “report,” and give recommendations so that what happened does not happen again: see **Irvine v Canada (Restrictive Trade Practices Commission) [1987] 1 S.C.R. 181.**

#### THE BRITAM SHARES

247. What are the shares we are talking about? They are those which BAI Company (Mauritius) Ltd and its related entities directly or indirectly held in Britam Holdings Ltd (Kenya). We shall refer to them in this Report as the Britam shares. This inquiry was prompted by the clouds overhanging a transaction where the facts spoke for themselves. A number of things was known. A lot more loomed large in the dark. The persons who did the sale were doing so on account of the FSC, the Regulatory body. Those concerned in varying degrees of involvement were: Cabinet, Regulatory Organizations, Ministers, Public Officers, Professionals, a Foreign Government, its Treasury, its Citizens and its Public Officers and a number of undisclosed foreign investors. The public has a right to know. It is a misconception in Mauritius that a Commission of Inquiry is a public inquisition of some persons who are targeted. Some liken it with a judicial or quasi-judicial process. Nothing could be further from the truth. As we have stated earlier, a Commission of Inquiry is a search, investigation and assembling of relevant and material facts from which conclusions may be drawn.
248. BAI Co (Mauritius) Ltd had started as a known Private Investment Company. Its origin may be traced to December 1969, a little over a year after independence when the British-American Company Limited (“BACL”) was formed and started its operations in Mauritius. Mr Dawood Rawat under whom the 2015 demise occurred was not one of the early owners. He entered the scene only a month later, in January 1970. The Company was operating then as a worldwide company.

249. BACL was soon to diversify into insurance business and created the BA Insurance Company Ltd, incorporated in Mauritius on 14 December 1988, as a Subsidiary of BACL above, with Dawood Rawat as the Chairman. It was renamed BAI Co (Mauritius) Ltd, the entity we are concerned with. Subsequently, in 1990, two years after its incorporation, BAI Co (Mauritius) Ltd under the chairmanship of Mr. D. Rawat effected a “Management Buyout” of the Worldwide Company. In 1992, BA Insurance was listed on the Stock Exchange of Mauritius (SEM) and assumed the status of a PIE. In the same year, Mr. Dawood Rawat acquired a controlling interest in the company.
250. Around the same period are formed two related investment companies: BA Investment, incorporated in Mauritius on 23 September 1991 and KLAD; Investment and Corporation Ltd, incorporated in the Bahamas on 22 September 1994.
251. In 1997, BA Insurance Company acquired British American Insurance Company in Kenya. In July 2003, the BAI Group was restructured. BA Insurance became, thereafter, a subsidiary of BA Investment and the latter was listed on the SEM in the same year. BA Investment was subsequently delisted from the SEM during 2010. In 2004, Mr Dawood Rawat ceased to be a Director of BA Insurance. In 2005, BAICL, renamed later as Britam Holdings Limited Kenya, acquired a stake in the Equity Bank of Kenya, (Mr P. Munga who negotiated the deal of MUR2.4bn in 2016 with the Mauritian party was a shareholder in both companies).
252. On 01 April 2008, BA Investment acquired 100% of South East Asian Bank and renamed it Bramer Banking Corporation Ltd, Banking Licence issued on 27 August 2008.
253. The BAI Group had a large and complicated structure. We need not go into these. But suffice it to say that we are concerned with Bramer Banking Corporation Ltd dealing with banking business, with BAI Co (Mauritius) Ltd dealing with Insurance Business and BPFL dealing with properties and securities.
254. On 08 September 2011, British American (Kenya) Holdings Limited which was a subsidiary of BAI Co (Mauritius) Ltd acquired 452,504,000 shares representing 23.34% stake in BAICL which was renamed Britam Holdings Limited (Kenya) in June 2015.
255. They were all publicly regulated entities, also referred to in the financial jargon as PIEs (Britam Holdings was not listed). They had as auditors among the Big Five KPMG and BDO and their audit reports were deemed to be those the investing public could rely on for their investment. Their annual audit reports were all unqualified. That is, they represented to the investing public that the BAI was healthy on the face of it. As per international standards when a business entity presents investment risks, the auditor is under a professional duty to submit a qualified report for public consumption. At the time of collapse, there were 135,000 life policy-holders with regard to the SCBG.
256. What led to the collapse so to speak of this conglomerate? We have it from the Communiqué of the BOM that it had conducted an examination on-site into the affairs of the BBCL between 22 January and 20 February 2015, as a result of which, on 27 February 2015, the BOM showed a number of failures to BBCL going as far back as 2012. On 2 April 2015, the Bank of Mauritius decided to revoke the licence of BBCL. BBCL had been experiencing large withdrawals of deposits placing it in a precarious liquidity situation. That was further worsened by its difficulty to raise funds on the interbank market. It had relied heavily and continuously on a daily basis since

6 March 2015 for overnight facility from the Bank. It had also failed to maintain the minimum cash reserve requirement as from the maintenance period that started 5 March 2015. The capital of BBCL was seriously impaired. BBCL had failed to demonstrate its ability to address capital and liquidity issues to the satisfaction of the Bank. The Bank, as regulator of the banking system, considered that BBCL had been carrying on business in a manner which was contrary or detrimental to the interest of its depositors and the public. The Bank also considered that the conditions prevailing at BBCL posed serious systemic risks to the domestic financial system. In light of the above, the Bank had decided to revoke the banking licence of BBCL with immediate effect.

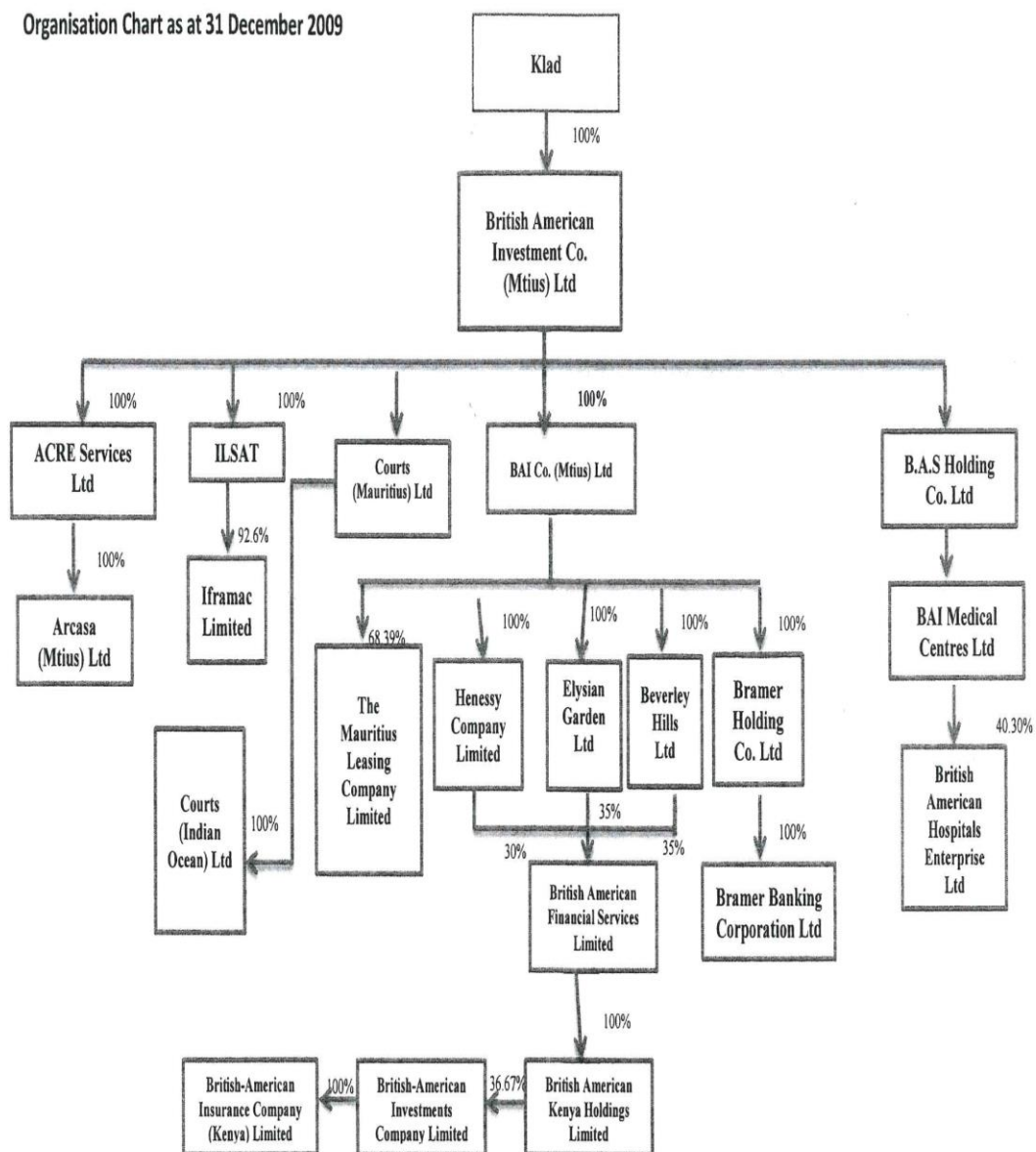
257. It is not in the mandate of this Commission to question the wisdom or lack of it of the Central Bank to revoke the licence of BBCL or the manner in which it did so.

258. Doubts on the financial soundness of the BAI Group and related companies had been expressed from a time as far back as year 2007. With respect to the insurance sector, the IMF in its country Financial Section Assessment Programme Report 2012 for the financial sector had alerted the Government of Mauritius on a situation whereby “*a single insurance company (had)*” “*a substantial proportion of its assets invested in related companies.*” The IMF Report had “*emphasized (on) the need for this issue to be solved.*”

259. The matter was serious enough for the then Leader of the Opposition to raise it in Parliament, through a formal Private Notice Question (PNQ on 21 November 2013). Nonetheless, BAI Group has expanded apace, albeit the public controversy around its shaky foundations. It diversified its businesses into other sectors: Banking, Financial Services, Healthcare, dealer in Motor Vehicles, among others.

260. As at year 2015, a snapshot in tabular form of the BAI Group shows as follows:

Organisation Chart as at 31 December 2009



261. It is not that the auditors had failed to see the state of affairs of the Group. They had seen it and had alerted the Audit Committee and Board of the fact that BAI Group's liabilities exceeded its assets. During the period January 2010 to December 2013, BAI Group had accumulated losses amounting to MUR14.7bn. Albeit the precarious situation of the Group, they had continued their business as usual. Indeed, the insurance segment had embarked upon more attractive business offering new insurance products to an under-informed public at enticingly rates, adding to the financial risks to itself and the investment public. One related entity, BPFL, issued preference shares which promised high returns at low risk. In sum, the situation was one which could be described in economic parlance as a potential bubble due to collapse any time.

## **AUDITORS AND REGULATORS**

262. Situations like this need not occur if the professionals and the oversight institutions involved in the matter play according to the rules. That means abiding by the professional and institutional ethics concerned. BAI was a public interest entity. BA Investment was in the past listed on the Stock Exchange of Mauritius. BBCL was also a listed entity. As such, the manner in which it conducted business was subject to public scrutiny, especially regulatory oversight and action. The investing public relied heavily on the audit reports overseen by the financial institutions to place their money. Auditors who have found something amiss in course of the annual audit report of firms they audit, are bound by a treble duty:

- (1) to report the matter to Company Audit Committee (CAC), as per their professional engagement;
- (2) to produce a qualified report for public notice, as per the standards relating to the profession; and
- (3) to report the matter to relevant authorities, as per law.

263. The professional auditors have to do as a matter of public interest to inspire and secure confidence in the investing public. Did the auditors of the BAI Group do so for the investing public to be alerted? They barely did: they only apprised the CAC but not the investing public. Who were they? KPMG and BDO. KPMG was for BAI Co (Mtius) Ltd and BDO was for Bramer Banking Corporation Ltd, at the material time.

264. Both KPMG and BDO, accordingly, as auditors and accountants failed in their professional duty and responsibility, in public interest, to bring this state of affairs to the attention of the financial institutions concerned and the investing public. It is not that they were not aware. They had duly reported the sorry state of affairs to the CAC. But they failed to advise the public as they should have done through their report. Had they done so, the public would have exercised due caution.

265. In the case of the BAI Insurance, the amount it had to make up was MUR3.6bn. Nearing the deadline of 30 June 2009, the BAI wrote to the FSC to state that it could not meet the exigencies imposed by the latter on account of adverse conditions in the international market. It did not give details of what the adverse conditions were and how it affected the BAI Group in putting some reasonable order in its financial affairs. The FSC moved the deadline to 31 December 2014.

266. On 31 December 2009, one could indeed see a book entry in the bank account of the BAI: namely, a payment-in of MUR3.6 bn. On the books, therefore, the BAI Group had complied by the due date with the Insurance (Long Term Insurance Business Solvency) 2007 rules vis-à-vis the FSC, the regulator.

267. However, the next day, that critical sum was gone as quickly as it had come. It was transferred back on the same day to its original source/s by way of what in accounting practice is referred to as a round tripping exercise.
268. In 2013, the FSC came up with a law to ensure financial solvency of insurance companies. The FSC imposed a mandatory solvency threshold for those offering insurance businesses. Rule 12(6) of the Insurance (Long Term Insurance Businesses Solvency rules 2013 required that the aggregate value of investments of an insurance company in one or more of its related companies shall not exceed 10% of its assets. Insurance companies which at that time were not in compliance with the Rules were given up to 30 June 2014 to comply.
269. KPMG was the audit firm of the BAI Group [BAI Co (Mtius) Ltd and Bramer Banking Corporation Ltd amongst others for period 2012 to 2014]. The auditors who had been preparing should have identified the irregularity. It was not any irregularity. It was in audit reporting practice, a material irregularity. BA Investment was listed until 2010. BBCL however remained listed until its licence revoked in April 2015. After identifying it, KPMG should have normally issued a qualified report. It did not do that. Instead, in possible breach of professional standard, it issued an unqualified report. The investing public continued to live in the delusion that their investments were safe and the projected returns ensured.
270. BDO which was the auditor of BPFL should have been expected to equally issue a qualified Audit Report on the matter. But it did not do so either. It issued an unqualified (Clear) Audit Report, albeit the material irregularities which comprised the questionable issue of Preferred Shares and questionable accounting practices regarding the BPFL Roadmap to determine whether BPFL was sustainable and whether it would be able to meet its public commitments when they fell due.
271. The BPFL Roadmap was not in accordance with the FSC restriction on re-investing the proceeds from disposal of assets into related companies. FSC did not raise any issues on the non-compliance.
272. KPMG, the Auditor of BA Insurance issued an unqualified Audit Report for years 2010 & 2012 in spite of being aware of BAI questionable financial performance and difficult financial position at that time which may jeopardize the ability of BAI to continue as a going concern.
273. Over and above that there is another duty which is statutory. The accounting firms need to report the matter to the oversight institution, in this case the FSC. They plainly did not do so.
274. Section 43 of the Insurance Act 2005 provides:
- 43. Auditor's and actuary's duty to report*  
*The auditor or the actuary of an insurer shall –*  
*where a report or return is made to the insurer or to any public authority,*  
*provide a copy to the Commission;*
- where, but for a termination of appointment or resignation, there would have been reason to submit to the insurer a report containing unfavorable or critical remarks, submit such a report or draft report to the Commission.*

- (1) *The auditor or the actuary of an insurer shall forthwith inform, and as soon as practicable, submit a report to the Commission where in the performance of his functions he becomes aware or has reason to believe that –*
- (a) *the insurer's financial soundness is seriously prejudiced, or the insurer's ability otherwise to comply with this Act and the FSC Rules is seriously impaired; (underlying ours)*
  - (b) *there is any material change in the business of the insurer which may jeopardize its ability to continue as a going concern; (underlying ours)*
  - (c) *there has been or there is a breach of any of the provisions of this Act or FSC Rules, or any other enactment relating to the keeping of accounting records and to audit;*
  - (d) *the policy framework of the insurer to counter money laundering and the financing of terrorist activities, and the related measures, is inadequate, or lacking, or has not been or is not being properly implemented;*
  - (e) *rules and guidelines made by the Commission have not been or are not being properly complied with;*
  - (f) *a financial crime or any serious irregularity is being, has been committed, or is likely to be committed;*
  - (g) *losses have been incurred which reduce the amount paid as stated capital or assigned capital, as the case may be, by 50% or more;*
  - (h) *the insurer is unable or is not likely to meet the margin of solvency. (underlying ours)*
- (2) *In respect of any act performed or communication made in good faith, whether spontaneously or in response to a request by the Commission pursuant to the discharge of his duties under this section -*
- (a) *the auditor or the actuary shall not be deemed to be in contravention of any enactment or to commit a breach of*
    - (i) *any code of professional conduct to which he is subject whether in Mauritius or abroad;*
    - (ii) *any contractual provision binding him to any confidentiality whether to the insurer or to any other party;*
  - (b) *no civil, criminal or disciplinary proceedings shall lie against the auditor or the actuary.*

275. KPMG had signed the consolidated financial statement of BBCL highlighting material uncertainties with respect to the going concern of the subsidiaries of KLAD. Yet KPMG provided an unqualified audit opinion when they had initially underlined a material uncertainty in the consolidated financial statement of KLAD. As such, KPMG should have under Section 43 of the Insurance Act 2005 reported the matter to FSC.

276. The prejudice and devastation which breached professional standards cause to the firms which professionals audit as well as to the public is something underestimated by some professionals. The temptation to run the professions along business lines is far too great for some. Had KPMG and BDO qualified their reports meant for public consumption, the collapse of the BAI (Group) might well have been prevented. But it may well be that keeping an important client of long date was important to them and reporting to the

authorities would have followed loss of clients of long date. The Reports would have helped the public to invest less and less in the insurance products which would have in turn acted like a wake-up call in the Group. But the outcome would be the loss of BAI business for KPMG and BDO.

277. In fact, the auditors did their first duty to the Audit Committee, in reporting it partially. But they did not discharge their statutory duty to report it to the regulator. Nor did they say so in their report, which if they had done, would have gone public. The Regulator was aware but the public was not, through the omission of the professional Auditors and the Regulator.
278. With the revocation of the licence, its impact on the insurance sector which was regarded as a jewel in the crown by ex-Minister Bhadain, the FSC had to take a decision. It used its powers under Section 106 of the Insurance Act to appoint Conservators. The problem with leaving it in the hands of the Conservators was that there was a ticking bomb which the Government had to deactivate.
279. Disgruntled policy-holders, 24,690 in number were lining up to express their anger at what had happened and why it should have happened at all. Government stepped in as a moral and social obligation, in public interest. To appease public anger so soon after a general election, Government held out it would repay a first tranche of 70% of the investment of a certain category of investors, by 15 May 2015 and a second tranche by 30 of June 2015. It was expected that the sale of the assets of BAI (Mauritius) Ltd would fetch enough revenue for the purpose. But when? That was the issue. The assets were legally not in the hands of Government but in the hands of the Conservators and it was arguable that they had the power to sell as Conservators. The first duty of Conservators is to salvage the ailing insurance business.
280. Government decided, accordingly, to change the law to take over the control of the conservatorship by amending Section 110 of the Insurance Act. As per the amended law, Section 110A and 110B, created, among others, a new persona referred to as a SA with a limited scope of action with regard to his powers of disposal. What hitherto resided and resided only in the conservators was now removed from them. The SA could only transfer the assets to an entity approved by the Minister of Financial Services. The entity that was created for the purpose was the NPFL, a private company with government holding 100% shares. It was for NPFL to honour the obligations which Government had taken to repay the policy-holders by 15 May 2015 and 30 June 2015.
281. The legal mechanism had been discussed with the six key players directly concerned who were: The Minister of Finance and Economic Development; the Minister of Financial Services, Good Governance and Institutional Reforms; the FS; the Conservators; the FSC and the SLO. It was Benoit Chambers, overseeing the conservatorship which was tasked with the amendment to the law.
282. Usually, realization of assets of defunct or ailing companies is entrusted to professionals – insolvency practitioners. There are professional conservators, liquidators and administrators involved for the purpose. There strictly is no need for government to interfere in the normal course of things. Procedure and substance are well laid down in our laws such as the Insolvency Act and there are Insolvency Practitioners who do, or are expected to do, their job professionally and ethically. Independent institutions are involved. Insolvency Practitioners are professionally qualified people and are bound by their ethics and their science. Whether they are or they are not, is another question.



We assume that the temptation of high fees should be greater in this profession than in others because they daily see and juggle with big sums of money. And this was not an ordinary client, the then fifth great business of the country, according to some estimates.

283. Whatever is done, it is important to remember, has to be done ethically and legally under judicial oversight. Conservators differ from administrators in that the former more common under the field of insurance are professionals who enter the scene to save the business in the interest with adequate returns for the policy-holders in mind. Liquidators, on the other hand, proceed to put an end to the business, realize the assets and pay off the creditors from available funds.
284. On 24 April 2015, indeed, Cabinet was apprised of an impending amendment to the law. And within a couple of days a Bill was introduced in the NA under a Certificate of Urgency. The Minister who brought it to Cabinet was the ex-Minister Bhadain and the one who introduced it before the NA was also ex-Minister Bhadain. This new law received Presidential Assent with the same celerity at the level of parliament.
285. Armed with this law now, the ex-Minister set about his momentous task assuming complete control of the whole process for dealing with the manner in which the assets of the BAI including Britam should be dealt with.
286. Messrs Basgeet and Oosman, the first conservators, would soon be out because of a controversy around the application of the amended legislation. Mr Ramtoola of BDO was appointed in his personal capacity to replace them. On appointment, he stated that he could not do it all alone. He was bound to use the staff of BDO to do so.
287. The SA had to report periodically to the FSC and the FSC felt that it had to seek the green light of the Minister even when the need did not arise. For example, Cabinet had taken the decision on 10 July 2015 that the assets should be transferred to the NPFL. When FSC was apprised of the matter, FSC still took the decision to write to ex-Minister Bhadain to seek his approval.
288. Indeed, the course which the process took had all the features to show that the FSC, Mr Ramtoola, the Advisers and the ex-Minister Bhadain did take themselves to be above Cabinet.
289. Aside the fact that the matter of sale was never brought to Cabinet, the decision that the undertaking should be transferred to NPFL was simply ignored.
290. But Government, in this case, was persuaded to remove the task from the hands of the conservators and to place it in the hands of a SA involving Ministerial approval to a particular newly created entity, the NPFL. Its preoccupation was seemingly to obviate a potential social problem amongst aggrieved policy-holders to whom promises had been made. This was a classical model of an Ad Hominem law. A law made just to deal with a particular situation. A new entity was created, the NPFL, where Cabinet decided that all the assets of the BAI Group should be transferred thereto for eventual refund to policy-holders.
291. In this case, the assets were parked in Kenya and they had to be sold to keep angered policy-holders at bay. The conservators were ousted by legislation. Government decided that the assets were first to be transferred as per Cabinet decision to the NPFL.

292. Those who were dealing with the matter decided to sell it first at the price of MUR2.4bn before transferring it. There were offers up to MUR4.3bn including the one to whom it was sold at that figure. There is no record of who sold it at that figure and for what reason. One ready explanation is that the share prices in the NSE had fallen to 11Kshs on 12 March 2016. And the SA was lucky to get 16Kshs. Others are sceptical. Who were involved? What happened? Is there an explanation that makes sense? This is what this inquiry is all about.
293. What we do not know is whether all was done above board. Were they right in selling at almost half the price? What were the fees and the commissions that were paid in the transaction and what were amounts that have been received to date? Was there any fraud, malpractice, undue influence or other misdeed? This is the light we have to throw into this affair.
294. But first as to the basics. What was the nature of Britam shares? We have seen what the shares were. They were shares in an investment holding company. BPFL was a mutual fund investing in real estate. It was regulated under the Securities Act 2005. Such companies are referred to by an acronym: a PIE, i.e. a public interest entity.
295. A PIE has obligations under the law of the land. It needs to abide by the rules set by the regulatory authorities concerned within the area of activity of the PIE.
296. The biggest hurdle the Commission had was the lack of public records. It was a matter of shock to the Commission that the Registry of the MFSGG&IR had next to nothing regarding the Britam shares. Which would support the view of the ex-Minister Bhadain that his Ministry was not concerned at all and all was done at the MOFED which had some records.
297. In our system of Government inherited from the British, there should be a record for every public activity where decision makers express themselves one way or the other, with or without qualification, on a file for posterity. There is a registry whereby the institutional memory is preserved. It also serves to track the movement of files. There are public officers entrusted with the public duty to keep, update, maintain and secure the entries. The entries are minuted and the documents referred to as folios. There are degrees of confidentiality and access to files depending upon whether they constitute high matters of state or just day to day public administration.
298. Ministers coming first time in office or professionals in the private sector barely understand the public duty involved in keeping records of agreements or disagreements, approvals or rejections. They had rather taken decisions without leaving a trace or mopping up the traces or creating false traces. By so doing they do hope that they will not be caught in the wrong-doing. Little do they know that just like silence speaks louder than words, no trace is more eloquent than trace. There is no perfect crime. Offenders are no less caught even if they have wiped out the tracks and the traces. The Britam case is a perfect example of this universal truth. It is the wipes that show where the traces were and what were the traces wiped.
299. On the face of it, there is no institutional memory at the Ministry concerned. No file. No minutes. No record at the Ministry concerned. Because public officers were kept out of discussions. Whether by choice, by accident, by design or by ignorance, it is hard to say. All this happened paradoxically at the MFSGG&IR on an issue which had to do with the vital subject matter as financial services. Record protects a public officer.

Lack of records betrays him or her. Decision makers in public office believe they save their skins by lack of record. Clearly, they do not. They have a hard time dispelling the suspicion and allegations overhanging them and follow them as their shadow because they thought they would not be tracked by absence of record. There is no such thing as leaving no trace.

300. But it is a fact, universally acknowledged, that there is no perfect crime. No matter how we would want to destroy evidence, hide them as we may, under the carpet or sink it at the bottom of the sea, it is in the nature of incriminating material to resurface. *Les feux mal éteints n'en éclatent que mieux*, Racine dixit. And resurface, it did.

301. What pieces we could not pick from inside, we were able to do so from outside. And establish the film of events. This we did with oral depositions of witnesses, some of which we called several times to test information passed on to us in private. We complemented it with documents produced, the request for some of which was resistance at first, emails exchanged in the process of the transaction and put under meticulous scrutiny.

## WHAT WAS PUBLIC KNOWLEDGE AND WHAT WAS NOT

302. But first let us start with what was already in public knowledge before the inquiry began. Then we should tell of things that came out from the dark. These are the things we knew at the start of the inquiry: that, whoever was involved in the sale at that figure knew of the existence of higher offers, had been alerted to the need of a transaction advisor. What we know is that they were disposed, without recourse to a transaction advisor at almost half of the higher figures; that the transaction was done in Kenyan Shillings when inter-state transactions are done in an international currency; that those involved had to have resort to a legislative enactment to adopt a special procedure to take the matter off its normal course; that Cabinet had decided for the undertaking in question to be transferred to an entity specially created for the purpose, the NPFL but that NPFL was never transferred the undertaking; that NPFL received the sale price as a matter of course.

303. With this backdrop out of the way, we shall look at the facts we have dug out from the depositions. Then we shall reconcile them with the facts from the documents thereafter. But first as to a couple of Rulings with were given *en cours de route*.

## CHAPTER 7

### RULINGS OF THE COMMISSION

*Where laws end, tyranny begins –  
Wilkes Case, 9 Jan. 1772*

#### **Ruling No. 1 - Application of Confidentiality in the Conduct of Public Inquiries**

304. Me Basset, S.C., GOSK appearing with Counsel Patten for the FSC apprised the Commission of certain statutory obligations of confidentiality in imparting information to the Commission. He submitted the following two documents relating to the principles in the conduct of Commissions of Inquiries in common law jurisdictions:

- (i) The Royal Commission on Tribunals of Inquiry referred to as the Salmon Report (HMC0, Cmnd 3121); and
- (ii) An article on the practical difficulties of conducting inquiries as per the Salmon Report published in the Law Quarterly Review (Volume 111) entitled *“Procedures at Enquiries – The Duty to be Fair.”*

305. The Commission considered the submissions of Me Basset in the light of the references in support as regards the mandate of the Commission as per the letter of the President of the Republic and the provisions of the Commissions of Inquiry Act, particularly Section 2(2). The Commission ruled that the inquiry is to be conducted in public to the extent the law so permits as it considers itself bound by the confidential provisions of each and every deposition comprising the proceedings. Consequently, it decided that a blanket decision could not be given one way or the other. However, each request would be examined in its own specificity. The underlying principle is for the Commission to ensure that a fair balance is struck in the public interest between what should be in public domain or otherwise. It gave its Ruling accordingly. (**Annex 14**)

#### **Ruling No. 2 – The Hearing of Witnesses from Abroad Through Video-Link**

306. Me Sewraz, Senior Attorney, instructing Me Glover, Senior Counsel and appearing for Mr D.A. Rawat, made a request to the Commission to depose before it through video-link.

307. While considering the request, the Commission noted that there is a vacuum in the legal system in Mauritius regarding deposition by video-link.

308. The Commission carried out a comparative study of what obtains in other Commonwealth jurisdictions which allow the reception of evidence at arm's length through video-link. It came across no jurisdiction where video-link evidence is allowed without a clear provision to that effect in its law of evidence.

309. In the Mauritian legal system, there is a law which allows a court to admit evidence by live video-link except that it is limited to three situations:

- (a) a witness in a case of International Piracy;
- (b) a complainant in a Sexual Offence case; and
- (c) a detainee in an application for bail.

310. The Commission, therefore, invited arguments from learned Counsel of Mr Rawat and Me Jean-Louis, Principal State Counsel, from the Solicitor General's Office.
311. At the hearing, Me Jean-Louis made his submissions along the same lines as noted by the Commission in its comparison of what obtains in other jurisdictions and what the Mauritian law provides.
312. Me Glover's argument was mainly based on the fact that Mr Rawat did not intend to come to Mauritius to give evidence considering the treatment that some members of his family had received at the hands of Police in Mauritius. Hence, his unwillingness to come to Mauritius. The Commission basing itself on a Singaporean case **Anil Singh Gurm VS Yeh & Co & Anor [2018 SGHC 221]**, examined the application of Mr Rawat's request for video-link evidence, ruled that a distinction should be made between a witness's inability to submit to jurisdiction and his unwillingness to do so for fear of reprisal or insecurity of person. In the Singaporean case referred to above, the Singaporean Court declined an application for video-link on the ground that fear of prosecution or reprisal for that matter amounts to unwillingness to physically come to court and not inability to physically come to court.
313. That was the subject-matter of Ruling No. 2 (**Annex 15**) the gist of which has been that short of a law legitimizing reception of evidence from foreign jurisdictions by video-link, the Inquiry was bound by its own law to apply the law of evidence as is.

## CHAPTER 8

### FACTS FROM THE DEPOSITIONS

*Now what I want is facts .... Facts alone are  
wanted in life – Hard Times, BK 1. Chapter 1*

314. One of the primary functions of public enquiries is fact finding: [**Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) (1995) 2 S.C.R. 97.** Facts are ascertained and completed from witness depositions and documents and reasonable inferences.
315. The witnesses heard by the Commission as well as the gist of their depositions together with the documents which they produced from which the Commission could cull the facts relevant to its TOR are as follows:
1. Mr Yogesh Rai Basgeet, Chartered Accountant and Partner at PWC. SA of BAI Co (Mtius) Ltd for period 01 May to 26 August 2015. Heard on 19 June 2017 – 1<sup>st</sup> Hearing (pages 2 to 54)
  2. Mr. Mushtaq Oosman, Chartered Accountant and Partner at PWC. SA of BAI Co (Mtius) Ltd for period 01 May to 14 August 2015. Heard on 19 June 2017 – 1<sup>st</sup> Hearing (pages 54 to 74)
  3. Mr. Yacoob Ramtoola (assisted by Counsel T. Koenig), Managing Partner of BDO and SA of BAI Co (Mtius) Ltd with effect 26 August 2015. Heard on 21 June 2017 – 2<sup>nd</sup> Hearing (pages 5 to 60), 26 September 2017 - 14<sup>th</sup> Hearing (pages 2 to 44), 5 October 2017 - 15<sup>th</sup> Hearing (pages 2 to 57) and 24 April 2018 - 21<sup>st</sup> Hearing (pages 2 to 44)
  4. Late Mr. Oodaye Prakash Issary, Ex Chief Executive Officer of NPFL. Heard on 21 June 2017 - 2<sup>nd</sup> Hearing (pages 60 to 101), 25 July 2017 - 6<sup>th</sup> Hearing (pages 2 to 71) and 08 August 2018 - 24<sup>th</sup> Hearing (pages 23 to 56)
  5. Mr. Kavydass Ramano, Notary: Escrow Agent. Heard on 12 July 2017 - 4<sup>th</sup> Hearing (pages 2 to 23) and 17 July 2017 - 5<sup>th</sup> Hearing (pages 2 to 28)
  6. Mr. Prakash Seewoosunkur (assisted by Counsel D. Basset), Head of Pensions at FSC. Heard on 26 July 2017 - 7<sup>th</sup> Hearing (pages 2 to 47) and 08 August 2018 - 24<sup>th</sup> Hearing (pages 2 to 22)
  7. Hon. Seetanah Lutchmeenaraidoo, GCSK, Ex-Minister of Foreign Affairs, Regional Integration and International Trade. Heard on 27 July 2017 - 8<sup>th</sup> Hearing (pages 2 to 34)
  8. Mr. Padassery Kuriakose Kuriachen, Ex-Acting Chief Executive of FSC. Heard on 27 July 2017 - 8<sup>th</sup> Hearing (pages 34 to 67)
  9. Mr. Ramanaidoo Sokappadu (assisted by Counsel N. Patten), Secretary of the Board of FSC. Heard on 01 August 2017 - 9<sup>th</sup> Hearing (pages 2 to 24) and 08 October 2019 - 32<sup>nd</sup> Hearing (page 2)
  10. Late Mr. Somduth Nemchand, Ex- DPS, MFSGG&IR. Heard on 02 August 2017 - 10<sup>th</sup> Hearing (pages 2 to 25)
  11. Mr. Jugdish Dev Phokeer, Ex PS, MFSGG&IR. Heard on 02 August 2017 - 10<sup>th</sup> Hearing (pages 25 to 52)

12. Mr. Vidianand Lutchmeeparsad, Ex-PS of MOFED. Heard on 03 August 2017 – 11<sup>th</sup> Hearing (pages 2 to 33) and 26 April 2018 - 22<sup>nd</sup> Hearing (pages 18 to 23)
13. Miss Prityea Chennen (assisted by Counsel Rault); Company Secretary at Prime Partners Limited acting as Secretary of the Board of NPFL. Heard on 03 August 2017 - 11<sup>th</sup> Hearing (pages 33 to 80)
14. Mr. Dharam Dev Manraj, FS and Ex-Chairman of FSC. Heard on 6 September 2017 - 12<sup>th</sup> Hearing (pages 2 to 24)
15. Mr. Akileshwarnath Deerpalsingh, Chartered Certified Accountant/ex-Adviser at MFSGG&IR, Ex-Deputy Chairman and Ex-Adviser of FSC. Heard on 6 September 2017 – 12<sup>th</sup> Hearing (pages 24 to 68) and 26 April 2018 - 22<sup>nd</sup> Hearing (pages 2 to 18)
16. Mr. Faadeel Ramjanally, Chartered Certified Accountant/ Ex-Adviser at MFSGG&IR and - Director of NIC. Heard on 6 September 2017 -12<sup>th</sup> Hearing (pages 68 to 107)
17. Mr. Sudarshan Bhadain, Ex Minister of MFSGG&IR. Heard on 8 September 2017 - 13<sup>th</sup> Hearing (pages 2 to 56), 5 October 2017 – 15<sup>th</sup> Hearing (pages 58 to 104) and 30 August 2018 - 26<sup>th</sup> Hearing (pages 2 – 61)
18. Mr. Georges Chung Ming Kan, Chartered Certified Accountant at BDO & Co Ltd. Heard on 21 November 2017 - 16<sup>th</sup> Hearing (pages 4 to 76)
19. Me Zareena Tawheen Choomka, Bar at Law, Legal Adviser of BDO & Co Ltd. Heard on 21 November 2017 - 16<sup>th</sup> Hearing (pages 76 to 94)
20. Mr. Kim Lo Tiap Kong, Senior Manager at BDO & Co Ltd. Heard on 21 November 2017 -16<sup>th</sup> Hearing (pages 95 to 108)
21. Mr. Dushyant Chowbay Bissessur, Manager at BDO. Heard on 21 November 2017 - 16<sup>th</sup> Hearing (pages 109 to 124)
22. Mr. Afsar Ebrahim, Chartered Accountant and Ex Deputy Managing Partner of BDO & Co Ltd. Heard on 13 December 2017 - 17<sup>th</sup> Hearing (pages 2 to 71), 24 April 2018 - 21<sup>st</sup> Hearing (pages 44 to 67) and 16 August 2018 - 25<sup>th</sup> Hearing (pages 2 to 33)
23. Mr. Thierry V.M. Koenig, Senior Attorney. Head of ENS Africa Mauritius. Heard on 07 February 2018 - 18<sup>th</sup> Hearing (Pages 2 to 7)
24. Late Rt Hon Sir Aneerood Jugnauth, Ex Minister Mentor. Heard on 22 March 2018 - 19<sup>th</sup> Hearing (pages 2 to 11)
25. Mr. Lakshmana Lutchmeenaraidoo, Ex-Managing Director of Phoenix Insurance in Nairobi. Heard on 10 April 2018 - 20<sup>th</sup> Hearing (pages 2 to 14)
26. Mr. Gautam Saddul, Chartered Surveyor, Saddul & Partners. Ex-Chairperson of NPFL. Heard on 26 April 2018 - 22<sup>nd</sup> Hearing (pages 23 to 54)
27. Mrs. Shakuntala D. Gujadhur-Nowbuth, DPS, Ministry of Agriculture and Agro-Industry. Ex-Board Member of NPFL. Heard on 26 April 2018 - 22<sup>nd</sup> Hearing (pages 54 to 62)
28. Mr. Richard Li Ting Chung, Ex-Head of Insurance, Rogers Capital. Ex-Board Member of NPFL. Heard on 26 April 2018 - 22<sup>nd</sup> Hearing (pages 62 to 72)
29. Mr. Sohail Javed Ahlaq Ahmad Suhootoorah, Lead Analyst, the then MOFED. Ex-Board Member of NPFL. Heard on 26 April 2018 - 22<sup>nd</sup> Hearing (pages 72 to 80)

30. Mr. Ravi Raj Yerrigadoo, Ex Attorney General. Heard on 27 April 2018 - 23<sup>rd</sup> Hearing (pages 2 to 27)
31. Mr. Benito Elisa, Consultant. Ex-Adviser at MFSGG&IR. Heard on 08 August 2018 - 24<sup>th</sup> Hearing (pages 56 to 69)
32. Mrs. Sarada Moloye (Veena), Director, Inno8 Ventures Ltd. Ex-Head of Executive office at FSC. Heard on 26 September 2018 - 27<sup>th</sup> Hearing (pages 2 to 15)
33. Mr. Sarwansingh Purmessur, Ex-DPS, MFSGG&IR. Heard on 26 September 2018 - 27<sup>th</sup> Hearing (pages 16 to 19)
34. Mr. Clarel Benoit (assisted by Mr. Dhaneshwar (Rishi) Pursum and Mr. Anjeev Hurry), Benoit Chambers. Heard on 10 October 2018 - 28<sup>th</sup> Hearing (pages 2 to 29)
35. Mr. Paul Gerald Lincoln, Country Managing Partner, Ernst & Young Ltd. Heard on 17 October 2018 - 29<sup>th</sup> Hearing (pages 2 to 30)
36. Me Yvan Caril Jean-Louis, Representative of State Law Office. Heard on 19 March 2019 - 30<sup>th</sup> Hearing (pages 2 to 8)
37. Me Bhooneswur Sewraj and Me Gavin Glover representing Mr. Dawood Anjum Rawat. Heard on 19 March 2019 - 30<sup>th</sup> Hearing (pages 8 to 21)
38. Mr. Vasoodayven Virasami, Official Receiver, Office of the Registrar of Companies. Heard on 13 June 2019 - 31<sup>st</sup> Hearing (pages 2 to 12)
39. Me. Johanne Hague, Barrister at Prism Chambers. Formerly employed by Jurisconsult Chambers. Heard on 26 February 2020 - 33<sup>rd</sup> Hearing (pages 2 to 14)
40. Mrs. Shaline Dweepaul, Partner at Juristconsult Chambers. Heard on 04 March 2020 - 34<sup>th</sup> Hearing (pages 2 to 28)
41. Mr. Radhakrishna Chellapermal, Ex-Deputy Financial Secretary, MOFED. Heard on 24 June 2020 - 35<sup>th</sup> Hearing (pages 2 to 8)
42. Mr. Mohamad Oozeer, Adviser, MOFED. Heard on 24 June 2020 - 35<sup>th</sup> Hearing (pages 8 to 13)
43. Mr. Ashik Ahmad Toorabally, Legal Advisor at NPFL. Heard on 16 July 2020 - 36<sup>th</sup> Hearing (pages 2 to 16)
44. Mr Vikash Peerun, Chief Executive Officer, NPFL with effect from 20 February 2020. Heard on 19 August 2020 - 37<sup>th</sup> Hearing (pages 2 to 15)

## **THE FIRST SET OF FACTS**

316. **How it all began could only be ascertained from the Conservators. They were Mr Yogesh Rai Basgeet and Mr Mushtaq M.O. Noormohamed Oosman, originally appointed under Section 106 of the Insurance Act and later under Section 110A (2) of the Insurance Amendment Act (Annexes 16 & 17)**

## **W1 MR YOGESH RAI BASGEET OF PWC**

317. Mr Yogesh Rai Basgeet is a Chartered Accountant and Partner at PWC. He was appointed SA of the BAI Company (Mauritius) Ltd and any of its related companies with effect from 01 May 2015 along with Mr Mushtaq Oosman, who was then the Conservator with André Bonieux.



318. Two dates had been set for payment of tranches. The first tranche was for 15 May 2015, the second tranche for 30 June 2015.
319. With regard to the potential buyers, Mr Basgeet spoke of several entities having expressed interest in the purchase of the 23.92% shares held in Kenya. The proposals were still verbal but they ranged from USD120M to USD130M, equivalent to MUR4.2bn to MUR4.5bn at that point in time. Asked to give a figure, he stated there were six of them. This information<sup>1</sup> was relayed to the Board of the FSC in a Board Meeting held on 06 June 2015. FSC minutes of the 217<sup>th</sup> meeting refer inasmuch as his appointment and that of his colleague had been by the FSC. It was incumbent upon them to keep the FSC apprised of every development. The board meeting of FSC was held every Saturday. He sought a mandate from the FSC to give an indicated price range with which the sale should be done. It was then that the FSC stated that the Britam shares were to be transferred to NPFL and not sold.
320. He pointed out that the proposals from interested parties were not processed further as funds to meet commitments relating to the payment of the first tranche to policy-holders had been made by funds from realized assets. He also mentioned that MUR3.5bn had to be raised for the 2<sup>nd</sup> tranche. He was very clear as to his role in the matter. Regarding Britam, it was not to realize assets but to transfer the undertaking to an insurance company<sup>2</sup>. There had been a first commitment to pay by 15 May 2015. Sufficient funds had to be remitted to NPFL for meeting the commitment. The sum targeted was MUR3.5bn.
321. He also added that the assignment of Mr Oosman as SA was terminated on 14 August 2015 and he, for his part, resigned as SA on 26 August 2015. He stated that he had resigned because he was very uncomfortable and embarrassed. The situation prevailing then was not conducive to a proper discharge of his duties and responsibilities as Special Administrator<sup>3</sup>.

#### **FACTS RELEVANT TO OUR TOR CULLED FROM THE ABOVE**

322. The following facts are the matters which may be retained from his deposition:
1. There were at least six bidders on his count which were interested in buying the Britam shares and the figure ranged from MUR4.2bn to MUR4.5bn (USD 120m to USD 130m) at the time of their engagement; this he communicated to the FSC.
  2. Under the newly amended Section 110A and Section 110B of the Insurance (Amendment) Act, he had to seek approval from the FSC and the Ministry in order to finalise any transaction<sup>4</sup>.
  3. The amendment to Section 110 of the Insurance Act was already a source of confusion between the SA and the regulator regarding the scope and limit of their powers under the three laws applicable: the Financial Services Act, the Insolvency Act and the Insurance Act.
  4. The Minutes he referred to show that Mr Deerpalsingh, a political advisor to the Minister was the Vice Chairman of FSC, an independent body.

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<sup>1</sup> PP 18 & 19 of the deposition of Mr Basgeet on 19 June 2017.

<sup>2</sup> P.24 of the deposition of Mr Basgeet on 19 June 2017.

<sup>3</sup> Ditto P.39

<sup>4</sup> Ditto P.16

5. The share price as at 5 June 2015 was quoted at 22.25Kshs, which would have fetched at least MUR3.5bn. The interested bidders had also been given the target date to finalise the transaction.
6. FSC informed them that the idea was not to dispose of the Britam shares, an information confirmed by the Minutes of 217<sup>th</sup> Board Meeting of 6 June 2015. This Meeting was chaired by the FS. The Vice Chairperson was Mr. A. Deerpalsingh and both the lawyer members: Mr. R. Ramlohl and Mr. A. Domingue were absent. The idea was to either warehouse the shares or create a Special Fund. So, they informed all the parties.
7. The minutes also showed that Cabinet was to decide on the course of action. It was for Cabinet to take the action and not to any individual public officer or Minister or institution for that matter.
8. Any independent valuation of the Britam shares were left pending when the FSC decided that the undertaking should be transferred<sup>5</sup>.

## OF NOTE

It is to be noted that:

1. As per their Letter of Engagement, Messrs Basgeet and Oosman needed: <sup>6</sup>“to take charge of the whole of the business of the Companies and all of their property, books, records and effects and to exercise all powers necessary to preserve, protect, recover and realise any of the assets of the Companies, collect all monies and debts due to them, assert causes of actions belonging to the Companies and file, sue and defend suits on their behalf, in accordance with law, transfer to National Insurance Company Ltd/National Property Fund Ltd part of the business of BAI Co (Mtius) Ltd and make distributions to policyholders of BAI Co (Mtius) Ltd and certain clients of Bramer Asset Management Ltd or other related entity in accordance with the scheme(s) communicated to them by the Government of Mauritius from time to time.”
2. Under the Letter of Engagement, signed by Mr Mushtaq Oosman and Mr Yogesh Rai Basgeet, the Conservators were stated to be bound by the provisions of Section 110A (4) and Section 110B of the Insurance (Amendment) Act. It is to be noted that the Bill to amend the Insurance Act which came up for consideration before the NA on 28 April 2015<sup>7</sup> under a Certificate of Urgency received 52 votes and came into force on 29 April 2015<sup>8</sup>. The obvious objective was to pacify policy-holders with respect to their repayments.
3. The Letter of Engagement from the FSC also mentioned that Benoit Chambers would be the legal adviser<sup>9</sup>. It is not clear whether Benoit Chambers had been instructed properly by the FSC Board.

### **323. Was this version supported by the other Conservator, Mr Mushtaq M.O Noormohamed Oosman?**

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<sup>5</sup> P. 31 of the deposition of Mr Basgeet on 19 June 2017.

<sup>6</sup> P.2 of Letter of Engagement, dated 1 May 2015.

<sup>7</sup> Hansard of the session of National Assembly of 28 April 2015.

<sup>8</sup> Act no.6 of 2015

<sup>9</sup> Page 2 of Letter of Engagement dated 1 May 2015

**W2 MR MUSHTAQ M.O. NOORMOHAMED OOSMAN, CHARTERED ACCOUNTANT**

324. Mr Mushtaq M.O. Noormohamed Oosman, deposed to the like effect as Mr Basgeet. He gave the reasons for which his relationship with the FSC and the Minister soured. His interpretation of the scope of new law of Section 110A and Section 110B of the Insurance (Amendment) Act was that it applied only to insurance businesses but the FSC and the Minister took them to be of general application for all businesses. The situation became untenable for which reason he wended his way to the FSC accompanied by his lawyer to submit his resignation. The Chairman refused to accept it, commenting that he was doing a good job. But a couple of days later, he learned by public notice on 14 August 2015<sup>10</sup> that he had been removed from the position. That disheartened him.
325. The apple of the discord was the sale of a company called Solis by them for MUR6m. That was to enable the payment of salaries to employees. To him, that was a professional priority. However, both the FSC and the then MFSGG&IR were not happy. In the view of the latter two, the approval of the FSC and Minister had to be obtained for go-ahead with the transaction in the light of the new amendments brought to Section 110 of the Insurance Act. But to Mr Oosman, Section 110A (4) of the amendment has not curtailed any of the powers which he continued to retain under the Insolvency Act and Financial Services Act. The amended law was clear on the matter. So was his Letter of Engagement.
326. Mr. Oosman added that, on their return from an official mission from South Africa, the then Minister of MFSGG&IR, the then Chairman and the then Vice Chairman of the FSC, brought a proposal to the SA that Barclays (South Africa) had offered to act as broker for the sale of Britam shares. Thereupon, he and Mr Basgeet proposed that there should be transparency in the matter inasmuch as Britam shares constituted a big asset. There was need to get proposal from other entities with a view to acting in the best interest of the seller. Both he and Mr Basgeet, accordingly, proposed to carry out a due diligence exercise. However, the discussion on the matter did not progress as the sale of Britam shares was put on the hold following funds received from the Central Bank to effect payment of the 2<sup>nd</sup> tranche of the SCBG.
327. He also added that there were two buyers who had offered between the brackets of USD 120-130m, one wanting a quick due diligence and the other longer.

**FACTS RELEVANT TO OUR TOR TO BE RETAINED FROM THE ABOVE**

328. The facts we would retain from the above deposition relevant to our TOR would be as follows:
1. The amendments to the Insurance Act were an actual source of conflict between the ex-Minister and the first two Conservators. Granted that the amendment had entered the Minister into the affairs of the Conservators, the new Section 110A and Section 110B had produced grey areas for many a mischief in the sector. Did non-insurance business fall under the purview of amended Section 110A and Section 110B? The relationship between the Insurance Act and the Insolvency Act was anything but clear. In point of fact, Section 110A which required Ministerial approval had to do with Insurance business and the sale of Solis which created the conflict was non-insurance business.

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<sup>10</sup> “Communiqué” from FSC dated 14 August 2015

2. PWC had asked for transparency and accountability in the sale process on account of the sum involved and other factors.
3. Following the controversy around the Solis sale, Mr Oosman went to submit his resignation accompanied by his lawyer but was commended for the good work he was doing by the Chairperson of the FSC and his resignation was not accepted. But soon after, he learned in the Press that he had been revoked. The seat of power had obviously shifted from independent institutions and professions to invisible hands above them. That became possible only when the amended law entered a Minister into the scenario of Section 110 of Insurance Act. The Minister's ultimate say, as opposed to that of Administrators and Conservators, was now required, and was hence what mattered.
4. All discussions on the matter of sale were being carried out in terms of an international currency: i.e. USD.

**329. What happened after the exit of Messrs Yogesh Rai Basgeet and Mr Mushtaq M.O. Noormohamed Oosman? Enter a new Special Administrator, Mr Yacoob Ramtoola.**

**W3 MR YACOOB RAMTOOLA, CHARTERED ACCOUNTANT AND MANAGING PARTNER AT BDO**

330. Following the exit of Mr M. O.N Oosman on 12 August 2015 and the resignation of Mr Y.R Basgeet on 26 August 2015 as SA, Mr Yacoob Ramtoola entered the scene as the SA, so appointed by the FSC.
331. During his deposition, he produced a copy of the statement of the financial position of BAI as at 20 July 2015 where the value of the Britam (Kenya) shares amounted to MUR3.417bn. He stated to us that he was unaware of any verbal offers (six in number) which had been made for the purchase of shares of Britam (Kenya) by interested parties and he only took cognizance of that fact from the press. He became aware that on 11 September 2015, Barclays Bank had written to Mr Manraj, then Chairman of the FSC, offering its services to act as Transaction Advisor for the sale of the shares.
332. He confirmed that he had several meetings with the then Minister of Financial Services & Good Governance and Institutional Reforms in the presence of the PS of the Ministry, the DPS of the Ministry, Advisers, Messrs Deepalsingh and Ramjanally, late Mr Issary, Chief Executive Officer NPFL, and at times also with Mr Manraj, FS and Mr Kuriachen, the then Ag. CEO of FSC. Those meetings were held in the office of the Minister late in the afternoon and even late in the evening. The main concern of all those attending the meetings was how to raise funds eventually to pay the SCBG policy-holders. Issues relating to the BAI Group were discussed, including Britam sale.
333. He confirmed that he dealt with the offer from MMI Holdings where a figure of MUR4.3bn had been mentioned. He explained that MMI Holdings, according to him while proposing the figure of MUR4.3bn had based itself on the prevailing share price of Britam on the NSE which was then Kes26.90, including a premium of 50%. He further confirmed that Mr. P. Munga came to Mauritius in November 2015 and had met with officials of BDO who took him to the ex-Minister Bhadain. He first stated that it was only a courtesy call. But when probed further by the Commission whether it was a courtesy call or a transaction meeting, he agreed that there was more to the meeting than

a courtesy call. During the meeting, Mr. P. Munga had expressed the interest of a pool of investors he represented who were willing to buy the Britam shares.

334. On being questioned as to whether he travelled regularly to Kenya on the matter, Mr Ramtoola stated that he does so on a regular basis as BDO has an office in Kenya. He informed the Commission that he had monthly meetings with the FSC to update them on BAI issues. He informed the Commission that the SPA had been prepared by the Legal Advisors of BDO and that the SPA was a tripartite document where NPFL was referred to as the beneficial owner even if the shares were still in his custody.
335. As regards the MOU, his version was that it had been vetted by the Legal Adviser of BDO. He stated to the Commission that the decision to accept the offer of MUR2.4bn made by Plum LLP was taken at a meeting chaired by ex-Minister Bhadain in his office in the presence of officials of the MFSGG&IR, its Advisors, the FS, the FSC, NPFL and himself.
336. He confirmed that he had a number of meetings with ex-Minister Bhadain and his team to brief them on BAI issues including Britam. He explained that he was involved in the disposal of the shares although according to his Letter of Engagement he had among others to transfer the shares to NPFL as according to the Insolvency Act, he was still the dealer in the shares.
337. Mr Ramtoola proceeded to explain to the Commission that neither he nor any other representative of BDO had any meeting with Mr Munga or his representative in Nairobi. However, the Managing Partner of BDO in Kenya, Mr Sandeep Khapre, did accompany Mr Lutchmeeparsad to the meeting of 18 November 2015. He added that there was no assignment between BDO Kenya and Britam and that the MoU was drafted by Britam Kenya. It was Mr Munga accompanied by his Secretary who brought the draft along with them on 08 March 2016 and that there had been two or three meetings between lawyers of BDO and Britam to finalize the draft. He spoke of the MOU being signed on 12 March 2016 which was a Public Holiday, as the Kenyan team had to fly back to Nairobi on the same night.
338. Mr Ramtoola explained that the SPA had to be a Tripartite Agreement involving the seller, the buyer and the beneficiary. Why was there a need for such a concurrent device when, as per Cabinet decision and as per his Letter of Engagement, the shares had to be transferred to the NPFL for the latter to decide what to do with them. His explanation was that it was easier that way because of time constraints and the need to avoid various levels of official clearances in Kenya.
339. Asked whether the model was right, his answer was that he had seen such a model previously. He stated that NPFL was only the beneficiary being given that the shares were not transferred to it as the process of transfer and getting the approval of the Kenyan authorities would have delayed the sale process bearing in mind that there was a time constraint of up to 30 June 2016 to raise money to repay the policy-holders of the SCBG. He confirmed that the SPA had been vetted by the legal advisers of Britam and BDO and that the legal team of BDO was also involved in the drafting of the SPA. To him, the legal team of BDO comprised Me Koenig and Me Choomka. He said that between 11 December 2015 to 08 March 2016, BDO communicated with Britam Kenya only by phone and there was no written communication.

340. On being questioned as to whether there was an alternative to the sale, Mr Ramtoola stated that it is undisputed that on 7 October 2015, the then Minister of Finance, Mr S. Lutchmeenaraidoo had announced the creation of a Sovereign Fund to house or buy the said investment. Indeed, a copy of an article from Reuters was produced to the Commission confirming that Mauritius was aiming to raise the MUR4.2bn from the sale of Britam shares and if this was not attained, a Sovereign Legacy Fund would be set up to buy the shares.
341. That was not to happen. On 14 October 2015, he was in copy of a letter addressed to Hon R. Bhadain, the then Minister of Financial Services, Good Governance and Institutional Reforms by MMI Holdings making a non-binding offer for the 24% equity in Britam Holdings for MUR4.2bn. On the same day, i.e 14 October 2015, he was called to attend a meeting with Mr Manraj, FS, attended by a representative of MMI Holdings and that of Rothschild International, to discuss the offer of MMI Holdings. After discussions, MMI Holdings revised its offer upwards to MUR4.3bn, at the request of the FS, subject to due diligence to be carried out.
342. On 6 November 2015, MMI Holdings wrote to the FS requesting for an extension of the date to submit a binding offer by February 2016 to enable them to carry out a due diligence which had been made difficult in view of the up-coming December holiday period. Asked whether he transferred the shares as per his Letter of Engagement and as per Cabinet decision, his answer was “*I think we assisted or BDO assisted the NPFL to turn or realize these assets into cash.*” The reason he gave was that third parties got involved in the process.
343. The following exchange between the Commission and Mr Ramtoola is eloquent.

QUESTION:

*Mr Ramtoola let us go back a step. We agree that National Property Fund Ltd was to all intents and purposes the owner of the assets. We agree that the National Property Fund Ltd has its own board of directors and we agree that it has its own shareholders. We agree on that. So, in a normal situation National Property Fund Ltd would have their own responsibility to dispose of these assets, is that correct?*

ANSWER:

*Yes, in normal circumstances.*

QUESTION:

*That's right. That is the abnormality. You said it. why did you get third parties involved in it?*

ANSWER:

*My Lord actually the third parties get me involved into it. if you look at the letters that were sent to the Minister of Financial Services or the Financial Secretary who passed me the letters....  
And if you look at my letter of engagement*

QUESTION:

*Yes?*

ANSWER:

*I did commit to complete the transfer of the assets in 15 days and that is what I was going to be paid for in 15 days.*

QUESTION:

*So basically, you went beyond your mandate?*

ANSWER:

*I think we assisted or BDO assisted National Property Fund Ltd to turn or realise these assets into cash.*

QUESTION:

*Without any consultation with the National Property Fund Ltd as a general rule or with the consultation with the Minister or the Financial Services or anybody?*

ANSWER:

*With the consultation of the Minister of Financial Services, with the consultation of the CEO of National Property Fund Ltd and with the consultation of the FSC Board.”*

344. That said it all. Why did the sale to MMI Holdings at MUR4.3bn not materialize? On 14 November 2015, Mr P. Munga, Chairman of Britam (Kenya) landed in Mauritius. Mr Ramtoola was not in the country. Mr Munga met representatives of BDO and ex-Minister Bhadain in the presence of Mr A. Ebrahim of BDO (Mauritius) and Mr Sandeep Khapre of BDO (Kenya) to discuss the impending sale. At the meeting, Mr P. Munga made known that foreign shareholders would not be allowed in Britam as their vision would not be aligned to that of the Kenyan investors.
345. In fact, it was he who gave a reference to Mr Lutchmeeparsad of the MOFED who was proceeding on a mission to Nairobi to engage in discussion with the Kenyans. He learnt that Mr Lutchmeeparsad would be accompanied by the BDO Managing Partner in Kenya, Mr Sandeep Khapre. That was on 18 November 2015. Mr Ramtoola, for his part, denied any knowledge of the outcome of that meeting.
346. Indeed, on 16 December 2015, at the 235<sup>th</sup> Board Meeting of FSC, the Chairman, Mr Manraj circulated a letter emanating from the National Treasury of Kenya referring to a telephone conversation between Cabinet Secretary of Kenya and himself as FS where it was agreed that the 23.34% stake of Britam Kenya held by BAI (Mauritius) would be sold to the shareholders of Britam. On 12 January 2016, Dr Benson Wairegi, Group Managing Director of Britam wrote to FS requesting for a follow up meeting in Nairobi in the week beginning 15 February 2016 to finalise discussions on the sale of Britam shares.
347. Mr. Ramtoola added that a MOU was signed on 12 March 2016, between representative of Britam and himself for a value of Kshs7,171bn payable in an escrow account. The sum of Kshs7,171bn was reached on the basis of 16 Kshs per share. At that time, the share price on the NSE was 11Kshs per share. It was also agreed during discussion which was included in the MOU that there would be a deferred consideration of 3Kshs per share which would have amounted to Kshs1,414bn would be payable if market conditions would improve in Kenya, the referenced price per share would be 18Kshs.

348. The dates of the transaction he gave were as follows: MOU was signed on 12 March 2016. Already on the 12 March, the prices had been agreed. The contracting parties were: 1. Y. Ramtoola; 2. A pool of investors, yet unnamed. It is worth recalling that an MOU, signed on 12 March, contained all the details of sale with facts and figures and payment details ahead of the SPA itself which was signed on the 10 June 2016.
349. Mr. Ramtoola confirmed the following to the Commission: FSC as well as the MFSGG&IR were kept informed of progress being made on the BAI issues including the Britam shares; monthly reports were also being submitted to FSC.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WORTH RETAINING**

350. Even if he gave us a truthful account by and large, the Commission needed to clear a number of doubts in his deposition such as: the nature of the input of officials and legal advisers, Me Koenig and Me Choomka into all the relevant documents. The officials will deny this and the legal advisers as well. Mr Ramtoola would be called three times.
351. Except for that he was quite factual in the rest of his deposition and forthright. He contradicted the version of ex-Minister Bhadain whose version had been all through that he had nothing to do with the sale of the Britam shares and it was all a matter handled by MOFED.
352. He addressed a letter dated 16 November 2015, attention of the Managing Director of Britam (Kenya) to request him to meet Mr. Lutchmeeparsad in Nairobi in connection with the sale of shares held by the BAI Group in Britam.
353. The facts relevant to the TOR that we may retain from the first deposition of Mr Ramtoola are as follows:
1. Mr Ramtoola was appointed on the 26 August 2015 following the exit of Mr Basgeet and Mr Oosman. He prepared his own Letter of Engagement with the objective set out: *“transfer the assets belonging to BAI Group to a company by the name of NPFL.”*
  2. He had read in the press of the existence of 6 offers.
  3. He was in the picture when Barclays Bank had written to the FS, Mr Manraj, offering its services to act as Transaction Advisor for the sale; that Barclays had valued the assets tentatively at USD120m, the whole enterprise at Kshs54bn and the Mauritian component at Kshs13bn.
  4. Mr Ramtoola was aware that MMI Holdings had made a non-binding offer for the price of MUR4.2bn, with an exclusivity period of 6 months, which figure it had improved to MUR4.3bn after a meeting called by the FS in which he participated; and that the meeting had gone as far as reaching an agreement for a pre-payment of 10% into an Escrow Account.
  5. On 6 November 2015, MMI Holdings asked for extension of time. They were having difficulty with the Kenyans to start due diligence before making a binding offer by 1 February 2016.
  6. On 14 November 2015, Mr Peter Munga landed in Mauritius. On the same day, which was a Saturday, he had a meeting with ex-Minister Bhadain



which was attended by Messrs A. Ebrahim and S. Khapre, CEO of BDO (Nairobi). Two matters were discussed in relation to the impending sale: foreign buyers would not be welcome, the Britam shares were the crown jewels of the Rawat empire and Britam Kenya would continue engaging BDO & Co. along the lines agreed at the meeting.

7. We read a report submitted by the SA to the Board of the FSC at its 234<sup>th</sup> Board meeting held on 8 December 2015, mentioning that the shareholders of Britam Kenya are not keen to sell to MMI Holdings and have proposed to buy the shares at the same price offered by MMI Holdings.
8. On 18 November 2015, a meeting prompted by the MOFED took place in Nairobi whereby the missive, Mr Lutchmeeparsad, requested the Kenyans to match the price of MMI Holdings or do better.
9. A letter dated 23 November 2015, refers to a meeting Mr Peter Munga had with ex-Minister Bhadain on 14 November in which he expressed his appreciation of the fact that the ex-Minister had made a *“most timely Press Statement (which) was of great relief to the 25,000 Shareholders and also calmed the markets. Peter Munga added in the closing paragraph of the letter that “we are still reeling from the after effects.”*
10. Mr. Ramtoola had given himself 15 days to transfer the undertaking to the NPFL but he found himself embroiled by third parties.
11. Both the Kenyan and the Mauritian counterparts conceded *“that Britam Kenya is a strong, stable and well managed institution and it was the crown jewel amongst all the investments previously owned by Mr Rawat.”*
12. Mr Peter Munga had a meeting with the ex-Minister Bhadain in Mauritius on Saturday 14 November. Mr Ramtoola, in his deposition, referred to a meeting of 23 November but the date should be logically 14 as evidenced by the letter of Mr Peter Munga dated 23 November 2015.
13. The correspondence between the FSC, the MFSGG&IR and the SA show that they were all aware that Cabinet had on 10 July 2015 decided that *“the transfer of undertaking of BAI to be done to National Property Fund Ltd and National Insurance Company Ltd respectively.”*
14. Mr Ramtoola agreed that the shares in Britam were not transferred but a back-to-back agreement was signed on 10 June, a point in time when NPFL was not the owner of the shares.
15. According to Mr Ramtoola, NPFL became the owner of the shares on 07 August 2015. NPFL has been created on 5 May 2015 after a Cabinet decision dated 4 May 2015 that the undertaking/assets should be transferred to the NPFL.
16. The explanations of Mr Ramtoola were: *“I think we assisted or BDO assisted National Property Fund Ltd to turn or realize these assets into cash”*. That was done *“with the consultation of the Minister of Financial*

*Services, with the consultation of the CEO of National Property Fund Ltd and with the consultation of the FSC Board.”*

17. Mr. Ramtoola had several meetings with ex-Minister Bhadain and his two advisers in the office of the Minister and those meetings went till very late in the evening.
18. The ex-Minister and his team were well aware of the fact that there had been an offer at MUR4.3bn by MMI Holdings and that there were other potential bidders in the offing.
19. The Kenyans were chosen because the Kenyan officials entered the scene and lobbied with the Mauritian officials.
20. That there was a meeting between Mr Peter Munga and the ex-Minister Bhadain to discuss matters of substance relating to the sale to the Kenyans. However, Mr Ramtoola tried to play down this meeting as a mere courtesy call to later concede after some probing that it was more than a courtesy call.
21. According to Mr Ramtoola, the SPA had been vetted by the legal advisers of BDO.
22. BDO and Mr Ramtoola had been overshadowed by the ex-Minister Bhadain and his two advisers who were the ones pulling the strings.
23. BDO and Mr Ramtoola should have known of the offer of 18 November by the Kenyans for MUR4.3bn.
24. Mr Peter Munga had already met ex-Minister Bhadain on the 14 November 2015 to make an informed decision on 18 November 2015 that the sale was for MUR4.3bn and should be sold to the Kenyans.

#### **OF NOTE**

It is to be noted that:

1. The Letter of Engagement of Mr Ramtoola was prepared by no other person than himself and sent to FSC. The Letter of Engagement fully sets the scope of the assignment he attributed to himself. Amongst, he set himself to transfer all the assets belonging to BAI group to NPFL. He sent it to the FSC which subscribed to it.
2. In that self-specified Letter of Engagement dated 26 August 2015, Mr Ramtoola bound himself *inter alia* to:
  - (i) transfer in whole or in part of the undertaking of BAI Co. (Mtius) Ltd and its related entities to the NPFL pursuant to Section 110B (1) of the Insurance Amendment Act 2015.
  - (ii) continue to manage the undertaking as SA prior to the assets being transferred to NPFL. (underlining ours) finalize the transfer of Britam Kenya to the NPFL, subject to regulatory approvals in Kenya.
3. The above he had to do “*within two weeks*” of the date of the agreement which was 26 August 2015.
4. A Press Communiqué was issued by FSC to confirm his appointment as SA.

354. **Mr Ramtoola’s Letter of Engagement bound him, *inter alia*, to transfer in whole or in part of the undertaking of BAI Co. (Mtius) Ltd and its related entities to the NPFL pursuant to Section 110B (1) of the Insurance Amendment Act 2015; continue to manage the undertaking as SA prior to the assets being transferred to NPFL (underlining ours); and finalize the transfer of Britam Kenya to the NPFL, subject to regulatory approvals in Kenya. Was that done? If not, why not?**
355. Mr Ramtoola was recalled to explain this. And other facts which had emerged from depositions and documents submitted to the Commission. The main one was that the ex-Minister Bhadain had deposed to say that he had only been at the receiving end of the events taking place, all of which were in the hands of ex-Minister Lutchmeenaraidoo and the FS; that he, ex-Minister Bhadain had nothing to do with the actual sale, still less with NPFL; and further that there had been no such thing as an offer to buy, by the Kenyans for the sum of MUR4.3bn.
356. Mr Ramtoola was more forthcoming and forthright at his second deposition and more open compared to the first time when we had seen him overly cautious. His replies were candid. He had regular meetings with ex-Minister Bhadain and various officers including the PS, Mr Phokeer, Mr Nemchand, the DPS, Advisers to the Ministry, Mr Deerpalsingh, Mr Ramjanally, the CEO of NPFL, late Mr Issary and at some time Mr Manraj as FS and also the Acting CEO of the FSC, Mr Kuriachen. Regular meetings were held with some or sometimes almost all of them not only in the context of Britam but also in the context of the BAI Group.
357. Those meetings had been held in the office of ex-Minister Bhadain. Right from the start of his assignment as SA, he explained he was often called upon to brief the Minister and the team on the progress of the administration.
358. Most of the time it was late in the afternoon. Sometimes it even went quite late in the evening. As regards Mr Phokeer, his answer was that he did not recall whether he was participating or not but he did attend quite a few meetings.
359. As regards the roles of the Advisors at those meetings, he explained that both the Advisors would be present and their main concern together with the Minister and all those who were attending the meeting was how to raise the funds to eventually meet the Government commitment to repay the SCBG policy-holders.
360. On the question of how was the figure MUR2.4bn arrived at he started to explain that there was a deal with MMI Holdings which was signed by himself as SA where a figure of MUR4.3bn was mentioned. Actually, the figure of MUR4.3bn was based on the MMI Holdings offer. In his own words:
- “if I may quote from the letter from MMI two paragraphs which are very relevant to the case. The first one was that the figure is based on the quoted price at the time of the offer x 51.5 which is 50% on the share price. So a premium of 50% to arrive at the figure... I think it was 26.90 shillings per share. This was based on the quoted price at the time x a mark-up of 1.5.”<sup>11</sup>*
361. He added that the MUR4.3bn quoted by MMI Holdings was arrived at on assumptions. Its letter goes on:

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<sup>11</sup> P.7 of the deposition of Mr Ramtoola on 26 September 2017.

*“It is assumed that there will be no material adverse changes in the Kenyan trading or regulatory conditions or the market assessment of Britam overall on the Kenyan Equity Market. So basically, that price of 26.90 Kenyan shilling was based on the fact that it was a quoted price x 1.5 and when the deal of MMI, when the deal did not go through for reason that we have already explained and the offer of Plum match the deal of MMI which was to pay 50% premium on the quoted price.”<sup>12</sup>*

362. He went on to explain that at the time of the deal, the price was about 12 Kshs and the price obtained was 18 Kshs, based on the same concept that is a 50% mark up on the quoted price and *“that comes to the MUR2.4 or 2.5bn that we are talking about.”<sup>13</sup>*
363. On a related question of how many caps was he wearing at the time: SA, BDO Mauritius, BDO Kenya, his answer was that he was the SA and also the Managing Partner of BDO.
364. As regards the arrival and departure of Mr. Peter Munga he stated that the latter had come to Mauritius to pursue the matter of the Britam sale on 23 (sic) November 2015. He met his colleagues who took him to the Honourable Minister Bhadain. In the said meeting he reportedly stated that the foreign shareholders would not be welcome and not aligned to the vision of the Kenyan investors.
365. To the Commission there was a mystery shrouding this meeting with ex-Minister Bhadain and Mr Peter Munga which took place on 14 November 2015 in the office of the ex-Minister, 4 days prior to the Nairobi meeting on 18 November 2015.
366. Pursuing his deposition, Mr Ramtoola stated that BDO and Mr Peter Munga met only twice, the second time, in March 2016 when the MOU was signed. Mr P. Munga did meet the Managing Partner in Kenya, Mr Sandeep Khapre who actually accompanied Mr. Lutcheemeeparsad to the Nairobi Meeting of 18 November 2015.
367. He also added that there had been regular meetings at the FSC on a monthly basis which he attended and when he was not in Mauritius, then one of his colleagues would attend the meeting at FSC. These were attended by himself, by Mr Ebrahim or Mr Georges Chung.
368. The SPA was vetted by their Legal Advisers and Me Koenig because legally they were still the owners of the shares and NPFL was the beneficial owner, that’s why NPFL had to intervene in the agreement.
369. He stated that the agreement was perhaps drafted by BDO’s Legal Advisers. A draft had been discussed and the price had been determined with a 50% premium. He stated:  
*“We were quite concerned in case the stock market in Kenya bounced back for some reason and that the share price goes up and there was nothing in the MoU to cater for an upside. So we had this introduced in the MoU.”<sup>14</sup>*
370. The choice to sell to the Kenyan shareholders was dictated by two factors: (1) the outcome of exchanges between the Ministries of Finance of Kenya and Mauritius; and

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<sup>12</sup> PP 7 and 8 of the deposition of Mr Ramtoola on 26 September 2017.

<sup>13</sup> Ditto P.8

<sup>14</sup> Ditto P.17

(2) MMI Holdings was being denied access to the records of Britam and, added Mr Ramtoola:

*“... as a minority shareholder if the majority shareholder of the Board doesn't want to give MMI access, whether it's MMI whether it's a Mauritian company, with 23% you don't even have the right to challenge that.”<sup>15</sup>*

371. He explained the final figure at which they were sold. The previously given figure of MUR4.3bn was by reference to the November 2015 prevailing rate at the stock exchange based on the price in the open market. The same principle was applied at the time of sale in March 2016. The focus should not be, in his view, on the figure but on the principle.

372. He further explained that since it was a Government-to-Government agreement to sell to Kenya, his job as an Administrator was to see whether the price offered was fair or not. He went on to say that even Mr. Manraj in his deposition as FS did mention that the price was fair because the offer of Plum LLP exactly matched the offer of MMI Holdings.

*“When the transaction occurred 6 or 7 months later the share price was no longer the 26 or 18 Kenyan shillings, it went down to 12. So even as I said to you MMI offer has one condition which everybody is overlooking. What happen if when they do the transaction the share price had gone down from 18 to 12.”<sup>16</sup>*

373. He also pointed out that the IFC was later to buy the shares in Britam at those prices. To him, the majority shareholder, had made the offer saying that they would match the MMI Holdings offer. This was communicated to the Minister and in various meetings that they had had.

374. He was quite clear that the offer received was discussed with ex-Minister Bhadain. He had regular meetings with ex-Minister Bhadain and the team, not only on Britam but on BAI which included Britam. The deal was discussed with them and the decision was taken to go ahead with the sale.<sup>17</sup>

*“Each time we were meeting; we were discussing Britam because that was quite crucial in terms of realisation of assets.”*

375. In the meetings that he had with ex-Minister Bhadain on Britam, he added that Mr. Deerpalsingh was present in most of the meetings.

376. The question was specifically put to Mr Ramtoola as to who took the decision to sell at that price because he was the SA. Mr Deerpalsingh had stated it was he, the SA, under his obligations under the Insolvency Act. Mr. Phokeer said he was not present. Ex-Minister Bhadain said he was not participating in anything. The response of Mr Ramtoola was in terms of a short ironical exclamation. He wished it were true. He wished that he had a free hand in the matter. That is evident from the hereunder:

#### QUESTION:

*In other words, you were solely responsible for that sale. Will you agree with this?*

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<sup>15</sup> PP. 20 and 21 of the deposition of Mr Ramtoola on 26 September 2017

<sup>16</sup> Ditto P. 27

<sup>17</sup> Ditto P. 32

ANSWER:

*I wish it was true I would have taken all the decisions.*<sup>18</sup>

QUESTION:

*You did not?*

ANSWER:

*I'm just quoting to you what was said in Parliament.*

QUESTION:

*Did you ever have a meeting with the Minister of Finance?*

ANSWER:

*The Minister of Finance very earlier on. That was at the time of MMI but I think it was with*

*Mr Manraj when we signed the document Mr. Manraj went to see the Minister of Finance and came back to me and said yes, Minister agreed.*

QUESTION:

*Did you have any meeting with the Minister of Finance on Britam?*

ANSWER:

*On Britam I don't think so.*

377. In the final analysis on the matter of the sale price, he opined that:

*"if I have to go back and recommend the deal, I will still recommend the deal because I think it was a good price and a fair price based on what's happening at that material time. He added that other avenues were out of question because of the prevailing circumstances."*<sup>19</sup>

378. On the matter as to whether he had not trespassed his own Terms of Engagement and gone against Cabinet decision by selling the shares before transfer to NPFL instead of transferring the shares to the NPFL and allowing NPFL to sell it, his reply was that:

*"the Special Administrator was still legally owner of the shares and they had assisted right through the process of administration in converting assets into cash. That was done for Courts, that was done for other Assets and that was done for Britam."*

379. When questioned that it was not in his initial terms, his answer was that he had the powers under the Insolvency Act.

380. Mr. Ramtoola was asked to throw light on some aspects of his own previous involvement more particularly his prior professional engagement with the BAI Group of companies. He replied that:

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<sup>18</sup> P. 38 of the deposition of Mr Ramtoola on 26 September 2017

<sup>19</sup> Ditto P 40

1. prior to his appointment as SA, BDO was approached to prepare a report regarding the repayment of SCBG policy and the BAML investors;
  2. BDO had also been the Auditor of Mauritius Leasing which later became a subsidiary of BAI; and
  3. BDO had also been the Auditors of BPFL until the collapse of BAI.
381. On the issue of his powers, Mr. Ramtoola pointed out the dilemma posed by the new Section 110 of the Insurance (Amendment) Act in that a SA appointed under the new legislation, Section 110A and Section 110B of the Insurance (Amendment) Act 2015 shall have all powers, duties and functions as specified under the Insolvency Act and the FSC Act as well as the Insurance Act.
382. On the question whether there was any need to have a Transaction Advisor, he stated that there was no need as the duty of a Transaction Advisor is mainly to look for buyers and sellers and, in the case, there was already a willing buyer and a willing seller. The Commission remains puzzled by such a statement.
383. Regarding the visit of his team to Kenya from 07 to 10 May 2016 he explained that this visit was important as there was need to secure the shares that were held by an offshore company in the Bahamas. He explained that it was initially thought that the shares were in Kenya but when the team went to Kenya, they found that those shares were held by a company domiciled in the Bahamas.
384. He confirmed that the MOU was drafted by Plum LLP, the buyer, subject to being agreed to by the seller. He confirmed that the shares had not been transferred to NPFL but remained under his custody up to the date of sale.
385. As regards the Minutes of the meeting Mr Lutchmeeparsad had in Nairobi, he explained that he recalled having sent a letter to Britam in connection with the meeting and after that he did not hear of any outcome. It was only after the Commission of Inquiry started its work that he set about looking for the notes of meeting. He asked for a copy from Mr Khapre, who, then sent a copy to him. He could not recall the exact date of receipt. The Notes of Meeting were not circulated by him. However, he showed it to Messrs Ebrahim and Chung.
386. The Commission drew his attention to the two different versions of the Notes of Meeting. One referring to “*Britam are willing to buy the shares at a **mutually acceptable** valuation but they wanted a longer payment period*” and the other one ... “*Britam are willing to buy the shares at the **same valuation** as MMI has offered but they wanted a longer payment.*” He informed the Commission that he cannot comment on the two documents.

## FACTS RELEVANT AND MATERIAL TO THE TOR WORTH RETAINING

387. The deposition of Mr Ramtoola reveals that:
1. BDO had been the auditor of one of the subsidiaries of the BAI Group of companies which rendered it vulnerable to a situation of conflict of interest;
  2. those engaged in the sale of the Britam shares were fully aware of the offer of MMI Holdings for MUR4.3bn;
  3. Mr Ramtoola had gone beyond his own terms of engagement and against Cabinet decision according to which the undertaking was to be transferred and not sold;

4. He was unable to comment upon the material difference which were found in the two versions of the Minutes of the meeting of 18 November 2015;
5. The amended Section 110A and Section 110B of the Insurance Act were the source of controversies as regards the role of the SA in relation to the new powers conferred upon the Minister responsible for financial services.

388. The third time Mr Ramtoola was called, it was for throwing further light on the involvement of the Kenyan Office of BDO in the matter, the nature of the interaction between the Kenyan team which came to Mauritius between 08-12 of March 2016 to finalize the deal in terms of a MOU, the nature of the involvement of the legal advisers and how the sum MUR2.4bn was arrived at.

389. How comfortable was he with the new law as an insolvency practitioner? His answer was it was very unlike the situation where in a winding up or in a receivership or liquidation, the receiver and liquidator exercise full powers to take decisions.

390. On the issue of why there was the need of a transfer-cum-sale agreement, his answer was that:

*“In this particular case the process of transferring and getting the approval of the authorities in Kenya would have delayed significantly the sale process and there was a time limit in terms of money to be raised to pay the Super Cash Back Gold on the 30<sup>th</sup> of June. Advice was received that you could do the transaction in one go where NPFL gets involved.”*<sup>20</sup>

391. Was proper consideration given to the real value of the shares?

QUESTION:

*“Barely two weeks after you did the transaction the share price shot up to 14, 15, 16, would that be a justification on my part to say the price was wrong or are you trying to use this paper to say the price was right?”*<sup>21</sup>

ANSWER:

*What I’m saying is there was an offer which was based on the current market price a premium at that time and that price was fair.*<sup>22</sup>

QUESTION

*Do you think it’s normal for a transaction of 2-3 Billion Rupees be done by way of a few phone calls without any confirmation on the principles under which you are going to potentially dispose of these wholly?*<sup>23</sup>

ANSWER:

*The principle was already set out in earlier correspondence with the Minister.*

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<sup>20</sup> P.15 of the deposition of Mr Ramtoola on 05 October 2017

<sup>21</sup> Ditto P.27

<sup>22</sup> Ditto P.28

<sup>23</sup> Ditto P.38



QUESTION:

*And you believe that was the principle that was agreed between the Ministers or ministries when they have this exchange of letters?*<sup>24</sup>

ANSWER:

*Well, I'm just going by the letter which I have submitted.*

392. Regarding the time constraint within which it had to be finalized, he stated that *“we were discussing as I said over the phone and impressing on the team in Britam that this deal must be finalised and money received by end of May to pay the Super Cash Back Gold.”*<sup>25</sup>
393. As to who decided the finalization in March, he stated that the decision was to finalise as soon as possible so that the proceeds could come in between by May 2016 for the repayment of SCBG.
394. Attention of Mr Ramtoola was drawn to the fact that on 19 April 2016, a dividend was declared by the Britam Board. It was around 0.30Kshs per share. His answer was that the SPA clearly set out to whom dividend accrues, whether the dividends were paid ex-div or cum-div. They received the 2014 dividends but as far as he knew the 2015 dividends accrued to the new shareholders. The dividend was paid sometime in July or August which meant that the SA did not receive any dividends during that year. And that in his term as SA, he followed on the dividend that was due to him which was a 2014 dividend which was received.
395. Mr Koenig who was appearing for Mr Ramtoola, with some diffidence verging on contempt, tried to argue that using such terms as *“pool of investors”* as a party in a legal document or an MOU is *“monnaie courante.”* It is provided for in the Companies Act. He undertook to show us the law but never came up with it. It should be noted that it was behind the screen of this non-legal entity in a legal document that Mr Peter Munga was at once the Principal and the Agent.
396. The facts to be retained on subsequent depositions of Mr Ramtoola are:
6. The relative ease with which the Kenyans imposed themselves on the Mauritian sellers between January and March 2016.
  7. The discussion during that crucial period is not documented: the details of the phone conversation are unknown, which is not a proper manner of carrying out a transaction of this nature;
  8. The legal papers were brought to Mauritius by the Kenyans who finalised things in the second week of March when there was no urgency in that money to pay the policy-holders had been advanced by the Bank of Mauritius, a fact within the knowledge of the parties involved.
  9. The Kenyan buyers had originally agreed to *“match the price of MMP”* but when they came, they reneged on that agreement and were able to get a deal with the Mauritian sellers that the sales should be based on the prevailing market price.

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<sup>24</sup> P.38 of the deposition of Mr Ramtoola on 05 October 2017

<sup>25</sup> Ditto P.42

10. The documents used had a number of flaws which had been left open by the legal advisers: one of which was that the MOU was between a legal entity and a non-legal entity “*a pool of investors*”.
  11. The legal documents were cleared with a levity that boggles the mind. There was no legal Adviser for the transaction nor any transaction Advisor to keep a vigilant oversight on the process.
397. **It became important for us to know where was the NPFL in all this. For, as per Cabinet decision and the Letter of Engagement of Mr Ramtoola, the undertaking had to be transferred to the NPFL. It was for the NPFL then to decide how and when to realise the assets.** We heard the Secretary, the CEO, the Chairperson and the other members of the NPFL Board on the matter. Late Mr Oodaye Prakash Issary was the CEO. The Chairperson of the Board was Mr Gautam Saddul, Chartered Surveyor. Mrs Shakuntala D. Gujadhur-Nowbuth was the DPS of the Ministry of Agriculture and Agro-Industry and Board member of NPFL and Mr Benito Elisa, Adviser. We summoned them.

#### **W4 THE DEPOSITION OF LATE MR OODAYE PRAKASH ISSARY, THE CEO OF NPFL**

398. Late Mr Oodaye Prakash Issary deposed, assisted by the in-house Legal Adviser, Me Toorabally. He was at the material time the CEO of the NPFL. It is to be noted that Mr Issary passed away on 9 December 2019 at the age of 51. May his soul rest in peace! The deposition of late Mr Issary will make sense if the following undisputed facts drawn from the documents produced are known. Late Mr Issary produced a set of them.
399. The NPFL was created on 5 May 2015 as a Company wholly owned by Government,<sup>26</sup> holding 100% of the declared 3 shares, following the report of BDO and on 10 July 2015 Cabinet decided that the BAI assets should be transferred to it.<sup>27</sup> The ultimate objective of the NPFL was to realise the assets optimally in its concern to repay the policy-holders of SCBG and the BAML investors. Its setting up was one of the strategic measures recommended by BDO in its 48-hour report on strategic measures dated 24 April 2015. NPFL was conceived as a wholly owned subsidiary of NICL where all the realizations of the assets from sale or otherwise of BAI Group by the Assets Recovery Unit would be pooled.<sup>28</sup> The funds realized from its sale was originally meant to effect payment of the second tranche to targeted policy-holders. The Chairperson of the Board was appointed on 6 May 2015<sup>29</sup>. And a few days later Late Mr Issary was appointed the CEO<sup>30</sup>.
400. In his deposition, late Mr. Issary said that he had had several meetings, between 8 to 10 meetings<sup>31</sup>, at the level of the Ministry on issues relating to BAI including Britam shares and numerous telephone calls with the team of officials at the level of the MFSGG&IR.

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<sup>26</sup> Incorporation Certificate NPFL

<sup>27</sup> Cabinet Decisions- 7 August 2015

<sup>28</sup> Strategic measure 9.1- page 11 of the BDO Report to recommend strategic measures to protect value of underlying assets of BAI

<sup>29</sup> Item 2 of the First Board Meeting of NPFL

<sup>30</sup> Item 2.1 of the Second Board Meeting of NPFL

<sup>31</sup> P.16 of the deposition of Mr Issary on 25 July 2017

401. He stated that NPFL was neither a party to the negotiations nor involved in any discussion with the pool of investors or Plum LLP<sup>32</sup> for that matter. There was a delay in the transfer of the shares by the SA. He could not say why.

402. The transfer took place only, according to him, on 16 June 2016<sup>33</sup>. It was more of a straight sale of assets than a transfer of undertaking. Nor could he explain why the transfer and the sale was decided to be a concurrent transaction.

## **FACTS RELEVANT TO THE TOR TO BE RETAINED FROM THE ABOVE**

403. The facts which may be gleaned from his deposition are that:

1. If Cabinet had decided that the undertaking of BAI(Mauritius) should be transferred to the NPFL, this was not what happened.
2. The Mauritian party was using NPFL to window dress its decisions sometimes by institutional manipulation.
3. The Chairperson and CEO of NPFL were happy being led than leading rubber-stamping decisions taken at the level of the MFSGG&IR.
4. The NPFL Board members were being called at an urgent meeting to give their approval on a major transaction of sale of NPFL property after the sale had taken place.
5. The facts and circumstances surrounding the NPFL Board meetings regarding the sale including the manner, the type and nature of the convocation show how cosmetic the process of approval was at the level of NPFL.
6. The decision had already taken place above the heads of most of the directors of NPFL and the Directors' Resolution for approval of the decision had already been circulated for purported endorsement by the Board of a "*fait accompli*" so as to give a semblance of regularity on paper to what in fact was for all interests and purposes most irregular.
7. The MOU with prices having been agreed upon was signed on 12 March 2016 but the SPA confirming same was signed on 10 June 2016. For its part, the Shareholder's Resolution was taken only on 20 June 2016 but the Directors' Resolution (Board Members NPFL) on 21 June 2016.
8. The Share Transfer Agreement was signed on 16 June 2016 but the Directors' Resolution in respect of Share Transfer was signed on 16 June 2016.
9. Late Mr Issary, in his capacity as the CEO had somehow signed the sale documents with all the details of prices and payment terms well before NPFL Board approval had been obtained.

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<sup>32</sup> P.66 of the deposition Mr Issary on 21 June 2017

<sup>33</sup> Ditto P.67

10. It was obvious that decisions were being taken by ex-Minister Bhadain and his team for implementation at the NPFL where the NPFL Board was treated by the team as an *ex post facto* rubber-stamping instrument.
11. The shots were being called from above even over BDO or Mr Ramtoola or NPFL or Cabinet for that matter.
12. The loose manner in which the papers representing the transfer of shares is another indication of the levity with which the legal papers were done by the Mauritian party generally and, in this particular case, with respect to the Share Transfer “document”. The capacity in which late Mr Issary, Mr Saddul and Mr Ramjanally signed in the resolution for the Share Transfer has not been specified. Did they sign in the name of NPFL? How valid were the documents? Was there any conflict of interest for them to be appointed Directors of BAKHL, owner of the Britam shares at that point in time and NPFL which ultimately became owner of the shares?

#### OF NOTE

404. It is to be noted that:

1. As a rule, any dealing with the assets should first have been submitted to the NPFL Board for consideration and approval. However, late Mr Issary was curt and candid. Until such time as the transfer of the undertaking to NPFL had taken place, he was simply unconcerned of where they were parked.
2. The matter of the concurrent transfer and sale at MUR2.4bn did come up for approval at the Board level of the NPFL only on the 20 June 2016. In other words, 3 months after an agreement had been reached for the price of MUR2.4bn with the terms reduced to writing in an MOU. The MOU was concluded on 12 March 2016 and the SPA signed on 10 June 2016.
3. When on 20 June 2016 the Board was convened, the agenda was only for “*presentation by BDO on the disposal of shares in British American (Kenya) Holdings Ltd to Plum LLP*” to the Board for decisions which had been taken months before, at other levels and well outside the knowledge of most members.
4. Since the first meeting had aborted, another meeting was fixed for Monday 20 June 2016. The resourcefulness of knowledgeable public officers is evident by the manner in which they dealt with the issue subsequently.
5. How was it convened? On the Friday night of 17 June 2016, at 20.45 hours, late Mr Issary caused the Secretary of Board to send a convocation letter by email to the NPFL Board members for a meeting for Monday 20 June at 9 a.m. Mr Saddul, the Chairperson had been made aware of the meeting and the agenda. Papers were attached to the email. They were: (1) the SPA; (2) the Deed of Variation and Novation; and (3) the Escrow Agreement. The venue was the premises of BDO and not that of NPFL.
6. At the meeting of 20 June 2016, Mr Chung of BDO made a presentation only for the implied purpose of seeking approval for the sale that had been

agreed upon on 12 March 2016 through an MOU. Directors' Resolution for Board members' signature had been ready up-front. The Board which had some public officers who know how things are done and not done refused to be led by the nose. They declined to sign.

7. They adopted a technique of saving their skin while at the same time sparing the face of those in charge of the deal. They just took note of things that had happened. The circumstances are mysterious.
8. Each of the Directors signed on separate copies of Directors' Resolution all dated 21 June 2016 where they *"take note that the sole shareholder of the company has approved the transfer."*
9. The other question which Late Mr Issary defended was the currency in which the deal was done: in Kenyan shillings. He was expecting MUR2.4bn but ventured to say he had obtained MUR2.7bn. He referred to certain documents but they did not support his contention. There are no minutes for same.

405. The facts from oral depositions and documents show that by the 12 March 2016: (1) the prices had already been decided and inserted in an MOU; (2) an Escrow Agreement was already signed and an Escrow Agent was already appointed for the payments to be made. The Kenyan team had arrived on the 8 March 2016 and were leaving on the 12 March 2016 with the deal done. Yet the mystery behind the ultimate buyer still persisted. No due diligence had been done. He was still unknown or undisclosed. In both legal documents, the non-legal term "a pool of investors" continued to screen the fact that the investor was just one person Mr Peter Munga.

406. Late Mr Issary was called again to depose as to the involvement of the NPFL in the deal. He highlighted to the Commission the existence of the following procedure relating to Board Meetings of the Organisation in the normal circumstances. The items of the agenda and the date of the meetings were discussed with the Chairperson by the CEO and decided upon, meetings are held normally in the Board Room, sufficient notice was given to Directors for the meeting, meetings are convened by the Company Secretary who also take down the Minutes and papers, if any, to be discussed at the meeting are also circulated along with the convocation.

407. He stated, however, that at times there was need to call for urgent meetings. He referred for example, to the 13<sup>th</sup> Board Meeting held on 20 June 2016 held at the office of BDO. He confirmed that in view of the urgency of the matter, the Board was only convened on Friday the 17 June 2016 at 20.16 hours. He added that the meeting was convened at the request of BDO. In fact, in a mail on 17 June 2016, Mr. Chung from BDO requested for an urgent meeting to make a presentation to Board Members on the Britam transaction and to seek an approval from the Board.

408. He explained that on receipt of the mail he had discussed the matter with the Chairman who gave his green light for an urgent meeting. He further explained that he had noted that the email addressed to him was copied to two of the Board Members only.

409. Minutes for the meeting held on 20 June 2016 were taken by the Company Secretary at the meeting. But the Minutes barely reflected what happened.

410. The papers late Mr Issary presented to the Commission provoked some other questions. He was called again. On his second deposition, question was the illusory nature of the further amount of Kshs1.414bn which became payable if the volume weighted average price of Britam shares was equal or more than Kshs18 over the period of 09 March to 30 June 2016 and this condition could only be satisfied if the NSE Index at 30 June 2016 was 51% higher than its level at 9 March 2016. The consolidated profit before tax should be Kshs3.2bn or more for the year ended 31 December 2016. Mr Issary confirmed that these conditions were not satisfied. He was not a party to the discussion so he could not answer. It was done under the aegis of the SA. He could not answer as to who caused this unreachable condition to be inserted.

411. He explained that he was requested by the MFSGG&IR to execute the documents which represented the transfer/sale<sup>34</sup>. He confirmed that it was the Ministry which circulated the Shareholder's Resolution and the Directors' Resolution to be signed on 21 June 2016. The meeting of 20 June 2016 was convened, according to him, because it was the Directors who had requested it. According to him, it was Mr Toorabally, legal adviser of the NPFL who had vetted the documents. Asked about when and how the NPFL became the owners of the shares of BAFSL, a local entity registered in Mauritius which was the sole shareholder of the BAKHL registered in Bahamas, he was unable to either understand or answer. How was the SA involved in the sale when all he had to do by law was the transfer equally defeated him? He confirmed *that critical decisions were being made at the Ministry's level*<sup>35</sup>. Nor could he explain in what capacity the SA, Mr Ramtoola signed the transaction documents.

412. He admitted his perplexity also on the fact that if the shares of BAFSL, the company registered in Mauritius, had already been transferred in May 2016 to NPFL, what was the SA doing in all this? His answer was: *"It took me some time to digest this."*<sup>36</sup> He admitted that the NPFL could have sold the shares already notionally transferred to it in May 2016. How come BDO came into it? How come the SA entered into it? How come BAKHL came into it? How come the Ministry came into it? He was not aware that on account of the exchange rate, he had made a loss of about 2 million dollars. He agreed that the money did not come to the NPFL account straight from the Escrow Account but via a BDO account. His explanation was that NPFL did not have a foreign exchange account. He expressed the view that it took a week to open such an account but later agreed that it could be done in one hour<sup>37</sup>.

413. The funds that were received by NPFL from disposal of Britam shares transited as follows:

(a) Amount transferred from Escrow Account to BAI Account and thereafter to NPFL

Date of transfer	Amount USD	Amount MUR
4 July 2016	11,000,000	391,000,000

Amount transferred from Escrow Account to BDO Account and thereafter to NPFL Account

<sup>34</sup> P.11 the deposition of Mr Issary on 25 July 2017

<sup>35</sup> Ditto P.40

<sup>36</sup> Ditto P.43

<sup>37</sup> Ditto P.57

Date of transfer	Amount USD
5 July 2016	58,500,000

**Note:** An amount of USD58,835,000 was transferred from the Escrow Account to BDO Account and BDO transferred only USD 58,500,000 and withheld the difference of USD 335,000.

414. The questions that he could hardly explain were:

1. NPFL had already open a USD Account on 04 July 2016 at MAUBANK Ltd (A/C Number 012000009230), therefore the question arose as to why the need to transfer funds from the Escrow A/C to BAI A/C and BDO A/C and ultimately to NPFL. Why direct transfer from Escrow A/C to NPFL A/C was not resorted to?
2. Why had BDO retained the sum of USD 335,000?
3. Whether the Accounts of BAI and BDO were interest bearing and if so, how much interests had been earned during the period the money had remained in these accounts in view of the huge amount involved?

415. On the question whether the Board of NPFL requested that there be an independent valuation of the shares, his answer was that questions were asked relating to the transaction but not specifically for independent valuation.

416. On the question if dividend for the year ending 2015 had been paid to the seller inasmuch as Britam had declared 0.30kshs dividend per share, his answer was that he had enquired about it but had been told that NPFL was not entitled to receiving dividend. It is to be noted that the ex-dividend date was 10 June 2016, the very date on which the SPA was signed and the dividend payable would have amounted to over MUR45m.

417. Probed with the question of how seriously was he involved with the transaction, he answered that there was a fast-approaching deadline which Government had to meet, the criteria for repayment were being changed almost every day, every week and his focus was on these operational issues, how to get people repaid and how to harmonise the processes<sup>38</sup>.

418. He was not aware that one of the directors was being chased to sign the expected Directors' Resolution on an open street.

**419. When and how the funds for the first consideration were transferred could only be given to us by the Escrow Agent. He was Me Ramano.**

#### **W5 Me KAVYDASS RAMANO, NOTARY PUBLIC**

420. Me Ramano was appointed as Escrow Agent for the transaction concluded on 12 March 2016. He requested that he be heard in camera. His view was that, according to Section 3(c) of the Notaries Act, a notary is bound by professional secrecy and may not divulge any of his client's affairs except with the consent or where, ordered to do so by a Court. He referred to Section 35 of the Notaries Act which enshrined the Confidentiality Clause and governed the relationship between client and Notary.

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<sup>38</sup> P.52 of the deposition of Mr Issary on 08 August 2018

421. MKR on being questioned by the Commission on whose confidentiality was to be safeguarded, his answer was that a notary has no client as such but he has to be careful in not breaching the confidentiality of parties to an agreement.
422. That did not deter him, though, from answering all questions relating to his involvement in the sale. His role was restricted to his acting as the Escrow Agent jointly with Juristconsult when came the question of transfer of the First Amount of the sale price. As an Escrow Agent, he was not the Notary of the transaction<sup>39</sup>.
423. He confirmed that he had secured the clearance of the five (5) parties involved in the transaction: namely, NPFL, BAFS (sic), Mr Y. Ramtoola as SA, BAKHL and Mr Peter Kahara Munga who represented the buyers. He informed the Commission that receipt of funds in respect of the sale of Britam shares was made through a single Escrow Account at SBI.
424. Me Ramano, as he then was, produced several documents: among others, the Escrow Agreement dated 26 April 2016; a letter dated 20 March 2017 from SBI; a bank statement dated 10 June 2016 regarding transfers effected on the account of SBI; letters addressed to SBI by NPFL and Plum LLP authorising the transaction to be effected through the SBI.

#### OF NOTE

425. It is worth noting that:

1. The documents show that in the MOU dated 12 March 2016, the Escrow agent was stated to be Mauritius Commercial Bank Ltd. The Escrow Agreement departed from that condition in the MOU in that it is MKR and Juristconsult who were jointly appointed Escrow Agents in the SPA signed on 10 June 2016.
2. The Escrow Agent is in line with the character of the Escrow Agreement as provided in Section 3.7 as follows:

*“The Escrow Agents shall not be required to exercise any judgment, opinion or view in relation to the applicability, suitability or appropriateness of any notification received in accordance with this Agreement, but shall simply be required to respond to written directions and notifications as required by and in accordance with the terms of this Agreement.”*

3. An Escrow Account is a custom-based account made pending the completion of a specific transaction between two parties: the buyer and the seller. Notionally, the funds leave the buyer and stays midway between the seller and the buyer in the hands of a third party – in this case jointly by MKR and Juristconsult - until the transaction is completed when it is deemed to be the sellers’ property and proceeds go to him. Should the transaction abort for some reason, the sums which are deemed to be the buyer’s and are returned to him?
4. The Escrow account was opened to receive the First Amount. This was done as follows:

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<sup>39</sup> P.9 of the deposition of Mr Ramano on 17 July 2017



- (1) On 29.04.2016 in the sum of 988,087.297
- (2) On 18.05.2016 in the sum of 1,982,105.55
- (3) On 31.05.2016 in the sum of 25,653,620.38
- (4) On 03.06.2016 in the sum of 41,216,824.29

5. There were other departures from the originally agreed Escrow Agreement dated 26 April 2016 which would be academic for us to look into inasmuch as they were regularized in the Deed of Variation and Novation entered into on 10 June 2016, the date of the SPA.

## THE FACTS TO BE RETAINED FROM THE ABOVE

426. The facts which may be gleaned from his deposition are that:

1. Me Ramano was appointed Escrow Agent jointly with Juristconsult.
2. Me Ramano was not the Notary of the transaction as such any more than Me Choomka was the lawyer of the transaction any more than Mr Ramtoola or BDO was the Transaction Advisor for the sale.
3. The Fees of Me Ramano were to be paid by NPFL and those of Juristconsult by Plum LLP.
4. As per the terms of the Escrow Agreement, the Escrow Agents played the role of only the trustees of the money pending completion of the transaction.

427. **Where was the FSC in all this?**

## W6 MR SEEWOOSUNKUR, HEAD OF PENSIONS AT THE FSC

428. We heard Mr Prakash Seewoosunkur, the Representative of the FSC, on the matter. He informed the Commission that he was leading the team that was set up at the level of FSC “to oversee post BAI crisis.”

429. He stated that, as per Section 110 of the Insurance Act as amended, it was mandatory for the SA to comply with the amended law which reads: “*the Special Administrator shall transfer in whole or part of an entity of an insurance and any of its related companies as the Minister may approve.*” Notably, the new law for the subject matter of financial services was changed from the Minister of Finance to the Minister of Financial Services. The Minister was then the Minister of Financial Services, Good Governance and Institutional Reforms.

430. Mr Seewoosunkur informed the Commission that EY had been approached to assist in ensuring that there be quality assurance in whatever was being done by the SA. On being questioned of the involvement of EY, he stated that he did not have the details. However, he confirmed that “*Ernst & Young was not party to this exercise.*”<sup>40</sup>

431. He stated The figures MUR4.2bn up to MUR4.5bn were being proposed and considered by potential buyers. This was known to the FSC as well as to the MFSGG&IR.

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<sup>40</sup> P.18 of the deposition of Mr Seewoosunkur on 26 July 2017

432. He stated that all the issues relating to Britam were handled by the then Ag. Chief Executive Officer and the Board of the FSC<sup>41</sup>. All reports of the SA were submitted to the Board<sup>42</sup>, a fact confirmed by the SA. He had to implement the decision which had been taken by the Board after the SA had apprised the Board and the Ag. Chief Executive Officer had communicated it to him<sup>43</sup>.
433. Mr Seewoosunkur explained to the Commission that approval was given on 6 November 2015 by the FSC Board and communicated to the SA for the transfer of the Britam shares to the NPFL<sup>44</sup>. He confirmed that “*the final instruction was issued..*” and “*the role of the Financial Services Commission ended... with instructions to transfer the undertakings.*”<sup>45</sup> This is confirmed by SA who was giving status reports periodically to the FSC.
434. In course of his second deposition, Mr. Seewoosunkur testified to the fact that he was not aware of the report prepared by BDO in April 2015<sup>46</sup> as he had proceeded on leave without pay during the period August 2014 to May 2015 to take employment in the Private Sector.
435. On being questioned on the haste with which the BDO Report to recommend strategic measures had been prepared, he agreed that this was the case but added that the report was prepared on the basis of information already available in the Conservator’s Report<sup>47</sup>.
436. Mr. Seewoosunkur stated that he was not aware as to whether there was a Board decision on any procurement process for the appointment of BDO<sup>48</sup> to prepare the Strategic Report the objective of which was to “*recommend strategic measures to protect the value of the underlying assets with focus on the SCBG policies*”<sup>49</sup>.

## FACTS RELEVANT TO THE TOR FROM THE ABOVE

### 437. What emerges from the above deposition are as follows:

1. The need for transparency had been brought home by the FSC to the Ministry. So was the need for the transfer of the undertaking.
2. The Ministry was also aware of its obligation to transfer.
3. The need for utter openness had been emphasized on account of the nature of the funds. They were now public funds and the amount was huge. Apart from the corporate interest it provoked, there was also public interest involved.
4. All these directives were formal, written in black and white in the relevant correspondence between the relevant parties concerned with the dealing with the shares.
5. That there was no record as to the manner in which BDO was appointed to prepare the Report which recommended the 11 strategic measures.
6. That the report was prepared within two days but with information supplied, the source and veracity of which is anybody’s guess.

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<sup>41</sup> P.15 of the deposition of Mr Seewoosunkur on 26 July 2017

<sup>42</sup> Ditto P.10

<sup>43</sup> Ditto P.23

<sup>44</sup> Ditto P.33

<sup>45</sup> Ditto P.33

<sup>46</sup> P.6 of the deposition of Mr Seewoosunkur on 08 August 2018

<sup>47</sup> Ditto p.16

<sup>48</sup> Ditto P.20

<sup>49</sup> P2 of the BDO Report on Strategic Measures

## OF NOTE

It is to be noted that:

1. The need for transparency and oversight on the process of disposal of the assets within the BAI Group was emphasized by the FSC at its meeting of 10 July 2015. The rationale is well articulated in the Letter of Engagement which urge that the norm should be “*as if Joint Administration (sic) are dealing with public funds.*” The Letter of Engagement also spoke of “*the need to exercise extra diligence as compared to cases of normal corporate bankruptcy.*”
2. The offer from EY, despite the fact that the latter sent an Engagement Letter to the FSC and Board approval was obtained for the contract to be awarded to it, remained a dead letter. Why? That remains also a moot point.
3. There had neither been any procurement process nor FSC Board approval for the appointment of BDO to prepare the Strategic Report

**438. The question related to the above is how and why such clear directives were not followed by those concerned. A lot of light could be thrown by the persons who were nearer the decision makers: the officials of the MFSGG&IR. As from 17 December 2014, the responsibility for matters of Financial Services was under the MFSGG&IR. Who then had the carriage of the process between the Minister of Finance and the Minister of Financial Services?**

## W7 DEPOSITION OF EX-MINISTER SEETANAH LUTCHMEENARAIDOO, GCSK

439. He stated that truth must come out of this inquiry<sup>50</sup>: how was it that a sale of MUR4.3bn de-escalated to MUR2.4bn and the public is in the dark? At the end of the day, it is the tax payer who would have to chip in for the difference.

440. He gave a history of the evolution of events till mid-February 2016 when he found himself exiting the scene by force of circumstances. He stated that from the very beginning the shares of Britam were valued at a minimum of MUR4bn. This stand had been taken and adopted by the FSC and adopted also by the MOFED. Barclays Bank had approached them with a bid to find a buyer for the shares at MUR4.2bn<sup>51</sup>. That proposal had gone to the FSC in October 2015 and the decision was taken to wait until December 2015 for a better price<sup>52</sup>. So, the issue was not only MUR4bn but MUR4bn plus.

441. On top of that the South African Group MMI Holdings, a powerful group listed on the Stock Exchange of Johannesburg, that performed in the sector of financial services, financial management and had a market capitalisation of around MUR105bn, had formally made their offer on 14 October 2015 to the MOFED where they proposed to buy 23.92% of Britam shares and had agreed to pay MUR4.3bn<sup>53</sup>.

442. That proposal of MMI Holdings had also gone to the FSC Board and which found the offer quite attractive and decided to seek the approval of the Minister responsible for Financial Services for same. A letter dated 21 October 2015 was, accordingly, sent by the FSC to the Minister concerned for Financial Services to that effect. However, this was not to be. He had gone to Cabinet on the matter. But Cabinet had decided that the

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<sup>50</sup> P.2 of the deposition of Mr. Lutchmeenaraidoo on 27 July 2017

<sup>51</sup> Ditto P.3

<sup>52</sup> Ditto

<sup>53</sup> Ditto

shares and other assets of BAI should instead be transferred to the National Property Fund Ltd (NPFL)<sup>54</sup>.

443. The next thing he knew was that on the 21 January 2016, i.e, 4 months later, the SA reported to the FSC Board that Britam shareholders were not agreeable to the selling of those shares to the South African Group MMI<sup>55</sup>. On 19 February 2016, the SA again reported to the FSC Board that negotiations were difficult. From then on, the negotiations were with the Kenyans following which the SA announced on 28 April 2016 that a Memorandum of Agreement had been signed for MUR2.5bn. That had been done on the 12 March 2016, some six weeks before. Escrow Agreement had been sent to investors. On 25 May 2016 the SA again informed that MUR105m was remitted in the Escrow Account and the remaining proceeds of MUR2.5bn were to be received by 30 May 2016 and finally on the 30 June 2016 the SA once again reported that the SPA had been signed on the 10 June 2016 and that transfer of shares to Plum LLP was completed.
444. Respecting the change of course from MMI Holdings to the Kenyans, he explained that the Minister of Finance of Kenya, His Excellency Henry Rottich, Cabinet Secretary of the National Treasury to Ministry of Finance of Kenya spoke to him personally and intimated that the Kenyan government was not favourable to the sale of the Britam shares to MMI Holdings. The reason he gave was that his government did not want a South African group to be involved. He had no problem with that the Kenyans should be the buyers provided they matched the price of MMI Holdings, that was MUR4.3bn.
445. That stand was pursued and since the PS of the MOFED, Mr. Lutcheemeeparsad, was going on a mission to Kenya, he requested him to personally meet with the Britam Directors and to see how they would proceed with the transfer of those shares against payment of MUR4.3bn. Mr. Lutcheemeeparsad received a mandate from the SA on the 16 November 2015 to have discussions with Britam and the MOFED on the matter.
446. On his return, Mr. Lutcheemeeparsad reported to him what had happened. A meeting had been held on 18 November 2015 chaired by Mr Peter Munga, a Director of Britam, representing the investors. Officials of the Ministry of Finance of the Kenyan government were present. At one moment Mr. Peter Munga requested the permission to see his colleagues in another room to take a decision. It took them 15 minutes and Mr Peter Munga came back and said that they were prepared to buy the shares of Britam for MUR4.3bn but were asking for some facilities for the payment. This was what came out of the report of Mr. Lutcheemeeparsad. On 11 December 2015 he received a letter of appreciation from Henry Rottich, Cabinet Secretary of the National Treasury for the Ministry of Finance with a proposal that the Board of Britam would finalise the details of the transaction through a MOU. That was his wish expressed on the 11 December 2015.
447. To ex-Minister Lutchmeenaraidoo, the person one may not ignore in the matter is Mr Peter Munga. In fact, Mr Munga had travelled to Mauritius quite a few times. He was in Mauritius between 14 November and 16 November 2015. Who he had met needs to be found out? What was decided needs to be found out. That was before the meeting of 18 November in the Nairobi meeting where he had agreed to match the price of MMI Holdings. Mr Munga had come back to Mauritius on the 8 March 2016 and

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<sup>54</sup> P.4 of the deposition of Mr. Lutchmeenaraidoo on 27 July 2017

<sup>55</sup> Ditto P.5

stayed from 8 to 12 of March 2016 and came back again in 2017 from 5 to 7 February 2017. To him, Mr Munga could not have been in Mauritius by accident. What happened that an agreement to sell Britam fell from MUR4.3bn to MUR2.4bn?

448. Also, was the amount finally agreed upon paid totally? The agreement provided for one first payment of 2 Billion 550 Million Rupees and the remaining MUR514m was subject to certain conditions. What happened? These were some of the questions that needed probing, according to him.

449. In point of figures, he pointed out that 452.504 Million shares representing 23.34% of Britam shareholding were sold at the considered price of MUR3,060bn for a cash consideration of MUR2,556bn and a conditional cash which was subject to provisions of Clause 7 of 504 Million Rupees. On the basis of information which he had this amount had not yet been paid. As far as he knew, from the very beginning government had publicly announced that it would not fund the losses linked with the BAI saga. The Central Bank had opened a line of credit of MUR3.5bn for the payment of SCBG victims and his take was that this amount currently is at MUR3.7bn which is owed to the Central Bank. Government had also borrowed MUR6.5bn for the proposed indemnity to those who have lost money in the SCBG scheme which brought the total amount to more than MUR10bn of government public funds which have or in the process of being spent to cover the cost of commitments that have been taken. He explained that any short fall in revenue could only in principle affect the public debt of government and also the repayment of indemnity to those who had lost their money in the SCBG Scheme.

*“Now the basis of what I have 4.3 Billion which was reduced to 3 Billion 060 and where credit to the amount of 2.556 has been made already we are in the presence of a loss of either 1.2 Billion is the condition of (sic) cash is paid or we are in the presence of a loss of 1.8 Billion Rupees in the case where the buyer don’t pay those commissions and funds cashed of 504 Million Rupees.”<sup>56</sup>*

450. Mauritius had considered alternatives to selling, he said. The Budget of 2015 had spelled out that government would set up a Sovereign Legacy Fund for the long-term investment for the future of the country. The MOFED had stated that if there was no buyer, then government should buy it as a government and invest in that sovereign fund. The same would have applied if there was a low price being offered such as MUR2.4bn which was not reduced price but a “cadeau” to the Kenyans. As only MUR2.550bn has been accounted for up to now.

451. He added that a Minister in his mandate was limited to certain powers conferred to him by the President. When it comes to those issues of dealing with companies owned by government, one delegates powers of day to day running of organisation to the board of directors to take policy decision. But selling assets, especially, shares valued at MUR4.3bn at MUR3.060bn was not a policy decision. It was a specific decision. A one-off transaction. To him, no one had the power of deciding an issue like this without going to Cabinet. He added that: *“if I were responsible for this as Minister believe me for 10 times less than this, I would go to Cabinet.”* Who took the final decision of disposing of those shares for MUR1.7bn less than that was agreed upon in Kenya? This was the question, according to him.

452. According to him, there were fund management companies at least three that suggested that the value would be between USD110M to USD130M. Other fund management

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<sup>56</sup> P.10 of the deposition of Mr. Lutchmeenaraidoo on 27 July 2017

companies had shown an interest, quite a few from Germany also even US. They had stayed within this range saying that the value would be between USD110 - 130M.

453. It would be good to note that Mr. Lutcheemeparsad had gone to negotiate but when Mr Peter Munga came to Mauritius, he did not meet with the PS with whom he negotiated in Kenya within the Ministry of Finance. How and when did he disappear from the scene having shown such a marked presence at the beginning? He explained that it all started in his absence, while he was on mission to Washington. On his return on 10 February 2016, he found himself in hospital. On three further occasions he was admitted: 24 February to the 28 February 2016; 29 February to 7 March 2016 and 20 March to 29 March 2016. Thereafter, he was “sent to ICAC.” Hence, in point of fact, he was technically not operational. His active involvement in his term of office with the process of sale was that around the 18 November 2015 Nairobi meeting and a letter he had requested Mr Lutcheemeparsad to write to Mr Peter Munga about the agreement and the correspondence of 11 December 2015.

454. He went on to say that Mr. Lutcheemeparsad had submitted a written report of what had happened in Nairobi on the 18 November 2015. And the Ministry had followed up on that to send a mail to Mr Peter Munga saying that government would be pleased to hear from him and that the FS on top of this spelled out that his price should be at least MUR4.3bn and not less<sup>57</sup>. He added that he read in the papers that the matter had not even gone to the NPFL Board for the sale. There was no board resolution and approval which he found quite unusual<sup>58</sup>.

455. The magnitude of the sale was huge. We are speaking not of millions or hundred thousand. We are speaking of billions of rupees. No company could take on its back this type of responsibility especially if the price had been slashed down in the process. He does not know any Minister who would take the responsibility of that importance on his own back. Where the price had been reduced by MUR1.7bn and probably MUR1.9 bn. That to him made it more serious.

456. Were the sellers pressed for time by their commitment to repay the policy-holders? To that question, his answer was that as a government they could have mitigated the pressure as they had done with repayment of the first tranche.

457. His side comment as regards the Minister who did not go to Cabinet and had this matter on his own was that:

*“We are all humans. We know an ego trip is made of a trip where you think you are the most important guy in town. Politicians are elected and are there to serve. So, ego has some space in your way of thinking but when the ego, the ambition one has goes beyond limits, then it becomes an obstacle.”<sup>59</sup>*

## **FACTS RELEVANT AND MATERIAL TO THE TOR WORTH RETAINING**

458. What we may retain from the above as material relevant to our TOR is as follows:

1. At the initial stage, ex-Minister Lutcheemeparsad GCSK was equally involved with the question of sale of the Britam shares. His objective was

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<sup>57</sup> P.27 of the deposition of Mr. Lutcheemeparsad on 27 July 2017

<sup>58</sup> Ditto P.28

<sup>59</sup> Ditto P.33

to get the best price possible. If there was no interesting buyer, the option of warehousing them as opposed to selling them was seriously considered.

2. There were offers being made which ranged from USD110m to USD130m, one of which was MMI Holdings with which there was already a figure agreed at: MUR4.3bn, subject to due diligence.
3. Government of Kenya then entered the scene and persuaded him to sell it to the Kenyans.
4. He agreed provided that the Kenyan shareholders would match the price offered by MMI Holdings or do better. The Kenyans had agreed.
5. That decision for the Kenyans to match the price of MMI Holdings (MUR4.3bn) was formally decided in a meeting in Nairobi between officials and representatives of shareholders and Mr Lutchmeeparsad on 18 November 2015 except that the Kenyan buyers were asking for more flexible repayment facilities.
6. Mr Peter Munga – the key person who was involved from the side of the Kenyans and who chaired the meeting - had visited Mauritius between 14 November and 17 November 2015 but not met anyone from MOFED.
7. There was a report of that meeting of 18 November 2015 at the MOFED.
8. Government was still deciding whether to sell the shares or to warehouse them and create a Sovereign Legacy Fund for posterity, account taken of the magnitude and the value of the assets.
9. Ex-Minister Lutchmeenaraidoo had exited the scene (when he exited the Ministry) on his return from Washington in February 2016. He was shocked to learn later that the sale had been concluded at MUR2.4bn.
10. There was no evidence that independent expertise had been used to arrive at that low figure of MUR2.4bn. There was no NPFL Board approval, nor any Cabinet approval for same.

#### **OF NOTE**

It is to be noted that the question was whether albeit the objection of the Kenyan Government, Mauritius should not have pursued with the selling of those shares to MMI Holdings. The Kenyan government would have raised a series of obstacles for foreign buyers and Mauritius would have had to go through the gates of various institutions to obtain necessary approvals for the transfer. However, Kenya being a friendly country having expressed its interest, the wish of a government could not be ignored. However, that be, if the Kenyans were prepared to match the price of MMI Holdings, that was a good deal at that price and logical.

- 459. Had the FSC, the entity concerned with the disposal of the shares, been duly apprised of the decision of Cabinet that the assets had to be transferred to the NPFL and not sold as such?**

**W8 MR PADASSERY KURIAKOSE KURIACHEN, ACTING CHIEF EXECUTIVE OFFICER, FSC**

460. Mr Kuriachen was the acting CEO of the FSC from April 2015 to 13 July 2017, the very period within which the transaction took place. He also produced to the Commission letters dated 31 October 2015 and 6 January 2016, from the MFSGG&IR which were addressed to him as Acting CEO.
461. He produced a letter dated 6 November 2015 which he had sent to the SA. He attended Board meetings but had no voting rights. Minutes were prepared by Mr Sokappadu, Secretary to the Board, on which he relied to do the follow up. There was a dedicated team at the FSC headed by Mr Seewoosunkur to deal with the BAI issues. His role was to collect and combine all information required by the SA. The letter of the 6 November 2015 made mention of the fact that the transfer of undertakings of BAI was to be done to NPFL and NIC. That was following Cabinet decision. A public Communiqué had also been sent out in the following terms:
- “Ernst and Young will continue its assignment to ensure that due process is followed by the special Administrator with regard to the transfer of undertaking of BAI and its related companies to National Insurance Company Ltd and its related companies.”<sup>60</sup>*
462. That was following a decision of the board of the FSC to engage EY to ensure that the SA complied with the procedures and laws. A letter of engagement was also prepared detailing the terms of reference. EY had even sent a letter of proposal for the manner in which the transfer should be made<sup>61</sup>. But there was one hitch: on 02 September, the Board of the FSC informed the EY that the engagement was called off.
463. The SA was expected to give periodic reports to and brief the Board regularly. After the FSC board had taken a decision regarding transfer, the approval of the Minister became necessary as per the amended law whereby, once Ministerial approval was obtained, that Ministerial clearance was to be communicated to the SA.
464. The Cabinet decision of 10 July 2015 that the undertaking should be transferred to NPFL was brought to the notice of the Board. Following a Board decision, FSC wrote to the Minister to seek his approval.
465. Mr Kuriachen stated that his role was limited to communicating the decision of the Board to the SA which he had done. His take on the matter was that once the transfer of the undertaking to NPFL had been effected, *“that particular Special Administrator’s role has finished.”* But in this case, it was not finished.
466. In fact, the SA kept coming to the Board, briefing the board members and submitting reports. According to Mr Kuriachen, the FSC had already made it clear to them that once the asset was transferred to NPFL if you sell it or you engage a separate role in disposing the assets, the FSC is not interested or is not concerned<sup>62</sup>.

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<sup>60</sup> P.42 of the deposition of Mr Kuriachen on 27 July 2017

<sup>61</sup> Ditto P.44

<sup>62</sup> Ditto P.56



467. His understanding of the situation was that once the transfer had been made to NPFL, it was for the SA to carry out further transactions. He conceded that the SA did not have a role as the SA on the disposal of the Britam shares in June 2016.
468. He was shown the document of sale where there was no date but only “June 2016” with Mr. Ramtoola signing as SA of the BAI. He stated that he had not seen it before. Asked whether he knew when the undertaking was transferred, if at all, he said he did not know.
469. He recalled of two options put by the SA to the Board: one to consult somebody to explore the possibility of selling it and second, to transfer the shares to NPFL. But they went for transfer of the shares to the NPFL. The reasoning was that holding on with the shares parked at NPFL would increase in value.

**FACTS RELEVANT TO THE TOR TO BE RETAINED FROM THE ABOVE DEPOSITION**

470. The facts we may wish to retain from the above deposition relevant to our TOR are as follows:
1. There was a Cabinet decision on 10 July 2015 that the undertaking of BAI Co (Mauritius) Ltd and related companies should be transferred to NPFL and the NIC.
  2. That decision to transfer the sale to NPFL had been brought to the notice of the Board and on the decision of the Board, FSC had written to the MFSGG&IR.
  3. Mr Kuriachen’s role was limited to executing the decisions of the Board and he did so communicate it to the Ministry and the SA as such.
  4. His take on the matter was that with the transfer of the undertaking to NPFL, *“that special Administrator’s role has finished.”* But what happened was different.
  5. The SA kept the Board posted of developments regarding the assets regularly.
  6. To Mr Kuriachen, once Cabinet had decided that the undertaking should be transferred, the role of the SA should have ended. But it would appear that he had continued with his role as SA.
  7. He came across the SPA first time in course of the present proceedings, on which the specific date had not been mentioned but the month and the year had been as June 2016.
  8. EY had been engaged for the purpose of ensuring that due process should be followed with respect to the sale of the shares. It is a moot point why the Board called off the engagement of EY.
471. **One key person who could enlighten us on what happened at the FSC was Mr Ramanaidoo Sokappadu who was also the Secretary of FSC.**

**W9 MR RAMANAIDOO SOKAPPADU, ASSISTANT DIRECTOR OF MOFED, SECRETARY OF THE BOARD OF THE FSC**

472. Mr Ramanaidoo Sokappadu, was the Secretary of the Board of the FSC at the material time. He produced copies of notes of meeting of the FSC Board and relevant extracts concerning sale of Britam shares to the Commission. He confirmed that the SA had continued to submit reports to the Board of the FSC on issues relating to BAI Group including sale of Britam shares even after the 06 November 2015.
473. From the documents produced, the Minutes of Meeting of 212, 213, 215, 218, 220, 223 to 228, 237 and 238 were missing, the Commission had to make a special request dated 09 August 2019 the reply came to us only on 18 September 2019.
474. The FSC declined to give us the documents asked. The reason it gave was that such a request was outside the Terms of Reference of the Commission. The Commission could have exercised its powers under Section 11(3) (6) which binds someone to produce any document in his possession or under his control, failing which he commits a criminal offence.
475. However, the Commission, did not have to use its coercive powers inasmuch as Mr R. Sokappadu for his second deposition on 08 October 2019 was assisted by Counsel D. Basset, J. Gael Basset and Me N. Narayen and produced the relevant extracts of the Notes of Meetings of the 212<sup>th</sup> to 243<sup>rd</sup> Board meetings the FSC, confirming having received the approval of the FSC Board to produce these documents.
476. **Who was the PS who was closer in time to the events? It was the DPS late Mr Nemchand who could possibly fill in the gaps in the recital of what was happening at the MFSGG&IR at the material time.**

**W10 LATE MR NEMCHAND, THE EX-DEPUTY PERMANENT SECRETARY**

477. Late Mr Nemchand was forthright. He stated he was not involved at all with the sale of Britam shares. However, he was aware that there had been numerous meetings<sup>63</sup>. At none of them was he present as he had not been convened to do so. He was aware that the meetings were mostly chaired by the then Minister and were attended by the FSC, the NPFL, Mr Manraj, Mr Ramtoola and Mr Afsar Ebrahim. The meetings and discussions were driven by the Minister and FS. There was no formal convocation issued for same. There were no minutes drawn up. No record of discussions held or decisions taken at those meetings had been kept<sup>64</sup>.
478. Mr Nemchand added that they were held either in the office of the Minister or in the Board Room of the Ministry, mostly in the afternoon and sometimes very late in the evening. He said that in some cases the meetings went up to 8 to 9 p.m.<sup>65</sup>
479. When questioned on the need to keep records as is the practice in the Civil Service and as to whether it was not one of his duties to advise the Minister on the matter, he stated that he was in a very embarrassing position as there was already a very Senior Civil Servant, the FS, who was conferring with the Minister<sup>66</sup>.

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<sup>63</sup> P.4 of the deposition of Mr Nemchand on 02 August 2017

<sup>64</sup> Ditto P.7

<sup>65</sup> Ditto P.9

<sup>66</sup> Ditto P.16

480. Questioned on the need for Good Governance principle regarding the relationship between Ministers and Civil Servants, Mr Nemchand comments were two-fold. On the one hand, some Civil Servants have abdicated their responsibilities and, on the other hand, some Ministers are over-bearing in that they do not like being advised by Civil Servants on account of their “*arrogance or ego*”<sup>67</sup>. Mr Nemchand said that he did not know anything about Mr Peter Munga.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WORTH RETAINING**

481. What the deposition of Mr Nemchand reveals is:

1. meetings were mostly chaired by the ex-Minister Bhadain and attended by the “*Financial Services Commission, the NPFL, Mr Manraj, Mr Ramtoola and Mr Afsar Ebrahim.*”
2. They were driven by the Minister and FS. No formal convocation was issued for same; no minutes were drawn up; no records were kept of the items discussed or the decisions taken.
3. Since he was not invited to the meetings and persons higher than himself attended, he let them be.
4. He confirmed that the relationship between some Ministers and the public officers leaves a lot to be desired.

**482. If late Mr Nemchand was the then DPS, we needed the deposition of the then PS with regard to the activities of the Ministry concerned related to the sale.**

#### **W11 MR JUGDISH DEV PHOKEER, THE EX-PERMANENT SECRETARY AT THE MINISTRY OF FINANCIAL SERVICES, GOOD GOVERNANCE AND INSTITUTIONAL REFORMS**

483. Mr Jugdish Dev Phokeer, the ex-PS at the MFSGG&IR during period February 2016 to 3 January 2017 was the next person to testify.

484. Before Mr Phokeer deposed as a witness, the Chairperson made the following statement:

*“Mr Phokeer is deposing before us as the Ex Permanent Secretary of the Ministry of Financial Services. Some of you may have been wondering: Mr. Phokeer is a member of the Integrity Reporting Board of which I am a member as well under Lord Philip who is the Chairperson. Now some of you may wonder about this term ‘conflict of interest.’ Now conflict of interest in Mauritius is a term that is a lot used and a lot abused. It is as much used as it is abused but for the purposes of law, a conflict of interest arises when there are conflicting interests. They should be interests that are opposing. If there are no interests that are opposing, there is a commonality of interest and not conflict of interest. A classical situation would be a private interest conflicting with a public duty. A private interest, a private family, personal interest, conflicting with a personal duty but there is I can reassure you Mr Phokeer is doing his public duty and I am doing my public duty. So, there is no conflict of interest in this.”*<sup>68</sup>

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<sup>67</sup> P.20 of the deposition of Mr Nemchand on 02 August 2017

<sup>68</sup> Pp 25 & 26, of the deposition of Mr Phokeer on 02 August 2017

485. Mr Phokeer deposed as to his stint at the MFSGG&IR which was from early February 2016 to 3 January 2017. A PS was not a mark of the Ministry. In other words, there was no permanence in the position of a PS, albeit its dire requirement in public service. There were some gaps. Some periods where there was no PS. At one time there was Mr. Nowbuth who moved away because of a difference of opinion with the Minister. As far as he was concerned, the situation between the two persons became a bit tense and the PS had to leave. Created in December 2014, the Ministry must have been without a PS for a period of around 2-3 months.
486. Mr Phokeer was PS only for the latter part of the material period. After the crash of the BAI, the Minister went to Cabinet to set up the mechanism to manage the aftermath. So, the law was amended inter alia to enable the FSC to appoint a SA. Once this was done the Minister was directing the whole operation.
487. His comment on the relationship between Ministers and public officers was that there was no need for a tension to exist. But it does exist. When somebody has been in politics for a while, he has known the *rouage* of government but when<sup>69</sup> we get a fresh politician who becomes a Minister, there is bound to be tension. He has a tendency to function like a private company type manager or director. He also wants to accommodate a few Advisers to advise him, greener than himself, especially Political Advisers. A few green Political Advisers aspire to take over the public service, with a resulting confusion of roles. Who is responsible for it, it is difficult to say but we all have allowed things to deteriorate.
488. As to why what happened in this case happened, he explained. We had a new Ministry and a super dynamic Minister at that. He wanted to get things done with quick despatch, quicker than others.<sup>70</sup> When the big problem arose with the crash of Bramer Bank and the BAI Insurance Company, the Minister had to put in place the mechanism to take over the whole thing and for almost two years this was the major activity of the Minister and the Ministry apart at some point in time the Heritage City project. The Minister had set up a small team with himself and his two Advisers who were handling practically all the major issues<sup>71</sup>. This was his way of functioning. The role of Civil Servant like the PS or the DPS was reduced to preparing Cabinet papers or doing the official part of things. The small team was handling by themselves everything. That is a risk in public affairs. If they do it and do it properly, then that is fine but if they do it and then it goes wrong, then we end up in more trouble to set things right, he commented.
489. Concerning the BAI matter, he added that Government had decided to set up a private company which was the NPFL with a Board to take decisions. There was a SA appointed and paid by the FSC. Those two entities ought to have supervised the whole exercise but unfortunately the whole exercise was directed by a team led by the Minister.<sup>72</sup> For him, things might have gone wrong because there were three captains in the ship: the SA, the Board and the Minister.
490. In normal circumstances, the PS ought to have supervised the whole thing. It's not the role of the Minister to supervise the implementation of any activity or project undertaken

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<sup>69</sup>Ditto Pp.33-35

<sup>70</sup> Ditto P.36

<sup>71</sup> Ditto

<sup>72</sup> Ditto P.37

by a Ministry. This had arisen because of the confusion of roles between what a Minister should do, what others should do and what the Civil Servant should do.<sup>73</sup>

491. He was not privy to what happened but around June 2016 when the file came to him for the Ministry to approve the transaction, he looked into the file to ensure that they had all the documents in the file such as SPA and the Escrow Account with an accompanying draft sent to the Ministry. He received the whole thing in a file processed by his junior officers through the middle management officers like the DPS for his approval of the transaction and signature of the Shareholder's Resolution. He discussed it with the Minister who said he had no objection and he gave the go ahead. At that point in time, on 20 June 2016, the figures were already fixed.<sup>74</sup>

492. Concerning the need or otherwise for the matter to receive Cabinet approval, Mr Phokeer stated that usually the Minister would go to Cabinet for approval. However, in this case, his view was that it was the SA who was selling an asset. He did not see it as an absolute requirement because he already had the mandate to do that. He was a professional. However, normally the Minister would keep the Cabinet informed what was happening on the issue of BAI because BAI was the major issue in 2016 and there was a difference of USD2bn, a big difference. As such, he ought to have gone to Cabinet to say that we targeted that much and we were not in a position to receive that much for these reasons. He ought to have done this because factoring that much amount MUR4.3bn and getting only MUR2.4bn disturbed the whole scenario for reimbursement and this was a major issue that ought to have been taken to the cabinet.

493. With regard to the difference, he did not come across any document explaining the shortfall.

494. Being the director of the whole operation, the Minister was practically taking all the decisions<sup>75</sup>. To Mr Phokeer, there could have been a better governance.

495. The advisers were Faadeel Ramjanally, at some point in time official Adviser and then at a given point in time chairing the NIC. He had an office at the Ministry and his role did not change. Even if he had resigned as Chairperson, his role continued same<sup>76</sup>. The other adviser was Mr Akilesh Deerpalsingh who also at some point in time officially Adviser and at some other point in time Consultant with the FSC was in point of fact attached to the office of the Minister advising him<sup>77</sup>.

496. He also remarked that the Ministry was created out of nothing. There was no table, no desk, nothing. There was an official letter appointing the then Honourable Bhadain as the Minister of Financial Services Good Governance and Institutional Reforms. So, from there the Minister had to build up everything and he had said it so many times that in two years he had been able to create a Ministry. So, to get started he roped in through the Head of Civil Service, the DPS, Mr Nemchand and from there on they roped in a series of Advisers with the approval of the Prime Minister. At one time, he had mustered around 20 Advisers qualified in Financial Services who were appointed but the core

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<sup>73</sup> P.40 of the deposition of Mr Phokeer on 02 August 2017

<sup>74</sup> Ditto P.41

<sup>75</sup> Ditto P.45

<sup>76</sup> Ditto P.49

<sup>77</sup> Ditto

team remained the three persons mentioned. The others were just doing a bit of technical work as technicians in various matters<sup>78</sup>.

## FACTS RELEVANT AND MATERIAL TO THE TOR WORTH RETAINING

497. What Mr Phokeer's deposition revealed is that:

1. On account of the impermanence of a PS, there was very little at the Ministry whereby the events leading to the sale might be tracked and traced.
2. In the absence of an institutional memory kept for the purpose, the knowledge of those who were involved was kept by those who were involved.
3. Those who were involved were basically a team of three: the Minister and his two Advisers with BDO at their back where the Minister under the authority of the amended law "*being the Director of the whole operation, ... was practically taking all the decisions.*" Those two advisers were Messrs Faadeel Ramjanally and Akilesh Deerpalsingh.
4. The amended law had, according to him, created a situation of three captains in a ship: the Minister, the NPFL and the SA.
5. There was a marked confusion of roles between new Ministers, public officers, political advisers which was not very healthy for good governance.
6. This situation might have arisen because the Ministry had to be set up from scratch by a new Minister who was dynamic but relying on two advisers who may have themselves needed advice on how to run public affairs.

**498. It was crucial for the Commission to know what had happened in Nairobi on 18 November 2015. The person who attended the meeting was Mr Vidianand Lutchmeeparsad, the then Permanent Secretary of MOFED.**

## W12 MR VIDIANAND LUTCHMEEPARSAD, PS OF THE THEN MOFED

499. The version of Mr Vidianand Lutchmeeparsad is as follows. He was nominated by Government to attend a high-level Seminar on Livestock Policy and Public Invest Dialogue which was held in Nairobi, Kenya from 17 to 20 November 2015. On the eve of his departure to Kenya, the then Minister of MOFED, Hon S. Lutchmeenaraidoo, along with Mr D. Manraj, FS proposed to Mr Lutchmeeparsad to seize the opportunity of his presence in Kenya to meet the Directors of Britam and discuss about the sale of the Britam shares. He was told to transmit to the Chairman and Directors of Britam Kenya the offer from MMI Holdings for the purchase of the 24% stake in Britam Kenya for a price of MUR4.3bn and to see whether they could match the price or do better than MMI Holdings.

500. Mr Lutchmeeparsad's deposition has been to the following effect: that there was a meeting organized for the purpose in Kenya where he was assisted by Mr Sandeep Khapre, the representative of BDO office (Kenya); that he had been given a written

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<sup>78</sup> P.51 of the deposition of Mr Phokeer on 02 August 2017

mandate by Mr Yacoob Ramtoola, SA for the purpose; that the meeting took place on 18 November 2015 at the Britam Centre in Nairobi at 17.00 hours; that it was chaired by Mr Peter Munga, Chairman of Britam Kenya; that from the Kenyan side, the following persons were also present: (i) Mrs Agnes Odhiambo, Head of Controller of Budget, Government of Kenya; and (ii) Mr Wanyambura Mwambia, Deputy Director of Economic Affairs, charge of Tax Administration and Private Sector issues in the Ministry of Finance Kenya.

501. Mr Lutchmeeparsad narrated that the meeting went well. This was later confirmed by the Minutes prepared by Mr Khapre and circulated soon after. At the meeting, he apprised the Chairman of Britam Kenya of the offer made by MMI Holdings and that Mauritius urgently needed the MUR4.3bn as there was a need to payback a loan that Government of Mauritius had taken from its Central Bank.
502. In reply, the Chairman, Mr Munga said that Britam was an important institution in Kenya and they were not agreeable that a foreign investor like MMI Holdings came to purchase the shares in Britam as they had their own strategy and vision which might not be compatible. Thereafter, the Chairman along with the officials left the meeting for 15 minutes to proceed to another room. On their return, the Chairman imparted to him that, after consultation, *“there is a probability that the Britam Kenya shares would be purchased by themselves, by their shareholders at the same price of MUR4.3bn.”*<sup>79</sup>
503. Mr Lutchmeeparsad added that since his mission had been successful, there was a dinner which followed to celebrate the event. On his return to Mauritius, he took along with him a copy of the notes of meeting which had been given to him by Mr Sandeep Khapre. He so informed the then Minister and the FS and handed out a copy of the notes of meeting to each of them. He emphasized on the fact that the Chairman and Directors of Britam were willing to purchase the shares at MUR4.3bn but they wanted a longer payment period.
504. The then Finance Minister and FS requested him to write back to Mr Munga to inform him that Government was agreeable for the payment facilities but that the Kenyan party should come up with a better offer. Mr Lutchmeeparsad sent a mail to Mr Munga through the latter’s Secretary, Ms Gladys Karuri.
505. Mr Lutchmeeparsad informed the Commission that, thereafter, he was out of the picture because the matter had been taken over by the MFSGG&IR.
506. Mr Lutchmeeparsad was recalled later in an exercise to verify a couple of important facts. First, had he received a copy of the Notes of Meeting when he was in Kenya from Mr Sandeep Khapre? His answer was that the original document was hand delivered at the hotel when he was in Kenya by Mr S. Khapre. He further informed that on the very evening after the meeting he had dinner with Mr Khapre and Mr Krish Lutchmeenaraidoo<sup>80</sup>. The dinner was organised in the form of a celebration for the success that the Kenyan side namely Mr Munga and his Directors had accepted to offer the same price as MMI Holdings for the sale of shares of Britam Kenya<sup>81</sup>. He confirmed that he had given a copy of the Notes of Meeting to the then Minister of Finance and also to the FS, Mr Manraj.

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<sup>79</sup> P.15 of the deposition of Mr Lutchmeeparsad on 03 August 2017

<sup>80</sup> Pp.20 & 21 of the deposition of Mr Lutchmeeparsad on 26 April 2018

<sup>81</sup> Ditto P.21

## **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

507. What emerges from the above deposition is as follows:

1. Mr Lutchmeeparsad had received a copy of the Notes of Meeting of the 18<sup>th</sup> November 2015 meeting in Nairobi hand-delivered at the hotel. This was the one which he brought to Mauritius and gave to the Minister and the FS;
2. That they held a celebratory dinner since Kenya had agreed to match the price of MMI Holdings and he regarded his mission as having been successful.
3. He had two witnesses for same, Mr Sandeep Khapre and Mr Krish Lutmeenaraidoo.

**508. What were the circumstances which led to the *ex post facto* meeting of the NPFL to legitimise an agreement which had been clinched before? We heard the Secretary who had sent the convocation.**

### **W13 MS PRITYEA CHENNEN, ASSISTANT COMPANY SECRETARY AT PRIME PARTNERS LTD**

509. Ms. Prityea Chennen, Assistant Company Secretary at Prime Partners Ltd had been designated to act as Company Secretary to NPFL. She testified that she received an email from the CEO of NPFL, Mr Issary, on Friday 17 June 2016 at 20.45 hours requesting her to convene a Board Meeting of NPFL for Monday 20 June 2016 at 09.30 hours at the premises of BDO, Port Louis, to execute resolutions in respect of the transfer of Britam shares to NPFL.

510. The Meeting held on 20 June 2016 was the first of its type held by NPFL. It discussed Britam shares. It was the first time also that a Board Meeting of the NPFL was held outside the NPFL premises or its parent Ministry, i.e. at BDO office Port Louis. It was the first time that a Board Meeting was convened at such a short notice.

511. She explained that, at that meeting, there were discussions for approximately one hour and most of the discussions were led by Mr Georges Chung, representative of BDO. She added that the three documents which were discussed at the meeting had been mailed to Board Members by Mr Georges Chung of BDO.

512. When questioned as to whether she prepared the minutes for the meeting, Miss Chennen replied in the affirmative. However, she stated that the diagram presented in the minutes as well as the technical terms and technical aspects referred to therein had been provided by the CEO. She also confirmed that there was no audio recording of the meeting and there were only handwritten notes which she had already disposed of.

513. To the Commission, what she stated in her Minutes of the Proceedings is revealing:  
*“Mr Georges Chung, representative of BDO joined the meeting and informed the Board that ..... the Special Administrator was in the process of transferring all the shares .... to National Property Fund (NPFL)” which shares “would be disposed to PLUM LLP.”*



## FACTS RELEVANT AND MATERIAL TO THE TOR TO BE RETAINED

1. As per Ms Chennen’s deposition, the convocation sent on a Friday evening for a Monday morning Board meeting at the premises of BDO looks to what extent the NPFL was being taken for granted and all decisions were being taken at the back of the Board.
2. On 20 June 2016, the SPA had already been signed. The event was a matter of the past by 10 days. Yet the Minutes of the meeting speaks of approval for the future. We read therein: *“The Board was apprised that ... (452,504,000) shares ... would be disposed of to PLUM LLP.”*
3. What is more all the details had been given: that is KES7,171,000,000.00 was the cash price which had been agreed upon.
4. No wonder that the Directors declined to give their approbation and affix their signatures to a paper representing a sale which had already taken place and in which they had not participated at all.
5. All this could only have happened either because both the Chairman of NPFL and its CEO were unduly condescending or that the centre of control was elsewhere.

**514. One perennial name in the transaction was obviously that of the FS, Mr Manraj. His shoulders were stated to be large. What was his role in the process of sale?**

## W14 MR DHARAM DEV MANRAJ, GOSK, THE FINANCIAL SECRETARY

515. We heard Mr D. Manraj, the FS. He testified to the fact that both in his capacity as FS and also Chairman of the FSC he had at some point in time been made aware of *“the sale exercise of Britam Shares in order to get sufficient funds, money to pay the policyholders”*<sup>82</sup>. In his own words, *“The value of the shares was discussed with the MMI and they proposed that the price of MUR 4.3bn.”*<sup>83</sup> As FS, his involvement was only at the beginning of the sale process. He had given a Letter of Comfort to the BOM to give a loan of MUR3.5bn to NPFL for the purpose of repayment to policy-holders of SCBG and investors of BAML. He confirmed that at the early stage there were a couple of offers for the sale of the shares including the offer from MMI Holdings. Unfortunately, the Kenyan authorities were not agreeable to selling the shares to a South African firm.
516. He also referred to the alternative option of keeping the shares in a Sovereign Legacy Fund which was thereafter dropped *“because on the stock market the prices were going down”*<sup>84</sup> He added that the Kenyan Authorities agreed with MOFED to purchase their shares. In fact, the PS of the Ministry who was on mission to Kenya, discussed with the Kenyan Authorities to match the price of MMI Holdings offer of MUR4.3bn. The Kenyan Authorities agreed but needed more time to pay and did not make any firm offer. According to him, there was no documentary evidence in support of the agreement of MUR4.3bn by the Kenyans. Thereafter, the MOFED washed its hands with this exercise

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<sup>82</sup> P.3 of the deposition of Mr. Manraj on 06 September 2017

<sup>83</sup> Ditto P.4

<sup>84</sup> Ditto

which was taken over by NPFL as it was its responsibility to go and sell those shares according to Cabinet Decision.

517. He explained that as regards the FSC which was for some time under his Chairmanship, it was not its role to sell the shares as it was not the owner<sup>85</sup>. He added that the role of the FSC was very clear under Section 110A of the Insurance (Amendment) Act which was to appoint a SA.
518. He stated that he had not attended the Board Meetings of the FSC on 28 April 2016, 26 May 2016, 30 June 2016 and 27 July 2016 as he was taken up with the budget exercise. He was, therefore, not directly involved in whatever discussion and negotiations were being held during the material time. He added that the role of the SA was to report progress to the FSC on the management of companies belonging to BAI Group. The SA did not have to seek approval from the FSC but he had to report every month for all the companies including Britam. He considered that legally speaking FSC was not responsible for the sale of the Britam shares.
519. He further added that during his absence at Board Meetings it was the Vice Chairperson who took the role and function as Acting Chairperson.
520. He informed the Commission that he had been requested by the Prime Minister to meet the Minister of Financial Services, Good Governance and Institutional Reforms to discuss with him on all issues concerning BAI. There were several meetings which in certain cases could last up to two o'clock or three o'clock in the morning. However, he had not been able to confirm whether there had been any notes of meeting kept for each and every meeting relating to the matter as internal meetings were not minuted but meetings with outsiders were. According to him, if there were no minutes for meetings, it was not sound management<sup>86</sup>. Government in his reckoning was the shareholder with NPFL, the owner. *"They are supposed to work at all the aspects before they put their signature on the sale deed"*. He added that *"there were plenty of problems with those policy holders it was a big momentous problem at that time. I do not think many people could have solved this"*.
521. When questioned as to whether Cabinet was apprised of the sale of Britam shares at MUR2.4bn, he stated that he was not aware as he only acted as Secretary to Cabinet from time to time. However, he had it from the grapevine that there was no Cabinet decision concerning the sale of Britam shares. According to him it was not mandatory for a Minister to seek approval of Cabinet before disposing an asset of the company as it was the case for the sale of an asset of the Government<sup>87</sup>. However, if a Minister chose not to seek Cabinet approval, he would be assuming a very big risk because there will be no Collegial Responsibility of Cabinet. The Minister would have to take personal responsibility of whatever had happened in the transaction.
522. As regards the price obtained for the sale, Mr Manraj highlighted the various methods used for determination of price.

- (i) Market price of the share of the company was on stock exchange;

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<sup>85</sup> P.5 of the deposition of Mr. Manraj on 06 September 2017

<sup>86</sup> Ditto P.12

<sup>87</sup> Ditto P.17

- (ii) Accounting calculation based on record, cash flow based on past profits and also calculation based on assets;
- (iii) Another method could be to invite for offers and according to him the best system would be a tender process.

523. He added that in this case of Britam it was based on the market price of its shares on the stock exchange as Britam was a listed company.

524. While replying to the premium clause in the SPA, relating to the payment of a second instalment in the event the shares prices of Britam Kenya increased by 51% or more over a period of 113 days, he said it would be a nonsense to think that the price would increase by 51%. So, it was only good on paper to get satisfaction on paper but that was never going to happen<sup>88</sup>.

## FACTS RELEVANT AND MATERIAL TO THE TOR TO BE RETAINED

The facts to be noted with respect to his deposition are, *inter alia*, as follows:

1. As FS and Chairperson of the FSC at one time, he was made aware of the sale exercise. The then Prime Minister had requested him to meet the Minister of Financial Services, Good Governance and Institutional Reforms to discuss with him on all the issues concerning BAI.
2. He had his input at the beginning only.
3. Share price at the Stock Exchange is one of the ways in which shares are valued.
4. The shares were meant to be transferred to NPFL which should have been the entity to dispose of them.
5. As regards the provision in the SPA that there would be an upward increase in price if the share price would increase by 51%, his comment was that it was nonsensical to assume that such a thing would happen.
6. There is no document to show that the Kenyans had made a “firm offer” to buy the shares at MUR4.3bn.

**525. The facts gleaned hitherto showed that Mr Akileshwarnath Deerpalsingh had an important role to play in his capacity as the Political Adviser of ex-Minister Bhadain.**

## W15 MR AKILESHWARNATH DEERPALSINGH, FCCA

526. Mr. Akileshwarnath Deerpalsingh, FCCA, gave an account of his involvement in his different capacities in the Britam case. His deposition was characterised by a recital from documents. He submitted to the Commission a chronology of events supported by a number of annexes, 16 in number along which he gave his narrative, with a couple of comments as he went along. He said that he had been involved in the Britam case both in his capacity as Adviser to the MFSGG&IR, Vice-Chairperson of the FSC and Consultant at the FSC.

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<sup>88</sup> P.23 of the deposition of Mr. Manraj on 06 September 2017

527. In short, he testified to the following. In May 2015, the then SA – Messrs M. Oosman and R. Basgeet advised that there was a need to warehouse the Britam shares as they were held in entities which were outside Mauritius more particularly in the Bahamas.
528. Regarding the repayment of policy-holders of SCBG, the first repayment was effected in May 2015 and the second one was due for 30 June 2015: hence the urgency for funds amounting to MUR3.5bn to be made available and the decision to sell the shares of Britam.
529. During the week 31 May to 03 June 2015, he received a phone call from Mr Manraj, Chairman of FSC who was on official visit with the then Minister of Finance, Hon S. Lutchmeenaraidoo in Reunion Island informing him that there was no need to sell those shares as it has been possible to secure financing to the sum of MUR3.5bn through a loan from the BOM. In June 2015, the FS issued a Letter of Comfort to the BOM with respect to the loan.
530. Regarding the proposal of the then Minister of Finance in Parliament on the creation of a Sovereign Legacy Fund to take over the shares of Britam at MUR4.2bn, Government had decided not to go ahead with it.
531. Barclays Bank in September 2015 had offered to act as transaction advisor to manage the sale process of Britam shares but this did not materialize.
532. In October 2015, there was a non-binding offer from MMI Holdings for MUR4.2bn with certain conditions. However, the Kenyan authorities were not agreeable for buyers who were outside Kenya to purchase the Britam shares. The meeting Mr Lutchmeeparsad, PS of the then MOFED had with Mr Peter Munga and other officials was in the presence of Mr Khapre in Kenya on 18 November 2015.
533. Mr Deerpalsingh commented that he considered the involvement of the then MOFED in the process of the sale of Britam shares as an encroachment upon the powers of the SA. He added that, in accordance with the provisions of the FSC Act, the Insolvency Act and the Insurance Act, the SA was already vested with the power to transfer, manage, administer and even to dispose of the undertaking.
534. The attention of Mr Deerpalsingh was drawn by the Commission to the fact that the letter of engagement of Mr Ramtoola spelt out that the SA would transfer the shares to NPFL in so far as Britam was concerned.
535. Mr Deerpalsingh informed that in his capacity as consultant at the FSC he came to know that the sale of Britam shares had been concluded for MUR2.4bn and he did not bother to enquire into the reason for the shortfall from MUR4.3bn to MUR2.4bn. However, as consultant, he was involved in preparing replies to Parliamentary questions. It was then that he came to know that at the time MMI Holdings had made its offer, the listed share price of Britam was 14.8Kshs and at the time of sale the share price was 11.75Kshs. In his view, if Government had received MUR2.4bn which represented a share price of 15.85Kshs, it was well above the market price.
536. He added that as Vice Chairperson of the FSC he was kept apprised by the SA during Board Meetings of the FSC of everything that was going on as regards the BAI affair including Britam.

537. The Commission drew the attention of Mr Deerpalsingh that during his “*exposé*” he made reference to numerous persons who in one way or the other were involved with the Britam issue but at no point in time any reference had been made to the then Minister of Financial Services, Good Governance and Institutional Reforms to which his reply was “*so do you want me involve him?*”<sup>89</sup>”.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

538. The facts relevant and material to the TOR which may be noted about his first deposition are as follows:

1. Mr. Deerpalsingh during the Ministership of Mr Bhadain wore several hats. At one-time adviser to the then Minister appointed in March 2015, he resigned in November 2015. He was appointed Vice Chairperson of the FSC from May 2015 to October 2015. During the period January 2016 to December 2016, he was appointed Consultant at the FSC and resigned in the first week of January 2017.
2. The Commission subjected them to careful scrutiny. Its attention was drawn by the Secretariat engaged in examining them to one particular aspect in one of the critical documents produced. It was the copy of the Notes of Meeting of 18 November 2015 which had taken place in Nairobi which had been attended by Mr Lutchmeeparsad.

539. For that reason, the Commission had to issue a second convocation to him.

540. At his second deposition, the Commission wanted to dwell on his knowledge of things rather than his story as per documents produced. Mr Deerpalsingh stated that he had attended several meetings with regard to the BAI matter where representatives of FSC, the then Minister of Financial Services, Good Governance and Institutional Reforms, the then Minister of Finance and Economic Development were present. These were updates on the matter of the Britam sale. He emphasized on the fact that there were only updates and there were no negotiations at all.

541. On being questioned on the Notes of Meeting submitted by him to the Commission on the 06 September 2017 and a copy of the same document being produced by Mr Ebrahim on 13 December 2017, he stated that he had received it from BDO more particularly Mr Ebrahim by email dated 04 August 2017 upon his request. He explained that he had requested to have that document as he was not aware as to whether there had been a meeting in Kenya between Mr Lutchmeeparsad and Director of Britam on 18 November 2015. He also filed a copy of the email dated 04 August 2017.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

542. What emerges of value from the second deposition of Mr Deerpalsingh is as follows:

1. Mr Deerpalsingh was relying on documents, one of which was on the face of it spurious.
2. His documents and depositions gave only half a picture of what happened. Half a picture is half the truth and half the truth is as good a lie. It is not unknown

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<sup>89</sup> P.63 of the deposition of Mr. A. Deerpalsingh on 06 September 2017

that some witnesses, after swearing or solemnly affirming to speak the truth deny the seekers the whole truth.

3. The truths he denied the Commission was: what was his personal involvement in the whole matter from the start? After all, he had been wearing so many hats. If he could get so many materials and so much of information from other sources, why could he not favour us with materials and information from the various positions he was holding and he was heading? His credibility was at stake from his very first deposition.
4. With reference to the Notes of Meeting of 18 November 2015, which on the face of it had been tampered with, the Commission wanted to know how he came by the document. His answer was that he was not aware that there had been a meeting in Kenya in November 2015. So, after the Commission had started its hearing, he asked for notes. It is not quite clear in what capacity he asked for them. The email came to him on 4 August 2017. He submitted it to the Commission on 6 September 2017 and a similar copy was produced by Mr Ebrahim on 13 December 2017.
5. When the matter of Notes of Meeting came up, his reaction was quite eloquent. He anticipated the problem with the document just before it was going to be pointed out to him. His pre-question answer was if there was a forgery, he would go to the CID to give a declaration. That came out of his mouth even before the Commission had put the anomaly to him. It is only after his anticipated reaction that the Commission pointed out to him that it was in presence of two different versions of the Notes of meeting on one material aspect crucial to the subject matter of the investigation.

#### **OF NOTE**

At this stage, it is noted that:

1. As per the documents he produced, what emerges is that there never was an intention for Government to sell those shares. The intention was to warehouse them at NPFL and allow NPFL to engage PWC to sell them through an open and formal process of invitation of expression of interest from local buyers, if with an aggressive timeline: invitation was to be sent out on 25 May 2015 and the sale proceeds to be banked by 27 July 2015.
2. But the weakness of his deposition was that it was presenting a picture based only on documents, documents he had and/or had no access to. They were to us incomplete and selective.
3. That necessarily did not give a complete picture of his participation or that of those who were involved.
4. The 16 documents, when examined, tended to support the case he was attempting to make, namely that it was all the work of MOFED and they, at the MFSGG&IR had nothing to do with it.

**543. If Mr Deerpalsingh was one of the Political Advisers, Mr Faadeel Ramjanally was another. The Commission summoned him to hear his version of facts.**

**W16 MR FAADEEL RAMJANALLY, CHARTERED CERTIFIED ACCOUNTANT**

544. Mr Faadeel Ramjanally is by profession a Chartered Certified Accountant. He was one of the advisers at the MFSGG&IR during the period 01 April to 27 May 2015. As from 1 July 2015 to 30 June 2016 he was appointed Ag. Director of Financial Services Promotion Agency and as from 17 April 2015 to 23 January 2017 also Director of NICL.
545. He added that the NPFL was set up as a subsidiary of the NIC. He was entrusted with the responsibility of overseeing the repayment of the policy-holders of the SCBG. His involvement in the sale of Britam shares was peripheral, he said. He was made aware at the NIC of a bid from Old Mutual Limited to acquire the NIC together with the shares of Britam.
546. He was aware of the offer from MMI Holdings. He stated that during negotiation with the Old Mutual Limited, they raised the issue of having a due diligence on the NIC as well as the Britam shares. When informed of the offer from MMI Holdings, the Old Mutual Limited backed out.
547. He explained that he knew of the status on the different disposals of the BAI entities through his involvement with the repayment to policy-holders of SCBG by NPFL. His version was that he was only kept informed by the NPFL and also the Minister of Financial Services & Good Governance and Institutional Reforms in weekly meetings. He confirmed that many times meetings were taking place between advisers and the Minister which went up to two o'clock in the morning on certain occasions but no records of discussions held at the meetings were kept.
548. He spoke of his awareness that the FS had received a letter from the Kenyan authorities calling for a Kenyan solution to a Kenyan problem. The shareholders of Britam Kenya would not open their books to any foreign institution. Hence, the offer from MMI Holdings could not be concluded as there was also a need for ample time to be given to MMI Holdings for a due diligence exercise to be done.
549. His version is that the SA was requested to come up with a proposed solution of how to dispose of the Britam shares as it was also not intended to proceed with the setting up of the Sovereign Legacy Fund in view of the falling share prices of the Britam shares on the NSE.
550. He further explained that he was also aware that another group from South Africa – Sanlam Group - had expressed its intention to acquire the shares. But it did not submit any bid or propose any figures for the purchase.
551. He informed that he was appointed in May 2016 as Director of the Bahamas Holding Company of Britam Kenya and he signed the transfer of shares agreement in June 2016. That was to enable the transfer of shares from the Bahamas to an entity in Mauritius in order to avoid any sort of claim from potential creditors in the jurisdiction which are not under the purview of the SA in Mauritius. The transfer should have been effected to NPFL but they did not have the technical expertise to deal with such matters. To him, the shares were still under the SA until the final transfer in June 2016.
552. He also informed the Commission that he along with the two other advisers: namely, Messrs Deerpalsingh and Elisa worked on the Insurance Amendment Act and other legislations as well.

553. As regards meetings, he was kept informed by the NPFL and the MFSGG&IR in the weekly meetings that were held as to the status of how much money was flowing into the bank accounts from different disposals in order to meet the requirements of repayment to the SCBG policy-holders. The meetings were taking place between the advisers and the Minister fairly regularly and until quite late in the night, sometimes until 2 o'clock. The FS as well as the PS attended the meetings. He recalled discussions concerning MMI Holdings, the Sanlam Group, Old Mutual etc.
554. At one of the meetings the fall from MUR4.3bn to MUR2.4bn of the shares was mentioned. In his view, the shares were transferred to the SA and the NPFL did not have the technical experts to warehouse them and realize them later. NPFL was, according to him, *"a one-man company."* For that reason, the SA was better placed to do it. He spoke of the context in which it happened. It included the time pressure to realize the assets to pay the policy-holders. With hindsight, things could have been done differently but at that time, it could not have been done otherwise.
555. He stated that the decision to sell to the Kenyans came from the MOFED. Mr Ramjanally was, like Mr Deerpalsingh, making the case for the fact that it was the MOFED which had decided the sale. When pressed with more questions, he modified his first answer as follows: *"except that I would add that as part of those persons who knew about the transaction would also include the Ministry of Financial Services and the FSC as well."*
556. He was at the Ministry as Adviser for two months and he was involved in the preparation of the amendment to the Insurance Act and other legislations. He added that he *"participated in the meetings where the drafting was done and the idea was to bring back those assets which had fallen out of the purview of the Conservator at the time."*

## FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED

557. What the above deposition reveals is as follows:

1. The meetings took place at unusual hours, till 2 o'clock in the morning.
2. As Political Advisers, he and Mr Deerpalsingh were involved with the amendment to the Insurance Act, thus contradicting what Mr Deerpalsingh had stated.
3. The meetings that were held in relation to the matter comprised the Advisers and the Minister.
4. He at first aligned himself to the version that it was a sale to the Kenyans by MOFED but when pressed, he rounded up his answer by saying that the MFSGG&IR and the FSC were also involved.

## OF NOTE

It is important to recall at this stage a couple of lingering issues: namely,

1. What was the role played by the political advisers? The papers we examined showed that their names recurrently appear in emails and related documents as people concerned with the subject matter. Mr Deerpalsingh was one of the political advisers of ex-Minister Bhadain. Another was



Mr Faadeel Ramjanally. They were both directly involved with the amendments to the Insurance Act.

2. Ex-Minister Bhadain was playing a key role as the Minister of Financial Services, Good Governance and Institutional Reforms. The Commission was particularly interested in finding out what he would have to say concerning the document which Mr Deerpalsingh had produced which looked spurious to us.

**558. As per the Section 62 of the Constitution, the Minister then assigned the responsibility for financial services and accordingly for the sale of the Britam shares was Honourable Mr Sudarshan Bhadain as he then was. He was also assigned the responsibility for good governance and institutional reforms.**

#### **W17 MR S. BHADAIN, THE THEN MINISTER OF FINANCIAL SERVICES & GOOD GOVERNANCE AND INSTITUTIONAL REFORMS**

559. Ex-Minister Bhadain started his narrative by going to the source of the problem for the government at the time. It was the issue of repayment of policy-holders of a large number at the very bottom of the ladder in terms of their investment, more particularly, those who had invested less than MUR500,000. The repayment was to be in tranches. The date of the first tranche was 15 May 2015 and the second tranche was 30 June 2015.

560. His narrative was that since it had to be done by legislation, it was the Ministry of Finance which was working on the proposed legislation together with the Conservators and Benoit Chambers, the Legal Adviser of the Conservators on an amendment to the Insurance Act. After they had finalized it, it was discussed with him. It was then that he took it to Cabinet. He added:

*“When I took it to Cabinet, Cabinet agreed that this legislation had to be passed as a matter of priority so that the policy holders could be protected and paid.”<sup>90</sup>*

561. He explained that the whole concept of SA came in that legislation where the SA had powers which were basically different from the Insolvency Act because government decided that policy-holders should be the priority of priorities as compared to all the creditors or else there would have been a social crisis. So, the first repayment of 15 May 2015 was made – MUR2.5bn. That was only 5 – 6 weeks after licence of Bramer Bank was revoked.

562. He added that the MUR3.5bn was raised by the sale of shares by the SA, Mr Mushtaq Oosman and Mr Rajiv Basgeet who had actually sold shares which were listed on the Stock Exchange of Mauritius. In his reckoning, they also sold shares in Kenya. But he was aloof of it all. In his own words,

*“I personally as Minister of Financial Services I wasn’t even aware as to which shares they were selling and whether they were shares in Mauritius or were those shares in Kenya but what they had said that they were going to raise the 2.5 Billion to alleviate the victims who had invested less than 500,000 so that there was no prevailing crisis<sup>91</sup>.”*

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<sup>90</sup> P.5 of the deposition of Mr Bhadain on 08 September 2017

<sup>91</sup> Ditto PP. 6 and 7

563. He further explained that Government had also given another commitment to the effect that each policy-holder would be repaid MUR500,000 per policy-holder and that came to an amount of around MUR3.5 bn. That had to be paid by 30 of June 2015.

564. In his view, while the Bramer Bank was the lungs of the BAI Group, BAI (Mauritius) Ltd, as an insurance segment, was the heart which would still fail if the lungs were punctured. He defended the Minister's position to revoked the licence of the Bramer Bank. There was a liquidity problem which was under observation for a little while before decision was taken.

565. The then Minister of Finance, Mr S. Lutchmeenaraidoo decided that he would create a Sovereign Legacy Fund. In the week of June, he went on, he received a phone call from Mr Manraj. Ex-Minister Lutchmeenaraidoo and himself were in Reunion Island. Ex-Minister Lutchmeenaraidoo told ex-Minister Bhadain over the phone that "the Ministry of Finance" had decided that they would create a Sovereign Legacy Fund to warehouse those shares of Britam because the Government had to find MUR3.5bn by 30 June after 15 May. The conversation proceeded as follows:

*« Roshi t'en fait pas, ça ce sera pour nos enfants, on va créer un legacy sovereign fund et tu sais la valeur de ces actions vont augmenter parceque j'ai des informations qu'il y a un bâtiment au Kenya, un des plus grand bâtiment, le propriétaire c'est Britam et ca va être loué. La valeur de ses actions ça va monter, tu vas voir ce qui va se passer. Bein la t'en fais pas, on va trouver des sous. La banque centrale va nous avancer un prêt de 3.5 Milliard. »<sup>92</sup>*

To which, ex-Minister Bhadain asked how are we going to do that and Mr Manraj said:

*"no, no, Vishnu has already decided that he is going to get the governor of the Central Bank and going back to interfere once again to grant a loan to NPFL for 3.5 Billion which will cater for the repayment for 30<sup>th</sup> June at a low interest rate. I said why are we doing that and basically explaining to me he said, look I'll pass you on to Mr. Lutcheemeenaraidoo on the phone. I distinctly remember Mr. Chairman (what) he told me. »<sup>93</sup>*

566. He referred to a Letter of Comfort which had been given by the Central Bank to advance a loan for the first repayment to the SCBG policy-holders.

567. On the matter of the offer for the Kenyans to buy Britam, he cited the following extract from the PQ B379 of 2015 of Hon. Berenger who had asked him:

QUESTION:

*"Can I know from Honourable Minister whether he will check and tell us whether there was not a firm offer to buy Britam which is very relevant to the work of the Commission BAI Investment in Kenya for a sum above 4 Billion?"*

ANSWER:

*"There was nothing firm to it. We in fact requested Barclays to see if they could help us secure one buyer for the whole lot. They said there might have one but*

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<sup>92</sup> PP.15 & 16 of the deposition of Mr Bhadain on 08 September 2017

<sup>93</sup> Ditto

*no one secure. In fact, I can tell the house one thing, if there is a buyer for Britam at 4.2 Billion we will sell it immediately Mr. Deputy Speaker Sir.”*<sup>94</sup>

568. Ex-Minister Bhadain cited Reuters on the choice between selling the shares and creation of a Sovereign Legacy Fund contemplated by ex-Minister Lutchmeenaraidoo who said he wanted to secure MUR4.2bn and this would mean obtaining 21 shillings per share. If the returns of sale did not come to the MUR4.2bn projected, then the Sovereign Legacy Fund would buy it.

569. He referred to a letter dated 14 October 2015 which had been addressed to him and copied to Mr S. Lutchmeenaraidoo, Minister of Finance, Mr Yacoob Ramtoola, BDO Mauritius which referred to a non-binding offer by MMI Holdings for the 24% equity stake in Britam Holdings Ltd. That he said referred to an:

*“expression of interest that have previously been submitted by MMI to (i) the Honourable Minister of Finance of the Republic of Mauritius, (ii) the Governor of the Central Bank of Mauritius (I don’t know why), (iii) PWC Mauritius as the previous Conservator of Assets formerly held by BAI Group, (iv) BDO Mauritius in their capacity as the new Conservator.”*<sup>95</sup> *This non binding offer is based on a number of specified assumptions in the letter.”*

570. Respecting the reasonability of the transaction, he had the following to say:

*“I’m not saying they were wrong in doing all that but what I’m saying is that I wasn’t kept informed apart from that letter which came on the 14<sup>th</sup> of October.”*<sup>96</sup>

He repeated the fact that he was never aware:

*“that Mr Lutchmeeparsad had been actually requested to go and meet the Britam shareholders or representatives Kenya for whatever reason because he was there or otherwise.”*<sup>97</sup>

571. As regards the minutes of meeting of 18 November 2015 on which he relied to make a case that there never was any decision taken respecting price, he began by raising issues of mandate against MOFED. He questioned the role of the Minister of MOFED to do what by law it was the SA to do. In his view,

*“How can a Minister of Finance send somebody to deal with both people in Kenya where according to Section 110 of the Insurance Amended Act which has been prepared by the Ministry of Finance itself and enacted. I took it to Parliament but it was prepared there.”*<sup>98</sup>

572. According to him, it was not permissible for ex-Minister Lutchmeenaraidoo to usurp the functions of the SA and deal with the realization of the assets on his own:

*“this whole system and send somebody there to talk to these people without Cabinet’s approval, without his colleague, Minister of Financial Services knowing about it and at the end of the day I was informed by Mr. Manraj.”*<sup>99</sup>

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<sup>94</sup> P.16 of the deposition of Mr Bhadain on 08 September 2017

<sup>95</sup> Ditto P.18

<sup>96</sup> Ditto P.20

<sup>97</sup> Ditto P.21

<sup>98</sup> P. 21

<sup>99</sup> Ditto

573. He raised the issue of the decision to sell to the Kenyans with Mr Manraj and he came to learn that there was no option but to sell it to the Britam shareholders.

574. It is after making that point that he came to the copy of the minutes of the meeting of 18 November 2015. He took us carefully, almost like a grammarian, through the document:

*“I look at the minutes and I see that the meeting was in Kenya. Mr Vidyanand Lutcheemeeparsad, Permanent Secretary, I see the attendees of the Chairman of Britam, the Directors of Britam, Agnes Odiambo, I also see the representative of the Ministry of Finance of Kenya - Mr Wanyambura Mwambia, Deputy Director of Economic Affairs in charge of Tax, Administration and Private Sector issues in the Ministry of Finance, Government of Kenya present there and then Mr Lutcheemeeparsad, Permanent Secretary of the Ministry of Finance in Mauritius. When we read that carefully, that gives the lie to everything with due respect Mr Chairman and when we look at that it says: The Chairman of Britam was apprised of the offer made by MMI in writing to Government of Mauritius to buy 24% shares of Britam that were previously held by BAI and are currently managed by the Special Administrator appointed in Mauritius.”<sup>100</sup>*

575. He quoted:

*«Mr Lutcheemeeparsad also reiterated that Mauritian Rupees 4.3 Billion is required on an urgent basis to pay back the loan taken by the Government of Mauritius from the Bank of Mauritius, the Central Bank<sup>101</sup>. That’s what Mr Lutcheemeeparsad is telling them, we need MUR4.3bn to be able to go and repay the Central Bank..... Now the Chairman of Britam acknowledge the wish of Government of Mauritius, wish to protect policy holders and citizen stake holders. He and his colleagues also clarify that Government of Kenya was committed also to protect Britam as it was an important financial services player in Kenya and this is something we’ve got public officials there. So they both explained their position and then that’s very important. The Chairman said that prima-facie (on the face of it) he had no interest in talking to MMI as they may disrupt his strategy. He went on to say that some of the current shareholders of Britam Kenya were willing to buy the shares at a mutually acceptable valuation. Let’s stop there. There had never been any agreed (sic). We go back to offer and acceptance basic law Mr Chairman, the offer was made by Mr Lutcheemeeparsad MUR4.3bn. It was not accepted by Britam’s Chairman at that meeting because he said that they were willing to buy the shares at a mutually acceptable valuation but they wanted a longer period ....”<sup>102</sup>*

576. Ex-Minister Bhadain, thereafter, laid stress on the fact that there was no firm offer and that the Kenyan meeting ended up with parties would clinch the sale at “a mutually acceptable valuation.”

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<sup>100</sup> P.22 & 23 of the deposition of Mr Bhadain on 08 September 2017

<sup>101</sup> Ditto P.23

<sup>102</sup> Ditto P.23

577. He insisted that he was never aware that there had been an agreement to sell at MUR4.3bn:

*“I was never aware of 4.3 Billion.”<sup>103</sup>*

He added that he had never seen any such document:

*“I’ve never seen any documents, I’ve never been told that the Kenyan had accepted that.”<sup>104</sup>*

578. He sought to support his view by quoting extracts from other documents he had produced. He added that albeit his reply in Parliament, he was still in the dark of the details respecting the agreed sale price of MUR4.3bn:

*“I’m still in the dark, most of this process I’m in the dark because Mr Lutcheemeenaraidoo .... had the ears of Sir Anerood at that time when he was the Minister of Finance.”<sup>105</sup>*

579. And he, for one, argued that he had been kept in dark then and continued to remain in the dark thereafter.

580. Accordingly to him, someone has been lying to the Commission and this very serious. He further referred to the wording in the letter which the Cabinet Secretary of Kenya wrote back:

*“The Board of Directors of Britam will need to make arrangements, to have negotiations with the Government of Mauritius in order to agree on the suitable timeframe within which the sale will be effected as well as the sale price”*

As to whether he had informed Cabinet about it, he stated that it cannot be because *“when the Super Cash Back Gold people are paid 4 Billion Rupees on 30th of June 2016, of which Britam is 2.5 Billion.”* The most important part of his deposition was when he situated the transaction of MUR2.5bn in time and space and proceeded to mention the one who did the deal.

581. He informed the Commission that the SA attended a meeting in Kenya to discuss with the Kenyans, apparently delegated by Mr. Manraj to do so. On his return, the SA informed that the offer of Britam was to the tune of Rs2.5 billion. He explained that at that time the price per share on the stock market was Rs11 compared to Rs28 at the time of the collapse of the BAI. To him, the price obtained was a fair one. He explained why: had the sale price been agreed on the basis of the price per share on the stock exchange at that time (i.e, Rs11), the 23.34% of Britam stock would have amounted to Rs1.7 billion. By obtaining Rs2.5 billion, the Special Administrator had been able to secure a price of Rs16 per share. He added that in January 2017 the IFC which is the Investment Arm of the World Bank purchased 10.3 % of shares in Britam at Rs15.85 per share.

582. He explained to the Commission as to why the SA continued to be involved in the sale of Britam Shares. He added that NPFL was not involved in the sale of the shares as the shares were still under the SA until signature of the SPA on 10 June 2016. NPFL became the owner of the shares on 10 June 2016 and on the same day the sale was effected. He also explained that the then PS of this Ministry, Mr Phokeer had to sign the shareholders’ resolution as Government was the sole shareholder. When he came to

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<sup>103</sup> P.24 of the deposition of Mr Bhadain on 08 September 2017

<sup>104</sup> Ditto.

<sup>105</sup> Ditto P.29

know that Mr. Phokeer was giving his signature, he questioned him as to why he was doing so as the Permanent Secretary of his Ministry since the Ministry of Financial Services, Good Governance and Institutional Reforms had not been involved in the negotiations.

583. Later in his deposition, he proceeded nonetheless to defend the price finally paid for the sale because the price per share was 11 shillings at that time, which was a fall from 28 shillings some months before. The sale was concluded at 16 shillings per share. So, in his view, Mr Manraj “*was right to say that it can only be the best offer.*” In the light of this he was asking “*where is the problem?*”
584. He stated that he called a press conference to explain all of that because he had left government by that time. He also referred to the Commission the fact that IFC, the investment arm of the World Bank later proceeded to acquire 10.3% stake in Britam in January 2017 at Kenyan shillings 15.85 per share. He compared it to what Mauritius had sold 23% at 16 shillings per share in March 2016.
585. Respecting his activity on 12 March 2016 when the deal was struck, he stated that he was informed by the Administrators that basically the Kenyan people were willing to pay MUR2.5bn upon which he had gone to see late Sir Anerood Jugnauth to complain that Vishnu had done that. The aftermath of that and other matters was that late Sir Anerood was cross and Mr S. Lutchmeenaraidoo was removed as Minister of Finance to take on the portfolio of the Ministry of Foreign Affairs.
586. He referred to a meeting in May 2016 chaired by the then newly appeared Minister of Finance, Hon Pravind Jugnauth, following the decision of the Supreme Court to quash the conviction of the Intermediate Court. He also referred to the repayment of SCBG which had to be made on 30 June the MUR4bn. There were meetings held in the MOFED chaired by the newly appointed Minister of Finance where were present he himself, Mr Manraj, Mr Patrick Ip, Mr Akhilesh Deerpalsingh, Mr Faadeel Ramjanally and Mr Sonoo from the SBM. It had been called by Mr Dev Manraj.
587. He added that the new Minister of Finance reportedly explained that Government had a deadline of 30 June to meet. He got State Bank to come in and SICOM to come in and “*we have to find a solution, Roshi has explained all this..... 2.5 Billion has been obtained through Britam shares, ... the Administrators had recovered about 700 odd Million which made it 3.2 ... we still had to find about.*”<sup>106</sup>
588. “*700 Millions or 800 Millions ...!*” He continued: together with Honourable Pravind Kumar Jugnauth, they found a solution and he, ex-Minister Bhadain even thanked him in Cabinet for that.
589. Regarding NPFL, his position was that the NPFL was set up by the Minister of Finance. The Chairman, Mr Saddul was appointed by the Minister of Finance, Mr Lutcheemeenaraidoo. There was no NPFL in his Ministerial portfolio as per his letter which the President of the Republic had sent to him as to which institution fell under him. Nor was it ever later inserted.
590. He also raised an issue in law concerning conflict of interest to which we have alluded and determined elsewhere.

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<sup>106</sup> P36. of the deposition of Mr Bhadain on 08 September 2017.

## FACTS RELEVANT TO THE TOR EMERGING FROM THE ABOVE

1. The deposition of the ex-Minister was not a factual recital of events as they happened involving both MOFED and MFSGG&IR. It was a narrative pieced together to present a case of “*Pas moi ça li ça!*”
2. The pieces hardly fit in the puzzle: that he was only reporting to the public such as the NA what was being told to him; that the source of the amended legislation was of MOFED; that he had nothing to do with NPFL; that when the SA sold the shares at MUR2.4bn; he went to the then PM to complain about it as a result of which his colleague was moved to the Ministry of Foreign Affairs.
3. When confronted with the Minutes of 18 November 2015 as regards the Nairobi meeting, he was evasive and diverted attention to the supposed encroachment of powers of a Ministry into the affairs of Special Administrators.
4. His over-emphasis on the role of MOFED even against the flow of his ideas has been patent.
5. His reference to Special Administrators is another anomaly in his story. At the relevant time there was only Mr Ramtoola as the SA.
6. Basically, his account and the papers he submitted was self-serving.

## OF NOTE

It is to be noted:

1. The narrative of ex-Minister Bhadain was pieced together from documents carefully selected to support the fact that he had nothing to do with the sale and it was all Mr Lutchmeenaraidoo and MOFED from the amendment to the legislation to the finalisation of the deal. He set a time and a place for that. It was then in Nairobi in mid-February by the SA.
2. The Minutes of the Nairobi meeting he relied on showed that the agreement on 18 November 2015 was for sale at a mutually acceptable valuation.
3. When he learnt that ex-Minister Lutchmeenaraidoo had sold it for MUR2.5bn. He was so concerned that he complained about it to late Sir Anerood Jugnauth.
4. Yet, he went on to argue that MUR2.4bn was not a bad deal if one considers the price paid by IFC at 15.95 when Mauritius sold it at 16Kshs.
5. All his statements in Parliament was on information received.
6. He had been kept in the dark of what was happening with respect to the sale all through.
7. By sending Mr Lutchmeeparsad, MOFED has usurped upon the functions of SA who alone was responsible by law to conclude the sale.
8. In any case, in the Nairobi Meeting there was an agreement for the sale to be at a mutually agreeable valuation.
9. As ex-Minister of Financial Services, he was never aware of the fact that sale was for MUR4.3bn.
10. The MMI Holdings offer was a non-binding offer made to him and the Kenyans would not allow them access to the books.

591. The number of anomalies in the deposition of ex-Minister Bhadain became the reason for our calling him a second time.

592. He had stated that he was kept in the dark yet he knew so much of the factual details. He had made public statements. He stated the price was right still he said he had gone to see late Sir Anerood Jugnauth to complain about ex-Minister Lutchmeenaraidoo having undersold it, when documentary evidence contradicted him. He had piloted the Bill yet he stated it was all MOFED's work except for his taking it to Cabinet. He stated Cabinet had agreed for its introduction at the NA as a matter of urgency.
593. To the question why should he defend MUR2.4bn when he was not involved, he evaded the question and embarked on a harangue against ex-Minister Lutchmeenaraidoo stating that the whole process was vitiated by him. He had encroached upon what by law is the work of the SA.
594. He relied on the same documents he had previously relied on from which he emphasized his points. He relied on the SPA. He stated it was a government to government agreement. He added that the Commission has a political score to settle with him.
595. As to why he was all the time shifting responsibility upon ex-Minister Lutchmeenaraidoo, his reply was: This second time he contradicted what he had said the first time. Previously, he had defended him for having taken the decision to revoke the licence of Bramer Bank. This time he stated he had done it wrong.
596. He added Mr Lutchmeenaraidoo had lied to the Commission. There never was an offer for MUR4.3bn on 18 November 2015.
597. His reply was quite confusing to our questions on his activities in mid-March:  
*“on the 10<sup>th</sup> March when the Special Administrator had apprised me about the sale of Britam shares when we were discussing..... I've never had any specific meeting about Britam in my office, be it with the Special Administrator or with Mr Manraj or anybody else.”*
598. The questions by the Commission became more pertinent, he became hyper sensitive and was advised to take care for his hypertension. That did not stop him from releasing his venom against the Commission, against Mr Lutchmeenaraidoo and against Mr Pravind Jugnauth whom he had congratulated in his first deposition.
599. He had a number of stories to tell, none of which was relevant to us but still enabled the Commission to see how he could put 2 and 2 together and make it 22.
600. He embarked on a story of how he was called by late Sir Anerood Jugnauth to be offered the Ministry of Finance but for the papers to follow – which never followed.
601. Did he have anything new? He showed the share price index of 11 March 2016 sold to Plum LLP at 15.85Kshs per share, 30 December 2016 to World Bank at 15.85Kshs per share and 27 September 2017 to Afric Invest at 15.85Kshs per share.
602. In his reckoning, Mauritius obtained 35% premium above the quoted price per share. Others got only 5% premium alone. Yet, they had a Transaction Adviser and could not do better. Mauritian without one got 35%.
603. He evaded all questions which pertained to his involvement, challenged Mr Hajee Abdoula and became so hyperactive that the proceedings had to be suspended.



When it resumed, he confirmed that there never was any meeting in his office regarding the Britam sales.

604. He had only status updates regarding the BAI matter. Yet, he recalled a meeting he had on 10 March 2016 with the SA and the lawyers of Britam except that he says it was a follow-up of the Nairobi meeting of the SA.
605. Concerning his misapprehension that it was MOFED who had sent Mr Lutchmeeparsad when in fact the SA was involved, his reply was that MOFED should not have been involved at all.
606. Concerning the amendment to Section 110A and Section 110B of the Insurance Act according to which the shares were to be transferred to the NPFL, his reply was that the amendment was done by MOFED to give priority to policy-holders over other creditors. He agreed that he participated in the discussions but it was the product of lawyers and professionals i.e. Benoit Chambers.
607. Concerning his stand that NPFL did not fall in his portfolio yet it had been mentioned in “60 Significant Achievements” at Achievement 56, Ministry’s publication, his reply was that it is not he who went telling people to set up NPFL.
608. Concerning the fact that it was he who piloted Insurance (Amendment) Bill, his reply was that it was MOFED’s Bill. But he stated *“it’s easy to understand, this part. No in Parliament I basically presented the Bill.”*
609. He explained that there was a social crisis a legal *cul-de-sac* and exacerbated by *“at that moment in time Manraj, Lutchmeenaraidoo, Bonieux, Clarel Benoit, all these good people they were taking decision.....”*

## OF NOTE

1. If there is anything that can characterize the second deposition of the ex-Minister it was his extraordinary ability to evade real issues and divert attention to other matters were second to none.
2. His creativity to make films out of a certain number of events depending upon the targeted audience.
3. Whatever virtue it may have in the other sciences, in legal science, the adage is that fish end up in dinner plates of people because at one moment they opened their mouths too wide.
4. In this case, in the story he warped up the following facts emerged:
  - a. He had a meeting on 10 March 2016 with the Kenyans regarding the sale of the Britam shares after all;
  - b. His persistent denial that he had anything to do with NPFL contradicted his own publications and other documents;
  - c. Section 110A and Section 110B of the Insurance (Amendment) Act 2015, did not follow the normal route of legislative drafting and procedure for the passing of laws;
  - d. The best way he felt he could co-operate with the Commission is by adding a newly created enemy to his list.

610. A third chance was given to ex-Minister Bhadain to come up with a better sentiment.

611. In his third deposition, he maintained that he had nothing to do with the Britam sales; it was MOFED which had handled it; it was the work of SA who had gone to South Africa; that the price was still right etc.
612. That could not be reconciled with the depositions and documentary evidence which the Commission had evaluated in the meantime.
613. The third summons required him to give additional information and/or produce documentary evidence if any relating to *“your involvement and that of your advisers: namely Messrs Deerpalsing, Ramjanally and Elisa in the subject-matter of the enquiry during the period you were entrusted with the portfolio of Minister of Financial Services, Good Governance and Institutional Reforms.”*
614. For his third appearance, he spoke about the electoral campaign of 2014, the purported purpose of the up-coming government and the focus of the in-coming government and the setting up of the Ministry of Financial Services, Good Governance & Institutional Reforms. And he was given the portfolio of that Ministry. He was later assigned the responsibility for the subject of international arbitration by formal letter from the President. That was followed by a further assignment for the responsibility of Heritage City Company Ltd as if to emphasize the fact that NPFL was never assigned to him as a responsibility. On this matter, the Commission found that all Minutes of NPFL referred to his Ministry as the parent Ministry.
615. Regarding the history of a Ministry dedicated for financial services, he stated that it had been first set up on 2000 under the then Minister Khushiram but after 2005 it was merged with the Minister of Finance until 2014.
616. On a personal note, his story is that after he had taken his oath as a Minister on 17 December 2014, he did not know where to go. He ended up in his Chambers and sat there. Not much could be done as it was the New Year festive period. Late Mr Nemchand was identified as the Acting PS who could assist him in reviving this Ministry. Even the Registry had to start from scratch. By Cabinet decision, the Public Sector Efficiency Bureau came under his responsibility and the Public Sector Governance.
617. He needed specialized persons in the sector. He used the Government procedure for the appointment of Advisers. Advisers are not for Ministers but for Ministry, he stressed.
618. In terms of Ministerial work, it was basically one of fire-fighting. His first mission was to South Africa for the DTA where nothing had been done for a good while his second was to deal with the next DTA with India.
619. He could very well understand the insurance sector. He understood the global business sector. He understood how the law worked. Looking at the different legislations relating to financial services was not a problem for him because he practiced these.
620. But he needed practising Accountants. Persons were brought in who were qualified professional Accountants such as Mr Benito Elisa and Mr Akilesh Deerpalsingh. There were about 20 who were recruited by the Ministry. It was a good team *“like we had created a professional firm with professional background with professional qualifications. There was no colleur d’affiche, nobody appointed like you know you would find in other Ministries.”*

621. He explained: *“The team which was created was a replica of that together with the people from the Civil Service and the Ministry.”* They were not personal advisers but Ministerial advisers. They would relate to the PS, the DPS etc. As Advisers, they were trained to understand how the civil service works but they had no authority over any public servant. In this regard, Mr Faadeel Ramjanally was Adviser from 01 April 2015 to 25 June 2015 to become the Director of NIC Ltd thereafter. Mr Akilesh Deerpalsingh was Adviser from 02 March 2015 to 31 December 2015 as well as Vice Chairperson of FSC from May to October 2015 to become thereafter the Consultant of FSC up to December 2016. Mr Benito Elisa was Adviser from 02 March 2015 to 09 March 2016 as well as one of the Directors of NPFL from May 2015 to early March 2016. He added that Mr Benito had never been involved with anything to do with Britam.
622. As to whether he had a meeting with Mr Peter Munga on 14 November 2015, his answer was that he had but it was only a courtesy meeting of just about 5 minutes, not more from entry to departure from his office.
623. They said that they had come to meet the SA intending to acquire the share of Britam and he replied to them that the MOFED had publicly stated that it would create a Sovereign Legacy Fund to park them.
624. He added that after MUR2.5bn had been paid on 15 March (May) 2015 and MUR3.5bn had been paid on 30 June 2015, people had to be paid on 30 June 2016 and 30 June 2017. For the repayment of 30 June 2016, Mr Lutchmeenaraidoo went to the Central Bank for an advance to pay because of the decision to place the shares in a Sovereign Legacy Fund.
625. He maintained that he had nothing to do with the sale of the Britam shares. If he answered to the PQs in Parliament, it was because he was kept informed all the time of the realization of the assets and what money was available for the repayments to the policy-holders.
626. Was the amended Section 110 complied with, both as regards consultation and the way the assets were being dealt with i.e. by transfer of assets as opposed to sale of assets?
627. The amended law provided as follows: *“A Special Administrator shall, after consultation with the Commission, transfer, in whole or in part, the undertaking of an insurer or any of its related companies to such insurer and any of its related companies as the Minister may approve.”* He denied that he was at all consulted on the matter in the application of amended Section 110 of the Insurance Act.
628. Concerning the MOU which was signed, he was evasive. He began to take us back to the criticism of Mr Lutchmeenaraidoo that he had dared sending Mr Lutchmeeparsad to discuss the sale of the Britam shares with the Kenyans. This was a breach of Section 110A where the SA had sole authority.
629. On this matter, he was reminded that the meeting of the 18 November in Nairobi had taken place through the good office of the SA and BDO was represented at the meeting.
630. He challenged the Statement of Mr Ramtoola who stated that the MOU was signed after liaising with the Minister of Financial Service, Good Governance and Institutional Reforms. He became particularly sensitive, when his involvement in any manner was put to him. It was put to him that Mr Ramtoola has stated that all was done in

consultation with the Minister. His reply was “*neither am I his doctor nor am I his lawyer. I am Minister.*” He rounded up his remark in a manner not uncharacteristic of him:

Mr Bhadain: “*consultation, liaising, I mean next thing they are going to say that they were in bed with me.*”

*Commission: No need to stretch it that far*

*Mr Bhadain: .... You know people should have bedside manners.*”

631. To him the sale of the shares at MUR2.4bn by the SA did not require “*any approval whether it is by law or otherwise.*” As regards the application of Section 110A where it is stated that the transfer of an undertaking shall be made to such an insurer as the Minister may approve, his answer was that “*when the law says Minister approves, in fact it is Cabinet which approves.*” That should be the interpretation which is to be given to Section 110B of the Insurance (Amendment) Act 2015
632. He was referred to the procedure which obtains in such a case where it is an approval sought by the Minister from Cabinet. He gave his own interpretation to the application of Section 110B, according to which the transfer of undertaking did not require in this case even the consent of any shareholder i.e. in this case Government of Mauritius which, in the process, had become the sole shareholder.
633. He stated that this is exactly what he had stated to the PS when the latter was issuing an approval for the transfer to NPFL. He maintained that it was the SA who, at the instance of MOFED had gone to Nairobi and struck the deal which was later translated into an MOU which was signed in Mauritius on 12 March 2016. He cannot set a date to the Nairobi meeting where, according to his story, the SA had clinched the deal in a February meeting to come back in March.
634. According to him, the SA had sold the shares at the meeting and they tried to window dress it by papers as if it was a transfer-cum sale.
635. Finally, he stated that, if the SA says that he was pressurised to do that it was complete BS.

## FACTS TO BE RETAINED

1. In the year 2000, a Ministry for financial services was set up under the then Minister Khushiram and lasted just one mandate 2000-2005.
2. Thereafter, it was revived only in 2014, when after the General Election, Mr Bhadain was assigned that responsibility along with the one of good governance.
3. After his appointment, he basically went to his Chambers and sat there and waited until the end of the festive season of New Year to set up the Ministry.
4. He resorted to Section 89(3)(h) of the Constitution for the recruitment of advisers and set up an office with the public officers.
5. He succeeded in creating a good team, almost like a professional firm with people having professional qualifications and background.

6. Of all of them, there were three frequently assisting him: Messrs Ramjanally, Deerpalsingh and Elisa.
7. For the meeting of 14 November 2015, it is Mr Afsar Ebrahim who brought Mr Munga to his office on a courtesy visit for just about 5 minutes where he told Mr Peter Munga that the shares were to be parked in a Sovereign Legacy Fund, as per decision of MOFED.
8. Repayment to the policy-holders were due by June 2016. According to him, money had been obtained from the Central Bank for same by MOFED.
9. He denied having anything to do with NPFL which was not in his portfolio.
10. He denied that the SA was in consultation with him when the transaction was being concluded.
11. He admitted that the Kenyan team had a short meeting with him on 10 March 2016.
12. He stated that if he answered PNQ in Parliament, it was simply because he was all through kept informed of the state of play with the Britam sales.
13. The amendment to Section 110 of the Insurance Act was to him the product of MOFED and when it invokes the approval of the Minister, it means the approval of Cabinet.
14. His interpretation of Section 110 A and Section 110 B of the Insurance Act is that when the SA needs to transfer the undertaking of an insurance company, he does not need the consent of any shareholders, in this case the NPFL.
15. He denied having exerted any pressure on anything to get his way in the matter.
16. The third deposition of ex-Minister Bhadain has revealed contradictions, prevarication, evasion, confabulations.
17. Contradiction is where a witness says one thing at one time and a different thing at a different time.
18. Prevarication is when he steers clear of the question asked by himself asking a question.
19. Evasion is when you ask him to answer a specific question but he takes you along the garden path.
20. Confabulation is when he selects a couple of fact and makes a fable with them attractive enough as to find favour with the credulous.
21. Ex-Minister Bhadain and Mr Deerpalsingh had the knack to be all four characteristics combined: sometimes contradicting themselves, sometimes prevaricating, sometimes evading but all the time confabulating.

22. A Commission of Inquiry is not *stricto sensu* an assessment of the credibility of witnesses as such but a search for the facts and the degree to which they cooperate or do not cooperate reveal a lot about their own involvement in the subject matter of the inquiry.
23. Mr Deerpalsing's version of facts was defensive, selective in documentation and protective of his then Minister so much so that he did not mention him at all. It was too good a version to be true.
24. Mr Ebrahim's deposition is characterised by a dilemma of at least five conflicting loyalties: loyalties to wriggle with; loyalty to his profession; loyalty to Mr Ramtoola; loyalty to the parties to the transaction; and loyalty to the Minister. In all this, he sacrificed his loyalty to truth.
25. Mr Ramtoola must have woken up one morning after his first deposition and said to himself I shall no longer continue to embarrassing myself in this. I shall answer the questions as truthfully as I possibly can.

## OF NOTE

The depositions of ex-Minister lacked sense in many respects:

26. He was so categorical that there never was any MUR4.3bn offered by the Kenyans to the Mauritians. Yet, he stated that he had been kept in the dark of it all by MOFED. Was he trying to defend a case of alleged forgery of the Minutes of the meeting?
27. He had replied to the PNQ in Parliament that "*The existing shareholders of Kenya came to Mauritius, but the Special Administrators had a meeting with me at the Ministry and all the team and they basically came up with that proposal of Rs2.9 billion. In view of the fact that, after having worked the figures, we could accept that figure; we went ahead and the Special Administrators accepted that by signing a MoU and now it is a done deal.*" when confronted with this, his reply to us was that he was only replying as all Ministers do, on information received, i.e. "*I am informed that..*"
  - a. We have perused the PNQ. The PNQ does not have any such qualification.
  - b. In any case, it would be illogical to accept such an explanation that he was replying from information received when he had himself participated in the meeting. He could not have been informed of his own participation, unless he had fallen unconscious at the meeting.
28. When he saw himself caught in such incoherence, he began to spit venom on the Commission.
29. Except for Mr Deerpalsing, who did not mention ex-Minister Bhadain at all, every single witness who has deposed and who was involved in the sale of the Britam shares implicated him. For this manifest omission, the reaction of Mr Deerpalsingh was eloquent. When he was asked a simple question inasmuch as the ex-Minister was after all the Minister with whom he had the closest ties and

whom everyone had implicated, Mr Deerpalsingh's repartee was: *"Do you want me to involve him?"*

30. Mr Ramtoola regarding the meeting of 14 November 2015 at the office of the ex-Minister stated that following that meeting, a letter had been sent to the Minister. The Commission has a copy of this letter where the next steps regarding the sale was decided between the ex-Minister and Mr Peter Munga.
31. Mr Ramtoola confirmed that throughout the process, the Minister had been kept informed. There were regular meetings with him concerning the BAI matter including the sale of Britam shares. He confirmed that before the MOU was signed, they had discussions and they did liaise with the Minister. When confronted with this, the ex-Minister foul-mouthed Mr Ramtoola and wished that people should have bedside manners.
32. Mr Manraj confirmed that he had inquired whether there had been a Cabinet decision on the sale of the Britam shares to the Kenyans and he found that there was not any and it was a serious matter and the Minister was thereby taking a personal responsibility for same.
33. Mr Ramjanally confirmed that he had attended a meeting where the sale of the Britam shares falling from MUR4.3bn to MUR2.6bn had been raised and discussed with the Minister.
34. Mr Ramtoola confirmed this. Mr Georges Chung was of the same view that the meetings were a regular feature of the BAI matter with the Minister of Financial Services, Good Governance and Institutional Reforms.
35. The type of pressure which was exerted upon others by the political Advisers may be gauged by the following extract of the deposition of one of the witnesses: *"So I remember there was a certain Mr. Faadil Ramjanally who called me and meet me at my office even on the streets because it was urgent and he would come and take a taxi immediately to come and bring the papers for me to sign and then these kinds of things. So there were a lot of things you know in my busy schedule where I said I'm busy, no let's wait a proper meeting. They make all the efforts to make sure they came in front of me with papers to sign."*
36. The circumstances surrounding the appointment of BDO to prepare the Strategic Report without following rules of transparency and accountability may also be noted.
37. Mr Ebrahim stated well before the assignment they had a couple of meetings with FSC and MFSGG&IR, following which they submitted their Engagement Letter.
38. To be able to have their way they kept dropping the statement that Government had approved or Cabinet had approved.

636. When did the NPFL Board fully come into the picture? For this we heard Mr Georges Chung Ming Kan of BDO.

**W18 MR GEORGES CHUNG MING KAN, CERTIFIED CHARTERED ACCOUNTANT, PARTNER AT BDO**

637. Mr Georges Chung Ming Kan, Certified Chartered Accountant, partner at BDO was assisted by H. Duval S.C. when he deposed before the Commission. The gist of Mr Chung's deposition is as follows.

638. As partner, he was involved in the insolvency practice at BDO. As regards Britam, his mandate was to assist the SA to implement and complete the sale of Britam shares.

639. He was aware that since October 2015 there was an offer made by MMI Holdings for the purchase of Britam shares and that did not go through for reasons he ignored.

640. He took over the file after the signature of the MOU, i.e., after 12 March 2016. It was only for implementation and completion of the transaction.

641. He and his team had to ensure that the shares were properly owned by the BAI Group. He explained that the company which owned the shares was incorporated in Bahamas. So, there was a need to replace the Directors of the company with representatives of NPFL who would act as Directors of the local company to which the shares had to be transferred.

642. He stated that he also assisted the legal advisers of the buyers (Juristconsult) to propose the draft Escrow Agreement and the SPA. He was also responsible for liaising with SBI where the Escrow Account was held to ensure that all funds were credited in that account and thereafter ensuring that the funds were transferred to NPFL.

643. He added that he, for one, had never travelled to Kenya. However, he was aware that Mr Ebrahim and Me Choomka had done so in May 2016 to ascertain whether the company owning the shares was registered in Nairobi Kenya. On examination, they found that BAKHL was not registered in Kenya but in Bahamas and they had to come back.

644. He confirmed having met Mr Munga between 8 to 10 March 2016 at the BDO's office and he was also aware that Mr Munga came to Mauritius in November 2015 accompanied among others by Mr Khapre of BDO Kenya. He also spoke of the fact that they had paid a visit to the then Minister of Financial Services, Good Governance and Institutional Reforms but he ignored what took place in discussions held at that meeting. He informed that he was not involved in the drafting of the SPA but was providing information to the Legal Advisers to enable them to draft the SPA, which was done by Juristconsult, the legal representatives of Coulson Harney LLP and the legal representative of Plum LLP. He confirmed that the FSC, the MFSGG&IR and as well as Advisers of the Ministry were kept informed of the draft MOU & SPA by the SA in his monthly report.

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

From the deposition of Mr Georges Chung Ming Kan, we may cull the following facts:

1. That BDO and its team was fully involved in the work of the SA, Mr. Ramtoola;



2. That there was no legal adviser as such overseeing the transaction on behalf of the seller even if there was a legal adviser of BDO to whom papers prepared by the buyer's legal firm were being submitted for finalisation;
3. That he took the file after the signature of the MOU i.e, after 12 March 2016 for purpose of implementation and follow-up;
4. That the shares were not transferred to NPFL but plainly sold before transfer.

#### OF NOTE

It is to be noted that:

Even if Mr. Ramtoola had been entrusted the responsibility of SA in his personal capacity, he was a mere façade to circumnavigate the problem of conflict on paper.

#### W19 Me ZARINA TAWHEEN CHOOMKA, BAR-AT-LAW

**645. Was there proper legal oversight from the part of the Mauritian side to ensure that the right things were done from the beginning all through to the end in a matter entailing such public interest and involving such huge assets?**

646. Me Zarina Tawheen Choomka was summoned to explain her participation in the transaction. She was the legal adviser of BDO. She informed the Commission that her services had been retained by BDO Company in 2015 to provide legal advice. She had worked for BDO on various assignments including some involving BAI. She explained that her involvement in the Britam case was for a couple of specific matters. As such, she cleared some legal documents such as the MOU. This was done on the facts furnished to her by Mr Afsar Ebrahim. All instructions given to her were verbal as she already had a work station at the BDO. So, there was no need for a Letter of Engagement as such.

647. She also stated that she was called upon to travel to Kenya in May 2016 for 2 days with regard to the ownership of the Britam shares in Kenya. It was only when she was in Kenya that they learnt that the company was incorporated in the Bahamas.

648. She submitted to us an email sent by Ms Gladys Karuri<sup>107</sup> to Mr Afsar Ebrahim where Mr Munga was in copy. It made reference to two matters of no mean materiality to the Commission. The first is the discussion which Mr Peter Munga had with the Minister on his first visit to Mauritius in mid-November when the line of action had been agreed upon. And the second was a clear reference to the fact that the sellers could not pretend not to know that there had been a Kenyan offer to buy the shares at MUR4.3bn on a previous occasion.

649. Was there legal oversight on a transaction of such a public nature and such an amount? It is in answer to this that, after her deposition, she addressed a correspondence to the Commission extracts of which are given below. First, she clarified her position to say that she had not acted as the legal adviser for transaction nor had she provided any legal opinion for the said transaction. Her role was only, she said, to clear documents submitted to her as and when required. In her own words<sup>108</sup>,

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<sup>107</sup> Mail dated 11 March 2016 from Ms Gladys Karuri addressed to Mr Afsar Ebrahim.

<sup>108</sup> Letter from Me Z. Tawheen Choomka dated 28 November 2017 addressed to the Commission.

“6. My services were not retained to act as legal adviser for the Transaction nor was I instructed to provide any legal opinion with regards to the said Transaction. But as highlighted in paragraph 3 above, my duties were to provide legal support and assistance as and when called upon by BDO & Co. Ltd. For the purposes of this Transaction, I provided legal assistance and support as follows

- (a) Drafting the MoU by putting the terms provided to me in the shape of an MOU;
- (b) Liaising with the BDO team and others for any amendment required with regards to the incorporation of general terms in the MOU;
- (c) Drafting of simple Escrow Agreement with MCB as escrow agent; (later not used for the Transaction);
- (d) Assisting the BDO Team in the gathering and communication of documents required by the legal adviser of the buyer (Juristconsult) to enable it to advise the buyer on the Mauritian law aspects of the Transaction and to sign the SPA;
- (e) Making a simple draft of SPA (later not used for the Transaction);
- (f) Reflecting amendments in Deed of Variation and Novation to the Escrow Agreement and minor amendments to SPA; and
- (g) See whether SPA reflected the terms in the MOU.

650. She only cleared documents she was given as the BDO legal adviser, with oral instructions given and facts supplied:

“7. Since I was not acting as legal adviser for the Transaction, I believe not all documents or communications may have come to my knowledge. I was only concerned with those documents for which I was called upon to assist.

8. I have to inform the Commission that further to the request of the latter at its last sitting with regards to any written instructions I may have received for the drafting of the MOU, I have provided a copy of a forwarded email which I have been able to retrieve from my archives for the purpose of assisting the Commission in its mission. But I maintain that on the day I drafted the MOU, the instructions were verbal and accompanied by a paper already containing the terms of the offer to be incorporated in the MOU.”

651. She also touched upon her visit to Nairobi in the following words:

“9. With regards to the travel to Nairobi on 7<sup>th</sup> May 2016 to 10<sup>th</sup> May 2016, the purpose was to assist the BDO team in ascertaining the ownership details of the Britam Shares. The Commission will recall that in the MOU, the registered office of the company Britam Holdings Limited was in Nairobi. Through searches effected there, it then came to our knowledge that the company was in fact incorporated in The Bahamas and not in Kenya. I was requested by the Commission on its last sitting to provide any written instruction that I may have received from BDO & Co. Ltd with regards to the travel. I have now skimmed through the email correspondences as provided in the bundle and I have not come across any such written instructions save for an email containing my electronic ticket.”

She confirmed that she:

*“never took part in any meeting with regards to the negotiation or the terms of the Transaction and that I was not in any way engaged in or connected with any fraud, malpractice, corruption, undue influence or other misdeed. I confirm having acted in good faith and according to the standards required by my profession.”*

652. In our reckoning, whatever she said in her letter to us reflects the substance of her deposition before us. However, the document which she produced does make reference to an important detail in the transaction: That BDO knew very well that there had been an offer of MUR4.3bn before the sale was struck at MUR2.4bn. We refer to the following in the letter:

*“The offer of Rs4.3bn you had, as verbally advised by yourself, was based on a share price of Ksh18,50% premium above market price and our December 2014 audited accounts, publicly available, reported profit of Ksh3.2bn and a Comprehensive Income of Ksh6bn. Our price has since gone down by 39% to Ksh11.90 and the USD:KSH exchange rate has come down by 11%. Our financial performance for year ending December 2015 is not public yet but is estimated to be around Ksh500m and a Comprehensive Loss of around Ksh3bn. The Company had to issue a Profit Warning in December 2015 so that market expectations are aligned.”*

#### **FACTS RELEVANT TO THE TOR TO BE RETAINED FROM THE ABOVE**

653. The facts that we may retain from the above are as follows:

1. that there was no legal transaction advisor to see the transaction process through;
2. the lawyer whose services had been retained was that of BDO, even then in a sporadic manner, as and when important papers had to be cleared. But procedural imperatives had been left unattended.
3. The document produced is further writing in support of the fact that the Mauritian party was fully “*au fait*” with an original offer which had been made for MUR4.3bn by the Kenyans.

#### **OF NOTE**

It is to be noted that:

1. Legal Advisers of neither the SA (ENSafrica) nor of the NPFL (Me Toorabally) were involved in the drafting and finalisation of the legal documents.
2. BDO, through Mr Afsar Ebrahim, had been requested to produce all documents and emails in their possession. But they had not produced one that mattered most.
3. It may well be seen as audacious on the part of ex-Minister Bhadain and his team to deny that there had been an agreement to sell at MUR4.3bn, a fact fully in their knowledge.

654. **The involvement of the BDO team in the completion process of the sale was one aspect which needed to be probed into.**

**W20 MR KIM LO TIAP KONG, ACCOUNTANT AT BDO**

655. Mr Lo Tiap Kong, assisted by H. Duval, S.C., testified at the Commission to the effect that he was a Senior Manager at the Insolvency Service Division of BDO which was led by Mr Chung. His involvement in the Britam case was mainly related to liaising with the registered agent of BAKHL which was based in Bahamas. He also provided the required documents to the legal advisers for the drafting of the MOU.

**656. The next member of the BDO team was the Manager of BDO with regard to his involvement in the matter.**

**W21 MR DOUSHIANT CHOWBAY BISSESSUR, MANAGER AT BDO**

657. Mr Doushiant Chowbay Bissessur, Manager at BDO, for his part, informed the Commission that his involvement in the Britam case came in May 2016 after the signature of the MOU and Escrow Agreement and he was receiving instructions from and reporting to Mr. Chung. He explained that he dealt mainly with the registered agent in Bahamas with regard to the BAKHL. He requested them to have the statutory documents of the company to enable the replacement of Directors for the purpose of transferring the shares to NPFL. He confirmed having interacted with the company by email.

**FACTS TO BE RETAINED FROM THE TEAM IN THE BACK OFFICE OF BDO**

The team which completed the transaction from the back office shows that after all the whole operation was undertaken by BDO behind the name of Mr Ramtoola.

**658. Who were the front-line players in the BDO team?**

**W22 MR AFSAR EBRAHIM, CHARTERED ACCOUNTANT AND DEPUTY MANAGING PARTNER AT BDO**

659. One of the names most frequently mentioned has been that of Mr Afsar Ebrahim, Chartered Accountant and Deputy Managing Partner at BDO. At the hearing, he was assisted by Me Didier Dodin standing for Me Henri Duval SC. He sought legitimacy of his involvement in a clause of the Engagement Letter dated 26 August 2015 of Mr Y. Ramtoola, the SA. The Clause read: “*The Special Administrator will be assisted by professional staff of BDO & Co in the performance of his duties.*” Mr Ebrahim informed the Commission that it was in view of that clause that he had been personally involved in quite a lot of the Special Administrator’s job. It was by virtue of that clause that he participated in various meetings and discussions with the buyer.

660. Since one of the conditions of the appointment of Mr Ramtoola as SA was that he would be assisted by the professional staff of BDO, Mr Ebrahim added that as Deputy Managing Partner, he was therefore personally involved in a lot of the SA’s job and had been attending meetings, discussions and all process regarding the duties of SA, all the more so when the engagement letter of the SA made specific mention of the transfer of the Britam shares to NPFL.

661. As regards the price, he held the view that the offer of MMI Holdings would not have brought MUR4.3bn as there was a condition relating to market price inasmuch as BDO knew that, at time the transaction would be finalised, the share price on the stock exchange would be low as the market kept on collapsing in Kenya.

662. He explained that in early November 2015 he received a phone call from Mr Sandeep Khapre of BDO (Kenya) requesting for a meeting in Mauritius with the SA on behalf of one, Mr Peter Munga. Mr Munga, thereafter, came to Mauritius and Mr Ramtoola not being available, he himself had to organise and accompany Mr Munga for a courtesy call on ex-Minister Bhadain. He confirmed that the issue of sale of Britam shares was discussed at the meeting. He explained that the Minister informed Mr Munga that Government would not have sold the shares of Britam had there not been any huge pressure to find cash to pay policy-holders. Mr Munga emphasized on the fact that the Board of Britam would have to be involved in the actual decision making as it would be the Board that would have to apply for authorization to the relevant Kenyan authorities for the change of shareholder holding 23.34%. Mr Munga confirmed that he was representing Britam and he had come to protect the interest of Britam as he was the founder of the company<sup>109</sup>.
663. In November 2015, the FS made a request to Mr Ramtoola to organise a meeting for Mr Lutchmeeparsad, the then PS of the MOFED, to go to Nairobi and meet with Directors of Britam. Mr Khapre CEO of BDO (Kenya) also attended the meeting.
664. As regards, the copy of the notes of the meeting held in Nairobi on 18 November 2015 which he had submitted to the Commission, he stated that he had received it from Mr Ramtoola who in turn had received it from Mr Khapre of BDO (Kenya). His version was that the minutes of meeting were drafted by Mr Khapre who was in attendance and, thereafter, a printed copy thereof was sent to Mr Lutchmeeparsad.<sup>110</sup>
665. As regards the transaction itself, he informed the Commission that, in the first week of March 2016, he had received a call from Ms Gladys Karuri, Britam Finance Director, that she would be coming along with Mr Munga who would be representing a pool of investors to sign an MOU relating to the sale of Britam shares. They were in Mauritius during the period between 8 to 12 March 2016. He met them in BDO's office along with Mr Ramtoola and Mr Georges Chung. His deposition was to the following effect: that he was not at all involved in the drafting of the MOU; that he had received the MOU from the buyers with the terms and conditions; that he just submitted it to the in-house counsel Me Tawheen Choomka for a legal clearance; and that he only assisted Mr Ramtoola in ensuring the finalization of the SPA and the Escrow agreement.
666. Regarding his visit to Kenya, he explained that while examining the Ordinary Share Certificate of BAKHL, he harboured some doubts on the validity of the Share Certificate as they contained a lot of different fonts and there were "*Blanco*" corrections and overwriting on them. Being uncomfortable with the situation, he had to travel to Kenya, the more so as the directors of the company were still Messrs D. Rawat and Simadree Rajannah who could have sold the shares of Britam without the knowledge of the SA, with the Government of Mauritius not being able to do anything about it. He informed that in Kenya he found out that the Ordinary Share Certificate, albeit issued in Kenya, was for a Bahamas Company. It was the same with the company name, BAKHL. It was not an entity based in Kenyan.
667. With regard to the setting up of NPFL, he stated that it was Mr Gautam Saddul who was appointed Chairman of NPFL on 06 May 2015 by the Board of Directors who were:

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<sup>109</sup> P.14 of the deposition of Mr Ebrahim on 13 December 2017

<sup>110</sup> Ditto P.20

1. Mr Richard Li Ting Chung;
2. Me Youshreen W. Choomka;
3. Mr Benito J. Elisa; and
4. Mr Sohail Javed Suhooroorah.

668. As for the CEO, it was late Mr Issary who was appointed the CEO on 07 May 2015. Since the Directors of the Bahamas based company had to be replaced, Mr. Ramjanally, the adviser to the Minister of Financial Services, Good Governance and Institutional Reforms was appointed as one of the Directors, the others being Mr G. Saddul and late Mr O.P. Issary. He stated that the transfer of the shares of BAKHL was effectively done on the 16 June 2016, the date of the tripartite agreement comprising the SPA. He said that apart from the one he had from 7 to 10 May 2015, he did not travel to Kenya for any other meeting in relation to Britam shares.

669. Mr Afsar Ebrahim was recalled to enlighten the Commission on the veracity of some of his statements which other facts and circumstances contradicted, more particularly, his source of the copy of the Notes of Meeting of 18 November 2015. It became important to know when exactly, in point of time, he became involved in the transaction and the nature of the supposed courtesy call which he had arranged with the ex-Minister Bhadain in the latter's office.

670. With regards to the notes of the meeting, he agreed that there had been a meeting of 18 November 2015 which took place in Nairobi prompted by Mr Lutchmeeparsad and attended by Messrs S. Khapre, P. Munga and some officials. He stated that he got the Minutes of the meeting by mail from his colleague in Kenya on 19 April 2017. It was, he stated, in word version, sent by Mr Sandeep Khapre who reportedly had drawn them up from the notes which he had taken at the meeting.

671. As regards the exact dates on which he received the Notes of Meeting, he explained that Mr Ramtoola received a copy of the Notes of Meeting on 19 April 2017 by way of an email from Mr Sandeep Khapre and this email was copied to him. However, when he was called upon to depose before the Commission on 13 December 2017, he could not find his copy and therefore had to seek a copy from Mr Ramtoola on the eve. He also confirmed that he had only seen one version of the Notes of Meeting which spoke of an agreement to buy "*at a mutually agreed valuation*" and he had never seen any version. He also confirmed that, at the request of Mr Deerpalsingh, he also sent to him a copy of the Notes of Meeting as the latter had to appear before the Commission. He added that it was done in good faith and in full transparency with a view to shed light on the matter before the Commission. When put before the fact that in his last deposition on 13 December 2017 he said that he received the Notes of Meeting on the eve from Mr Ramtoola and that now he was telling that he had received it in the 19 of April 2017, he tried to explain that he did not keep the mail which he got from Mr Khapre and for his deposition on 13 December 2017 he took a copy from Mr Ramtoola.

672. On being told that there were two versions of the Notes of Meeting of 18 November 2015, one version submitted by Mr Lutchmeeparsad and the other by himself, he was quick to see the small but material difference even before he was actually shown what it was. He commented that he did not know how this change had occurred.

673. He confirmed that he had no meeting with Mr Munga when he was in Kenya. However, he met Mr Munga twice during the latter's visit in Mauritius.

674. On being shown a copy of a letter emanating from Mr Munga dated 09 May 2016 addressed to him making reference to “*our meeting of this morning*” he said he had not met with Mr Munga physically but he had meeting with his lawyers and team from Britam and the Company Secretary.
675. Mr Ebrahim informed the Commission that his involvement in the MOU was related only to ensuring that the draft submitted by Plum LLP (sic) was in compliance with the Mauritian law and this he did with the in-house Counsel of the BDO. He said that he was not involved in the drafting of the MOU. He was reminded that, in course of his deposition on 13 December 2017, he had stated that he was not involved at all in the MOU. His comment was that he meant that he was not involved at all in the drafting of the MOU.
676. Mr Ebrahim was also requested by way of a letter from the Commission dated 13 August 2018 to submit replies to the following questions (verbatim):
1. The exact date on which you received a copy of the Notes of Meeting held at Britam centre, Nairobi on 18 November 2015 between Mr V. Lutchmeeparsad and Mr P. Munga along with Mr Khapre of BDO; the circumstances in which you received them?
  2. The date as from which you really became involved in the matter of the disposal of shares of Britam; and the nature of your involvement leading to the sale. Your involvement in (a) the preparation of the report dated April 2015 submitted by BDO to FSC making recommendation on strategic measures to protect the value of underlying assets with focus on the SCBG Policies; and (b) the process which obtained in the preparation and the finalization of the report?
  3. The circumstances in which you became involved in the implementation of the very report which BDO produced and all such matters cognate and incidental to the above?
677. He submitted replies to the questions set by the Commission on 16 August 2018. At the Hearing, further clarifications were sought from him. He was involved in the preparation of the report dated April 2015 on the strategic measures along with three other partners namely Messrs Yacoob Ramtoola, Georges Chung and Abdullah Ramtoola. He explained that the assignment was entrusted to BDO by FSC following a meeting held in the office of the then Minister of Financial Services wherein the following persons were present:
- (i) Hon. R. Bhadain, as he then was;
  - (ii) Hon. R. Yerrigadoo, Attorney General, as he then was;
  - (iii) Hon. S. Soodhun, as he then was;
  - (iv) Hon. S. Callichurn;
  - (v) Mr. D. Manraj;
  - (vi) Mr. Kuriachen;
  - (vii) Mr. A. Deerpalsingh;
  - (viii) Mr. F. Ramjaunally;
  - (ix) Mr. Y. Ramtoola; and
  - (x) Others.

678. We have it from him that the report was completed within 48 hours on the basis of materials produced by FSC, Registrar of Companies and the MFSGG&IR.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

679. The facts relevant to the TOR which we may retain from the above are as follows:

1. That Mr A. Ebrahim had received the Notes in the Word version as opposed to a pdf. A word format is more amenable to tampering with the text and making use of falsehoods.
2. That Mr Ebrahim is prevaricating on the facts and circumstances surrounding the Notes of Meeting of 18 November 2015.
3. That Mr Ebrahim's deposition is made up with contradictions and inconsistencies on three material items: the Notes of Meeting; the meeting of 14 November between Mr Peter Munga and ex-Minister Bhadain, and his own pronounced participation in the transaction from start to finish.
4. That the decision to assign the preparation of the Strategic Plan to BDO was taken in the office of ex-Minister Bhadain where other Ministers had given their presence, with little consideration to ministerial protocol, professional ethics and procurement procedure and law. For example, we note that a Vice Prime Minister is attending a meeting chaired by a new Minister for taking a decision to award a contract on strategic measures to a private firm.
5. That Mr Afsar Ebrahim has been the one who has been the principal link between Mr Peter Munga and ex-Minister Bhadain.
6. That it can be fairly stated that it was not Mr Ramtoola who was actually dealing with the matter but BDO, Mr Afsar Ebrahim and Mr Chung.

#### **OF NOTE**

It is to be noted that:

Rule 1 of General Notice No 2260 (**Annex 18**) provides that even if the appointment of an Insolvency Practitioner is personal, *“he or she should ensure that the standards set out are applied to all members of the Insolvency team.”*

Plum LLP was not yet in existence and the MOU kept referring to the Kenyan buyers as “pool of investors.”

**680. The Commission was concerned that there was no Legal Adviser overseeing a transaction of such an amount, such a character and such national sensitivity. What part did ENSafrica play?**

#### **W23 Me. THIERRY VINCENT MARIE KOENIG**

681. Me Thierry Koenig informed the Commission that he is the Head of ENSafrica which had been involved with the SA on issues relating to BAI Mauritius Ltd. He personally had been advising the SA in a number of difficult litigations and other matters. He stated that the person who dealt with Britam files at the level of his office was Mrs Martine de Fleuriot de la Colinière. A legal opinion was tendered by her, a copy of which was submitted to the Commission regarding her involvement. It had to do with the powers



and duties of the SA following the amendment to Section 110A and Section 110B of the Insurance Act.

682. He said that his involvement was only related to the transfer of the shares by the SA to NPFL. He confirmed not having been involved in any manner in relation to the Escrow Agreement, the MOU or the SPA.

#### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAIN**

683. The facts relevant and material to the TOR which we retain from the above are as follows:

1. There was no Legal Adviser for the Mauritian party overseeing the transaction. Each Legal Adviser involved looked at a specific aspect of the process.
2. The advice of Ernst and Young had not been heeded that the transaction should have taken place above board, with all the principles of transparency, account taken of the sum involved and the public character of the transaction.

#### **OF NOTE**

It is to be noted that:

1. From other materials at the disposal of the Commission, it would appear that Me Koenig was not instructed to do as its Letter of Engagement required him to do.
2. The SA, Mr Ramtoola, had confirmed before the Commission that *“I am sure it would be ENSafrica, Mr. Koenig who is here who has been advising me as Special Administrator on the transactions. He would have looked at the drafts.”*<sup>111</sup>.
3. At paras. 2 and 4 of the Letter of Engagement of Mr Ramtoola dated 26 August 2015, it has been clearly spelt out that *“ENS Africa who will cover all legal aspects except for the enforcement in Kenya”* and an amount of MUR1m would be paid to ENSafrica for *“the legal costs of transferring the Britam Kenya to NPFL”*.
4. It should be noted that the transfer of Britam Kenya to NPFL was done by BDO and Coulson and Harney. Mrs Martine de Fleuriot de la Colinière seemed to have emitted only a legal opinion for the SA.
5. As such, the FSC may have to assess the extent of the work which had been done by ENSafrica for the latter to have been paid MUR1m. We have seen a document as regards this payment. *A parte*, there is no evidence that this engagement had ever come to the Board for approval.

684. **Who between the then Ministers – Hon Lutchmeenaraidoo and Hon Bhadain – was entrusted with the finalisation of the deal? The testimony of the then Prime Minister, therefore, became crucial on a matter where ex-Minister Bhadain stated he had nothing to do with the sale. Accordingly, the then Prime Minister was called by the Commission.**

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<sup>111</sup> P.17 of the deposition of Mr Ramtoola on 5 October 2017.

**W24 LATE SIR ANEROOD JUGNAUTH, GCSK, KCMG, QC, PC, MINISTER MENTOR**

685. Late Sir Anerood, as the then Prime Minister of the country, deposed before the Commission on the thorny issue of who was handling the sale of Britam shares. It is worthy of note that we are concerned here with the Minister under whose responsibility the deal was finally done.
686. Late Sir Anerood was categorical. The responsibility for all matters pertaining to BAI was entrusted to ex-Minister Bhadain and whenever he required the help of Mr Lutchmeenaraidoo, the then Minister of Finance, he would make a request to him. He said that BAI was the sole responsibility of ex-Minister Bhadain. He added that it was ex-Minister Bhadain who as Minister of Financial Services, Good Governance and Institutional Reforms sought the agreement of Government on 24 April 2015 to introduce the Insurance Amendment Bill into the NA to provide for the appointment of a SA. He confirmed that ex-Minister Bhadain got the Bill to Parliament and the Bill was passed and approved on 28 April 2015.
687. As the then Prime Minister, he was informed that all meetings related to the issue of Britam were held at the MFSGG&IR in the presence of Mr. Ramtoola the SA and the two Advisers Mr. A. Deerpalsingh and F. Ramjanally who were very close to ex-Minister Bhadain. He added that Mr Lutchmeenaraidoo the then Minister of Finance and Economic Development was not really involved and it was only at the request of ex-Minister Bhadain that he got involved as and when required. He confirmed that there was an offer from South Africa, where a company was prepared to buy the shares of BAI for MUR4.3bn and this was referred to ex-Minister Bhadain who was handling the matter.
688. He added that certain decisions taken by the MFSGG&IR from time to time were brought to Cabinet. He was not aware as to how the figure of MUR4.3bn had gone down to MUR2.3bn or MUR2.4bn. In his own words, *“it was all in the dark until we came to know that it was sold for much less and in that process and that sale Mr. Bhadain was fully involved”*<sup>112</sup>.
689. He said that there was some urgency for the sale of the shares as ex-Minister Bhadain suggested to Government by way of a Cabinet Memorandum that the amount must be paid to policy-holders by such a date and the second part also must be paid by such date. Late Sir Anerood also touched upon the relationship between the two Ministers. If ex-Minister Bhadain had stated to the Commission that he, ex-Minister Bhadain had complained to him, late Sir Anerood, that Mr. Lutchmeenaraidoo was badly handling the BAI, *“that is not true.”*

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

What the deposition of late Sir Anerood shows is as follows:

1. that the matter was entrusted to ex-Minister Bhadain.
2. that ex-Minister Bhadain spoke about a time pressure for the sale to be effected.
3. that the source of the amendment to the Insurance Act was the ex-Minister Bhadain.

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<sup>112</sup> P.6 of the deposition of late Sir Anerood Jugnauth on 22 March 2018.

690. **The Commission found it necessary to tap into some local knowledge of the Britam shares in anticipation of what the Kenyans had to say. The person who met the profile to do so was Mr Lakshmana Lutchmeenaraidoo. He was not only based in Nairobi but he was also working in the Insurance Sector. At the same time, he had intimate knowledge of all the key players concerned.**

## **W25 MR LAKSHMANA (KRISH) LUTCHMEENARAIDOO**

691. Mr Lakshmana Lutchmeenaraidoo deposed as the Managing Director of an Insurance Company registered in Nairobi. He was based there from June 2014 to May 2016. He stated that he was in Mauritius in November 2015 for a quarterly Board Meeting when one Monday afternoon he received a phone call from Mrs Jugmohun, Adviser of Minister Lutchmeenaraidoo informing him that Mr Lutchmeeparsad was proceeding to Nairobi the next day. The Minister asked him whether he could help Mr Lutchmeeparsad to meet with the Britam people in Nairobi. He met Mr Lutchmeeparsad the next day and they were seated next to each other on the flight to Nairobi. Mr Lutchmeeparsad told him that he also had to meet Mr Sandeep Khapre of BDO. As it happened, Mr Khapre was on the same flight. The three of them met at the airport and subsequently agreed to meet later that same day. Mr Lutchmeenaraidoo advised Mr Lutchmeeparsad as to the manner in which he should handle the situation: not to get intimidated and to be firm about the position of Mauritius. *“You should make your case that you’ve got a firm offer from South Africans and you are meeting them because they’ve got pre-empt right and if they can’t match the offer they will have to waive the present rights.”*
692. Mr Khapre arranged for the intended meeting for Wednesday 18 November 2015. Thereafter, he left for the three of them to meet again in the evening when he was told that the meeting had started in a tense atmosphere as there was a Senior Officer from the Ministry of Finance of Kenya at the meeting thus giving the impression that the Britam Directors have the support of Government of Kenya and they did not want South Africans in their shareholding and that the Kenyans had agreed to match the offer of the South Africans but they needed some time to mobilise the funds. He added that they were prepared to come to Mauritius to meet the Ministers and take a firm commitment and to sign the required papers.
693. He added, at the initial stage of the sale of shares of Britam, a trio of Ministers was involved - The then MOFED, Minister of Financial Services & Good Governance and Institutional Reforms and the Attorney General.
694. He explained to the Commission that he had been following on a regular basis the evolution of the share price of Britam on the Stock Exchange by virtue of his dealings in the Stock Exchange of Nairobi. He added that there was a drop in the share price of Britam at some point in time which coincided with a drop in the profitability of Britam which was due to Britam investing in the construction of a huge building in Nairobi which had absorbed a substantial part of its cash balances. Hence, a sharp drop in its investments during two years which led to the drop in its profitability. A photograph taken after the meeting was produced showing the smiling faces of the following persons: Mr. Wanyambura Mwambia, Deputy Director of Economic Affairs in charge of Tax, Administration and Private Sector issues in the Ministry of Finance, Government of Kenya; Mr Sandeep Raghunath Khapre, CEO of BDO Kenya; Mr Peter Kahara Munga, Director of Britam Kenya; Mr Vidianand Lutchmeeparsad, the then PS of MOFED; and Mrs Agnes Odiambo, Head of Office of controller of Budgets, Government of Kenya.

695. He added that after the meeting, they met for dinner and it was a celebratory dinner because the Mauritian mission to secure the Kenyans to match the price of MMI Holdings had been successful.

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

696. Matters of note in the deposition of Mr Krish Lutchmeenaraidoo are the following:

1. That he is knowledgeable, intimately, actually and business savvy in the area of insurance in the region in his capacity as a businessman in the field based in Kenya;
2. That, in his capacity of the Chairperson of the Insurers Association, he had met the MFSGG&IR at one time to discuss the amendments to the Act but the meeting did not last long because he saw that the meeting was not leading anywhere;
3. That he facilitated the meeting which took place in Nairobi with the potential Britam buyer in company of Kenyan officials;
4. That he has intimate knowledge and expertise in the stock market and the low share price of Britam at that time was a temporary affair because there was an investment in a large building which Britam was carrying out; and
5. That, in the evening, they had met at dinner to mark the success of Mr Lutchmeeparsad's mission because even if the meeting had started in a tense atmosphere, it had ended up well for Mauritius in that the Kenyans had agreed to match the price of MMI Holdings.

**697. Did the Chairperson of NPFL Board allow himself to be led by the nose?**

**W26 MR GAWTAM SADDUL, CHARTERED SURVEYOR AND EX-CHAIRMAN OF NPFL**

698. Mr Gawtam Saddul, Chartered Surveyor and Ex-Chairman NPFL, gave evidence to the effect that the established procedures relating to Board Meetings was followed whenever there was a Board Meeting of NPFL. He explained the following:

1. Items of agenda were decided by himself in consultation with the CEO;
2. The Secretary, thereafter, convened the meeting which was normally held in the Board Room;
3. A two week-notice was given to members for the meeting;
4. During a meeting, the Secretary took notes and, thereafter, drew up the minutes; and
5. As Chairman, he had to ensure that there was the required quorum.

699. As regards the Board Meeting which took place for the sale of Britam shares, he recalled that there was need to have an urgent meeting. The signature of the Directors of NPFL was required to approve the sale. He confirmed having received instructions

from the parent Ministry to call for a Board Meeting to secure the approval for the disposal of Britam shares. He was informed that the shareholder's agreement had already been signed.

700. He confirmed having received a mail from BDO dated 16 June 2016 sending him a draft resolution but Board Members refused to sign. He added that neither himself nor any Board Member was involved in the sale process but they were put in front of a "*fait accompli*".<sup>113</sup>

701. The attention of Mr Saddul was drawn to the fact that it was the role of the Board to state clearly whether they accept or reject a transaction. If they accepted, this constituted a Board approval. It is not the practice for a Board to say that if the major shareholder has agreed to a transaction, they were content. To him, this constituted an abdication of the responsibility of Directors.

### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

702. What emerges from the above deposition is as follows:

1. Mr Saddul was aware of the procedure which obtains in the convocation of Board Meetings, the decision regarding agenda and the communication of notices given. However, in this case instructions had come from the Ministry to convene a meeting as a matter of urgency for the purpose of securing the signature of the Directors to a *fait accompli*.
2. The Directors had refused to sign the draft Directors' Resolution.

703. **What really happened at the Board meeting?**

### **W27 MRS SHAKUNTALA DEVI GUJADHAR NOWBUTH, DEPUTY PERMANENT SECRETARY**

704. Mrs Shakuntala Devi Gujadhara Nowbuth, DPS and then Board Member of NPFL deposed as regards what happened at the Board Meeting. Its objective had been to seek an *ex post facto* approval for the sale. Mrs Nowbuth confirmed that the sale of Britam shares was on the agenda. But since none of the Board Members was involved in the sale transaction, they were not agreeable to giving their approval. Then another meeting was convened at the BDO office where there was a presentation by BDO to explain the transaction through documents. There were many grey areas still. Nothing was clear to them. It was later that, after the sole shareholder had approved the sale of Britam shares, that the Board decided to just take note. There was no Board approval at all.

705. She informed the Commission that she inquired from one of the advisers Mr Benito Elisa at the MFSGG&IR who told her that Cabinet approval had been obtained for the sale of Britam shares. On that understanding, the NPFL took note. She relied only on the word of Mr Elisa to do so. The NPFL has no document to show that this actually took place.

### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

706. What emerges from the above deposition is that:

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<sup>113</sup> P.50 of the deposition of Mr Saddul on 26 April 2018.

1. NPFL was never consulted in the matter of sale of Britam shares nor at any time put into the picture.
2. The Directors were being taken for a ride all through the process.
3. The manner in which the NPFL was being dealt with verges on high-handedness by the line Ministry.

**OF NOTE**

It is to be noted that:

The first meeting took place a couple of days earlier followed by a meeting on 20 June 2016 at the BDO office for explanation and the signature to take note was done by circulation after the members had refused to give approval.

**707. What did the other Board members have to say?**

**W28 MR RICHARD LI TING CHUNG - HEAD OF INSURANCE AT ROGERS CAPITAL**

708. Mr Richard Li Ting Chung, Head of Insurance at Rogers Capital and Ex-Board Member of NPFL, gave the Commission valuable information under oath. The Board meeting that was held in late June 2016 was one of an unusual type. He recalled that he received a call from the Company Secretary which was Prime Partners, convening him for an urgent Board Meeting to discuss a major transaction and was told that the Board Meeting could not be postponed. He attended the Board Meeting the next day. At the meeting, the CEO and the Secretary told them that there was a transaction relating to the sale of Britam shares for which they needed the Directors' approval. Several questions were asked by the Directors but no clarification was forthcoming. They were simply told that there was a new piece of legislation made by the Minister of Financial Services, Good Governance and Institutional Reforms making provision that an asset owned by an Insurance Company can only be sold to an Insurance Company. They were explained that the shares of Britam which were in the hands of the SA who managed everything had first to be transferred to NPFL which was a subsidiary of NIC and simultaneously the shares would be sold to Britam. The Directors explained that they were not involved in any transaction so they would not sign any document until and unless they were given explanation of what had happened exactly. The CEO said that he himself did not know, as he was not involved and added that BDO was managing everything. A subsequent meeting was held at BDO's office. It was Mr Georges Chung Ming Kan who made a presentation at the meeting. He did not recall anyone taking notes for any of the two meetings.

709. He informed the Commission that pressure was being exerted by the MFSGG&IR particularly by the advisers, BDO and the CEO of NPFL. They were pressurizing Directors to secure their signature to the relevant documents. For example, Mr F. Ramjanally had even offered to come to his office with the papers or meet him on the road for the purpose of obtaining his signature.

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

710. What emerges from the above deposition is as follows:

1. There are so many disquieting features in the procedure adopted to circumvent an approval which had to be obtained upfront for the sale.
2. Since NPFL was not involved in any way in the sale process, most of the Board members quite rightly refused to rubber stamp a transaction which had taken place behind their back.
3. Unethical pressure was being exerted by those who had been involved to legitimise a sale replete with irregularities. The fact that Mr Ramjanally even offered to come to a Board member with papers outside office speaks eloquently of the manner in which such a major transaction was being handled by those concerned.

**W29 MR JAVED SOHAIL SUHOOTOORAH, LEAD ANALYST AT MOFED, EX-BOARD MEMBER OF NPFL.**

711. For his part, Mr Suhootoorah, Lead Analyst at MOFED, Ex-Board Member of NPFL, informed the Commission that there had been urgent NPFL Board meetings relating to the sale of Britam shares. The meetings were called as legally the SA could not sell the shares of Britam to a third party as it had to go through NPFL.
712. There was a first meeting having as agenda only the sale of shares. He recalled that a draft Directors' Resolution was circulated at the meeting and the Directors of NPFL were called upon to take responsibility for the sale of the shares by signing the resolution. At the meeting, the Directors took the view that following a transfer of the shares to NPFL, it became the responsibility of NPFL to sell them. He added that they would have proceeded in appointing a Transaction Advisor by way of a procurement exercise and the Transaction Advisor would have had the responsibility to look at the best process how to sell the shares. He continued that it was not clear how BDO had been appointed for the transaction. It was decided that there would be another meeting where BDO would give details as to how to proceed to select a buyer for the shares. He added that he does not recall that there had been any minutes for that meeting.
713. Another meeting was convened, thereafter, wherein BDO made a PowerPoint presentation explaining how the shares were held in another country. BDO had not been able to explain as to how there had not been any due diligence exercise for the sale of the shares. Nonetheless, there was still a request made to the Directors to approve the sale. It was a back-to-back transfer-cum-sale transaction in that the shares came to NPFL and then went to a third party in one transaction. The Directors, therefore, eventually decided that if the sole shareholder was the Government, represented by the MFSGG&IR, and the Ministry had approved the sale, they as Directors of NPFL could only take note of that decision.

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

714. What emerges from the above deposition is that:
1. NPFL Board position was that the SA could not do a transfer-cum-sale as a single operation and it was for the NPFL to sell the shares after the transfer.
  2. NPFL would have appointed a Transaction Advisor before effecting the sale through a proper procurement exercise.

3. The Board took the view that the sole shareholder being Government and the MFSGG&IR having approved the sale, they could overcome the *impasse* by the non-committal device of taking note.

**715. The association of the then Attorney General with ex-Minister Bhadain and his team had been frequently mentioned with respect to BAI and related affairs. The Commission needed to hear him.**

### **W30 MR RAVI RAJ YERRIGADOO, BARRISTER AND EX-ATTORNEY GENERAL**

716. Mr Ravi Raj Yerrigadoo stated that the revocation of the licence of Bramer Bank had repercussion on the Insurance Sector. There arose a need to amend the Insurance Act to introduce the notion of SA. The management of the aftermath of the BAI collapse was entrusted to the MFSGG&IR. One of the priorities was how to get maximum money to repay all those policy-holders.
717. He confirmed that he did not recall at any of the Cabinet Meetings he had attended where the sale of Britam shares had ever been raised. He added that the Attorney General's Office which is the Legal Adviser of Government had never been approached at any material time to look into, vet and to advise on any matter relating to the disposal of the shares of Britam.
718. He also made mention of the fact that there had been a drastic drop in the price of Britam shares around that time. He confirmed having had numerous meetings with ex-Minister Bhadain, in early mornings, late evenings, Saturdays and even Sundays. They related to BAML and SCBG. He added, however, that he had never been put into the picture of the Britam issue. He added that if ex-Minister Bhadain had in his deposition before the Commission said that he had not been involved in any issue relating to Britam shares. That was not true. He recalled having participated in three press conferences along with ex-Minister Bhadain alongside Mr Lutchmeenaraidoo on the whole issue of BAI, including the Britam sale.
719. He testified to the fact that the SA was reporting to FSC and also to ex-Minister Bhadain on a regular basis. He informed the Commission that the amendment to the Insurance Act was drafted by the MFSGG&IR. At one stage, ex-Minister Bhadain also expressed the wish to draft the Good Governance and Institutional Reforms Bill. The then Acting Prime Minister, Hon. Ivan Collendavelloo had to draw his attention to the fact that a legal person, on becoming a Minister, should stand advised by the SLO.
720. He explained that as regards the amendment to the Insurance Act, when ex-Minister Bhadain met him at the Attorney General office, he already had a draft of the Amendment Bill and same was submitted to the then Parliamentary Counsel Me Narain. He explained that the normal procedure for a piece of legislation to be introduced at the NA is that the Minister has to come to Cabinet with a paper highlighting the policy and at the same time seeking Cabinet approval for drafting instructions to be issued to the Attorney General's office. Once Cabinet approves the policy paper and the appropriate minutes are recorded in the appropriate file, the Ministry then writes to the Solicitor General to formally give drafting instructions. Discussions then are held between officials of the Ministry and those of the Solicitor General's office, at times with even the Parliamentary Counsel. Then a Draft Bill is produced. That conventional procedure had not been followed in the case of the amendment to Section 110A and Section 110B of the Insurance Act.



721. He confirmed that ex-Minister Bhadain was very much involved in the aftermath of BAI collapse. At all levels. That fact was pretty much in the public domain. The media reports show how deeply involved he was, especially when Courts (Mauritius) Ltd and Iframac were being sold. He explained that their respective involvement had turned out to be a real security risk so much so that the then Prime Minister had proposed to reinforce arrangements for the safety and security of ex-Minister Lutchmeenaraidoo, ex-Minister Bhadain and himself because of BAI issue. The special arrangements proposed comprised special cars and Riders. However, both ex-Minister Lutchmeenaraidoo and himself declined those facilities. On the other hand, ex-Minister Bhadain accepted them and began to use a big Audi A8 and the services of a Rider. This added to his panache.

722. Mr Yerrigadoo informed the Commission that whenever he was sending mail to ex-Minister Bhadain, he had to copy it to his political adviser, Mr Deerpalsingh, who was not in actual fact an adviser in the ordinary sense. Mr Deerpalsingh even accompanied ex-Minister Bhadain on official missions such as the mission for the Double Taxation Agreement to India. Mr Deerpalsingh was also drafting the speeches of the ex-Minister Bhadain and was always present in Parliament behind the ex-Minister Bhadain.

### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

723. What emerges from the above deposition is:

1. That ex-Minister Bhadain had taken it upon himself to draft a Bill to amend the Insurance Act without going through the proper channel of policy decision of Cabinet approval, proper drafting instructions to Solicitor-General and discussions between Attorney General Office and Ministry for the purpose of producing a Draft Bill.
2. That Mr Deerpalsingh was playing a frontline role even as adviser in the affairs of the Ministry, directly involved with whatever the ex-Minister Bhadain was doing.
3. That ex-Vice Prime Minister, Collendavelloo had cautioned him of the need to go through the proper channel for the passing of any legislation and he could not be lawyer and Minister at the same time.

724. **Do we have an insight of the working methods of the Political Advisers?**

### **W31 BENITO ELISA, EX-ADVISER TO MINISTRY**

725. Mr Benito Elisa informed the Commission that he was Adviser in Financial Services to the MFSGG&IR. As such, he was not only working with the then Minister but also with other advisers and Government officials.

726. As far as the Britam shares were concerned, he stated that he was never involved in any matter concerning the disposal of Britam shares and he never attended any meeting with regard to this. His participation was limited to helping in the process involved with repayment to the policy-holders.

727. He confirmed that he also worked on official files at times when his advice was sought on issues relating to the subject matter of the files.

728. He denied that he ever had any phone conversation with any Director of NPFL regarding the disposal of Britam shares or that he ever chased any Director to have his

signature on any document with regard to Britam shares. He added that he was a Director of NPFL from April 2015 to early March 2016 when he resigned for personal reasons.

## **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

### **What emerges with regard to the working method at the MFSGG&IR is:**

1. That, as Adviser, Mr Benito Elisa had access to official files of Ministry and worked with them.
2. That to the Commission is a serious matter in that public affairs and public officers had become almost non-existent, with political advisers having taken over Government machinery.

**729. The subtle erosion of the neutrality of the public service and the independence of regulatory institutions by extraneous factors was one of the concerns of the Commission. We heard Mrs Sarada Moloye.**

### **W32 MRS SARADA MOLOYE, THE THEN HEAD OF THE EXECUTIVE OFFICE, FSC**

730. Mrs Sarada Moloye deposed before the Commission with respect to procurement process for the appointment of BDO as Financial Adviser. The Commission was in presence of a memorandum addressed to her as the Officer in Charge relating to appointment of BDO as Financial Adviser. BDO had been appointed Financial Advisers through a letter emanating from BDO itself. The appointment was dated 22 April 2015. It mentioned that it was effected following discussion which had taken place apparently with the Ag. CEO of FSC.

731. The memorandum of Mrs. Moloye made mention of the fact that the appointment of BDO had been done “*at the instance of the Government.*” On being lengthily questioned by the Commission on what this meant, she stated that by inserting “*at the instance of the Government*”<sup>114</sup> she had in mind the parent Ministry which was MFSGG&IR.

## **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

732. What emerges from the above is:

1. That the decision to retain the services of BDO to prepare a report on the strategic measures was taken above the head of an independent regulatory body of the carat of a Commission.
2. That subtle pressure had been exercised by the Ministry to achieve that purpose.
3. That the FSC Board was not in the know and proper procurement procedures had not been followed.

### **OF NOTE**

It is to be noted that:

Albeit that the FSC did not have anything to do with the appointment of BDO, the FSC was to eventually pay a sum of MUR1m to BDO for the engagement.

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<sup>114</sup> P.5 of the deposition of Mrs S. Moloye on 26 September 2018.

733. **Had Cabinet decision not to sell the Britam shares but to transfer them to NPFL been communicated to the line Ministry under which they were sold. For this and other matters, the Commission called Mr S. Purmessur.**

**W33 MR S. PURMESSUR, THE THEN DPS MINISTRY OF FINANCIAL SERVICES, GOOD GOVERNANCE AND INSTITUTIONAL REFORM**

734. Mr S. Purmessur testified to the fact that he had been delegated by the PS to produce the file wherein Government decision had been recorded that on 10 July 2015 Cabinet had approved that the assets of the BAI Group of companies should be transferred to the NPFL and NIC with a view to safeguarding investment made by policy-holders of SCBG.

735. The Commission verified the information and found it correct referenced as FS/NPFL/39.

**FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

736. What emerges from the above is that there had been a decision taken on 10 July 2015 for the transfer of the assets of the BAI Group of Companies to NPFL and NIC.

737. **Ex-Minister Bhadain had stated that the draft of the amended Section 110A and Section 110B of the Insurance Act was submitted by Benoit Chambers which contradicted other evidence in the matter. The Commission had to hear the concerned lawyers from Benoit Chambers.**

**W34 Me CLAREL BENOIT, BENOIT CHAMBERS**

738. Benoit Chambers was represented by Clarel Benoit himself and other associates: Me Dhaneshwar Pursem and Me Anjeev Hurry.

739. Me Pursem explained that they were instructed by Messrs Bonieux and Oosman as legal consultants of the BAI Group of companies. In the dealing with the assets of the entities in conservatorship, there were two issues. One was that in the Insurance Act or any other related legislation there is no provision for a Deed of Company Agreement (DOCA) which is a binding arrangement between a company and its creditors governing how a Company's affairs shall be dealt with. This situation ensues when a company enters into Voluntary Administration. The second issue relates to the disposal of assets.

740. Me Benoit therefore proposed that there was a need to have a DOCA type system set up. To ensure its integrity, it should be under the supervision of the FSC and not under the supervision of the creditors as is the case under the Insolvency Act. Me Benoit added that there was also a second aspect to it. There were restrictions under the Insurance Act over the Sale of Insurance Assets. The consent of policy-holders was necessary for the disposal of the assets. Hence, the need to have an independent third-party consent under the supervision of FSC as Regulatory Authority which would ensure the protection of the interest of stakeholders.

741. Me Benoit explained that they, accordingly, drafted an amendment to be made to the Insurance Act after consultation with the FSC, the FS and the SLO. He informed that instructions were coming from Mr Bonieux and ultimately from PWC. Several versions of the draft bill were exchanged. Thereafter, they heard nothing from the FSC or from ex-Minister Bhadain, the Minister responsible. It was quite later that they became aware

that a Bill was eventually enacted. They consulted it on the website of the NA. To their surprise, they noted that it was a completely different product.

742. The three Counsels confirmed that most of the meetings in relation to the amendment to be brought to the Insurance Act were held in the office of ex-Minister Bhadain in the latter's presence along with Mr Manraj as Chairman of FSC but they had to stop their services as the assignment of Messrs Oosman and Bonieux was terminated because of divergence of views on the sale price of Courts between them and ex-Minister Bhadain.

743. Regarding the issue that the Kenyan Authorities did not want Foreign Investors to buy Britam shares, Me Benoit explained that there was already the Mauritius Union Insurance Company established in Kenya as well as Phoenix Insurance. So, these insurance companies could have been the buyers.

### **FACTS RELEVANT AND MATERIAL TO THE TOR WE RETAINED**

744. What emerges from the above is as follows:

1. Benoit Chambers had been initially involved in proposing amendment to the Insurance Act so that the sale of assets could be done within the existing legal regime obtaining in such matters of liquidation of companies and protection of investors.
2. Benoit Chambers did prepare an amendment which ensured that within that regime the consent of the investors be secured through the FSC as the independent regulator to oversee the sale.
3. However, after the amendment was finalised at their level and submitted, Benoit Chambers found from the website of the NA that it was a completely different one from the one they had proposed.

**745. Were professionals being chased for their work or unethically pressurised to do so?**

### **W35 MR GERALD LINCOLN, COUNTRY MANAGER ERNST & YOUNG**

746. Mr Lincoln informed the Commission that his involvement in the BAI matter was only limited to the time when he had been appointed by the BOM to act as Receiver Manager for Bramer Bank and that he had nothing to do with Britam and Britam Holdings. There was also the issue that he provided his services to the FSC but that was never finalised as there had not been any engagement letter.

747. He testified at the Commission that in view of the interferences and numerous instructions emanating from several quarters, he had to step down as Receiver Manager. He was discreet enough not to say more.

### **OF NOTE**

It is to be noted that from his deposition, it emerges that the issue of extraneous pressure exerted upon professionals involved to compromise their independence of action in the whole matter was a disquieting feature as a result of which those who would not toe the line preferred to quit.

**748. Was the amendment to Section 110A and 110B heretical? What had other stakeholders to say about it? We heard the Official Receiver on this point, Mr Virasami.**

**W36 MR VASOODAYVEN VIRASAMI, OFFICIAL RECEIVER AND LIQUIDATOR**

749. Mr V. Virasami, Official Receiver and Liquidator, recalled having been involved in the liquidation of the Bramer Bank. In fact, he was appointed as Joint Provisional Liquidators with Mr Ho Fong Kim Fat for Bramer Banking Corporation. However, these nominations as Joint Provisional Liquidators were only for 15 to 21 days after which their nominations did not follow suit subsequent to a Court Order.

750. He added that he had not been involved in the sale of Britam shares as this was not the case of liquidation as in receivership under the Insurance Act or the Insolvency Act. Following the amendment to the Insurance Act, a SA had been appointed. But had he, Mr Virasami, been involved in the sale of Britam shares, he would have appointed an expert, say a Transaction Advisor, who would have invited offers for the purchase of the shares and assessed the value of the shares before disposing of them. He would have also insisted to have cash payment immediately and opened a bank account in the company's name.

751. Mr Virasami was of the view that, albeit that Britam was a listed company in the NSE, there was a need for expert evaluation of the shares before sale. He also stated that the regime of SA is one which is unknown in our system of insolvency practice but that since it was passed by the NA, he would not make any further comment.

**FACTS TO BE RETAINED FROM THE ABOVE**

1. As a witness having practical knowledge in the field, he would have appointed a Transaction Advisor who would have invited offers for the purchase: he would not have rested on Share price at the Stock Exchange.
2. The amendment to the law was a departure from the conventional regime.

**752. On the issue of the extent of legal supervision or the lack or inadequacy of it over the whole transaction, we heard Counsel at Juristconsult Chambers. One of them was Me Shalinee Dreepaul.**

**W37 Me SHALINEE DREEPAUL-HAULKORY, PARTNER AT JURISTCONSULT CHAMBERS**

753. Me Dreepaul-Haulkory informed the Commission that she is a Counsel at Juristconsult Chambers. At the time of the sale of Britam shares in 2016 she was an associate and she is now an equity partner of Juristconsult. She added that Coulson Harney LLP was the Counsel of the purchaser in Kenya and Juristconsult was the local Chambers dealing with Coulson Harney LLP. All the documents namely the Escrow Agreement, the SPA and the Deed of Novation and Variation were drafted by Coulson Harney LLP but as the documents were governed by the Mauritian Law the services of Juristconsult were enlisted to look at the Mauritian Law component. She stated that Juristconsult was not involved in the drafting of the MOU.

754. On being questioned by the Commission regarding the purchaser being referred to in the Escrow Agreement as “*a pool of investors*,” a non legal entity represented by

Mr Peter K. Munga, she explained that probably Mr Munga had been authorised to represent the pool of investors by way of a Power of Attorney or any other document. She confirmed that Juristconsult was also involved in the drafting of the SPA. She stated that she was liaising with Me Tawheen Choomka as legal counsel for the sellers as well as the SA and Messrs Afsar Ebrahim and Georges Chung of BDO for legal clearance of documents.

755. Me Dreepaul-Haulkory explained that there arose a need to have a Deed of Variation and Novation for a number of reasons such as the confusion in the actual parties as BAI was cited as being the holders of the shares.

756. Me Dreepaul-Haulkory was asked as to whether she could be of any help to co-operate with requests made through the Attorney General's office under Mutual Legal Assistance to urge the Kenyan Authorities to answer the questions sent to them through the Mutual Legal Assistance Bilateral Cooperation to the identified witnesses in Kenya inasmuch as they have remained hitherto unanswered. The Commission requested Me Dreepaul-Haulkory to seek the assistance of Coulson Harney LLP in the matter. Me Dreepaul-Haulkory said that she would talk to Coulson Harney LLP which might transmit a message to his client. But nothing came out of the request for assistance.

#### **FACTS TO BE RETAINED FROM THE ABOVE**

757. Facts to be retained from the above deposition of Me Dreepaul-Haulkory are as follows:

1. It was Coulson Harney LLP which prepared all the documents in Kenya and submitted them to the Mauritian counterpart to harmonize them with Mauritian law.
2. She also agreed that "a pool of investors" was not a legal entity and this should have struck them at Juristconsult but did not.
3. Even if Me Dreepaul-Haulkory offered to help to get the active cooperation of the Kenyans, that did not materialize.

**758. What was the role of Juristconsult Chambers in the drafting of documents relating to the sale? For that we heard Me Johanne Hague.**

#### **W38 Me JOHANNE HAGUE, THEN AT JURISTCONSULT**

759. Me Hague was one of the employees of Juristconsult at the time who had worked on the documents relating to the transaction.

760. Me Hague informed that her involvement in the transaction was in the year 2016 when she was at Juristconsult Chambers which was appointed as the local counsel to act on behalf of the buyer. She stated that she could only speak from memory since what happened was four years back and she no longer had access to any document relating to the transaction as she has already left Juristconsult since September 2019. She informed the Commission that Juristconsult was involved mainly in assisting in the drafting of the Escrow Agreement and the Deed of Novation and Variation and the SPA.

761. She stated that when the services of Jurisconsult had been retained in year 2016, the MOU in respect of the transaction was already signed. She informed the Commission that at a certain point in time in March 2016, Jurisconsult was going to be appointed as joint Escrow Agent. However, in view of procedural difficulties relating to the setting up of a Joint Bank Account, that did not happen.

762. The Commission drew the attention of Me Hague that in the MOU and the Escrow Agreement the buyer is represented by a pool of investors and Mr Munga has signed as agent of a pool of investors which basically was a not a legal person. On being questioned as to whether a pool of investors is a legal entity, Me Hague agreed that a pool of investors is not a legal entity and that Mr Munga could have only acted as principal for the investors unless there was a Power of Attorney authorizing him to act as such or any other document where the name of the investors was specified. She explained that the term “a pool of investors” had been inserted in the Escrow Agreement probably coming from the MOU. The attention of Me Hague was also drawn on Plum LLP as being the purchaser being incorporated on the day of sale to which she replied that she did not recall the extent of her involvement in the drafting of the Deed of Variation and Novation.

#### **OF NOTE**

It is to be noted that:

1. Juristconsult was the local representative of Coulson Harney LLP engaged by the buyer.
2. Juristconsult agreed that use of the term “a pool of investors” a non legal term in a legal document was not right.
3. It was behind this device that the identity of who exactly was behind the scene as the buyer remained undisclosed until 10 June 2016, the day of its incorporation and the day of the sale to Plum LLP with Mr Peter Munga being behind the whole operation.
4. Did not those involved with the sale ask that simple question or were they complicit in a matter which was so explicit?

**763. It was the case of the ex-Minister and his team that the heretical Section 110A and Section 110B of the Insurance (Amendment) Act had been drafted by the Ministry of Finance. Was that true? The Commission heard Mr Chellapermal of MOFED in the matter.**

#### **W39 MR RADHAKRISHNA CHELLAPERMAI, DEPUTY FINANCIAL SECRETARY**

764. Mr Chellapermal was informed by the Commission that he has been convened to depose as his name had been mentioned by two witnesses: namely, ex-Minister Bhadain and Mr Deerpalsingh relating to his involvement in the amendment brought to the Insurance Act 2005.

765. Mr Chellapermal deposed that he could not recollect of any involvement on his part in the process leading to the amendment to the Insurance Act. He replied that it is the practice that MOFED is involved whenever a major policy decision on a measure which has been announced in the Budget Speech and which requires a legislation to be brought through the Finance Act. MOFED is involved for preparation of the Finance Act and not otherwise. He added that the scheduled officer for that purpose is Mr Oozeer, Adviser to the Ministry. Mr Oozeer also deals with all the amendments to be incorporated in the Finance Bill in consultation with the relevant Ministries. As Section 110A and Section 110B were not amendments to the Finance Act, hence MOFED had nothing to do with it.

766. He explained that the initial draft amendment to the Insurance Act proposed by Benoit Chambers had been emailed to him as it was originally intended to be incorporated in the Finance Bill. But it was not. He added that since the amendment had not been made through the Finance Act, it fell back on MFSGG&IR to deal with the matter.

#### **FACTS TO BE RETAINED FROM THE ABOVE**

##### **Concerning the amendments to Section 110 that were brought:**

1. MOFED was not concerned inasmuch as it was not an amendment brought under the Finance Act.
2. Since it was not, it could only have been the product of MFSGG&IR.

**767. It became obvious then that the Commission should hear Mr Oozeer mentioned by Mr Chellapermal.**

#### **W40 MR MOHAMMAD OOZEER, ADVISER AT THE MOFED**

768. Mr Oozeer was requested to disclose his involvement in relation to the amendment brought to the Insurance Act Section 110A and Section 110B. He stated that he had nothing to do with those amendments.

769. Nonetheless, Mr Oozeer recalled having had a meeting with ex-Minister Bhadain, the then Minister of Financial Services, Good Governance and Institutional Reforms on the proposed amendment to be brought to the Insurance Act in 2015. He added that during discussions at the meeting he advised on certain words to be included in the amendment. However, as adviser, the final decision did not rest with him. He explained that he was originally involved because the amendment was intended to be introduced in the Finance Bill but it was not. Hence, the amendment went as a stand-alone Bill at the level of MFSGG&IR.

770. On being questioned about the initial draft proposal of Benoit Chambers, Mr Oozeer stated that he is not aware of it. He confirmed that from the moment an amendment was not brought through the Finance Bill, MOFED was no longer concerned.

#### **FACTS TO BE RETAINED FROM THE ABOVE**

From the above deposition, it is apparent that, since the amendment to the Insurance Act in Section 110 was not brought via the Finance Act, Mr Oozeer was not concerned. Nor was MOFED. He recalled having only met ex-Minister Bhadain on the draft. However, Mr Oozeer stated that he had simply given some advice on it and no more.

**771. If NPFL was the primary entity concerned, where was its Legal Adviser all through? The Commission heard Me Toorabally.**

#### **W41 Me ASHIK AHMAD TOORABALLY, BARRISTER AT LAW**

772. Me Toorabally informed the Commission that he was the Legal Adviser of NPFL during the period August 2015 to 31 December 2019 and he was also appointed as Chairman of the Insurance Industry Compensation Fund since its creation in September 2016 up to the time when ex-Minister Seewoosunkur took over as Minister from ex-Minister Bhadain. He explained to the Commission that as Legal Adviser of NPFL



he was dealing mainly with the numerous *Mise en Demeure* served on the fund as well as Court cases brought by policy-holders of SCBG.

773. On being questioned by the Commission regarding his involvement in the different agreements particularly Escrow Agreement, SPA and Resolution of Directors regarding the sale of Britam shares, Me Toorabally said that he had not worked on any of them. He even stated that neither his opinion nor his views had been sought on any issue relating to the sale of Britam shares.

774. Regarding his attendance in the Board Meeting of 20 June 2015, he said that he can only recollect that Mr Georges Chung had given an “*aperçu*” of what was going on regarding the sale of Britam shares.

775. He further explained that he was receiving instructions from Me Thierry Koenig from ENSafrica who was the Attorney of NPFL and at times also from Me Yuddishteer Rughoobur, an Attorney from ENSafrica.

#### **FACTS TO BE RETAINED FROM THE ABOVE**

It emerges from the above that the legal adviser of NPFL was involved only with litigation cases before court and had little to do with vetting legal documents or giving legal advice.

**776. What did the CEO of NPFL have to say about the transaction and the proceeds? The Commission heard Mr Peerun, the newly appointed CEO to replace late Mr Issary.**

#### **W42 MR VIKASH PEERUN, CEO, NPFL**

777. Mr Peerun was assisted by Mr Amlesh Luchmun, Accountant of NPFL with whom he cross checked certain information before answering.

778. He had been called upon to enlighten the Commission on details mainly regarding the payment effected to policy-holders of SCBG and investors of BAML.

779. Mr Peerun produced to the Commission a report on those matters. A brief of the Report is at **(Annex 19)**.

## CHAPTER 9

### FACTS FROM DOCUMENTS

*(M)any practices which appear to be democratic are the ruin of democracies... Those who think that all virtue is to be found in their own party principles push matters to extremes; they do not consider that disproportion destroys a state - Aristotle*

#### WHAT FACTS MAY BE GLEANED FROM DOCUMENTS?

780. In the previous Chapter, the Commission identified the facts from oral depositions of witnesses. In this Chapter, the Commission will identify facts from the stack of documents at its disposal.

781. The Commission subjected all documents that came its way to meticulous scrutiny before relying on them. Accordingly, the Commission will cite only the relevant extracts from those that relate to the primary issues rather than the collateral ones, if after situating them in context.

782. The Commission will restrict itself to those which concern issues relevant to its TOR, namely:

- A. *the method and the circumstances of the sale;*
- B. *the need, if at all, of a transaction advisor for effecting the sale;*
- C. *whether there was a conflict of interest in the involvement of the BDO/BDO personnel;*
- D. *short-fall, if any, in the process of sale;*
- E. *the matter of fraud, malpractice, corruption, undue influence or misdeed;*
- F. *the choice of the currency used; and*
- G. *any matter ancillary to the foregoing.*

783. For documents relating to A above, the consideration will be split under A1 (Methods) and A2 (Circumstances).

#### A1. ON THE METHOD THAT WAS USED FOR THE SALE

784. Which documents exist with respect to the method, or lack of it, that was used to conduct the sale?

785. On Saturday 14 November 2015, there was a meeting in the office of ex-Minister Bhadain. The Commission faced a lot of reticence, prevarications and half-truths about this meeting from one quarter. Ex-Minister Bhadain stated to us that he had nothing to do with the Britam sale. Both Messrs Afsar Ebrahim and Yacoob Ramtoola stated that there was a meeting but it was a mere courtesy call, barely five minutes, with ex-Minister Bhadain. After some further probing, the truth came out. It was more than a courtesy call.

#### Why so much of mystery surrounding this meeting?

786. It was the mystery surrounding this meeting that prompted the Commission to look deeper. One document gave a lie to the above. It showed that on Saturday 14 November 2015, there was indeed a meeting which all three had attended with no other person than Mr Peter Munga who was on a two-day visit to Mauritius. This, be it noted, was

occurring in Mauritius prior to the meeting in Nairobi of 18 November 2015. That document emanated from no lesser a person than Mr Peter Munga himself who spoke of it in a subsequent letter addressed to the ex-Minister. He referred to his having met the ex-Minister Bhadain, in his office, in presence of Messrs Afsar Ebrahim, Deputy Group Managing Director BDO & Co. and of Mr Sandeep Khapre, the CEO of BDO (Kenya). Courtesy call it may have been but substantive issues had been discussed and finalized at this meeting. The letter is reproduced *in extenso*, for ease of reference, as well as individual evaluation by the reader. Why was there so much of reticence by the three to play down this meeting would bemuse the mind of many.

23<sup>rd</sup> November, 2015

Honourable Roshi Bhadain,  
Minister of Financial Services, Good Governance,  
Institutional Reforms, Technology, Communication and Innovation,  
Level 13, Sicom Tower, Wall Street, Ebene,  
**MAURITIUS.**

Dear Minister,

**Re: SALE OF 23.34% STAKE IN BRITISH-AMERICAN INVESTMENTS COMPANY  
(KENYA) LIMITED**

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*I wish to thank you most sincerely for the meeting held in your office on Saturday 14<sup>th</sup> November 2015. The meeting was also attended by Messrs Afsa A.A.Ebrahim,(sic) Deputy Group Managing Director BDO & Co. and Mr Sandeep Khapree the CEO of BDO Nairobi.*

*The meeting discussed the impending sale of the stake held by British-American (Kenya) Holdings Limited in British-American Investments Company (Kenya) Limited and I indicated, that any investor seeking to acquire the fore-mentioned stake with a view to eventually obtaining control of Britam Kenya would not be aligned to the interests of other existing shareholders and is therefore not welcome. I reiterated our position that the Kenyan Investors have invested enormous financial and other resources over the last 50 years and are making every effort to acquire the above stake.*

*Further, I categorically observed that the issues that led to the collapse of Mr. Rawat's empire had no relationship with Britam Kenya but regrettably, Britam Kenya suffered considerable reputational damage including the collapse of its share price. In this connection, I have been requested by the Board and indeed the shareholders to thank you for the **public statement that you made in April 2015 to the effect that Britam Kenya is a strong, stable and well managed financial institution and that it was the crown jewel amongst all the investments previously owned by Mr. Rawat.** Although your most timely Press Statement was of great relief to the 25,000 Shareholders and also calmed the markets, we are still reeling from the after effects.*

*Finally, the Board of Britam Kenya will continue engaging BDO & Co., the Special Administrators on the lines agreed during our meeting. (underlining ours).*

*Many thanks once again.*

*Yours Sincerely,*

*sd*

**PETER K. MUNGA, CBS  
CHAIRMAN**

**c.c. Mr. Afsa A.A. Ebrahim (sic)  
Mr Sandep Khapree (sic)**

787. The first “*constatation*” is therefore:

- (1) it was not for a courtesy meeting of “*less than 5 Minutes*”<sup>115</sup> that Mr Peter Munga had met ex-Minister Bhadain at his office in presence of the BDO personnel;
- (2) substantive issues had been discussed at the meeting;
- (3) Mr Peter Munga had indicated the position of Kenyan shareholders regarding sale;
- (4) He spoke of the drop in the share price which had stabilised with the help of ex-Minister Bhadain;
- (5) He appreciated the public intervention of ex-Minister Bhadain which he stated had settled the minds of the shareholders.

788. The concluding paragraph of the letter may not go unnoticed. It ends with the ominous sentence: “*Finally, the Board of Britam Kenya will continue engaging BDO & Co, the Special Administrators, on the lines agreed during our meeting.*” What were “*the lines agreed during our meeting?*” There is no record. It is left to imagination. That was happening on 14 November 2015 at the office of ex-Minister Bhadain in Mauritius, four days before the meeting in Nairobi chaired by Mr Peter Munga at the instance of MOFED.

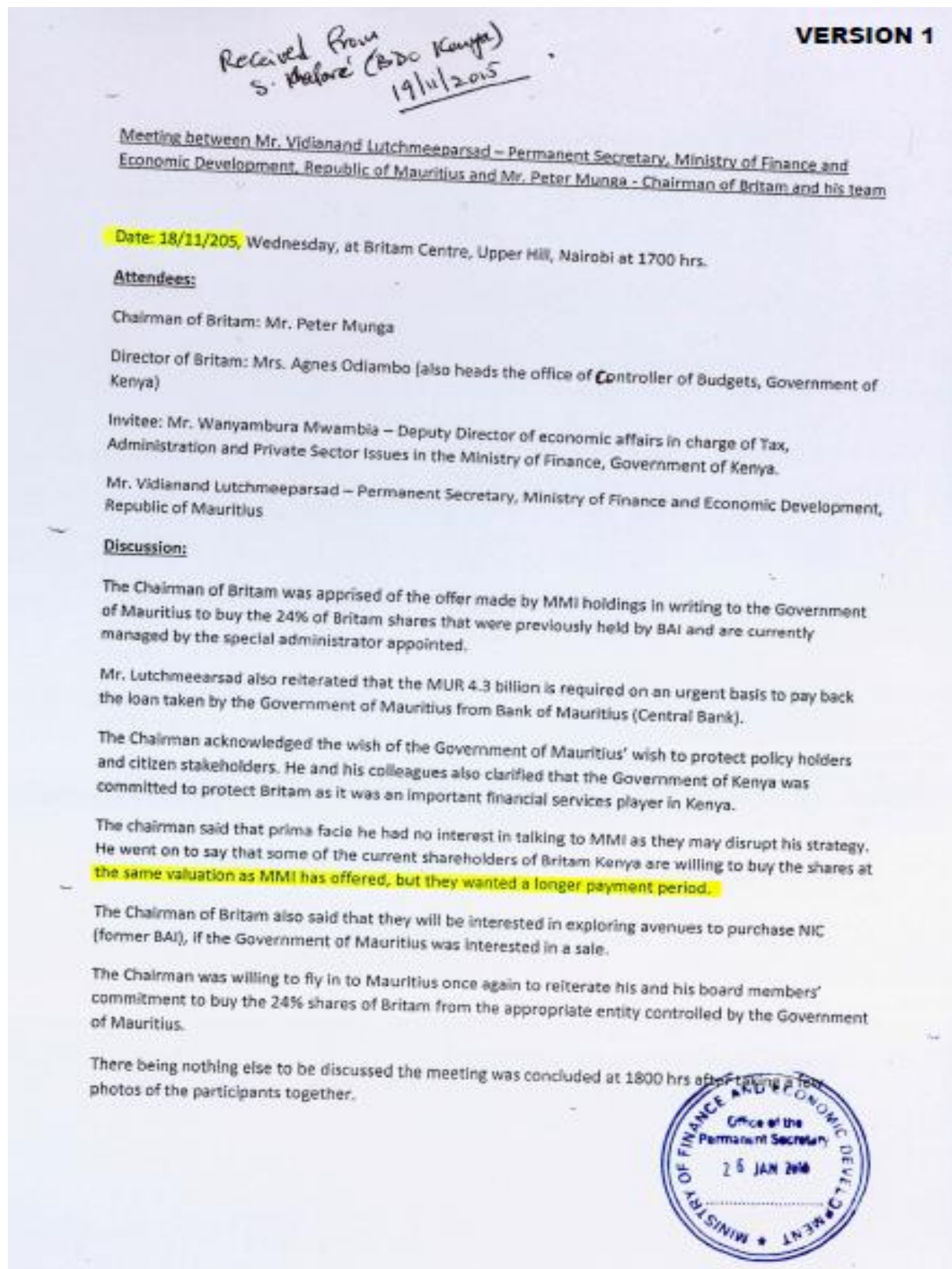
789. That Nairobi meeting was prompted by a parallel action from Port Louis. Mr Lutchmeeparsad, the then PS of the Ministry of Finance, who was on an unrelated mission was requested by ex-Minister Lutchmeenaraidoo and the FS to meet the Kenyans in Nairobi. He added that his mission was to tell the Kenyans that if they were to be the buyers, they had to match the price offered by MMI Holdings which was MUR4.3bn. The Cabinet Secretary of Kenya had spoken to ex-Minister Lutchmeenaraidoo to sell it to the Kenyans.

790. Four days later, back home, Mr Peter Munga, chaired the Nairobi meeting where Kenyan officials were present. They agreed after a 15-minute exchange to match the price offered by MMI Holdings. The Notes of meeting were given to Mr Lutchmeeparsad to bring back home to the Ministry of Finance.

791. From the mystery surrounding the pre-Nairobi Mauritius meeting of 14 November 2015, the Commission rolled into another mystery. Now there are two versions of the Minutes of 18 November 2015 as illustrated below. On analysis, they are more or less the same except for one critical part crucial to the Commission. On one version, there was no such offer made to the Mauritians of matching the price agreed with MMI Holdings (MUR4.3bn). On another version, there was such an offer. The one submitted by Mr Lutchmeeparsad spoke of the offer being “*the same valuation as MMP*” (Version 1). On the other hand, the one used by the ex-Minister and submitted by his team spoke of the offer being at a “*mutually acceptable valuation*” (Version 2). Which version is the fake one and which is the genuine?

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<sup>115</sup> P.13 of the deposition of Mr Afsar Ebrahim on 13 December 2017.



Amey  
**VERSION 2**

Meeting between Mr. Vidianand Lutchmeeparsad – Permanent Secretary, Ministry of Finance and Economic Development, Republic of Mauritius and Mr. Peter Munga - Chairman of Britam and his team

**Date:** 18/11/2015, Wednesday, at Britam Centre, Upper Hill, Nairobi at 1700 hrs.

**Attendees:**

Chairman of Britam: Mr. Peter Munga

Director of Britam: Mrs. Agnes Odiambo (also heads the office of Controller of Budgets, Government of Kenya)

Invitee: Mr. Wanyambura Mwambia – Deputy Director of economic affairs in charge of Tax, Administration and Private Sector Issues in the Ministry of Finance, Government of Kenya.

Mr. Vidianand Lutchmeeparsad – Permanent Secretary, Ministry of Finance and Economic Development, Republic of Mauritius

**Discussion:**

The Chairman of Britam was apprised of the offer made by MMI holdings in writing to the Government of Mauritius to buy the 24% of Britam shares that were previously held by BAI and are currently managed by the special administrator appointed.

Mr. Lutchmeeparsad also reiterated that MUR 4.3 billion is required on an urgent basis to pay back the loan taken by the Government of Mauritius from Bank of Mauritius (Central Bank).

The Chairman acknowledged the wish of the Government of Mauritius' wish to protect policy holders and citizen stakeholders. He and his colleagues also clarified that the Government of Kenya was committed to protect Britam as it was an important financial services player in Kenya.

The chairman said that prima facie he had no interest in talking to MMI as they may disrupt his strategy. He went on to say that some of the current shareholders of Britam Kenya are willing to buy the shares at a mutually acceptable valuation, but they wanted a longer payment period.

The Chairman of Britam also said that they will be interested in exploring avenues to purchase NIC (former BAI), if the Government of Mauritius was interested in a sale.

The Chairman was willing to fly in to Mauritius once again to reiterate his and his board members' commitment to buy the 24% shares of Britam from the appropriate entity controlled by the Government of Mauritius.

There being nothing else to be discussed the meeting was concluded at 1800 hrs after taking a few photos of the participants together.

792. It was the political Adviser, Mr Deerpalsingh, who submitted to the Commission Version 2 which was relied on by the ex-Minister and his team. Ex-Minister Bhadain used it to argue that there had never been an offer for MUR4.3bn by the Kenyans at the Nairobi meeting. Version 2 was also referred to by Mr Afsar Ebrahim. Version 1 had been filed – in point of time – at the very early stages of the proceedings of the Commission by Mr Lutchmeeparsad. An identical copy had been produced by Late Sir Anerood Jugnauth, GCSK, KCMG, QC, PC.

793. Version 1 produced by Mr. V. Lutchmeeparsad and late Sir Anerood Jugnauth reads as follows:

*Date: “18/11/205, Wednesday, at Britam Centre, Upper Hill, Nairobi at 17 00 hrs ..... shareholders of Britam Kenya are willing to buy the shares at the same valuation as MMI has offered, but they wanted a longer payment period” (underlining ours).*

794. Version 2 produced by Mr. A. Deerpalsingh and relied on by ex-Minister Bhadain and Mr. A. Ebrahim reads as follows:

*Date: “18/11/2015, Wednesday, at Britam Centre, Upper Hill, Nairobi at 1700 hrs..... shareholders of Britam Kenya are willing to buy the shares at a mutually acceptable valuation, but they wanted a longer payment period.” (underlining ours).*

795. Mr Deerpalsingh stated he had it from Mr. Afsar Ebrahim of BDO after the Commission had started its sitting. It is worthy of note that Mr Ramtoola on whose mandate the Nairobi meeting had taken place kept an eloquent silence of Version 2.

#### **FACTS TO BE RETAINED FROM THE ABOVE**

1. Version 2 is obviously Minutes that have been tampered with. There is corroborative evidence, oral and documentary which show that the agreement of the Kenyans was for MUR4.3bn on 18 November 2015.
2. The two versions also speak for themselves and to each other. It demanded a meticulous eye to detect the fake from the genuine.
3. Version 1 was put in at the early stages of the sitting of the Commission. Version 2 was put in much later long after the Commission had started its hearing. Obviously, the one who forged it and the ones who were complicit to it had already seen where the shoe was pinching or would pinch.
4. There is no perfect crime. Version 1 is its own witness to the forgery. We have two copies of Version 1. Both contain a common typo just one tiny missing figure in the whole text of 364 words. On the other hand, Version 2 has that tiny missing figure in that one-page text corrected. The typo is the figure “1” in “18/11/205” corrected to “18/11/2015.” The corrected typo is patent in the version relied upon by ex-Minister Bhadain and his team and produced to us after the Commission started its hearing. That should settle the issue of which version is true and which is fake. Obviously, it must not have occurred to the forger/s that the one missing “1” will give him/them away.
5. Independent support for the version that there was an agreement for MUR4.3bn on 18 November 2015, there are a number. A celebratory dinner followed the meeting as the Kenyans had agreed to match the price of MMI Holdings. That meeting of 18 November 2015 had been followed by a picture showing the smiling faces of the



Mauritian party with the Kenyans as illustrated below. The Mauritian party would have had their “*queue entre les pattes*” that evening had the mission not been successful. It is inconceivable that, gone on a mission to accomplish something, the parties would have taken a photograph to bear witness to their ironical smiles.



6. The Commission came across another document which corroborated the fact that there was an agreement for MUR4.3bn. This document did not exist in the list of documents produced by BDO. The document was submitted to us by one of the legal advisers involved in the matter. That document emanating from the Kenyan party raises no issue with the fact that the Kenyans had offered to buy the shares at MUR4.3bn on 18 November 2015.
7. The Commission’s conclusion on this matter is as follows. The Minutes produced and relied on by the ex-Minister and his team have been tampered with on a material aspect. Aside the fact that the document is its own witness, there is corroboration of the fact that there was an agreement by the Kenyans to match the price of MMI Holdings. Ex-Minister Bhadain would be hard put, in the face of such preponderant facts, to deny that he had something to do with Britam sales.
796. Back home, following his successful mission that the Kenyans had accepted to match the offer of MMI Holdings of MUR4.3bn, Mr Lutchmeeparsad reported it to MOFED. FS, characteristic of him, directed Mr Lutchmeeparsad to liaise with the Kenyans to push the Mauritian luck further, i.e., whether they could do better than MUR4.3bn.
797. Indeed, as a follow up, on 27 November 2015, Mr Lutchmeeparsad sent an email to Ms Gladys Karuri requesting her to forward the mail to Mr Peter Munga for a better offer and a firm offer:

*“Following our discussions, you clarified that the Government of Kenya was committed to protect Britam as it was an important financial services player in Kenya. For obvious reasons, you proposed that some of the current shareholders of Kenya are willing to buy the shares at MUR 4.3 billion. Besides,*



*you also showed interest in exploring avenues to purchase NIC (former BAI) if the Government of Mauritius was interest in a sale. (underlining ours)*

*I discussed the matter with Mr D. Manraj, Financial Secretary and also Chairman of the Financial Services Commission (FSC) Mauritius and the latter is of the opinion that should your offer be better than what has been proposed to us by MMI (South Africa), you are kindly requested to send your best offer to the Chairman of the FSC Mauritius for consideration at the following address: (underlining ours)*

*The Financial Secretary  
Ministry of Finance and Economic Development  
Ground Floor  
Old Government Centre  
Port Louis”*

798. The next document in hand would be a letter dated 11 December 2015, making reference to a telephone conversation of 09 December 2015. Therein, Mr Henry K. Rotich, Cabinet Secretary and National Security of the National Treasury of Kenya, gives his official imprimatur to the above meeting by addressing a letter of thanks to the FS for agreeing that the Britam shares be sold to Kenyans:

*“My understanding is that the Board of Directors of Britam will need to make arrangements to have negotiations with the Government of Mauritius in order to agree on the suitable timeframe within which the sale will be effected as well as the sale price and payment terms. In this regard, the commitments from the negotiations will be formalized in a Memorandum of Understanding between the Government of Mauritius and Britam”.*

799. It is to be noted that since the Britam shareholders had agreed to match the MMI Holdings offer of MUR4.3bn and only asked for “a longer repayment period” the Kenyan Cabinet Secretary is speaking in his reply in terms of “a suitable time-frame” for the sale to go through and “payment terms”.

800. He concludes:

*“By a copy of this letter, the Chairman, Board of Directors of Britam is advised to make the necessary arrangements for the proposed negotiations between the parties and the Government of Mauritius.”*

801. The negotiations in the context can only mean negotiation on payment terms inasmuch as this is exactly the indulgence which they had sought in matching the price with MMI Holdings. On 12 January 2016, the Group Managing Director, Dr Benson I. Wairegi EBS, writes to the FS as follows:

*“We are consulting on the proposed transaction and expect to conclude the process by mid-February 2016”.*

802. What he requests in the same breath is:

*“for a follow up meeting with you during the week of 15<sup>th</sup> February 2016 in Nairobi to finalize discussions on this matter.”*

803. He requests for “a convenient date for the meeting.”

804. The content of the above documents reveals the existence of Mauritius having opened and engaged in two communication lines with the Kenyans. One is with ex-Minister Lutchmeenaraidoo and the other is with ex-Minister Bhadain. However, one communication line between the Minister of Finance and the Kenyans was going to snap soon. For, on his return from mission on 10 February 2016, ex-Minister Lutchmeenaraidoo would no longer be in tether at the Ministry of Finance. He was admitted to a clinic straight from the tarmac as it were and would not ever return to the Ministry of Finance. Thereafter, only one line with the Kenyans would remain open: that between the ex-Minister Bhadain and his team, based at MFSGG&IR.
805. For that communication line as opposed to that which had existed before with MOFED, there is no document trail to fill the important gap of what happened between 12 January and 8 March 2016. Asked about this, Mr Ramtoola stated that all communications were by phone during that period. We make no comment on why such an important transaction which had international ramifications and evoked such public interest nationally had no document to show the remaining process which concluded the sale. How was a meeting planned to take place in Nairobi end up taking place in Port Louis, on a *non dies*, 12 March 2016! It is a mark of opacity that transactions should take place by phone calls only, without any supporting correspondence in writing. The phone calls must have been of some significance for what happened next.
806. What happened next is that Mr Peter Munga and his small team landed in Mauritius and engaged with BDO & Co and the SA. They spent four days between 8 March 2016 to 12 March 2016, at the end of which they went away with an MOU already signed with the deal done at MUR2.4bn.

#### **How come? What method was adopted?**

807. Minutes have not been kept. Meetings have taken place. There have been exchanges and discussions but no record exists. A file was opened. But it contains next to nothing. Fortunately, we retrieved a number of documents including some emails. One from Ms Gladys Karuri dated 11 March 2016 gives us an idea of what had been happening during the 5 days. Ms Gladys Karuri, Principal Executive Director (Finance, Strategy and Operations) of Britam Kenya, comprised the Kenyan team. It is not quite clear for whom she was strategizing and operating inasmuch as the eventual buyer/s are still covert behind the opaque screen of “pool of investors.” However, the one at the controls was Mr Peter K. Munga, reputedly a business tycoon. He was personally and physically in Mauritius on the four critical days in March 2016 when the prices and the terms were cast in stone. He had been personally and physically in Mauritius when he had met ex-Minister Bhadain on 14 November 2015 when they had decided “*on the lines agreed during our meeting.*” He personally and physically chaired the meeting four days later, on 18 November 2015, when the Kenyans had agreed to match the price of MMI Holdings. He was personally and physically in Mauritius from 05 to 07 February 2017, a week after the ex-Minister Bhadain had left the government. The immigration cards show that his first visit was for tourism, his second visit for business and his third visit also for business.
808. Ms Gladys Karuri can be read sending an email on 10 March 2016 at 13.52 pm. to Mr Afsar Ebrahim to thank him “*for the engagement we have had with you so far since we arrived in Mauritius on Tuesday morning*”. She referred to her argument as to why they were offering kshs 16 per share. In her own words,  
“*Before the BAI matter came up in April 2015, the share price of Britam was at shs 28 per share. In contrast, the share price at yesterday was shs 11.*”

809. She argued that Britam share price has dropped in excess of 130% and

*“From various analysts who actively cover the Kenyan insurance market there is currently a SELL recommendation on the stock with expected negative returns.”*

## METHOD ADOPTED

810. The above show a clear market strategy being used by financial strategist, Ms Gladys Karuri on behalf of Mr Peter Munga. The marketing strategy is that the assets should be represented as less attractive than they actually were. To counter that strategy, there was a need for a counter strategy from the Mauritian seller. There is no evidence that the Mauritian had either properly negotiated the deal or used any strategy for that matter, let alone a market strategy.

811. The method adopted, from all the documents retrieved and examined, was clearly the share price value on the NSE as at 11 March 2016. The email exchanges reflect a person-to-person engagement with Mr Afsar Ebrahim, through “*on-going discussions*” that took place. All was behind the scene. We read the following from Dr Benson I Wairegi to Ms Gladys Karuri on 10 March 2016 at 9.01 hrs:

*“Thank you for on-going discussions in Mauritius”.*

*“The shareholders have maintained that the deal only makes sense at a maximum price of 16 shs which is any way much higher than the price advised. As you are aware, all the modelling done based on a projecting support a premium of 15%.”*

## EVALUATION MODELS

812. The buyer/s seem to have won their argument by a number of modelling done by them which led the parties to agree to the deal at a premium of 15%. What modelling had been done has remained opaque and moot?

813. It is fair to say that the evaluation of shares is not an exact science but it is a science nonetheless. Analysts use a wide range of models in practice, ranging from the simple to the sophisticated. These models often make very different assumptions, but they do share some common characteristics and can be classified in broader terms.

814. It is clear that the Kenyan team came up with the share price model to justify the deal at MUR2.4bn. A number of important matters had not been factored in. They would have come on the table had there been a transaction advisor as well as a legal adviser overseeing the transaction as a whole or at least Cabinet oversight on the matter. But even Cabinet had been denied the opportunity, let alone the FSC. The details denied to everyone save the contracting parties came to the public knowledge only after a PQ had been raised in Parliament. What were the factors which would have come to light?

## CONTROL ISSUES

815. The first aspect that strikes us is that this was not a case of selling one share or two in a listed company. If that was so, the market price model would have been the least controversial. This was a case of selling all the assets, so basically the whole entity. Different evaluation criteria apply when one is selling the complete entity. It is a question

then of evaluating the entity itself in its integral whole as opposed to when individual shares are changing hands. An important question of goodwill comes into play.

816. The second aspect which strikes us is that the control issue has not been factored in. When evaluating a firm, one invariably needs to take into consideration who is at the controls: i.e. the competence and strengths of those comprising management. Special weightage is given with private firms where the owner is also the manager. This is so because in this case it is a plus point to have an owner who has absolute management control. In a publicly traded firm, in contrast, incompetent management can often be replaced, if enough stockholders can be convinced that it is in their best interests to do so. In the case of Britam, the plus point existed.
817. There are implications for valuation where only a portion of a private firm is offered for sale. If that portion provides a controlling interest (i.e., the right to pick the firm's management), it should have a substantially higher value than if it does not provide this power. Normally, this would mean that 51% of a private firm's equity should trade at a substantial premium over 49%. This applies whether a firm is being sold to a private entity or to a publicly traded firm. If, for instance, only non-voting shares or shares with diluted voting rights are offered to investors in the public offering, they should trade at a discount on shares with full voting rights. Note that the BAKHL shareholding benefitted from additional privileges given that it had a 24% stake in Britam. More about these later.
818. In an email dated 11 March 2016, Ms Gladys Karuri writes to Mr Afsar Ebrahim informing him of an enhanced offer made by Mr Peter Munga and his team as follows:
- “A cash offer of \$71m (MUR2.65bn) based o(sic) today's market price of Ksh11.90 plus a premium of 35% resulting in an offer of Ksh16 per share.”*
819. Even the share price argument at the NSE around which the MUR2.4bn was arrived at, was flawed. We refer to the reasoning given in the letter of Ms Gladys Karuri. She stated as follows:
- “As advised earlier, BRITAM has suffered the decline in Kenya stock market and the performance of the company has also suffered major setback. The adverse impact of BAI on BRITAM has also played its part in reputational risk but the financial impact has been quantified. I am fully aware that you had an offer which is higher than ours but I wish to highlight that the market conditions at that date were very different from what they are today. The offer of Rs 4.3bn you had, as verbally advised by yourself, was based on a share price of Ksh 18,50% premium above market price and our December 2014 audited accounts, publicly available, reported profit of Ksh3.2bn and a Comprehensive Income of Ksh6bn. Our price has since gone down by 39% to Ksh11.90 and the USD:KSH exchange rate has come down by 11%. Our financial performance for year ending December 2015 is not public yet but is estimated to be around Ksh500m and a Comprehensive Loss of around Ksh3bn. The Company had to issue a Profit Warning in December 2015 so that market expectations are aligned.”*
820. Later on, the email concludes in seductive terms the support given by Ex-Minister Bhadain in the matter. She mentions that the Kenyan generosity was:

*“as a gesture of goodwill and to show our good faith to the Government of Mauritius especially to Hon Minister Bhadain whose support has been unequivocal at the height of the crisis and his personal crusade to help those policyholders who lost their savings.”*

821. She concludes:

*“We thank you for your persistence and hard work in trying to resolve this delicate issue.”*

822. Thus, the enhanced offer had been made by email to Mr Afsar Ebrahim at 12.12 hrs on 11 March 2016. That was sent to the legal adviser Me Tawheen Choomka at 16.51 hrs. One may reasonably assume that the deal must have been considered done if the matter was referred to the legal adviser for vetting of document as she said she was doing, with material supplied.

823. The crucial issue as regards the MUR2.4bn, price at which the shares were sold, is whether – in the words of Mr Dawood Rawat – *“The Kenyans either duped the Mauritians or made a covert deal which is rather intriguing.”* **Dawood Rawat, weekly, Issue No 3261. The Britam Scandal. The Inside story of the Fiasco, Issue 3261, p23.** To test the veracity or otherwise of this statement, the Commission examined the evolution of share prices on the NSE on the relevant dates with respect to the sale of Britam shares. This is reflected in the table below.

DATE	OFFERS	PRICE OFFERED	SHARE PRICE ON NSE
11 September 2015	Barclays Bank	MUR4.3bn	17.1Kshs
14 October 2015	MMI	MUR 4.3bn	14.95Kshs
18 November 2015	Peter Munga	Match MMI price MUR4.3bn	
11 March 2016	Peter Munga	MUR2.4bn	11.75Kshs
10 June 2016	Plum LLP (Peter Munga)	MUR2.4bn	14Kshs
January 2017	IFC	-	15.85Kshs

### A number of intriguing facts

824. The MOU was not a legally binding document. That is explicit by the very wording of the MOU. Why was it taken to be *“a done deal”* on 12 March 2016? Why was not the issue opened on 10 June 2016, the date of entering into the SPA? The Kenyans had already reneged on their offer of MUR4.3bn and opened negotiation on the share price in March 2016. Why could not the Mauritians revisit the issue of share price on 10 June 2016? Why did the Mauritians regard the figures in the MOU as cast in stone? The other intriguing factor is that all this will remain covert even to the FSC whose Board is informed of the first consideration due to be paid but is not informed of the purchase price which is the most critical information.

825. As it is, the logic revealed in the documents show that the Kenyans should have come to Mauritius for discussion and negotiation, *“on the payment terms”* inasmuch as they had agreed on 18 November 2015 in Nairobi with MOFED to match the price of MMI Holdings except that they had requested for *“a longer payment period.”* However, when they came to Mauritius in March 2016, they opened discussion on the very sale price with the Mauritian team and were allowed to renege on their original offer.

It should be noted that they had come with legal draft documents ready just for input by Jurisconsult for the Mauritian Law component. There was no formal negotiation as such. Exchanges were taking place between Mr Afsar Ebrahim representing BDO and Ms Gladys Karuri representing the Kenyan buyers. The next thing we read is the pressure exerted by them:

*“The Chairman and I rescheduled our flights for 2 nights consecutively to demonstrate our commitment to this deal. We will be leaving tonight. We look forward to a favourable response from the Special Administrator and we sincerely hope to sign a Memorandum of Understanding before we leave. We shall do all we need to make the payment as initially outlined by 30 April 2015. In the event there is a delay at regulatory level, we shall seek the support of your regulator to expedite matters as we are very conscious of your deadline to repay policyholders in June and funds must be readily available well before that.”*

826. Following that unstructured person-to-person haggling, an MOU ensued containing all the details of the deal signed on the 12 March 2016. Albeit that it mentioned an Escrow Agreement which was to follow and did follow on the 26 April 2016 for the purposes of payment of the first amount. The fact remained that it was not a final document of a completed transaction. Both the MOU and Escrow Agreement were still tentative and without due authority from the NPFL Board. The parties would accordingly on 10 June 2016, enter into an SPA, the signature of which was done at arm’s length. They would accordingly seek to regularize the irregularity, and in the process adding to the number of the irregularities.

827. The CEO of NPFL requested the Secretary on the Friday of 17 June 2016 at 20.45 hrs to send an email to the members of the Board to attend a meeting on Monday 20 June 2016 at 9.30 am. The following documents were attached:

- (i) the SPA;
- (ii) the Escrow Agreement; and
- (iii) the Deed of Variation and Novation.

828. The objective was to seek from the Board a Directors’ Resolution for the Transfer and Sales of shares which had been signed by the CEO a week earlier. The Board members came up with a number of questions which could only be answered by BDO. Accordingly, another meeting was held at the BDO office where BDO made a presentation to the Board. The Members again declined to give their signature to a document, Directors’ Resolution, prepared in advance. A couple of days later, their signature would be needed to a document to the effect that the Board had taken note of the transfer-cum-sale. That they did on the basis of another document emanating from the MFSGG&IR which represented that the sole shareholder which was Government had agreed to the sale. It is on 21 June 2016 that the NPFL Directors’ Resolution would be signed to that effect. The legal value of the note given by the Board of NPFL is open to discussion.

## **FACTS TO BE RETAINED AS REGARDS METHOD**

1. There were two lines of communication between the Kenyans and the Mauritians. One was, on the one hand, between them and, on the other, ex-Minister Lutchmeenaraidoo and FS. The other line was between Mr Peter Munga, on the one hand, and ex-Minister Bhadain and BDO, on the other.

2. Mid-February 2016, ex-Minister Lutchmeenaraidoo exited the scene. He was no longer Minister of Finance. Henceforth, the only line of communication which subsisted was that between the Kenyans and ex-Minister Bhadain and BDO.
3. Further to the meeting of 14 November 2015 which Mr Peter Munga had had with ex-Minister Bhadain, Messrs Afsar Ebrahim and Mr Khapre of BDO, they were set to continue engaging BDO & Co, the SA *“on the lines agreed during our meeting.”*
4. The Kenyans landed in Mauritius and engaged one Ms Gladys Karuri for five days between 8 March to 12 March 2016 with Mr Afsar Ebrahim at the end of which the agreement was reached for sale at MUR2.4bn.
5. The method used was the stock market price which may be appropriate when individual shares are exchanged but was inappropriate in the circumstances of this case, all the more so when MMI Holdings had made an offer when the stock market price of the shares was comparable to the date of the SPA even if on the date of the MOU it may have fallen to the lowest of the lows, i.e. 11.75Kshs.
6. There is no evidence of any formal negotiation having been conducted and any negotiation skill having been used.
7. On analysis, there was no cross-checking whether the arguments advanced by the strategist Ms Gladys Karuri on the stock market price were valid or not.
8. The transfer-cum-sale Agreement was reached without the NPFL Board having given its approval till today.
9. A proper appraisal and valuation by an independent transaction advisor would have more likely than not fetched a much higher price.

## **A2. CIRCUMSTANCES WHICH LED TO UNDERSELLING THE ASSETS**

829. Now for the circumstances which led to underselling the assets to gauge the circumstances which led to the assets being undersold, the Commission looked at such core documents which could throw light on:

- (1) Section 110A and Section 110B of the Insurance (Amendment) Act which is the legal vehicle that was used for the operation;
- (2) Who were involved in the operation, (public officers or other persons);
- (3) Whether Cabinet had sanctioned the proposed amendment;
- (4) The role of the Minister; and
- (5) Whether the law had received proper SLO vetting.

### **Who was the author of Section 110A and Section 110B?**

830. Who was author of Section 110A and Section 110B Insurance (Amendment) Bill? That question loomed large in the mind of the Commission because the regime the amendment created was of heretic nature. Two very short amendments looking innocuous in themselves, they provided a power vehicle for a Minister to enter into a space he had no right to be in. The amendment vested powers upon him to direct that the undertaking of an ailing insurance business shall be transferred to an insurer *“as the Minister may approve.”* The amended law invented a new creature of statute referred to as the SA who became the legal instrument of an elected representative in a domain that

belongs to independent professionals and institutions: in this case the Conservator and FSC. In point of law, it robbed the consent of the investors in deciding the outcome of their investment in the aftermath of a failed investment.

831. The string of correspondence shows that it was Benoit Chambers at the instance of the original Conservators who had been instructed to prepare a Draft. Benoit Chambers had proposed an amendment to the Insolvency Act with an adaptation of the DOCA system to satisfy Government requirement to watch the interest of policy-holders, thus taking on board the need of their consent. DOCA is short for a Deed of Company Arrangement. When a business is going bust, the creditors are taken on board by a professional conversant with stock-taking, assets evaluation, management, sale and distribution with professional accountability in the realisation of assets. The agreement is cast in a Deed of Company Arrangement. The Chambers had come up with an elaborate Bill as a result of consultations where the interests of the investors were watched by FSC, an independent institution, as an oversight body.

832. However, it is not that elaborate law prepared by Benoit Chambers that was enacted finally. In its stead, the ex-Minister Bhadain and his team had come up with a draft of their own. Who was that author? The whole concept of SA emanated from the new legislation with a package of heresies. There is evidence that ex-Minister Bhadain and his political advisers were involved in the drafting of laws.

833. Indeed, one example is seen in the email exchanged between one political adviser and Benoit Chambers where the tail is seen to be wagging the dog. The correspondence – be it noted – is not through any accounting officer of the Ministry or a public officer on behalf of the public office. On 20 April 2015, we have the following email:

*“Dear Clarel*

*Our meeting refers. I have attached the word version of the proposed amendments to the insurance and insolvency act.*

*Regards*

*Akilesh.”*

834. The above goes on to show the extent to which Executive authority in our democratic set up was side-lined and crucial decisions regarding the rule of law was being taken by political advisers. In a matter so fundamental to our institutions, at the time of choice of which law was to be passed, it was the ex-Minister’s Political Adviser as opposed to an Accounting Officer of the line Ministry such as PS who was taking decisions. It was he who was giving instructions. The SLO has been barely involved and there is no record that the text was duly vetted by the SLO or at least overseen by the private law Chambers, on the weird assumption that such a possibility is permissible. It is a matter of serious disquiet that such an inroad could take place, all the more so on the passing of a law and in a Ministry with a portfolio of good governance and institutional reforms. A political adviser was giving instructions of which text to enact into law and the effect of the law was to enter a Minister into the affairs of an independent commission like FSC. It is this legal aberration which culminated in the enactment of Section 110A and Section 110B Insurance (Amendment) Act.

835. Did not this law ultimately gain legitimacy by Cabinet and the NA, albeit its tainted source and number of irregularities? For if Cabinet had given approval, as ex-Minister Bhadain stated, and further the NA had passed the law, it would be presumed that it is



good law until the contrary is shown. The Commission addressed its mind to these two aspects.

**Was there a Cabinet Agreement for the enactment of Section 110A and Section 110B?**

836. Ex-Minister Bhadain stated that when he brought the matter to Cabinet, Cabinet had agreed to the introduction of the Bill in Parliament. Accordingly, the Commission examined the Minutes of Cabinet, only to see that that statement of ex-Minister Bhadain was misleading. The Minutes read that Cabinet “took note” of the proposed Bill. For the uninitiated, it is worth nothing that in a democratic system of Government based on the Westminster model when Cabinet agrees to a Bill being introduced in Parliament, it says so in so many words and specifically uses the word “Agree.” For example, at the same Cabinet sitting, Cabinet “agreed” to the introduction of the Employment Rights (Miscellaneous Provisions) Bill. Again, Cabinet had “agreed” to the introduction of the Supplementary Appropriation (2013) Bill. In other words, Cabinet had not agreed to the passing of Section 110A and Section 110B of the Insurance (Amendment) Bill. It had, therefore, reached the NA by a subterfuge.

**Constitutional issues raised at the NA concerning Section 110A and Section 110B?**

837. Our examination of the email exchanges reveals that the SLO had advised that the constitutional issues in the draft legislation should be addressed. What were they?

838. On this matter we go to Hansard and find that the Opposition had raised a number of fundamental issues regarding the enactment, amongst which the unconstitutionality. The exchanges at the NA show that the parliamentarians had commented that they had been given little time to reflect on the matter as the legislation has been placed on a fast track with a Certificate of Urgency. The explanatory memorandum of the Bill had remained silent on the removal of consent of the policy-holders. The Minister had barely mentioned the constitutional issues referred to by SLO and unaddressed. The comments and the repartees of the Ministers were in the nature of threats and intimidation.

839. The pertinent comments of the then Leader of Opposition, Hon P. Bérenger, were simply dismissed. It seems that he entertained a doubt on whether Cabinet had actually given its agreement to the introduction of the Bill. On that issue and others an extract of what he stated makes intelligent reading:

*“But I say all this in a way, this is past history already, things have moved so fast and now I cannot accept that a piece of legislation that is already having an impact on our image, on our economy, on our financial system, on our flow of investments from overseas if approved by Cabinet on Friday and brought here, Tuesday, while 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Reading, how can this be right? I am sure à tête reposée everybody agrees that this cannot be right - and without consultations! But I won’t say more, without consultations with the people concerned. But I won’t say more on that because I have never heard such a deafening silence from the people concerned. You would have expected the big brains in the private sector, in the insurance and pension sector to have, at least, found something to say yesterday and today. It is true we got the piece of legislation. I, the Leader of Opposition, got the piece of legislation only on Saturday. It’s not good, it’s not fair, it’s not normal. Sunday is Sunday. Monday, nothing in the press! No reaction from the big brains of the private sector and so on, and all silence complet, silence radio total and even today, yesterday afternoon. This is bad for Mauritius. Very serious! So, I won’t insist more, but there should have been consultations. It is bad that we come with that important*

*piece of legislation, agreed by Cabinet on Friday, circulated on Saturday, First, Second, Third Reading on Tuesday. It is a complicated and very important piece of legislation.” (underlining ours)<sup>116</sup>.*

840. The Constitutional issues raised by other parliamentarians were equally derided with threats and intimidation.

841. There is nothing wrong for a Minister to make sure that in such a situation where insurers go bust, policy-holders obtain a fair deal within a reasonable time for their failed investments. In fact, that should be the role of a Minister, an elected representative of the people. But there was something wrong when he took over complete control of the process and began manipulating the process, the professionals and the institutions. There was something wrong when he robbed the consent of the policy-holders and supplanted it by his own through a piece of legislation. After all, the money was the money of the policy-holders and not his. One way of doing it would have been the way Benoit Chambers had advised. Another model would have been the Canadian model. In an identical situation, the law was amended to make sure that the policy-holders grouped themselves in a compensation Association. The Minister, then, comes in with the approval of the Governor to ensure that the deal is fair and timely. We refer below to the law of Ontario of how it met with an identical situation. Of note, the law preserves the right of the policy-holders to decide how to share the realized assets. The Minister does play a role in it but under the approval of an apolitical Lieutenant Governor in Council. It is not by the approval of a Minister that things are done but with the approval of an independent body set up for the purpose.

842. On account of its importance and for possible future decisions, the Commission is giving an example of how it has been done in other Jurisdictions.

#### **“AGREEMENTS WITH COMPENSATION ASSOCIATION**

##### ***Authority of Minister***

*.... the Minister, with the approval of the Lieutenant Governor in Council, may enter into agreements with a compensation association related to the conduct of a plan to compensate policyholders and eligible claimants of insolvent insurers. R.S.O. 1990.c.1.8,s.120.*

##### ***Membership in compensation association***

*44 (1) Where a compensation association has been designated by the regulations as a compensation association for a class of insurers, every insurer in that class shall be deemed to be a member of the compensation association and shall be bound by the by-laws and memorandum of operation of the compensation association. 2002, c.18, Sched. H,s.4(6).”*

#### **Was the application of Section 110A and Section 110B retroactive?**

843. The other controversial aspect of the new law was its retroactivity to the situation. It is no wonder that it began to give practical problems during the very first days of its honeymoon. The first SA would not survive. Mr Mushtaq Oosman would go to see the Chairperson of FSC with his legal adviser to submit his resignation but would be told that he should not do so as he was doing a good job. Yet he would learn the next day through the newspapers that FSC had terminated his appointment. Obviously, there was a disconnect between the visible head and the invisible head.

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<sup>116</sup> Hansard of 28 April 2015.

844. Indeed, on 14 August 2015, FSC terminated the appointment of Mushtaq Oosman as SA of BAI Co. (Mtius) Ltd and its related companies. The *Communiqué* also stated that Mr Yogesh R. Basgeet will continue the assignment as 'Special Administrator' appointed under Section 110A of the Insurance Act: see (**Annex 20**). Four reasons were given for the termination of Mr Mushtaq Oosman:

- (1) Non consultation with FSC;
- (2) Representation by employees;
- (3) Lack of instructions from FSC regarding sale of Solis Indian Ocean Ltd;
- (4) Claim of exorbitant fees.

845. None of the reasons stated in the *Communiqué* sound valid in law, especially when the fees were capped. However, the next event would be the resignation, on 26 August 2015 of Mr Yogesh Rai Basgeet who wrote to the FSC stating he was resigning with immediate effect and would give reasons in due course. Thereafter, the FSC issued a *Communiqué* that he had resigned as SA and had been replaced by Mr M. Yacoob Ramtoola: (**Annex 21**).

846. The Commission examined the procedure adopted by the FSC to appoint Mr Ramtoola as the SA. This is addressed at C below

#### **WHAT WE RETAIN FROM THE ABOVE IS THAT:**

1. The source of Section 110A and Section 110B is unclear;
2. Whether it was daily vetted by the SLO is unclear;
3. The draft between competing drafts had been chosen by a political Adviser rather than a public officer who is the Accounting Officer;
4. There was no agreement by Cabinet for the introduction of the Bill.
5. The piece of legislation which provided the vehicle to effect the sale was obtained by abuse of procedure both at Cabinet level and the NA.

#### **BAD APPLICATION OF BAD LAW**

847. A bad law may still be tolerated if those responsible for managing it did not use it or used it rightly. However, when a bad law is used badly, it is regarded as double suicide. Apart from irregularities at the institutional level there were irregularities in the documentation. They may be noted in the following:

1. The Memorandum of Understanding
2. The Escrow Agreement
3. The Deed of Variation and Novation
4. The Share Purchase Agreement

#### **THE MEMORANDUM OF UNDERSTANDING**

848. In the letter dated December 11, 2015 written by Henry K. Rotich, Cabinet Secretary of Kenya he had stated that the agreement of sale would be finalised in an MOU. He had also advised the parties to “*make necessary arrangements for the proposed negotiations between the parties and the Government of Mauritius.*” The MOU was signed on 12 March 2016, of all days. Who were the parties?

849. The first irregularity in the above is that an “agreement” was reached between a Kenyan non legal entity “*a pool of investors*” and the legal entities of Mauritius. The parties were on one side BAI Co. (Mtius) Ltd and its related entities represented by

Mr Yacoob Ramtoola, appointed as SA of BAI (Mauritius) Co. Ltd and its related entities. On the other side, it was “A pool of investors represented by Mr Peter Munga of P.O Box 625, Maragua, Kenya.” The document was signed by, “BAI Co. (Mtius) Ltd, represented by the SA acting on behalf of the Seller and Mr Peter K. Munga, representing the Buyer.”

850. The second irregularity lies in the cumulative transaction which was crafted. One of the substantive Clauses of the MOU is as follows:

*“1. The Special Administrator agrees to transfer the Shares to the Seller who shall in turn sell the same to the Buyer for a total consideration of 8,585,000,000 Kenyan Shilling (equivalent, at the exchange rate of 110 Shillings to the dollar, to Eighty-five Million US Dollars and equivalent at the exchange rate of 36 Rupees to the dollar to 3,060,000,000 Mauritian Rupees) (the “Total Purchase Consideration”) which shall consist of:*

*(a) A cash consideration of 7,171,000,000 Kenyan Shilling (equivalent, at the exchange rate of 101 Shillings to the dollar, to, Seventy-One Million USD and equivalent at the exchange rates of 36 Rupees to the dollar, to 2,556,000,000 Mauritian Rupees) (the “First Amount”); and*

*(b) A conditional cash consideration of 1,414,000,000 Kenyan Shilling (equivalent, at the exchange rate of 101 Shillings to a dollar, to, 14 Million USD and equivalent at the exchange rates of 36 Rupees to a dollar, to 504,000,000 Mauritian Rupees) (the “Additional Amount”)*

*For the avoidance of doubt: the Total Purchase Consideration, the First Amount and the Additional Amount (the “Consideration Amounts”) have been agreed in Kenya Shillings but will be payable in United States Dollars and the Parties confirm that notwithstanding any exchange rate fluctuations the Consideration Amounts payable will be the Kenya Shillings equivalent of the Consideration Amounts payable in United States Dollars and converted at the exchange rate available to the Buyer from its principal bankers as at the Business Day before the relevant date of payment of the Consideration Amounts.”*

851. The third anomaly lies in the law applicable. It was the law of England and Wales. At Para 15(c) we read:

*“English courts shall have exclusive jurisdiction with respect to any disputes arising out of this MoU.”*

852. The next oddity is that even if the Kenyan investors were not identified then and were undisclosed by the businessman Mr Peter Munga, the document guaranteed them a legal action in an English Court under English law. As per 15(d),

*“Each of the Seller and the Special Administrator confirm that their entry into this MoU constitutes commercial activities (rather than governmental or public activities) and accordingly that they are subject to private commercial law with respect thereto and each of the Seller and the Special Administrator waive any immunities or rights that they may have as governmental entities or bodies with respect to their entry into this MoU.”*

853. What is more serious is that by characterising the transaction as a private commercial transaction, it imposed secrecy in the dealing. Para 15 (c) reads:

*“In consideration of the continued negotiations between them, the Parties undertake with each other that they shall not (either directly or through their agents) approach, enter into discussions with, negotiate or make available any information to any other party in relation to the transactions contemplated under this MoU unless the Parties shall not have entered into a binding agreement within sixty (60) days from the date of this MoU.”*

854. The above continues:

*“The Parties declare that they will not disclose the contents of this MoU, verbally or otherwise, to any party other than as approved by each of the Parties, unless required by the law, any order of a court of competent jurisdiction, or any requirement of any relevant Kenya regulatory or governmental body or authority having jurisdiction over or otherwise. This clause shall survive the termination or expiry of this MoU.”*

### **FACTS TO RETAIN FROM THE MOU**

1. Legally speaking, an MOU is no more than an agreement of principles for the purposes of entering into a contract. As such, its validity in law is controversial. However, in this case the specific price as well as the specific terms and conditions have been laid down explicitly.
2. The buyer, styled as “a pool of investors represented by Mr Peter K. Munga” should have been “Mr Peter K. Munga representing a pool of investors.”
3. Even if the MOU, in the introductory paragraphs, provides that the SA is to transfer in whole or in part the undertaking of BAI Co. (Mtius) Ltd and its related entities to the NPFL, in the implementation paragraphs it provides for the transfer as well as the sale, in one and the same transaction.
4. The law governing the Escrow Account attached to the transaction refers to Mauritian law as the governing law. The MOU is governed by English law.
5. The MOU imposes a shroud of secrecy over the transaction in that none of the Parties shall make a public announcement of the contents of the MOU except with the written consent of both Parties.
6. Had the above non disclosure agreement been properly used by the Mauritian side the underselling may well have been prevented.

### **THE IRREGULARITIES IN THE ESCROW AGREEMENT**

855. On 26 April 2016, the Escrow Agreement was signed. The type of the signatures on the documents show it was signed at arm’s length. With respect to commitment to disburse funds by and among the following “parties”, we read as follows:

*“(1) British American Investment Co. (Mtius) Ltd bearing company registration number C9834 and its related entities (“BAI”) represented by Yacoob Ramtoola, the Special Administrator of BAI (hereinafter referred to as “The Special Administrator”) care of BDO & Co Ltd having its registered office at 10, Frere De Valois Street, Port Louis, Mauritius;*

- (2) *The National Property Fund Ltd (the “NPFL”), a company registered with the Registrar of Companies bearing number C130070 having its registered office at 15<sup>th</sup> Floor, Air Mauritius Centre, 6, President John Kennedy Street, Port Louis, Mauritius;*
- (3) *A pool of investors (the “Investors”) represented by Peter Kahara Munga, a Kenyan national bearing passport number C025509, of P.O Box 625, Maragua, Kenya;*
- (4) *Me Kavydass Ramano, (“MKR”) Public Notary having its registered address at NPF Building, Pope Hennessy Street, Port Louis, Mauritius; and*
- (5) *Juristconsult Chambers (“Juristconsult”), a company registered with the Registrar of Companies and bearing registration number C08084384, having its registered address (sic) at Level 6 Newton Tower, Sir William Newton Street, Port Louis, Mauritius.”*

856. We have underlined the questionable non legal entity above, which should not have passed unnoticed to a legal eye. That is repeated in the Escrow Agreement.

857. Cabinet decision to transfer the assets to NPFL is circumvented by the use of a term “concurrent documentation.” At para D we read:

*“D. The investors have proposed to acquire the Shares from NPFL promptly on transfer of the Shares from BAI to NPFL and as such both the transfers to NPFL and to the Investors will be documented concurrently.”*

858. The agreement is in Kenyan shillings but payable in USD. It is only later that the rationale for this would be apparent.

*“F. The Total Purchase Consideration including both the First Amount and the Additional Amount (the “Consideration Amounts”) having been agreed in Kenya Shillings will be payable in USD at the exchange rate available to the Investors from their principal bankers as at the Business Day before the relevant date of payment of the Consideration Amounts.”*

859. At para 7, we read:

***“7. Representations and warranties***

*7.1 Each party hereto individually represents and warrants that:*

*7.1.1 it has all necessary authority, including all corporate powers, to enter into this Escrow Agreement;*

*7.1.2 all necessary permissions, licenses and approvals required for the performance of its obligations hereunder have been received and remain valid on the date hereof;*

*7.1.3 it will take all possible measures to ensure that such permissions, licenses and approvals remain valid for the duration of this Escrow Agreement and, if cancelled, expired or revoked, that they be promptly replaced with new permissions, licenses and approval having the same effect; and*

*7.1.4 the persons signing this Escrow Agreement on its behalf have been properly authorized to do so.”*

860. With regard to authorisation, we know that NPFL board was convened only on 17 June 2016 for the purposes of a Directors' Resolution to that effect and reconvened on 20 June 2016 for the same purpose and that on 21 June 2016, its still have not given an approval as such.

861. Two things of note: Mr Peter Munga did not have any corporate power yet inasmuch as his company Plum LLP was not yet formed. He was a Director of Britam Holdings Ltd (Kenya). Nor had, on 26 April 2016, the CEO of NPFL have the corporate approval to enter into the transaction.

862. The Kenyans had made sure that they would not go empty-handed as it were, albeit that some parts of the agreement would fall.

863. At para 9, we read:

*“9.     **Invalidity***

*If any of the provisions of this Agreement is or becomes invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired. The Parties shall nevertheless negotiate in good faith in order to agree on the terms of a mutually satisfactory provision, achieving as nearly as possible the same commercial effect, to be substituted for the provision so found to be void or unenforceable.”*

864. On 10 June 2016, when the SPA was signed, these matters would have acted as leverage for the Mauritian team to start negotiations formally. Had a legal adviser overseen the transaction, these matters would have come to light to re-start negotiation.

865. Some of the irregularities in the documentation was corrected only at the instance of Coulson Harney LLP by another document referred to as the Deed of Variation and Novation. This is dated 10 June 2016, the very day of the signature of the SPA. The latter document had been entered into simply for the purposes of regularizing the irregularities in the content of the Escrow Agreement or in its application. The “dummy” buyer in the Escrow Agreement had to be substituted for a real buyer, now a newly formed legal entity, registered on the same day, of which the major shareholders were Mr Peter Kahara Munga and Pioneer International College Ltd. The NPFL was styled as the transferee and the seller at the same time.

866. A number of corrections had to be made to regularise the irregularities. As per para. C of the Recitals:

*“(C)     The Parties have agreed to enter into this Deed of Variation and Novation (the Deed), which inter alia:*

- (i)     provides for the amendment of the Escrow Agreement as set out herein; and*
- (ii)    provides for the novation of the rights and obligations of the Investors under the pursuant to the Escrow Agreement to the Purchaser, all upon and subject to the terms and conditions of this Deed.”*

*“(B)     It is noted that contrary to the provisions of the Escrow Agreement:*  
*(i)     the Seller, and not BAI, is currently the registered owner of the Shares (as defined in the Escrow Agreement);*

- (ii) *the Seller is currently wholly owned by BRITISH-AMERICAN FINANCIAL SERVICES LTD (under special administration), which on its part is currently wholly owned by BAI;*
- (iii) *the Parties have agreed that the sale of the Shares to the Purchaser (and/or its nominees) will be effected as follows:*
  - a.a *transfer by BRITISH-AMERICAN FINANCIAL SERVICES LTD (under special administration) (through the Special Administrator) of the entire issued share capital of the Seller to the NPFL; and*
  - b. *a sale by the Seller (then wholly owned by the NPFL) of the Shares to the Purchaser (and/or his nominees)."*

## **FACTS TO BE RETAINED FROM THE ABOVE**

1. The number of irregularities in the documentation shows that little heed was paid to the legal aspects of the transaction which was barely under legal scrutiny.
2. Looseness and levity characterized the documentation not commensurate with the character, the nature and the importance of the transaction.
3. The parties had bound themselves to do the deal in the dark. No one was to reveal what had been agreed to anyone, even if the possibility was open that with the consent of parties, matters could be disclosed.
4. One could understand a Non Disclosure Agreement if the assets were purely private assets. But they were not. They had the character in the events which happened of public assets, as had been rightly pointed out by Mr Oosman.

## **B. ON THE NEED FOR A TRANSACTION ADVISOR**

867. As important as it was for the transaction to have a legal adviser so important it was for it to have a Transaction Advisor. Was there such a need?

868. On 11 September 2015, Barclays Bank Mauritius Ltd had written to Mr D. Manraj, Chairman of FSC to propose the optimal way to proceed. It offered its services as Transaction Advisor for the sale of Government of Mauritius's stake in British American Investments Company Limited ("Britam").

869. Barclays Bank Mauritius gave its credentials for same. On the Situation Overview, it stated:

*"Britam is a leading insurer in Kenya and, based on our discussions with potential buyers, is likely to generate strong interest from a number of global insurers. We believe the following factors will help maximise the sale valuation of the Government of Mauritius' stake in Britam:"*

870. It remarked that Britam had a controlling stake which should have a special value. It stated:

(a) *"Sale of a controlling stake*

*The sale of a controlling stake in Britam (greater than 50% shareholding) will deliver the maximum price for all stakeholders, as potential buyers will likely attach a "control*



*premium” to a shareholding which allows them to exert majority control over the business.*

*We have engaged with some of the Kenyan shareholders and believe that they may be open to sell their shares alongside the Mauritian Government as long as it is to suitable buyer at acceptable terms.”*

871. It spoke of its potential to act as the platform to develop a bank assuring arrangements as follows:

*(b) “Relationship with Equity Bank*

*Britam has a long-standing relationship with Equity Bank, including a very profitable and successful bancassurance agreement. Any potential acquirer of the Government of Mauritius’ stake will be interested in ensuring that this distribution relationship can continue.*

*Analogous to world wide industry trends, we believe that Equity Bank should welcome a bancassurance arrangement with an entity that has a global insurer as a shareholder and strategic partner. Britam could act as the platform to develop such an arrangement.”*

872. It spoke of the need for a co-ordinated sale process and its benefits. In its own words,

*(c) “Co-ordinated sale process*

*Serious potential buyers are likely to want to undertake due diligence on the business and work with management and key stakeholders to understand and develop the future strategy of Britam. As such, and based on the above considerations, we believe that to achieve the maximum price a well orchestrated process to a targeted group of buyers offering them a controlling stake in Britam is the optimal way to proceed.”*

873. It sought an exclusive mandate for the purpose:

*2. “Barclays role*

*Barclays would like to seek an exclusive mandate for a sale of a majority stake in Britam from the Mauritian Government and from those Kenyan shareholders desirous of selling all or part of their shareholding.”*

874. It spoke of its having:

*“Strong institutional links with all of the European, US, South African and Asian insurers who are likely to be interested in acquiring a controlling stake in Britam and entering the Kenyan/East African insurance market”*

875. It mentioned that it had at its disposal:

*“A Leading Africa Financial Institutions Investment Banking team who have worked on multiple transactions across the continent. We mostly recently advised an international insurer on the proposed acquisition of a Kenyan insurer. Unfortunately, this buyer was outbid*

*On-ground presence in Kenya and Mauritius, providing us with good insight in relation to the key stakeholders”*

876. The idea was for it to *“assist in running a co-ordinated process and achieving the maximum valuation.”* BDO as a firm of Accountants and Auditors was no match for the stature of Barclays to ensure a co-ordinated process achieving maximum valuation.

BDO proceeded on a one-to-one sale – seller to buyer – without an independent party overseeing the soundness of the transaction. Rule 48 of the Rules Governing the Preference and Conduct of Insolvency Practitioners reads:

*“48. Where the Insolvency Practitioner sells the assets and business of an insolvent company shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity. Creditors or others not involved in the prior agreement may also see the sale as a threat to objectivity. The threat to objectivity may be eliminated or reduced to an acceptable level by safeguards such as obtaining an independent valuation of the assets or business being sold, or the consideration of other potential purchasers.*

*It is also particularly important for an Insolvency Practitioner to take care to ensure (where to do so does not conflict with any legal or professional obligation) that his or her decision-making processes are transparent, understandable and readily identifiable to all third parties who may be affected by the sale or proposed sale.”*

## ALTERNATIVES TO SALE

877. Was a sale of the assets at that point in time the only option available to the Mauritian Government? The documents showed that there had been a Warehousing Agreement, the purpose of which was to forestall any third party from preventing the transfer of the assets to NPFL. The objective of NPFL thereafter was to sell them through an open bidding process with an aggressive deadline. The Central Bank had approved a loan of MUR3.5bn to NPFL. Mr Lutchmeenaraidoo had made public statements that Britam was valued at MUR4.2bn but that the price in the stock market was falling: 28Kshs in April 2015 to 15.75Kshs in October 2015 and to 11.95Kshs in January 2016. He had also stated that there was no firm offer by the Kenyans to buy the Britam shares at MUR4.2bn plus and that he sought to obtain a price at 21Kshs per share.
878. However, on 11 March 2016, the deal was already clinched at MUR2.4 bn. Thereafter, MOFED between 7 June 2016 and 30 June 2016 was concerned with how to provide for the shortfall in the sale to honour its commitments to repay a category of policy-holders by 30 June 2016.
879. It would be good to note that IFC which according to our records had originally offered to assist Mauritius to sell the shares had, in January 2017, bought 10.37 per cent of the shares at 15.85Kshs, the same price as the Mauritians had sold to the Kenyans. It was argued before us that if IFC paid the same price at which Mauritius sold, it shows that the price was good. The Commission considers that argument was a fallacious one. On the contrary, IFC must have seen that the price at which they were sold was too good to be true for it not to buy them. It must have been a good deal for the buyers at that price for IFC to invest in. Accordingly, the price IFC paid may not justify the price at which Mauritius sold. If anything, it shows the good deal which the Kenyans had and, by extension, the IFC. IFC acquired a 10% equity stake in Britam, which was lower than the NPFL/BAI Holdings. Furthermore, this happened through the issue of additional new shares which resulted in dilution of stake held by existing shareholders. It therefore makes no sense to compare the price received by NPFL with the one paid by IFC.

### C. CONFLICT OF INTEREST BDO/RAMTOOLA

880. We are at the 227<sup>th</sup> Board meeting of the FSC dated 26 August 2015. The Board is considering the replacement of Mr Basgeet and Mr Oosman as Conservators. The manner in which the replacement is done can be ascertained from the Minutes which retain two firms as eligible: namely Ernst & Young and BDO. The record reads as follows:

*“2.3 After considering issues relating to each of the big five companies, Board agreed to appoint Mr M. Yacoob Ramtoola of BDO Mtius Ltd as Special Administrator with effect from 26 August 2015 to provide services as mandated and instructed by the FSC, which include, without being limited, to the following:*

- a) Transfer, in whole or in part, of the undertaking of BAI Co. (Mtius) Ltd and its related entities to the National Property Fund Ltd;*
- b) Finalise the disposal of Iframac Limited (Retail division – Courts) undertaking to Mammouth (Mauritius) Limited forthwith;*
- c) Finalise the transfer of all assets of Iframac Limited (Transport division) to the NPFL;*
- d) Finalise the transfer of BRITAM Kenya to the NPFL subject to regulatory approvals in Kenya.*

2.4 *The proposed fees are as follows:*

- (a) Rs 5.5 million exclusive of VAT and net of taxes for the transfer undertaking, in whole or in part, of BAI Co. (Mtius) Ltd and its related entities to the National Property Fund Ltd;*
- (b) Rs 3.0 million exclusive of VAT and net of taxes for the transfer of Britam Kenya to NPFL;*
- (c) Rs 1 million exclusive of VAT and net of taxes for the legal costs for each of the above.*
- (d) Disbursements in respect of any other fees shall be subject to the prior approval of the Commission.”*

881. Mr Yacoob Ramtoola signed his Engagement letter on the same day, 26 August 2015, following that hastened decision of the FSC.

882. On the appointment by the FSC of Mr Ramtoola, the latter should have, in the exercise of his practice, borne in mind the several obligations imposed upon him as per the Rules enunciated in General Notice no 2260 of 2012 (**Annex 18**), i.e, Rules Governing the Performance and Conduct of Insolvency Practitioners. Above all, Mr Ramtoola should have taken reasonable steps to identify the possible existence of any threats which existed prior, at the time of, or even after the appointment which might be expected to arise during the course of the assignment. FSC should have tried to identify the existence of the threats to ensure compliance with the fundamental principles and ethical guidance governing the performance and conduct of Insolvency Practitioners.

883. However, BDO and Yacoob Ramtoola were not unknown to the FSC. It was BDO which had been tasked to prepare a Strategic Plan by persons other than FSC. What procedure had been used to appoint BDO to prepare the Strategic Plan? The question was put to FSC. FSC could not explain. No public officer had been involved in taking that decision. No formal procedure had been used.

## HOW WAS BDO APPOINTED TO RECOMMEND THE STRATEGIC MEASURES TO DEAL WITH GOVERNMENT CONCERNS REGARDING THE POLICY-HOLDERS?

884. The documents confirm that it was following a meeting chaired by Mr Bhadain the then Minister of Financial Services, Good Governance and Institutional Reforms and attended by three other Ministers, Chairman FSC, CEO of FSC, advisers of ex-Minister Bhadain and representatives of BDO, that BDO had been appointed as Financial Adviser to the FSC without decision of its Board and without any proper procurement process. In its capacity as Financial Adviser, BDO was entrusted with the responsibility of preparing a report to recommend “*Strategic measures to protect the value of underlying assets with focus on the SCBG policies.*” The report was completed and submitted within 48 hours and the amount paid to BDO was Rs1,144,000 (Rs995,000 + VAT). The Report recommended among others the setting up of the NPFL as a wholly owned subsidiary of NIC where all properties of BAI Group and those personal assets which would be recovered through the Assets Recovery Unit would be pooled. NPFL was to acquire and manage the assets belonging to the companies of BAI Group and its subsidiaries.

### D. SHORT-FALL, IF ANY, IN THE PROCESS OF SALE

885. The Commission compared the USD amounts actually received to the theoretical amount, based on USD selling rates published by the Central Bank of Kenya<sup>117</sup>. The figures publicly available demonstrate to the following:

Amount transferred by the Investors		Amount Received in Escrow Account	Previous day Exchange Rate as per Central Bank of Kenya	Theoretical amount receivable	Difference
DATE	KES	USD		USD	USD
29.04.2016	100,000,000	988,087.29	101.2718	987,441.72	645.57
18.05.2016	200,000,000	1,982,105.55	100.8059	1,984,010.86	1,905.31
31.05.2016	2,600,000,000	25,653,620.38	100.7522	25,805,888.11	152,267.73
02.06.2016	4,200,000,000	41,216,824.29	100.9306	41,612,751.73	395,927.44
	<b>7,100,000,000</b>	<b>69,840,637.51</b>			<b>- 549,454.90</b>

886. The Commission’s analysis of facts and figures show, accordingly, that there occurred a shortfall of USD 549,454.90 by no means negligible, by which the NPFL was prejudiced due to the favourable exchange rates used for conversion at the choice of the buyer instead of the seller.

887. We have seen that the transaction was struck in Kenyan shillings. But it is to be noted that it was not NPFL which received the money in Kenyan shillings to convert it in US dollars. It was the buyer, Mr Peter Munga, who decided to convert the money at a bank chosen by him. In fact, it was a bank of which he was a non-executive Chairman. What difference would it make? The difference it would make is that Mauritius would be highly exposed to the evolution of the exchange rate of the Kenyan shillings.

<sup>117</sup> <https://www.centralbank.go.ke/rates/forex-exchange-rates/>

888. The second difference is that had the money been changed in Mauritius by a Mauritian bank, it would have been possible for the Commission to seek the help of US to trace and track funds which had been moved to other jurisdictions not willing to co-operate with Mauritius to do so. With this device, Mr Peter Munga has protected himself and all those he dealt with.

#### **E. FRAUD, MALPRACTICE, CORRUPTION, UNDUE INFLUENCE OR MISDEED**

889. Are there documents which show whether in relation to the above transaction there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of the said shares and whether any financial prejudice has thereby been caused to any person in Mauritius?

890. The Commission has underlined a number of irregularities that were disclosed by and in the documents. Whether each could be characterised as a fraud, malpractice, corruption, undue influence or misdeed, the Commission will treat it in the appropriate chapter.

#### **THE SHARE PURCHASE AGREEMENT WAS SIGNED WHEN?**

891. The SPA was signed on 10 June 2016. There were 13 conditions precedent to the entry into the SPA, one of which was as follows:

*“The receipt of a legal opinion from legal counsel in Mauritius in the form required by the Purchaser in relation to inter alia the respective capacities of and the entry into this Agreement by the Parties that are Mauritian, the capacity of and the entry into this Agreement by the Special Administrator, the capacity of and the entry into this Agreement by NPFL, the capacity of and entry into this Agreement by the Transferor and the validity and enforceability of this Agreement under Mauritian law.”*

892. When the documents at the disposal of the Commission are analysed, it is clear that no legal CDD (Client Due Diligence) or other relevant legal due diligence had been done. The NPFL Board as transferee and seller was never involved whether at the time of the MoU, the Escrow Agreement or the SPA.

893. There was not the least indication that the assets had already been sold when the *ex post facto* approval was sought from NPFL. The Board had been convened not to take management resolutions but for rubber stamping “*un fait accompli*.”

#### **WAS PROPER CONSIDERATION GIVEN TO THE COMPETING OFFERS?**

894. Witnesses who deposed before the Commission stated that there had been several potential buyers who signified their interest verbally. Barclays Bank made an offer on 11 September 2015 to have an exclusive mandate for a sale of a majority stake in Britam from the Mauritian Government. The bank valued the Government of Mauritius stake in Britam to a value of MUR4.2bn. This was followed by an offer from MMI Holdings on 14 October 2015 for the same price of MUR4.2bn.

895. The Commission was intrigued to see how both separate entities gave the same figure of MUR4.2bn at two different times. The Barclays Bank offer reached FS on

14 September 2015. The offer would lie on the file as it were. Come 14 October 2015, MMI Holdings would make a like offer to the then Minister of Good Governance, Financial Services & Institutional Reforms. A meeting would be called and would be discussed at MOFED in presence of Mr Ramtoola called by FS. At that meeting, the MMI Holdings would be asked to improve their offer which they did. The improved figure of MUR4.3bn would be brought before FSC Board on the same day. We have it that the Barclays offer was not considered because it asked for an exclusive mandate to sell. The Commission considered this an excuse which on the face of it is lame.

896. On 16 October 2015, Mr Ramtoola would, therefore, send a letter to MMI Holdings informing acceptance of revised offer of MUR4.3bn by Board of FSC. MMI Holdings was requested to make a deposit 10% of offer into a South African based Escrow Account. A signed copy of the Agreement was even sent to MMI Holdings. It would not make much headway on the Minister's desk inasmuch as under Section 110B, the newly amended law, everything now was centered upon him.

897. Indeed, on 21 October 2015, FSC would seek the approval of MFSGG&IR in respect of the proposal made by MMI Holdings, pursuant to Section 110B of the Insurance (Amendment) Act 2005.

898. On 26 October 2015, PS, MFSGG&IR wrote to FSC requesting the latter to confirm whether the offer of MMI Holdings was still valid to enable the Ministry to process the request: according to which the offer of MMI Holdings had expired on 16 October 2015. **(Annex 22)**

899. Awaiting Ministerial approval, Rothschild, the Financial Adviser of MMI Holdings sent a confidential memo to SA on 28 October 2015, expatiating on certain concerns that Britam might harbour. They offered to discuss them during meetings with SA. One of them was the due diligence required which Britam Kenya was allergic to. Rothschild had wind of the fact that there was a meeting with its competitor Britam Kenya the following week: **(Annex 23)**

*“The document has been prepared by Rothschild for the sole purpose of addressing certain concerns that British-American Investments Company (Kenya) Limited (“**Britam**”) may have and which may be discussed during meetings that BDO & Co, the special administrator for British American Insurance Co Ltd (“**BAI Co**”) and its related entities, will be having with Britam next week. It is designed as a speaking guide for BDO & Co and should, in no circumstances, be disclosed to Britam.”*

900. On the matter of due diligence, MMI Holdings explained:

*“Due diligence - We can attest that MMI recognises that Britam is a listed and regulated company and that MMI is only proposing to acquire a minority stake from the NIC. Our understanding is that MMI does not intend performing a detailed audit of Britam but would like to have high-level discussions with Britam's management on various business items to confirm that they understand Britam's strategy and validate the business and financial case they have already developed on the basis of public information. The expectation is that the financial and legal due diligence will be required to form an opinion of significant matters that need to be considered by the Board of Directors of MMI before a final decision is made by MMI.*

*This is again a topic that MMI intends to discuss with Britam’s senior management when they meet you in Nairobi.”*

901. On the matter of timing, MMI Holdings expatiated:

*“(3) Timing - The objective of the FSC and Government of Mauritius is to try and finalise a transaction as soon as possible for reasons that have been publicly communicated in Mauritius. Rothschild also considers that the BAI scandal has had a negative impact on Britam, as evidenced by its share price, and that the Mauritian stake now represents an overhang situation which is not good for anyone and which should be solved expeditiously.”*

902. MMI Holdings argued for an approach of common interests for Mauritians and Kenyans saying:

*“BDO & Co have had other approaches in the past that we have turned down because we considered that they were not in both the Mauritian and Kenyan’s interests. We consider that the MMI approach is in the interest of both the Mauritian stakeholders as well Britam and we encourage you to meet the senior executives of MMI in order to ascertain whether they will be compatible with Britam.”*

903. On 03 November 2015, the FSC informed PS, MFSGG&IR that offer of MMI Holdings was still valid as at date: **(Annex 24)**

904. MMI Holdings wrote to FS on 06 November 2015, requesting for an extension of its offer as they had not yet been able to conduct the due diligence exercise: **(Annex 25)**

## **CONCLUSION ON THE MMI OFFER**

905. On the matter of MMI Holdings offer, the only conclusion that can be drawn is that, it was to the detriment of Mauritians that the MMI Holdings offer was not pursued. To the like extent, the proposal of Barclays remained a dead letter. True it is that the Kenyan shareholders had been the preferred buyer but had formal negotiations taken place, the case of these proponents would have weighed heavily in favour of Mauritius for a better price. Ms Gladys Karuri’s arguments for sale at MUR2.4bn would have been discredited. MMI Holdings had a history behind it. Barclays equally. Plum LLP had still not been born on 12 March 2016.

## **PROCEEDS OF SALE RECEIVED TO DATE**

906. Are there documents to show whether all proceeds from the said transaction have been received to date, including dividend, if any, prior to the said sale? And whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third-party account, the currency in which it was so received, and any amounts retained as fees or commissions by or paid to other parties?

## **PAYMENTS MADE INTO ESCROW ACCOUNT**

907. The documents show that on 09 May 2016, Mr Peter Munga wrote to Mr Afsar Ebrahim referring to the meeting which took place in the morning of 09 May 2016 regarding the disposal of 23.34% of Britam shares. He mentioned that in line with the signed MOU and Escrow Agreement, on behalf of the local investors he confirmed that further to his \$1m deposit in the Escrow Account there will be additional \$1 m in the week and additional \$1m the following week. The balance of \$68 m would be a bullet payment by Monday 30 May 2016. He expected to sign the SPA at the earliest.

*“E. The Investors shall pay a total consideration of eight billion, five hundred and eighty five million Kenya Shillings (**Kes 8,585,000,000**) (equivalent, at the exchange rate of 101 shillings to the dollar, to eighty-five million United States Dollars (**USD 85,000,000**) and equivalent at the exchange rate of 36 Rupees to the dollar to three billion and sixty million Mauritian Rupees (**MUR 3,060,000,000**) (the “**Total Purchase Consideration**”)) as follows:*

- (a) a cash consideration of seven billion, one hundred and seventy-one million Kenya Shillings (**Kes 7,171,000,000**) (equivalent, at the exchange rate of 101 Shillings to the dollar, to seventy-one million United States Dollars (**USD 71,000,000**) and equivalent at the exchange rates of 36 Rupees to the dollar, to two billion, five hundred and fifty six million Mauritian Rupees (**MUR 2,556,000,000**)) (the “**First Amount**”); and*
- (b) a conditional cash consideration of one billion, four hundred and fourteen million Kenyan Shillings (**Kes 1,414,000,000**) (equivalent, at the exchange rate of 101 Shillings to a dollar, to fourteen million United States Dollars (**USD 14,000,000**) and equivalent at the exchange rate of 36 Rupees to the dollar, to five hundred and four million Mauritian Rupees (**MUR 504,000,000**)) (the “**Additional Amount**”).”*

## PAYMENTS TO THIRD PARTIES

908. The Commission received an Anonymous Note to the effect that funds had been transferred to an Account in Saudi Arabia and that the UAE/UK Government will help in the matter. The note read as follows:

*“Nothing will come out. Bhadain tient Pravind. Peux-tu proposer de ma part au Président de la Com d’enquête de demander au FIU d’enquêter sur les banques où l’argent a été caché. Les Gouvernements concernés- UAE et UK – vont collaborer. If they – including Sattar Abdoola. cooperate – the 1.7 billion rupees will return to government coffers.”*

909. The Commission liaised with the Financial Intelligence Unit for collaboration and co-operation with the foreign authorities concerned. The attempt was unsuccessful. The lock down did not further help in the Commission’s *démarche*. As it was with Kenya, so it was with UAE. Except that with UAE, we do not have a legal framework for co-operation and collaboration. But with Kenya, we do, through the Mutual Legal Assistance in Criminal and Related Matters Act 2003. Hence, on this matter of whether funds have been transferred in third party accounts, the doubt hovering over the heads of those who had been involved would linger on. The Commission recommends that this aspect be probed into otherwise than through the present process.

## F. CURRENCY

910. Are there documents which explain why Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred? The MOU shows that there was indeed an agreement. How and why is a mystery.



*“For the avoidance of doubt: the Total Purchase Consideration, the First Amount and the Additional Amount (the “**Consideration Amounts**”) have been agreed in Kenya Shillings but will be payable in United States Dollars and the Parties confirm that notwithstanding any exchange rate fluctuations the Consideration Amounts payable will be the Kenya Shillings equivalent of the Consideration Amounts payable in United States Dollars and converted at the exchange rate available to the Buyer from its principal bankers as at the Business Day before the relevant date of payment of the Consideration Amounts.”*

911. The Commission did not come across any document which showed that there was any discussion or negotiation with respect to the currency of the sale and the choice of Kenyan shillings. It goes without saying that since the transaction was an international transaction and related to the sale of shares in an unquoted investment holding company, it should have been in the currency in which international transactions are done and not in a local currency of either one or the other country.

912. Asked why was Kenyan shillings chosen for the sale, Mr Ramtoola stated that it was because the shares in the NSE was quoted in Kenyan shillings. That to us is a misapprehension. If the shares were sold from locals to locals, that would have made sense. However, this was an international transaction between two entities in two different countries. Additionally, the shares which were sold belonged to an unquoted investment holding company and not Britam shares on the NSE.

913. The funds after sale were transferred on the Escrow account and did not end up in the NPFL account but transitted in the BDO account before it ended up at its destination as follows:

- (1) 2 May 2016 – USD 988,087;
- (2) 18 May 2016 – USD 1,982,106;
- (3) 1 June 2016 – USD 25,653,620;
- (4) 3 June 2016 – USD 41,216,824;
- (5) 1 July 2016 – a sum of USD 11,000,000 left Escrow Account in the BAI Account;
- (6) USD 58,835 on same day went to BDO Ltd Account;
- (7) On 4 July, NPFL opened its bank account and received a sum on same day MRU 391,000,000; and

914. On 5 July 2016, NPFL received USD \$ 59,045,916.87.

## **G. ANCILLARY MATTERS**

915. A vital question has been why and how the assets were sold and not transferred to NPFL? Indeed, by virtue of the amended Section 110B of the Insurance Act, they should have been transferred to an insurance company as the Minister may approve. The documents show that all parties concerned - FSC, BDO as well as ex-Minister Bhadain - knew that the shares were not meant to be sold but transferred to NPFL. Cabinet had so decided, on 10 July 2015. Why were they sold then? This is another mystery? But what is not a mystery as revealed by the documents is that the transaction was being remote-controlled at the level of the ex-Minister Bhadain and his team.

916. One can see from the dates on the documents and the types of documents submitted that the ex-Minister Bhadain and his team exercised authority over the NPFL. NPFL was

no more than a façade for decisions being taken at the level of ex-Minister Bhadain and his team. That could not have happened without the indulgence of the Chairperson and the CEO. The little resistance it faced was from the DPS and a couple of professionals to be credited for their spine. They wanted to have little to do with decisions in public affairs being teleguided, as it were. But the ex-Minister Bhadain and his team comprised astute gymnasts who knew how to smooth the creases.

917. The then CEO of NPFL, could not say when the shares were transferred to the NPFL as decided by decision of Cabinet dated 10 July 2015. Yet he had signed the Escrow Agreement dated 26 April 2016. He understood his role to be that of receiving funds and paying out of those funds. It is in that light that he also, on 10 June 2016, appended his signature to the SPA. He was candid enough to state that the Board of NPFL only took cognizance of the whole issue of the sale of Britam shares at the Board Meeting held on 20 June 2016 where BDO was solicited to make a presentation on the matter. It is worth pointing out that prior to the meeting, the then CEO was well aware of all the details relating to the sale of Britam shares as he had already appended his signature to the following documents:

- (i) Escrow agreement dated 26 April 2016;
- (ii) Appointment as Director of BAKHL on 01 June 2016;
- (iii) Share Purchase Agreement on 10 June 2016;
- (iv) Deed of Variation and Novation on 10 June 2016; and
- (v) Share Transfer Certificate of 16 June 2016.

918. The above documents had been signed by him without the approval of or information of NPFL's Board. Yet he had signed warranting that he had the authority to do so! On whose instructions had he done so? Had he at least been fully informed of what he was giving his signature to?

919. One document was used to do a two-in-one transaction: the transfer from BAKHL to NPFL and from NPFL to the Plum LLP. Asked whether the model was right, Mr Ramtoola's answer was that he had seen such model previously and NPFL was to him the beneficiary of the sale.

920. The record shows that on 30 October 2015, the MFSGG&IR itself informed the FSC that the transfer of the assets be done to NPFL and NICL respectively, in accordance with Cabinet decision dated 10 July 2015.

## **GOING AGAINST CABINET DECISION**

921. There is a correspondence dated 30 October 2015 whereby the Ag PS, MFSGG&IR itself is informing the FSC of the Cabinet decision of 10 July 2015 that the assets of the BAI group of companies be transferred to the NPFL and the NIC with a view to safeguarding investments made by policy-holders in the insurance company.

922. On 4 August 2015, Mr Seewoosunkur Secretary of the FSC wrote to the then conservators to reiterate the fact that the intention is to transfer British American Insurance Corporation (Kenya) Limited (including encumbered assets) to NPFL based on the fact sheet that is availed of you. Mr Kuriachen, the then Chief Executive Officer reminds Mr. Ramtoola the same position i.e, for the transfer of undertakings of BAI to be done to National Property Fund Ltd in accordance with Cabinet decision dated 10 July 2015.

923. On 06 November 2015, the FSC informed SA and requested him to proceed accordingly – (**Annex 26**).

924. However, this is not what was done. The CEO explained that, as far as he was concerned, he had to execute the actions reflected in the documents. He could not explain why the the Share Transfer Agreement and the Directors' Resolution made mention of only 4,500 shares when in fact the 23.34% stake held by BAI in Britam Holdings Kenya represents 452,504 shares.

**SHARE TRANSFER**

We, British-American Financial Services Ltd, of Port Louis, Mauritius for good and valuable consideration received by us from **National Property Fund Ltd** (hereinafter called “the Transferee”) do hereby transfer to the Transferee 4,500 shares represented by Share Certificate No.3 in the undertaking called **BRITISH AMERICAN (KENYA) HOLDINGS LIMITED** to hold unto the Transferee subject to the several conditions on which we held the same immediately before the execution hereof.

And we the Transferee do hereby agree to accept and take the said shares subject to the conditions aforesaid.

**IN WITNESS WHEREOF** the parties have hereto set their hands this 16 day of June 2016.

Signed by the said  
**British-American Financial  
Services Ltd  
Ltd**

in the presence of:  
A Ebrahim

sd  
**for and on behalf of  
British-American Financial Services  
(under Special Administration)**

**WITNESS**

Signed by the said  
**National Property Fund  
Ltd**  
in the presence of  
A. Ebrahim

sd  
**National Property Fund Ltd**

**WITNESS**

925. The above document was signed on 16 June 2016 by circulation, purporting to state that the shares had been transferred to NPFL. He also confirmed that the Board Resolution had been prepared even prior to meeting pre-empting the decision of the Board for ante-dating the transfer.

## UNDER-REPORTING, MISREPORTING AND ABSENCE OF REPORTING AT THE FSC

926. The picture as per documents was as garbled at the NPFL as it was at the FSC. At the FSC, Mr Georges Chung is presenting a very different picture. We read an extract of the Board of Meeting of 20 June 2016:

*Extract of BM 20 June 2016*

### ***“1. SALE OF SHARES HELD BY BRITISH AMERICAN KENYA HOLDINGS LIMITED IN BRITAM HOLDINGS LIMITED***

*Mr George Chung, representative of BDO joined the Meeting and informed the Board that as per Section 110B of the Insurance Act 2005 (as amended), the Special Administrator of BAI Co. (Mtius) Ltd and any of its related companies, was in the process of transferring all the shares held by British American Financial Services Limited in British American (Kenya) Holdings Limited to National Property Fund Ltd (NPFL). ”*

927. BDO, is informing the FSC, on 20 June 2016 that the sale which had already taken place was in the process and they would be transferred. The Minutes read:

*“four hundred and fifty-two million five hundred and four thousand (452,504,000) shares representing 23.34% held by British American (Kenya) Holdings Limited in Britam Holdings Limited would be disposed to PLUM LLP...”*

928. It ends with the remark that:

*“Given the fact that the above disposal of the shares in British American (Kenya) Holdings Limited to Plum LLP is a major transaction under the Companies Act 2001, the Board understood that Shareholder’s approval would need to be sought.”*

929. All had been over and done with on 16 June 2016, but FSC was being misled into thinking that it was still in process.

930. The Board of Directors had, on its meeting held on Monday 18 April 2016, approved and recommended to the Annual General Meeting to be held, tentatively, on Friday, 24 June 2016, a First and Final dividend for the year ended 31 December 2015 of Shs0.30 per ordinary share of Shs0.10 each, subject to withholding tax where applicable, to be paid on or about Friday, 24 June 2016. The tentative date of closing the register of members would be Thursday, 9 June 2016, for the purpose of processing the Dividend.

## WHAT WAS PERIODICALLY REPORTED TO THE FSC

931. Mr Ramtoola of BDO was appointed by the FSC. Mr Ramtoola and other members of the BDO informed us that the FSC was being up-dated periodically of the progress of the dealings with the shares. In actual fact, BDO was misreporting, underreporting and failing to report to the FSC as the Table below shows:

**Commission Report – Sale of Britam Shares**

<b>Date</b>	<b>Mr Ramtoola's Brief</b>	<b>FSC Board Meeting Minutes</b>	<b>Remarks</b>
20 Jan 2016	Britam Kenya – 23% Already valued at Rs4.3Bn is being negotiated with existing shareholders. Various international parties are keen but pre-empt the right of existing shareholders making negotiations difficult.	There is no progress on this deal with MMI as majority of shareholders are not agreeable to sell to MMI. The shareholders will submit their proposals by 15 February 2016. Minutes of Board Meeting No. 236th Chaired by Mr D.D. Manraj.	<b>Misreporting</b> Mr Ramtoola knew of the Meeting of 18 <sup>th</sup> November where MUR4.3bn had been offered.
19 Feb 2016	Britam Kenya – 23% Already valued at Rs4.3Bn is being negotiated with existing shareholders. Various international parties are keen but pre-empt the right of existing shareholders making negotiations difficult.	Meeting No. 238th. Chaired by Mr D.D. Manraj and Reported by no one.	<b>Not reporting</b> <b>Mr Ramtoola knew that the Kenyans had agreed on the price of MUR4.3bn and were asking negotiation for longer payment terms.</b>
21 Mar 2016	Britam Kenya – Memo of agreement signed for Rs2.5billion	The deal has not yet been finalized. A major shareholder has made an offer which has been accepted. The major shareholder has been requested to pay by next week Rs 1.5 billion in an escrow account opened at the Mauritius Commercial Bank Ltd. Meeting No. 239th. Chaired by Mr D.D. Manraj and Reported by Mr Y. Ramtoola	<b>Underreporting</b> <b>The sale price, which is the most important item, has been withheld.</b>
28 Apr 2016	Britam Kenya – Memo of agreement signed for Rs 2.5 billion. Escrow agreement sent to Investors – awaiting funds	The main shareholders of Britam Kenya have signed an escrow agreement. Evidence of transfer will be given today. Meeting No. 240th. Chaired by Mr D.K. Dabee and Reported by Mr Y. Ramtoola	<b>Misreporting</b> The Memorandum of Understanding had been signed on 12 March 2016 And Escrow Agreement on 26 <sup>th</sup> of April 2016 The figure of the sale at 2.4bn was still not given to the FSC.
25 May 2016	Britam Kenya – Rs105m remitted in escrow account. Remaining proceeds of Rs 2.5 billion to be received by 30 May 2016	Rs 105 million has been remitted in the escrow account and the remaining proceeds of around Rs 2.5 billion to be received by 30 May 2016. The approval of the Capital Market Authority of Kenya is required. Meeting No. 241 <sup>st</sup> . Chaired by Mr D.D. Dabee and Reported by Mr Y. Ramtoola	<b>Under-reporting</b> The figure of sale at which the sale took place was still not given to the Board. Nor was it stated anywhere that the funds were being transferred to NPFL
30 June 2016	Britam Kenya – SPA has been signed on 10 June 2016. Transfer of shares to Plum LLP completed. Funds will be released from Escrow account to NPFL as soon as CMA approval is received	The Share Purchase Agreement was signed on 10 June 2016 and the transfer of shares to Plum LLP completed. Funds will be released from the escrow account to the National Property Fund Ltd once approval from the Capital Market Authority of Kenya is obtained. Meeting No. 242 <sup>nd</sup> . Chaired by Mr D.D. Dabee and Reported by Mr Y. Ramtoola	<b>Underreporting</b> The issue regarding the Board approval had not been adumbrated.
27 July 2016	Britam Kenya Shares: Transfer and sale of shares completed in June 2016	The transfer and sale of shares in Britam Kenya has been completed. Meeting No. 243 <sup>rd</sup> . Chaired by Mr D.D. Dabee and Reported by Mr Y. Ramtoola	<b>Underreporting</b> That there was a 3-in-1 concurrent transaction had not been stated.

## THE MYSTERY ABOUT PLUM LLP

932. MOFED had originally agreed that the sale of the shares be done to MMI Holdings at MUR4.3bn. Intervened Mr Henry K. Rotich, the Cabinet Secretary/National Secretary of the Kenyan Government to request that it be sold to the Kenyans because the Britam shareholders would not be aligned to the vision of the Kenyan investors. MOFED agreed on condition that they matched the MMI Holdings price or did better because Kenya is a friendly country. Mr Peter Munga came to Mauritius and met ex-Minister Bhadain and they agreed on the line to be followed. Who finally was the buyer? It was Plum LLP, formed and registered on the very day of the sale: 10 June 2016, with Mr Peter Kahara Munga as the Manager of Plum LLP. On 30 June 2016, he would issue a circular to the shareholders of Britam Holdings Ltd with the following information:

### 2. The Seller

Seller	British American (Kenya Holdings Limited)
Company number and place of incorporation	Registered under the laws of Bahamas bearing registration number 6564 B and having its registered office at 4 George Street, Mareva House, P.O. Box No. 3937, Nassau, Bahamas
Ultimate beneficial shareholder	Government of Mauritius, through Mr. M. Yacoob Ramtoola, the SA of British American Investment Co. (Mtius) Limited and its related entities having his office at 10, Frere Felix De Valois Street, Port Louis, Mauritius.

### 3. The Purchaser

Name of the Purchaser	Plum LLP	
Registration details	Limited liability partnership registered on 10 June 2016 under the Limited Liability Partnership Act No. 2011, Laws of Kenya, with registration number LLP/2016/65 and of P.O. Box 556-0060, Nairobi Kenya.	
Partners of Plum LLP	Peter Kahara Munga	<b>Pioneer International College Limited Shareholders of Pioneer International College Limited:</b> <ol style="list-style-type: none"> <li>1. Rose Kahara Munga - 1 share</li> <li>2. Pioneer International University Trust - 4,999 shares</li> </ol> <b>Trustees of Pioneer International University Trust:</b> <ol style="list-style-type: none"> <li>1. Peter Kahara Munga</li> <li>2. Rose Munga</li> <li>3. Alex Kieme</li> <li>4. Beth Nyambura</li> </ol>

933. The mystery around “a pool of investors” mentioned in the MOU would come to light only then. There was no pool of investors finally. It was all the set-up of one person and one person only. He happened to be the key actor, the producer, the director and the funder of the film: Mr Peter Munga. He was the real purchaser of the Britam shares. Had a CDD been done by the Mauritians involved with a simple question “who was behind the “pool of investors”. This would have come out. Capacity to pay the MUR4.3bn would have been in issue. Behind the façade of “pool of investors,” Mr Peter Kahara Munga had been able to dupe the big Mauritian brains in broad day-light.

934. Plum LLP had at the material time as partners Mrs Rose Kahara Munga, the wife of Mr Peter Kahara Munga and Pioneer International University Trust which itself had as trustees no other persons than Mr Peter Munga himself, his wife and children.

935. All the *démarche* of Mr Munga, geared towards the purchase of the shares of Britam, was shrewdly operated behind the veil of the term “pool of investors”, a non-legal entity which became Plum LLP only on the day of purchase on 10 June 2016. That façade would have come to light if the right questions had been asked from the beginning. The Senior Officials of the Government of the Republic of Kenya had their role to play in it.

936. The Commission had asked a number of questions from the Kenyan witnesses at the time they had agreed to co-operate with our inquiry. They were evasive on their answers to the first set of questions. Thereafter, they disappeared from the radar. As for the ex-Minister and his team, FSC and SA, had they as little as asked a simple question as to who were the natural persons behind the “pool of investors”, the cat would have been out of the bag. It is the view of the Commission that had a Transaction Advisor been involved, this would have been the first question it would have looked into. Equally, had a Legal Consultant been involved, the same thing would have happened. FSC has not been able to provide to the Commission an answer as regards its duty to check who was the real buyer or who were the beneficiaries of the Pioneer International University Trust, the major shareholder of Plum LLP, the eleventh-hour purchaser of the Britam shares.

937. How much rhetoric betrayed the reality may be gauged by para 5 of the Circular issued by Plum LLP to shareholders of Britam Holdings Limited on 30 June 2016, which read:

*“Support from the Government of Kenya*

*Both the Governments of Mauritius and Kenya recognize and support the intermediate Proposed Acquisition as a way of protecting the Company and its subsidiaries while providing the Government of Mauritius with the resources it requires to compensate policyholders in Mauritius. In particular, the National Treasury, Kenya has formally expressed their appreciation to the Ministry of Finance and Economic Development, Mauritius for agreeing to the Proposed Acquisition.”*

938. Albeit the existence of so many legal flaws in the legal documents witnessing in the sale process, on 1 July 2016, Mr Peter Munga confirmed that:

1. Conditions Precedents had been fulfilled;
2. Completion has occurred so that payments may equally be completed.

No question which shot to the eyes on the face of things was ever asked by Mauritian counterparts to the deal done behind the blind.

## **FACTS WHICH MAY BE RETAINED FROM THE DOCUMENTS**

939. From the above, we can retain the following facts:

1. When matters were in the hands of the Conservators, the talk was for open bidding process where FSC of Mauritius was looking for an insurance company to take over BAI Co’s 156,000 policies.

2. MMI Holdings offered on 17 April 2015 to buy the assets at MUR4.5bn based on the then current Britam share price<sup>118</sup>.
3. The law was changed to remove the matter from the hands of the Conservators and entrust the process to a SA who became bound, after consultation with FSC, to transfer, in whole or in part, the undertaking of an insurer and any of its related companies to such insurer and any of its related companies as the Minister may approve<sup>119</sup>.
4. The first two conservators were uncomfortable with the confusion created by the amendment and the involvement of the Minister in the exercise of their profession and they exited the scene. There is a search for SA by FSC. At a meeting of FSC, discussion revolved round who from the Big 5. BDO could not take it. FSC decided that Mr Ramtoola of BDO could be the SA in his personal capacity. Hence, Mr Ramtoola took it in his personal capacity with a statement that he would work with the staff of BDO. At the end of the day, it is BDO which did the work.
5. One reason or another was given for ruling out one and the other of the Big 5. BDO, be it noted it was which had prepared the Strategic Plan and proposed that NPFL be created where the undertaking would be transferred.
6. Government had undertaken to pay some policy-holders in a staggered fashion by 15 May 2015, 30 June 2015 and 30 June 2016. The assets had to be realized. MMI Holdings which had valued the assets at MUR4.5bn in April 2015 offered to buy them at MUR4.2bn which after open negotiation at a meeting called by FS in the presence of the SA was improved to MUR4.3bn, subject to due diligence. They offered to pay the first instalments into an Escrow Account. This South African cup would slip from the lip because Kenya would begin lobbying with the Government of Mauritius to sell the shares to the Kenyan investors.
7. Mr Peter Munga, the Chairperson of Britam Kenya landed in Mauritius on 14 November 2015. It was Mr Afsar Ebrahim who took him to meet ex-Minister Bhadain. In presence of Mr Afsar Ebrahim of BDO and Mr Khapre of BDO (Kenya), they discuss Britam sales to the Kenyans. The two parties were settled. On 23 November, Mr Peter Munga sent a letter summarizing the matters discussed and in the last line said “*the Board of Britam Kenya will continue engaging BDO & co, the Special Administrators “on the lines agreed during our meeting.”* What were those lines, is anybody’s guess to proceed along certain lines agreed at our meeting, but not disclosed?
8. At the other end, presumably unknown to the Ministry of Finance, that there had been a meeting by ex-Minister Bhadain and Mr Peter Munga on 14 November 2015, ex-Minister Lutchmeenaraidoo requested the PS Mr Lutchmeeparsad on another mission to Nairobi, to meet with the Kenyans requesting them to match the MMI Holdings price or to do better.
9. Four days after he met ex-Minister Bhadain in Mauritius, Mr Peter Munga chaired a meeting on 18 November 2015 in Nairobi. Mauritius made its case. The Kenyans agreed to match the price but they demanded a longer payment period. Mr Lutchmeeparsad brought home the good tidings but the Financial Secretary’s

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<sup>118</sup> Letter dated 17 April 2015 from MMI addressed to Messrs M. Oosman and A. Boieux.

<sup>119</sup> Section 110 of Insurance (Amendment) Act 2015



appetite grew by it. He wanted the Kenyan to “do better”. Mr Lutchmeeparsad wrote to Ms Gladys Karuri to that effect and to send a firm offer.

10. The Kenyans invited Mauritius to meet in Nairobi mid-February 2016 for “negotiations” and finalization.
11. There is no recorded meeting for mid-February 2016. But between 12 January 2016 and 8 March 2016, the communication between BDO and the Kenyans was by telephone. On 8 March 2016, Mr Peter Munga landed with his small specialist team in Mauritius.
12. There was no negotiation but a haggling on the price. The Kenyans held the Mauritian government responsible for the fall in the price of Britam shares from 26Kshs prior to the Britam affair to 11.90Kshs thereafter.
13. The record showed that agreement was reached between ex-Minister Bhadain and his team and the Kenyan team for the sale at 15Kshs per share. We have it as a fact testified by ex-Minister Bhadain himself that on 10 March 2016, he received the Kenyans and their lawyers along with the SA.
14. On 12 March 2016, they set the figure of the sale price and terms of the repayment in writing by way of a Memorandum of Agreement. The deal was done. The payments would follow through an Escrow Agent following an Escrow Agreement to be signed on 26 April 2016.
15. The events chronology showed that both Ministries, the MOFED, on the one hand, and the MFSGG&IR, on the other, were engaged at the start in the decision whether to sell or to keep and warehouse the shares. Sometimes left hand knew what the right hand was doing. And sometimes not. A common denominator was FS. This parallel run ended around mid-February 2016 when ex-Minister Lutchmeenaraidoo left MOFED.
16. It is soon after the exit of ex-Minister Lutchmeenaraidoo that the Kenyans arrived, on 8 March 2016. They simply ignored the outcome of the meeting of 18 November 2015 to the effect that they would meet the price offered by MMI Holdings at MUR4.3bn. They also ignored the letter written to them to the effect that they should make a better offer. They ignored the “*proposed negotiations between the parties and the Government of Mauritius*” in a follow up meeting in Nairobi.
17. They engaged in a party-to-party discussion revolving around the share price based on the stock market of Britam Kenya, continuing “*engaging BDO & Co., the Special Administrators on the lines agreed during our meeting*” of 14 November 2016.
18. The original intention was that serious bidders should come to the table, that there must be a proper bidding process, that there should be no rush as per the work ethics of the original Conservators. However, this was exactly what the ex-Minister and his team, Mr Ramtoola, Mr Afsar Ebrahim and BDO did not do.
19. When the graph of the prices on the stock market in Nairobi with reference to the relevant dates are read, this was what it revealed: that the prices around November 2015 and June 2016 were comparable. The terms and conditions including the prices and the details of payment in the MOU signed on 12 March 2016 were only proposals subject to a number of factors. Yet they were taken to be by the Mauritian team as a done deal.

20. Had the ex-Minister and his team engaged in a formal and structured negotiation for which the Kenyans had come and not proceeded by way of discussion and representation behind closed doors, a number of flaws in the Kenyan argument would have come to light.
21. The flaw in Ms Gladys' argument exaggerating the impact of the collapse of the Rawat Empire to persuade the Mauritians to come down from MUR4.3bn to MUR2.4bn would have come to light. Ms Gladys, it should be noted, was a financial strategist.
22. True it is that somehow the share price is seen to have dropped to the lowest figure in mid-March 2016 from what it had been since the collapse of the Rawat empire but MMI Holdings could not have overvalued the share prices when it had agreed in October 2015 to pay MUR4.3bn any more than the Kenyans for that matter when they agreed to match the price at MUR4.3bn on 18 November 2015. The share prices at those two operative dates for the transaction had remained more or less the same.
23. The Kenyans were speaking of a deadline to repay policy-holders. Was this deadline so absolute for Mauritius to rush to undersell? Funds had been made available by the BOM? And there was nothing to show that BOM was hot on the heel of Government to refund.
24. Lack of understanding of how Government works or should work, how public assets should be sold and what basic precautions one should take to ensure independence, transparency and accountability led to lack of formal negotiation by skilled negotiators resulting in an under sale. Mauritius, despite the fact that it was playing home, played second fiddle. A good negotiator refuses to play second fiddle. This is what the Mauritian party allowed itself to be.
25. Why was an independent valuation of the Britam stake not done? It has to be mentioned that the Britam stake had some privileges (appointment of Managing Director/ Chief Executive Officer or appointment of the Financial Director/ Chief Financial Officer).
26. The appointment of a Transaction Advisor would have been beneficial in this respect.

## CHAPTER 10

### WHAT THE FACTS REVEAL

*I swear/solemnly affirm to speak the truth, the whole truth and nothing but the truth – Witness Judicial Oath*

940. This Chapter will reconcile the facts from the depositions and the facts the documents and give a gist of what happened and how it happened.

941. The revocation of the licence of BBCL had a cascading effect on the related entities comprising the BAI Group more particularly the BAI Co (Mauritius) Ltd, reputedly the jewel in the crown. BBCL was the banking sector. BAI Co (Mtius) Ltd was the non-banking sector. Insurance was the turf of the MFSGG&IR regulated by FSC. FSC decided to place BAI Co (Mtius) Ltd under conservatorship and appointed Messrs. André Bonieux and Mushtaq Oosman as Conservators.

#### **The Ticking Bomb and Government Commitment**

942. Government had in its hand the ticking bomb of a social crisis to de-activate: giving satisfaction to 24,690 disgruntled policy-holders. *Stricto sensu*, there was no direct legal obligation for government to come to their rescue. They had lost their private assets in their private investments. Who invests what, where, how much and with what outcome is basically a private personal matter between citizens, stemming from a bilateral contract between investor and investment entity. However, Government stepped in as a moral and social obligation, in public interest.

943. It was nonetheless written on the walls that the crash would not have happened if independent institutions and the independent professionals responsible for regulating the sector had properly discharged their respective statutory and professional roles. Government held out that it would repay a first tranche of 70% of the investment of a certain category of investors, by 15 May 2015 and a second tranche by 30 June 2015. A third tranche had to be paid to another category by 30 June 2016. This is what we are concerned with.

944. Between 30 June 2015 and 30 June 2016, Government had to disburse around MUR6.5bn, without taking from the tax-payer. That meant from the proceeds of sale of the assets of BAI Co (Mauritius) Ltd. However, the process of sale was not in the hands of Government but in the hands of the Conservators who arguably had the power to sell. Their first duty as Conservators was to salvage the insurance business. But there were legal impediments to Government meeting its time targets.

#### **The Legal Impediments to Government Commitment**

945. The first impediment was the constraint of the existing legal framework in that the power to deal with the assets resided and resided only in the Conservators appointed. The duties and powers of a conservator were basically to “preserve, protect and recover” assets of the insurer as per Section 107 of the Insurance Act under which he was appointed: see Section 107(1) of the Insurance Act. Any money received could not be used to liquidate any indebtedness: see Section 107(4) of the Insurance Act. Unless government reneged on its commitment, the existing law had to be amended to give effect to government commitment. The key players directly concerned were: the

Minister of Finance and Economic Development; the Minister of Financial Services, Good Governance and Institutional Reforms; FS; the Conservators; FSC and SLO.

946. It was Benoit Chambers, which was engaged by the Conservators to produce a draft Bill. That was not as easy as it sounded because any draftsman worth his salt had to wrestle with two fundamental issues. The first was to acquire the consent of the policy-holders in the decision-making which meant – as Benoit Chambers stated – giving them a haircut. It is anathema to cut anybody's hair without his/her consent.

947. The second fundamental was that by law the administration of assets of ailing businesses is the job of specialized professionals fell within the sole province of the Conservators. That meant a rethinking of the regime of conservatorship to “*menager la chèvre et le chou*” in the proposed amendment so that government commitment was not jeopardised by conservators any more than the independence of Conservators was jeopardized by government.

948. Benoit Chambers, therefore, suggested that they should address the two issues *via* the procedure of DOCA (Deed of Company Arrangement) vesting the FSC with an oversight responsibility to safeguard the rights of the policy-holders. The SLO – passingly consulted on the matter – advised that the constitutional issue arising in the scenario needed to be catered for. Drafts were exchanged along the line discussed between personnel of the two Ministries (mostly the MFSGG&IR), Benoit Chambers and the SLO (minimally). The final draft comprised an amendment to the Insolvency Act with consequential amendments in related legislations, to adapt DOCA system to the novel and imaginative client requirement situation. A SA was conceived for the purpose, in line with DOCA system. FSC, in this scenario, was to oversee the process watching the interests of the policy-holders and creditors and imposing such terms and conditions as it thought fit.

### **The Baby is Born**

949. On 24 April 2015, indeed, Cabinet was apprised of a pending amendment to the law. Cabinet as per the Minutes took note of that pending legislation. However, within a couple of days, the Bill was already introduced in the NA under a Certificate of Urgency. The Minister who apprised Cabinet of the pending legislation was the ex-Minister Bhadain and the one who introduced it before the NA was also ex-Minister Bhadain. This new law received Presidential Assent with the same celerity it received at Cabinet and Parliament level. Benoit Chambers – so we were told – had to go to the website of the NA thereafter to pay a visit to their new born - only to find that it was the offspring of a different father! The elaborate Bill comprising consequential amendments to other related laws proposed by Benoit Chambers had been clearly jettisoned. A stand-alone amendment had been effected to the Insurance Act, adding Section 110A and Section 110B to the existing Section 110.

### **Who Fathered the Baby?**

950. Who was the father? Ex-Minister Bhadain denied parenthood and stated he only assisted in the delivery. His role was restricted, he said, to that of a gynaecologist as it were: just bringing it to Cabinet and NA. The father was MOFED, he said. MOFED denied the allegation. Those who draft the laws at MOFED stated they have to do only with the Finance Acts and there was an attempt to insert it in the Finance Act but it did not materialize and was back to the line Ministry. Who was between them the father then?

951. Fortunately, Nature has its own way of revealing its secrets. Parenthood cannot be hidden for long. For one thing, if it was not embedded in the Finance Act, it could not be MOFED. For another, whoever drafted the Bill must have been trying his hand at it first time at the level of MFSGG&IR. It is, to all intents and purposes, amateurish drafting. Legal drafting is a serious professional discipline. It is acquired through long and sustained practice and learning. Legal draftspersons do not grow on trees. They grow as trees. There is a long process involved when the professional develops his root base from which will emerge the off-shoots, the stem and the branches. Not a copy-and-paste exercise. Not a work of amateurs. Not a Do It Yourself. Not a matter of writing English in legal language. How it comfortably a new law suits in the whole ecosystem of existing laws is a prime consideration. Consultation is the key. How it impacts in the sector it touches is a prime consideration. It should be as near a perfect fit in the rest of the laws as human ingenuity can achieve.
952. With all the good intentions (the way to Hell is replete with good intentions), Section 110A and Section 110B of the Insurance Act are a heresy. Having to do with insolvency matters, the change was brought to the Insurance Act. It provides an access road to a politically elected Executive in the affairs of a State Regulator in whose functional independence lies its very strength. The comment of SLO of a possible constitutional challenge was left unaddressed. The concern of Benoit Chambers to use DOCA system was ignored. Above all, the law specifically robbed the policy-holders of their consent to determine how their investment would be dealt with in the wake of the debacle: a constitutional aberration. The Commission found that it was conceived in the bed of the Political Adviser of ex-Minister Bhadain, Mr A. Deerpalsingh. It might not be his draft but someone with some rudimentary knowledge of laws was the author in the small team of the ex-Minister. We have given our reasons elsewhere in this matter. Worse, it was fraudulent: the Explanatory Memorandum omitted to mention one essence of what the amendments sought to do: namely, the taking away of the consent of the investors in the process of the disposal of the assets! Because this was not mentioned in the Explanatory Memorandum, it passed unnoticed in NA.

### **ADMINISTERING THE BAD LAW**

953. Armed with this bad law now, the ex-Minister set about his formidable task of assuming complete control of the process of realizing the assets of the BAI including Britam to pay the policy-holders lined up for 30 June 2016. No wonder that quarrels would start in the very honeymoon period with ensuing rupture of relationship between the first two conservators, on the one hand, and the FSC/ex-Minister and his team, on the other. A law corrupt at source cannot be corrupt in the stream.

### **ELECTED EXECUTIVE TAKING OVER CIVIL EXECUTIVE**

954. In our system of government, elected executive should be limited to deciding policies and established executive limited to executing those policies. Execution should be left to the civil service and the professionals. The amended law had entered a “politician” encroaching on the independence of an independent Regulatory institution, that of professionals and that of investors.
955. On paper, it was SA who was in charge. But, in point of fact, loomed large all over the process, the power of the then Minister. It was he “who was directing all operations” as per witness depositions. Messrs Basgeet and Oosman would soon be on the exit road because of a controversy around who is the captain of the ship. Mr Oosman would offer to go on his own but he would be persuaded to stay to be revoked later. As to Mr Basgeet,

he would discreetly resign after a short while. They were replaced. Their replacement was instantly done within the day with a questionable procedure by FSC now fully subservient to the Minister in point of law and in point of fact. Mr Ramtoola of BDO would be appointed to replace Messrs Basgeet and Oosman - in a manner with due regard to procedural ethics but without due regard to substantive ethics. This was how it happened.

956. BDO had been assigned the task of preparing a Strategic Report of how the assets should be dealt with. Mr Ramtoola was the one who had proposed the Strategic Plan at the instance of FSC. For preparing such a huge task, BDO had taken just 48 hours. Asked how was it possible? Mr Ramtoola's answer was eloquent: with materials provided to him by FSC. He was the Managing Partner of BDO. He was aware of what had caused the sacking of Mr Oosman and the resignation of Mr Basgeet.

957. He was chosen by the FSC "*sur place*" despite the fact that he was associated with BDO which had an avowed conflict of interest in the matter. FSC did not see anything amiss with the appointment of Mr Ramtoola in his personal capacity and BDOs' proximity to, and familiarity with, the ex-Minister and his team. A text-book model of unethical use of ethics when the process is contrived to reach a pre-determined outcome.

958. Mr Ramtoola had seen it all. He had seen the power of the Minister. He had seen his power over FSC. He had seen his people at NPFL. All he had to do was to give his name to things being done. And this was indeed what he did. It was too much to expect Mr Ramtoola not to toe the line of the ex-Minister. From then on, it was the ex-Minister and his team having gained progressive control of the process of sale of the Britam assets, by a specious procedure, a specious law and on the facts.

959. The SA had to report periodically to the FSC and the latter felt that it had to seek the green light of the Minister even when the need did not arise. For example, Cabinet had taken the decision on 10 July 2015 that the assets should be transferred to the NPFL. When FSC was apprised of the matter, FSC sought the approval of the ex-Minister Bhadain pursuant to Section 110B of the Insurance Act. Indeed, the course which the process followed shows that the Advisers and the ex-Minister had taken charge. For one thing, the matter of sale was never brought to Cabinet. For another, the Cabinet decision that the undertaking should be transferred to NPFL was simply ignored.

#### **WAS THERE *FEU EN LA DEMEURE* TO SELL?**

960. It is not disputed that, on 10 July 2015, Cabinet had decided that the shares of Britam should be transferred to NPFL. Mr Ramtoola was fully aware of that decision. The entity whose responsibility it was to sell it was the NPFL at a sum and at a time suited for the purpose. That had been brought home to Mr Ramtoola through discussion and formal correspondence to that effect. There is a letter to that effect dated 6 November 2015. Mr Ramtoola was being requested in writing to transfer the undertakings to NPFL as per the above-dated Cabinet decision. Repayment to policy-holders for the upcoming June 2016 payment had been arranged for through a loan from the Central Bank. All this was known to the ex-Minister and those who completed the sale? There was no *feu en la demeure*.

961. Why did they sell then? Asked why, the Commission had answers which could only be implausible. It was to avoid transaction fees. NPFL did not have the expertise etc. It is a mystery how and why BDO did not go along its own recommendation to transfer the shares. If they felt the need to sell, why did not the ex-Minister go to Cabinet for the

sale? What interest did it serve for him not to go to Cabinet and, in the process, to flout the decision of Cabinet. In any case, was not the difference in price so serious as to warrant a Collegial decision of Cabinet? Every single witness on the matter is agreeable that the ex-Minister should have sought approval of Cabinet in the matter.

962. But the greater mystery lays in the fact that ex-Minister Bhadain went against his own law. As per Section 110A of the amended legislation, it is the undertaking which should have been transferred to NPFL and not the proceeds of sale. What really happened is that it was the proceeds of sale which were transferred. What interest did it serve them to do that?

#### **Ex- Minister Bhadain Witness or Accused**

963. Ex-Minister Bhadain, as the then Minister of Financial Services & Good Governance and Institutional Reform, was accountable to what was happening in his Ministry. But he denied all involvement in the sale of the Britam shares. On the facts as culled out, the Commission would be bold as to say that there will be not one soul in Mauritius, including himself, who would reach the conclusion he is advocating.
964. Summoned to depose as a witness, he pleaded as a defendant on trial, and a disgruntled defendant at that. It was in the nature of a counter-attack: Mr Bhadain vs Mr Hajee Abdoula; Mr Bhadain vs Mr Pravind Jugnauth; Mr Bhadain vs Mr Lutchmeenaraidoo.
965. The narrative given by ex-Minister Bhadain was that it was all the work of MOFED from the very beginning till the end. And he, for one, and his Ministry was ousted, was kept in the dark: a lump hard to swallow in the face of overwhelming facts. He had assumed accountability under Section 110A and Section 110B by his own law. The BAI sale related to insurance matters, subject-matter of Financial Services. Ex-Minister Lutchmeenaraidoo had exited from the scene as Minister of Finance in January 2016. He was tongue-tied on the events between the critical period – early February and March 2016 - when it all happened. This is where he sought to divert attention.
966. He began to submit in law. MOFED, PS nor anyone had no mandate for dealing with a matter which was solely the legal responsibility of the SA under the amended Section 110A and Section 110B of the Insurance Act. What he may have overlooked is that the Nairobi meeting was held with the SA fully in the picture with BDO represented by Mr Khapre of its Kenyan office.
967. Even this amendment was, as per his deposition, the work of FS where his role as the then Minister of FS was simply to take cognisance of it and take it to Cabinet. He made sure to state that Cabinet “agreed” to take it to Parliament. More about the subtle language he used later.
968. He also stated that he was unaware of the Nairobi meeting of 18 November 2015 which the PS had with the Kenyan buyers. When he became aware, he sought for a copy of the Minutes in which he found that the agreement reached was for the sale to take place at a “*mutually agreed acceptable valuation*.” From this term which allegedly existed in the Minutes, he argued that the Kenyans had accepted to match the price of MMI at MUR4.3bn.

969. At the same time, he defended “*bec et ongles*” the fact that the sale was clinched at MUR2.4bn for a reason best known to him. It was the best price that could be obtained because of the falling value of the shares on the Stock Exchange in Nairobi.
970. His unnatural overemphasis in mentioning MOFED or the ex-Minister Lutchmeenaraidoo to harp on their involvement, even against the train of his thoughts was too patent not to be noticed. It rang like a false coin in his narrative. With a better sentiment, he could have gained better mileage.
971. The fact was more than apparent that he and ex-Minister Lutchmeenaraidoo were at one time two brothers in arms and had soon turned into two brothers at arms. His complaint against ex-Minister. Lutchmeenaraidoo was almost pathological. A number of things coming out of his subconscious than his rationalization: it was all the doing of others; Mr. Vishnu Lutchmeenaraidoo was acting on his own accord; he was not going through Cabinet; he kept him in the dark, the then Minister of Financial Services, out of the picture; he had sent Mr. Lutchmeeparsad to Kenya to discuss with Britam over his head; he had usurped the role of the SA; the Kenyans were dealing with him as the content of the letter addressed to Mr Manraj dated 21 December 2015 showed etc etc.
972. He gave 15 specified facts in support of his version that he had nothing to do with the sale of Britam shares. He backed up the 15 facts with argumentation. All the 15 documents produced, this time, were true. But there were other facts, events and documents which did not form part of his deposition which completed the picture and gave him the lie. Ex-Minister gave a garbled picture on carefully chosen documents. Other documents and other pieces of evidence implicated him squarely: these he chose not to produce.
973. With this, we come to the key persons involved in the above enigmatic process: Ex-Minister Bhadain, Adviser Deerpalsingh, Mr Ramtoola and Mr Ebrahim.

#### **Mr A. Deerpalsingh Adviser or Undertaker**

974. Ex-Minister Bhadain’s style was emulated, unfortunately, by Mr A. Deerparsingh. They both developed a common strategy of being defensive. One cannot help asking whether Mr A. Deerparsingh as the political adviser did not require advice himself from the ex-Minister. After all, Mr A. Deerparsingh could not have come there on his own. What was his scope and his limit could only be told to him by the ex-Minister who is deemed to know his law? Professionals owe a duty to themselves and to other professional to apprise themselves of the scope and the limits of their power in any given situation. Otherwise, they are not acting as professionals.
975. In their defensive strategy, they both relied on documents and extracts from documents to support the view, a view unsustainable on the facts that they were targets as opposed to shooters. Mr Deerpalsingh went to that extent of not mentioning ex-Minister Bhadain: something hard to countenance when Mr Deerpalsingh was the ex-Minister’s political Adviser. When questioned on this most patent omission, his reaction was “*Do you want me to involve him?*”

**Q:** *And what is that material fact. You have the documents, you are explaining all those key persons, key ministries involved in all these documents in the chronology of events. You mention the Financial Secretary, you mention the*



*previous Minister of Finance, at one time you mention even the leader of the opposition.*

**A:** *That's Hansard.*

**Q:** *Yes from Hansard, you even mentioned Mr. Lutcheemeeparsad, you've mentioned Mr. Peter Munga, you mentioned Mr. Ramtoola, you mentioned the then Minister of Finance was it or Honourable Pravind Jugnauth but you don't mention your Minister under which you have been working at all in all these papers. How come? He was not involved at all?*

**A:** *So do you want me to involve him?*

**Q:** *No certainly... My God. I am asking, everybody wants to know how is it that you produce all these papers and your own Minister. You spare your own Minister in this.*

**A:** *Really, I have not done that Sir. If you look at the documents, you will also find his name as well.*

**Q:** *Ok show it to us.*

**A:** *I'm looking for the Annex and I will show you. For example, in the meeting of the Ministry of Finance which was chaired by Mr. Honourable Pravind Jugnauth, my Minister also was present at that time. I don't have any issue on that.*

976. If account is taken of the fact that the above meeting was taking place long after the sale has been completed, June 2016, the degree to which the ex-Minister and his team tried to discolour the minds of their audience may be gauged.

#### **Mr Afsar Ebrahim of BDO**

977. Mr Afsar Ebrahim, as per the events outlined, overshadowed Mr Ramtoola in the process of sale of the shares. It is he who travelled to Kenya along with Me Choomka to verify the registration of BAKHL. After verification, it was confirmed that the Company was incorporated in Bahamas. While he was in Nairobi, he also had meeting with the legal representatives of Britam Kenya on the SPA to be signed and details relating to transfer of funds. Mr Khapre instead of speaking to the SA for the latter to meet Mr Munga, spoke to Mr Ebrahim to arrange for the meeting with ex-Minister Bhadain for the 14 November 2016. He was the person who was actively involved in the drafting of the MOU. He was the person who insisted that the conditional clause of 51% premium on the share price be incorporated in the SPA. He was the person who provided Mr Deerpalsingh with the second version of the Notes of Meeting. Furthermore, in the light of his testimony and those of other witnesses as well as documents submitted, he was the one whose depositions contain lots of the contradictions and prevarications. We had asked for all the correspondence which BDO had in the matter to be submitted to us. A couple of them – of no mean consequence to the enquiry – were not submitted. The Commission received them from other quarters.

#### **HOW INFORMED WAS THE FSC? RE: THE PROCESS OF SALE?**

978. As per the Engagement, BDO had to update the FSC on a regular basis of the progress with the matter of the Britam shares. We resorted to the Notes of Meeting of the FSC to check what was reported and whether there was proper reporting.

979. We note that, at the 219<sup>th</sup> Board Meeting dated 4 July 2015, the FSC had requested that the shares be warehoused at the NPFL. At the 221<sup>st</sup> Meeting, the Minutes read that “*The Special Administrators are making arrangements to warehouse the Britam Kenya stakes*

*in the NPFL”. At the 222<sup>nd</sup> Board Meeting of 30 July 2015, the FSC Minutes read: “The assets of Britam Kenya will be transferred to the NPFL.”*

980. The same position is repeated at the 229<sup>th</sup> Board Meeting of 16 September 2015. There is no question of sale but of transfer. We read in the FSC Minutes: *“Discussions are ongoing regarding the transfer of the 23.9 per cent shareholding held by BAI (Co.) Ltd in Britam.”* At the 231<sup>st</sup> Board Meeting of 14 October 2015, Mr Ramtoola briefed FSC as follows: *“Barclays Bank has made an offer for an exclusive mandate to sell Britam Shares for 4.2 bn. Board recommended to wait until 31 December 2015 for a better offer.”*

981. At the 232<sup>nd</sup> Board Meeting dated 15 October 2015, we read:

***[Mr Yacood Ramtoola, Special Administrator joined the meeting at this stage]***

*“The Special Administrator briefed the Board on the proposal dated 14 October 2015 ..... from MMI Holdings Ltd for a 23.92 per cent equity stake in Britam Holdings Ltd for the sum of MUR 4.3 billion under the proposed terms and conditions mentioned in ..... It was noted that this offer is higher than what was offered by Barclays Bank (Rs 4.2 billion). MMI Holdings is a South African based financial services company operating in both long term and short term insurance, asset management, investment, healthcare administration, employee benefits, property management, etc. MMI is listed on the Johannesburg Stock Exchange with a market capitalization of ZAR 39 bn (around Rs 105 billion). The South African Government Employees Pension Fund has a 10.1 per cent shareholding in MMI.*

*After discussions and due considerations of the proposed terms and conditions. Board agreed to recommend same to the Minister of Financial Services for consideration and approval subject to a Memorandum of Understanding being agreed and signed on the basis of a 10% deposit in an escrow account as from the submission of a binding offer which shall not be later than end November 2015.*

*As per the requirements of the law and should the deal be concluded, the assets will first be transferred to the National Insurance Co. Ltd or its related entities which in turn will effect the transfer to MMI Holdings Ltd.”*

***[Mr Yacood Ramtoola, Special Administrator left the meeting at this stage]***

982. At the 233<sup>rd</sup> Board Meeting dated 12 November 2015, we read in the Minutes:

*“Board was informed that the Chairperson of Britam Kenya will be coming to Mauritius this week for discussions. Since the shares of Britam Kenya are listed on the stock exchange, shareholders have no pre-emptive right.*

*The agreement with MMI was signed. Representatives of MMI will be in Mauritius during the weekend for due diligence and has requested for an extension so that they may submit their revised offer by mid December 2015.”*

983. At the 234<sup>th</sup> Board Meeting dated 08 December 2015, we read in the Minutes:

*“The shareholders of Britam Kenya are not keen to sell to MMI of South Africa and have proposed to buy the shares at the same price offered by MMI. They will discuss with their shareholders and informed the Special Administrator accordingly. The Chairperson of Britam Kenya is expected to visit Mauritius soon.”*

984. At the 235<sup>th</sup> Board Meeting dated 16 December 2015, we read in the Minutes:

***[Mr Afsar Ebrahim and Mr George Chung from BDO joined the meeting at this stage]***

*“The Chairperson informed the Board that he received a letter from the Cabinet Secretary of the National Treasury of Kenya informing that the Government of Kenya is agreeable for the Government of Mauritius to sell the 23.34 per cent in Britam Kenya to Britam shareholders.”*

985. At the 236<sup>th</sup> Board Meeting dated 21 January 2016, we read in the Minutes:

*“There is no progress on this deal with MMI as majority of shareholders are not agreeable to sell to MMI. The shareholders will submit their proposals by 15 February 2016.”*

986. The most critical report to follow would be the March 2016 meeting because the deal was done on 12 of March. At the 239<sup>th</sup> Board Meeting dated 22 March 2016, we read in the Minutes:

*“The deal has not yet been finalized. A major shareholder has made an offer which has been accepted. The major shareholder has been requested to pay by next week Rs 1.5 billion in an escrow account opened at the Mauritius Commercial Bank Ltd.”*

987. Would one say that this is reporting, under reporting or misleading? The fact of the matter is that: (1) there should have been a transfer to NPFL and not a sale; (2) when an MOU has been signed with all the details of the sale cast in stone, FSC is being informed that the deal has not been finalized but that *“he major shareholder has been requested to pay by next week Rs 1.5 billion in an escrow account opened at the Mauritius Commercial Bank Ltd.”*

988. What was the price? Not one word on it. Why was the price concealed to the FSC even if the FSC was informed that MUR1.5bn will be paid into an Escrow Account? MUR1.5bn of what?

## CHAPTER 11

### COMMENTS ON REPLIES TO SALMON NOTICES

*... what is a fine lie? Simply that which is its own evidence. If a man is sufficiently unimaginative to produce evidence in support of a lie, he might just as well speak the truth at once - Oscar Wilde*

#### SALMON NOTICE WITNESSES

989. The facts that the Commission has been able to dig out from the integral whole and put together revealed that, on the state of the evidence as then existed, adverse comments could be made against a number of witnesses for their failings in one respect or another. Among them, there were local witnesses and foreign witnesses.

990. This Chapter will deal with Salmon Notices served on local witnesses. A Salmon Notice is a notice that is sent to a witness against whom some adverse comment may be made in an inquiry. It is a rule of fairness that they should be informed of the nature of the comment and afforded an opportunity to rebut them before the comments can be at all made in the final analysis.

991. The 5 local witnesses who, in our view, did not abide by their duty to speak the truth, the whole truth and nothing but the truth contrary to the oath they took in the matter, were:

1. *Ex-Minister Bhadain*

It would have been more in keeping with his calling for him to state the facts as he knew them. But he was selective on the facts which he presented to the Commission. His failings related to what the Commission found he had *prima facie* concealed.

2. *Mr Deerpalsingh*

Mr Deerpalsingh had adopted the same strategy. His depositions also revealed *prima facie* some compromising material.

3. *Mr Ramjanally*

Mr Ramjanally on the face of it was involved with the amendments to the Insurance Act.

4. *Mr Ramtoola*

The response of Mr Ramtoola was needed with respect to whether he was more of a follower than a leader in the process of the sale, more particularly, the proper exercise of his powers under Section 110A and Section 110B of the Insurance Amendment Act 2015.

5. *Mr Ebrahim*

Mr Ebrahim for his part was more directly involved in the nitty-gritty of the sale and his proximity to ex-Minister Bhadain.

## EX-MINISTER BHADAIN

992. Served with a Salmon Notice to respond to 8 simple questions, ex-Minister Bhadain gave his reply by reciting a catalogue of 49 facts: 15 for Question 1; 13 for Question 2; 3 for Question 3; 1 for Question 4; 12 for Question 5; 3 for Question 6; 1 for Question 7; and 1 for Question 8.

993. **Question 1 was -**

**“In the course of your witness deposition, you stated to the Commission that you had nothing to do with the sale of Britam Shares and that this transaction was handled by the then Ministry of Finance and Economic Development. Would you still hold on to that narrative?”**

994. The Commission received an elaborate written reply. He confirmed the version he had given previously. This time he advanced 15 further facts in support of that original version, he reiterated that he had nothing to do personally with the sale of Britam shares, based as he said on “true and undeniable facts.” His added arguments were that \_

1. He did not choose the buyer.
2. He did not negotiate with any buyer.
3. He did not make any offer to any buyer. He did not participate in any such decision or decision-making process to identify, choose and/or accept any buyer for the sale of Britam shares. He did not sign any document in relation to the sale of Britam shares to Britam shareholders.
4. The offer was made by Britam shareholders to the Ministry of Finance and Economic Development (“MOFED”) with attached document.
5. The Government of Kenya requested MOFED to sell the stake of 23.34% in Britam to its Kenyan shareholders and MOFED agreed, with attached document.
6. He, for one, did not participate in any decision or decision-making process to identify, choose and/or accept any buyer for the sale of Britam shares.
7. He did not sign any related document.
8. On or about **18 November 2015** the process of sale of Britam shares to Britam shareholders was initiated by MOFED. The PS of MOFED was sent to Kenya to meet the representative(s) of Britam. His ‘mission’, travelling costs and per diem, was approved by the Minister of Finance and Economic Development and paid for by MOFED. The PS reported back to his Minister and the FS on the outcome of his ‘mission’. **He, was not told about this and had no knowledge of any outcome of this mission, he as an ex-Minister of Financial Services, Good Governance and Institutional Reforms was kept in the dark.**

995. The ex-Minister while advancing those facts commented that MOFED, in so doing, had violated the procedure for handling the transaction inasmuch as the responsibility for recovery of assets of the defunct BAI Group in by law governed by Section 110 of the Insurance (Amendment) Act 2015 whereby the sole responsibility of SA appointed by FSC and should have been done in consultation with the FSC; that MOFED had flouted the law when it had sent the PS to Kenya to discuss the sale of Britam shares since the PS of MOFED had no authority to seek the assistance of BDO in Kenya to discuss the sale.

9. As his ninth fact, he attached a document showing that on 9 December 2015, the Cabinet Secretary/National Secretary of the National Treasury of the Republic of Kenya (“Kenyan Cabinet Secretary”) had a telephone conversation with the FS of MOFED for the sale of 23.34% stake of Britam to Britam shareholders, by Government of Mauritius, which was agreed by the FS of MOFED

996. Again, the ex-Minister Bhadain questioned the legality of the agreement between MOFED and Kenyan Government raising the obvious question whether it was in accordance with statutory/legal procedures? He queried as to why the Attorney General’s Office and the MFSGG&IR were not informed. Was there not a need to apprise the Cabinet of Ministers prior to any agreement being entered into by MOFED, on behalf of the Government of Mauritius with the Kenyan Government to sell the shares of Britam Holdings Ltd to its shareholders.

10. As his tenth fact, he added referred to the official letter dated **11 December 2015**, where the Kenyan Cabinet Secretary wrote: *“I wish to register my appreciation to you for **agreeing** to this request.”* He argued that he was never informed of this “at the material time.”

11. As his eleventh fact, he referred to the official note dated 11 December 2015 also clearly states that the Board of Directors of Britam will need to make arrangements to have negotiations with Government of Mauritius in order to agree on “the suitable timeframe within which the sale will be effected as well as the **sale price** and **payment terms**.”

997. The ex-Minister also commented on alleged MUR4bn mentioned by PS of MOFED. The wording of this official letter of 11 December 2015, addressed to the FS of MOFED shows that there was, in fact, no outcome resulting from the trip of the PS of MOFED in mid- November 2015. The representatives of Britam had clearly not agreed to pay MUR4bn for the shares of Britam and had sought the intervention of the National Treasury of Kenya, which dealt with the FS of MOFED.

998. The ex-Minister argued that:

- (i) there is no ‘official mission report’ for the November 2015 meeting.
- (ii) Cabinet was not apprised of the fact that MUR4bn having been obtained by the PS of MOFED in Kenya.
- (iii) why was the MFSGG&IR, the SA and myself not informed that the PS of MOFED had apparently obtained an agreement from the Britam shareholders in Kenya for Rs 4 Billion in November 2015?

- (iv) there was no need for the Kenyan Cabinet Secretary, Mr Henry K. Rotich, to correspond with the FS of MOFED in December 2015 since the deal was done for MUR4bn.
- (v) he was kept in the dark. So was FSC. So was the SA, that for one had been an offer for MUR4bn.
- (vi) there is no official document signed by the Kenyans making or accepting any offer of Rs 4 billion in November 2015? If this document existed, then why was no such information provided to me in the Treaty Room of the Prime Minister’s Office, where all senior public officials of my Ministry, the MOFED, the FSC, the SA, the Solicitor General and officers of the Attorney General’s Office, the Secretary to Cabinet amongst others, were present and had brought all their relevant records, documents and files to prepare the answer to the PNQ of the Leader of the Opposition on 3 May 2016?

12. To him, negotiations were still pending. He refers to the official letter of 11 December from the Kenyan Cabinet Secretary to MOFED which also states: “*the Chairman and Board of Directors of Britam is advised to make the necessary arrangements for the proposed negotiations between parties and the Government of Mauritius.*”

999. To him, the absence of an ‘official mission report’ in the matter shows that nothing had been actually agreed between him and Britam shareholders during his ‘mission’ to Kenya in November 2015.

13. He sought support of that fact in the correspondence of **21 December 2015** whereby the Group Managing Director of Britam Holdings Ltd wrote to MOFED and confirmed to the FS that the management and shareholders of Britam Holdings Ltd remained committed to acquire 23.34% stake in Britam Holdings Ltd.

1000. To him, this shows that Britam shareholders had not agreed on any sale price with the PS of MOFED in November 2015.

1001. Finally, he opined that:

(a) the PS of MOFED misled everybody, including himself, into believing that he had verbally agreed a deal of around Rs 4 Billion with the Britam representative in November 2015 and this is why there is no official document signed by Britam to prove same; or

(b) the Britam shareholders led the PS of MOFED to believe that they would agree to buy the shares for around Rs 4 Billion and then ran to the National Assembly Treasury of the Government of Kenya to intervene directly with the FS of MOFED, as shown by the documentary evidence.

14. He also added that on **12 January 2016**, the Group Managing Director of Britam Holdings Ltd wrote to MOFED stating that they would be ready by mid-February 2016 and requested the Financial Secretary for a follow up meeting with him in Nairobi during the week of 15 February 2016 to “*finalise discussions on this matter.*” and to: “*Please advise a convenient date for the meeting.*”

15. The tenor of the letter dated 11 December 2015 to the FS of MOFED show that Mr Y. Ramtoola was there to finalise discussions with Britam shareholders and formalise an MOU between Government of Mauritius and Britam, as requested by the Kenyan Cabinet Secretary, Mr. Henry K. Rotich.

1002. In light of the above mentioned 15 facts, ex-Minister Bhadain maintained that he did not take any decision, nor did he act in any personal or official capacity in the process described above with regard to the sale of Britam shares and the documentary evidence speaks for itself.

**1003. Our comment on the above**

1. All those 15 facts, the Commission may accept as by and large near the truth but not the complete truth. For the 15 facts do not constitute the whole story. They are carefully selected to give some credence to a version which is far remote from what actually happened.

2. True it is that ex-Minister Bhadain did not choose the buyer since it is MOFED which had agreed to sell the shares to the Kenyan shareholders.

3. Ex-Minister Bhadain did not negotiate with any buyer in the sense that it is MOFED which sent PS Lutchmeeparsad to tell the Kenyans that if they wanted to buy the shares, they should match MMI Holdings or do better. This was at the instance of MOFED.

4. Same thing may be said for fact 4 & 8, since it is the Cabinet Secretary of the Government of Kenya who requested MOFED to sell it to the Kenyan and it is MOFED which prompted the Nairobi meeting of 18 November but he omits to say that it was done through the SA and the latter was not only fully in the picture but duly represented at the meeting.

5. That he did not sign any document is also true. But that is neither here nor there.

6. Whether the mission of PS, Lutchmeeparsad was borne by Government is breaking an open door. All government missions are funded by Government and besides Mr Lutchmeeparsad's presence in Nairobi on another mission was conveniently exploited for the meeting. The comment of ex-Minister is cynical in this regard.

7. That MOFED had breached Section 110 of the Insurance (Amendment) Act 2015 because "the respondent" for recovery of assets of the defunct BAI Group is by law the SA. This to us is a subconscious realization emerging from the breach of his own Ministry in the matter.

8. It should be noted that the ex-Minister is avoiding to mention that the Minister has a role to play in the amended law in that nothing happens until he gives his approval.

9. There are other facts which have not been mentioned by the ex-Minister.



10. This only confirms his tendency to confabulate. A confabulator is one who selects his facts in a turn of events and injects some of his own from his imagination and turns it all in a fable that seduces. Not for that reason, what he makes up is not a lie.

11. It is of great significance that his narrative stops at 11 December 2015? It is all happening after 11 December 2015 for which record has not been kept. What we needed to look at is not what happened before but what happened after early February 2016, that is after ex-Minister Lutchmeenaraidoo exited MOFED and the whole matter fell to be under his control. There is enough material implicating him which he withheld.

12. The facts he occults, if taken with the above, demonstrate the ex-Minister's direct involvement in the matter.

13. His facts, be it noted, stop at 11 December 2015 when the relationship with him and the Minister of Finance and Economic Development is at its best: two friends together tight in tether.

14. Then in early February ex-Minister Lutchmeenaraidoo exits the scene. What was a parallel run between the MOFED and the MFSGG&IR now is being handled solely by the MFSGG&IR. The deal was clinched not in December 2015 but on 11 March 2016. The Minister of Finance & Economic Development after his return from Washington on 10 February 2016 never came back to the Ministry to pursue the matter. He was admitted to a private hospital following which he took over the portfolio of the Ministry of Foreign Affairs, Regional Integration and International Trade.

1004. Other facts which ex-Minister Bhadain occults are as follows:

1. Prior to the MOFED-Britam meeting in Nairobi on 18 November 2015, Mr Peter Munga met Mr Afsar Ebrahim who took him to the ex-Minister. That was on 14 November 2015. Both Mr Ramtoola and Mr Ebrahim stated it was only for "less than 5 minutes". Mr Ramtoola also stated it was only a courtesy call. The Commission was in presence of a communication emanating from Mr Peter Munga that they had discussed substantive issues at this meeting and agreed upon the line that they had to follow and the people he had to engage with. Indeed, later, Mr Ramtoola would concede that it was more than a courtesy call.
2. Why do the facts of ex-Minister Bhadain end at 11 December 2015?
3. Late Sir Anerood stated in evidence that the matter of the Britam sales was entrusted to ex-Minister Bhadain.

**Question 2 was –**

**Facts gleaned from witness depositions and documents show that the transaction was being handled by a team headed by yourself comprising your two Advisers (Messrs Deerpalsingh and Ramjanally), BDO as well as Mr. Ramtoola. Do you have any comment to make in that regard?**

1005. In reply to Question 2; the ex-Minister respectfully took strong exception to the words, “*the transaction was being handled by a team headed by yourself comprising your two Advisers (Messrs Deerpalsingh and Ramjanally), BDO as well as Mr. Ramtoola.*”

1006. He again advanced 13 facts to show that it was all the deed or misdeed of MOFED.

1. *The decision of the Financial Secretary of MOFED to send the Special Administrator, (Mr. Ramtoola) to finalise negotiations and formalise matters in a Memorandum of Understanding between the Government of Mauritius and Britam was taken after **21 December 2015**.*
2. *Mr Y. Ramtoola, Special Administrator was appointed by the FSC under S 110 of the Insurance (Amendment) Act 2015 and was acting under his statutory functions as per S 110A (4). He has all the powers, duties and functions of an administrator under the Financial Services Act and Insolvency Act and BDO was appointed by him.*
3. *Faadeel Ramjanally was not my Adviser as alleged in the above question, as he had resigned in or about June 2015. I verily believe that he has already deponed before the Commission and provided the necessary details.*
4. *Akilesh Deerpalsingh was also not my Adviser, as he had given notice of his resignation in **November 2015** and was no longer employed by the Ministry after 31 December 2015. I verily believe that Mr. Deerpalsingh has already deponed to this effect before the Commission and with great respect, the Commission may have inadvertently missed this fact when putting this question to me.*
5. *As Minister of Financial Services of the Republic of Mauritius, I did not head any team with regard to the sale of Britam shares. Whenever I needed to be briefed on any matter relevant to my Ministerial duties and required information from any relevant institutions or persons, I would ask my secretary to contact the relevant persons to attend my office to provide the information required.*
6. *According to due process of law, I asked the FSC and the Special Administrator to attend my office on various occasions to provide information, so that I could formulate policies and report to Cabinet. On many occasions, I needed to be briefed on relevant matters to answer questions in the National Assembly and answer queries from the representatives of ‘SCBG’ policyholders and BAML investors, as well as, the press and media.*
7. *The specific discussions which took place in my office were for them to provide me with any update(s) to honour the commitment of Government to repay the victims of SCBG and BAML, which was done in June 2016. At these meetings, I discussed policy matters as Minister of Financial Services, which included the recovery made by the Special Administrator in consultation with the FSC, including Britam shares, amongst others.*

8. *For instance, one important issue which the FSC and the Special Administrator had reported to me was that Mr Sattar Hajee Abdoulla had asked to be paid a huge sum of Rs 26,269,220.25 for two weeks work, from funds recovered from the sale of assets destined to repay victims of SCBG and BAML. The Board of FSC had found that he was not legally entitled for this payment as he was appointed by the directors of ex-BAI and not by the Government of Mauritius. Mr Sattar Hajee Abdoulla had served a 'Notice Mise en Demeure' on the Special Administrator and the latter wanted a policy decision to be taken. Accordingly, I took this matter to Cabinet and he was not paid when I was in office.*
9. *With regard to the amounts to repay SCBG and BAML I was regularly informed and updated by the FSC and the Special Administrator of the specific amounts recovered, and the methodology used to determine these amounts.*
10. *With regard to amounts recoverable from the sale of Britam shares, the Special Administrator explained that he was mandated by the Chairman of the FSC to negotiate with Britam shareholders on the same methodology as had been done with the lapsed MMI offer, which he had done and the FSC had not raised any objection thereto. The Special Administrator further explained that his team and him had negotiated the best possible price which was dependent on the prevailing share price at the Nairobi Stock Exchange of Ksh11.75 at the material time, plus a premium that they had successfully negotiated and obtained.*
11. *I was also informed by the Special Administrator that he would recover a gross amount of Rs 2.6 billion, subject to charges and exchange differences, which he would transfer to NPFL for the repayment due to SCBG policyholders and BAML investors. He also confirmed that the Kenyans would not pay a higher premium and this is precisely why they had sought the intervention of the National Treasury of the Government of Kenya to reach an agreement with MOFED beforehand on 11 December 2015.*
12. *On 3 May 2016, I informed the National Assembly, in answer to a PNQ of all information with regard to the sale of 23.34% stake in Britam to Britam shareholders, which were provided to me by the Special Administrator, the FSC, MOFED and NPFL. I tabled before the National Assembly a document provided to me showing that Rs 2.6 billion from disposal of shares in Britam Kenya was going to be used to repay SCBG policyholders and BAML investors a total amount of Rs 3.9 billion in June 2016. Based on information provided by the Special Administrator I informed the House as follows:*

*“I am informed by the Special Administrators that an MOU has already been signed with the existing shareholders of Britam Kenya on 11 March 2016 for an amount of Rs 2.9 billion of which Rs 2.6 billion will be paid by 15 May 2016. The signing of the escrow agreement was delayed by virtue of the different law firms involved in different jurisdictions. The agreement was finally signed on the night of 29 April 2016.”*
13. *Finally, I was subsequently further informed that the net amount received after exchange differences and charges was Rs 2.473 billion and I informed Cabinet of the amounts received from recoveries for the repayment of SCBG*

*policyholders and BAML investors in June 2016 to honour Government's commitment given to the victims.*

## COMMENT OF THE COMMISSION ON THE ABOVE

1007. The Commission weighed the above facts with other facts emerging from documents and depositions. It came to the following conclusions:

1. On the above 13 facts, the ex-Minister, by maintaining that he was not at all involved has given us enough material to show that, after all, he was involved.
2. The Commission found that he used his imagination too many: there is no evidence that the proposed Nairobi meeting did take place. The Commission checked the travel records of potential travellers in the matter. The MOU as per evidence was negotiated and finalized not in Nairobi but in Mauritius between 8 March and 12 March 2016. Hence his statement is patently incorrect, verging on a deliberate mis-statement.
3. By early February 2016, ex-Minister Lutchmeenaraidoo had exited MOFED. He was more concerned of his health, having been admitted at a clinic than Britam sales at MOFED.
4. With regard to Mr Ramtoola, SA, we have evidence that he was being led rather than leading in the matter and that the SA, albeit his statutory function, was being marginalized by Mr Ebrahim as well as BDO, intent upon toeing the line as agreed upon on 14 November 2015 between the ex-Minister and his team, on the one hand, and Mr Peter Munga and his “pool of investors”, on the other.
5. With regard to his advisers, they may have ceased officially being his advisers but officiously they had not ceased. Their appellation may have changed but we have evidence that they were still occupying the same physical space at the MFSGG&IR as before. It was a change of labels only.
6. With regard to facts 5, 6 and 7, the fact that by law or officially one has to do certain things does not preclude that person from doing the contrary: there is evidence that the ex-Minister was not the type who would be at the receiving end of anything but at the other end, that of throwing more than his whole weight into something. What the law laid and what was done with the law are two different things.
7. With regard to fact 8, in what way is this relevant to the question asked, one might ask. In any case, if there was a claim of MUR26m lodged by Mr Hajee Abdoula against Mr Ramtoola and Mr Ebrahim for work done, that is the right of every citizen of this country which is a society based on the rule of law to bring a claim in court. It would have been a very different kettle of fish if the action was a criminal action where parties were involved. It is not unknown that when someone making up a story is caught in a lie; he seeks to divert attention to something that catches the mind.
8. With regard to facts 9 to 13, the Commission takes note of the fact that the ex-Minister had earlier stated that he was not involved at all and it was all MOFED. Finally, he gives examples of how he kept himself regularly informed and updated by all those directly concerned: FSC and the SA. Two facts are to be noted with regard to the rest: (1) he does not mention

Mr Ebrahim at all. It is the latter who had brought Mr Peter Munga to the seminal meeting of 14 November 2015 where the line of action had been agreed upon; and (2) what he states to the Commission contradicts what he stated in Parliament. Misleading either institution is a matter of no mean gravity.

9. The word “team” used in the Salmon Notice was not an invention of the Commission on who were involved in the sale. It came from the horse’s mouth. We read from Hansard the following reply made by ex-Minister Bhadain with reference to the PNQ of 3 May 2016: *“the existing shareholders of Kenya came to Mauritius, but the Special Administrators (sic) had a meeting with me at the Ministry and all the team and they basically came up with that proposal of Rs2.9 billion. In view of the fact that, after having worked the figures, we could accept that figure; we went ahead and the Special Administrators accepted that by signing a MoU and now it is a done deal.”*
10. The question which arises when he used the word “we” in the above reply to Cabinet, was he using the word as the Royal we.
11. Mr Ramtoola did state when asked about the allegation of ex-Minister Bhadain that it was he the SA who struck the deal. His reply was *“I wish it was true. I would have taken all the decision.”*
12. Ms Gladys Karuri refers to the involvement of the Minister in her email *“as a gesture of goodwill and to show our good faith to the Government of Mauritius especially to Hon Minister Bhadain whose support has been unequivocal at the height of the crisis and his personal crusade to help those policyholders who lost their savings.”*

1008. **Question 3 of our Salmon Notice was –**

**As the then Minister of Financial Services, Good Governance and Reform Institutions, was it not incumbent upon you to ensure that you left it to public officers rather than take a lead role with Advisers to handle the transaction?**

1009. In answer to the above, the Commission concedes, with due regard to the ex-Minister, on two points. The first point is that there is a mistake in the question as he was not Minister for “Reform Institutions”, but rather “Institutional Reforms”. The typo is regretted. The other point is dealt with below.

1010. As regards the other facts which he added to our Question 3, they are as follows:

1. *“As Minister of Financial Services, Good Governance and Institutional Reforms, I did not have any “lead role” myself, with or without advisers. I could not, therefore, leave it to public officers. In Latin, ‘nemo dat quod non habet’.*
2. *Also, the public officers at my Ministry were not being informed by the public officers of MOFED, who had handled the matter. The Financial Secretary had reached an agreement with the Kenyan Cabinet Secretary and instructed the ‘Special Administrator’ to finalise discussions with Britam shareholders. The latter performed his statutory duties and consulted with the FSC, which in turn, advised me as Minister for Financial Services.*

3. *Even, if, in my capacity as ‘Minister’, I were to give any ‘lead role’ to any public officer, it would be against the statutory provisions and also against the intention of the legislator, which may well have attracted ‘judicial review’ challenges as per section 15 of the Courts Act.”*

1011. Our answer to the above is a second concession. We may agree with him that he may not have taken “*a lead role with Advisers to handle this transaction.*” What characterized his involvement was that he was putting all his heavy weight into the team to reach a pre-determined result, riding rough shed in his trail. There is enough independent material at the relevant places elsewhere and we would spare the reader a rehashing of the materials here.

1012. **Question 4 of our Salmon Notice was –**

**At a meeting under your chairmanship held in your office in April 2015, BDO was entrusted with the responsibility of recommending strategic measures to protect the value of underlying assets of BAI with focus on the Super Cash Back Gold Policies. The value of the assignment exceeded 1m. Were ethical and legal rules followed before awarding the contract to BDO?**

1013. The ex-Minister on the above could not respectfully see the relevance of the question to the issue of sale of Britam shares and also why it was addressed to him.

1014. His answer has been that the MFSGG&IR did not sign any contract with BDO. He was informed that the FSC entered into a contractual relationship to retain the services of BDO, for an amount of Rs 950,000 following its own procurement procedures, ethical and legal rules.

1015. Our response is that the decision to award the contract was not taken by FSC. This was another instance of how decisions at the FSC were teleguided by the MFSGG&IR through intermediaries. The decision to award the contract to BDO for the preparation of the Strategic Plan was just one of them. The decision was taken at the office of the ex-Minister comprising ex-Minister Soodhun, Minister Callychurn and ex-Minister Yerrigadoo, FSC and the then Ag CEO of FSC in the presence of BDO. A classical case of institutional manipulation by the elected Executive. We make Recommendations so that such inroads be avoided in our democratic system of government.

1016. **Question 5 of our Salmon Notice was –**

**In your deposition before the Commission on 05 October 2017, you stated that you had nothing to do with NPFL and that NPFL was the creation of Ministry of Finance with legal advice obtained from Benoit Chambers. Is that still your version?**

1017. On the above, the ex-Minister’s answer was that -

1. *“The legal advice from Benoit Chambers was with regard to the drafting of the Insurance Amendment Act 2015 which led to the creation of NPFL. Benoit Chambers had submitted advice and drafts of the Insurance Amendment Bill to officers of MOFED.*
2. *For instance, I am informed that on 17 April 2015, Clarel Benoit had sent an email with the proposed draft Insurance Amendment Bill attached to*

*Mr Radhakrishna Chellapermal of MOFED at 17hr18, which was also sent to Rishi Pursem and copied to Anjeev Hurry of Benoit Chambers, stating: “Guys, Attached are the amendments that need to be made to the IA. Regards Clarel”.*

- 3. Mr Radhakrishna Chellapermal then forwarded the email from Clarel Benoit to Mohamad Oozeer and copied same to Ramanaidoo Sokappadu, Visvanaden Soondram of MOFED and Rajeshsharma Ramlooll of the Attorney General’s office.*
- 4. The next day on 18 April 2015 at 10hr51, Mohamad Oozeer replied to Radhakrishna Chellapermal, stating: “Chella, Updated version including the latest improved version from Benoit Chambers forwarded in hard copies to SLO for vetting. Regards, M. Oozeer.” This email was copied to Dev Manraj, Patrick Yip, Ramanaidoo Sokappadu and Visvananden Soondram of MOFED and Rajeshsharma Ramlooll at the Attorney General’s office.*
- 5. NPFL was created by MOFED. As I recall, the share capital of NPFL was to my knowledge paid for by MOFED and the Financial Secretary, Mr Manraj had dealt directly with Mrs Chinien of the Registrar of Companies for the incorporation of NPFL. I have answered some questions relating to NPFL in the National Assembly as requested by the Parliamentary Committee and Cabinet. Similarly, the Minister of Finance and Economic Development has also answered questions in the National Assembly relating to the NPFL.*
- 6. NPFL was not included in the list of institutions which fell under the purview of my ministerial responsibility. This is precisely why I told Mr J.D. Phokeer, then Permanent Secretary at my Ministry, that I would not sign any shareholder’s resolution or approval documents for NPFL with regard to sale of shares of Britam and that he ought not do same, as it would be tantamount to procedural impropriety and an ‘ultra vires’ act, which could subsequently be legally challenged.*
- 7. NPFL never approached me as Minister of Financial Services to sign any document or to approve any transaction with regard to Apollo Hospital, which was controlled and managed by MOFED, with Mr V. Lutchmeeparsad, the PS of MOFED, as Chairman of a subsidiary of NPFL, i.e. NIC Healthcare Ltd.,*
- 8. NPFL was the holding company, which dealt with the sale of Apollo Hospital, another asset of the defunct BAI Group and this was dealt with by MOFED, with its Minister reporting to Cabinet and the National Assembly. The running of the operations of Apollo Hospital and payment for its expenses including, remuneration of doctors and other employees was the responsibility of MOFED.*
- 9. NPFL and MOFED dealt directly with the initial attempted sale of the hospital to Omega Ark Ltd and subsequently, the sale was effected to the CIEL Group. I was never kept informed of these transactions by either NPFL or MOFED.*

10. *NPFL and its related entities and BDO as the transaction advisor (appointed by MOFED), were reporting to MOFED and the Minister of Finance and Economic Development on the sale of the operations of the Apollo Hospital to Omega Ark Ltd.*
11. *Mr V. Lutchmeeparsad, the PS of MOFED, who was also the Chairman of NIC Healthcare Ltd (within the Group structure of NPFL) was the one dealing with Omega Ark and NPFL. The Minister of Finance and Economic Development replied to questions on the sale of Apollo Hospital operations as stated in Hansards of 31 August 2016. Omega Ark Ltd had taken possession and occupied the premises of Apollo Hospital, even before any sale was made.*
12. *During the course of this Commission of Inquiry, Mr V. Lutchmeeparsad, the PS of MOFED, was appointed Director of the Board of NPFL on 13 June 2017, whist (sic) he was still giving evidence before the Commission.”*

1018. He continued his argumentation as follows:

*“Based on the above mentioned 12 facts and as I deponed before the Commission, I maintain that I had nothing to do directly with NPFL, which dealt with my Ministry to be informed on matters relating to the assets transferred by the Special Administrator, after consultation with the FSC, to repay policyholders of SCBG and BAML investors.*

*The 2016/2017 Budget and Appropriation Bill clearly shows that no funds were allocated to my Ministry for NPFL, as it did not fall under my Ministerial portfolio.*

*I further maintained that legally and factually, NPFL was not under my Ministerial portfolio and I already have provided documentary evidence, i.e. relevant copies, as communicated to me by the President of the Republic of Mauritius, to the Commission of Inquiry.”*

**Our comments on the above are as follows:**

1. It is not Benoit Chambers which drafted Section 110A and Section 110B of the Insurance Act. We have a copy of the draft of Benoit Chambers. Section 110A and Section 110B was drafted by a legal bricoleur replete with errors in drafting. The draft was crafted and not grafted. It was one of the 11 Recommendations of BDO which had been given the contract to do so by FSC but at the instance of Ex-Minister Bhadain. The ex-Minister was obviously attempting to drown the real issue in the question asked and take the Commission into the garden paths.
2. Section 110A and Section 110B was not the product of MOFED. The draft of Benoit Chambers had involved considerable discussion and consultation with MOFED with amendments to Insurance Act as well as Insolvency Act and Companies Act. Ex-Minister Bhadain is misleading the Commission when he is stating that Benoit Chambers it is which drafted Section 110 A and Section 110B of the Insurance Act at the instance of MOFED. It would be good to note that Mr Ramjanally had stated that he along with others were involved with the amendments to Insurance Act and Mr Deerpalsingh by email had sent a copy



of the Insurance Amendment Bill to Mrs Aruna Devi Narain with a direction that *“this is the version everyone should work one (sic).”* It is ex-Minister Bhadain who had apprised Cabinet of same and introduced it in the NA under a Certificate of Urgency. The opposition voices had met with threats and intimidations by the ex-Minister.

3. NPFL was created following the BDO Strategic Report. It was not following a decision of MOFED.
4. That NPFL and its related entities and BDO as the transaction advisor were reporting to MOFED does not preclude the fact that NPFL was also under the oversight of MFSGG&IR. There is deposition to that effect as well as documentary evidence.
5. MOFED officials who were called, were quite categorical on the question that Section 110A and Section 110 B was not their baby. They agreed that there was some initial discussion which had taken place but that was because the MFSGG&IR wanted it to be included in the Finance Act. However, that idea was abandoned. Thereafter, they had nothing to do with the amendment.
6. The Commission does not find it useful to answer the rest of his facts as they are not pertinent, relevant and material to the question asked, all the more so when it has to do with movement of officials in the normal course of business in Government.

1019. **Question 6 of our Salmon Notice was –**

**You relied upon a copy of the Minutes of Proceeding to sustain a view that there had been a decision taken in Nairobi dated 18 November 2015 that sale of the Britam Shares was to be conducted “at a mutually acceptable valuation” when this term, material to the transaction, did not exist in the original Minutes of Proceeding. What is your response to that? How did this term end up in the Notes of Meeting?**

1020. His answer to the above was that this document had already been produced by Mr A. Deerpalsingh before the Commission of Inquiry, from whom he subsequently obtained a copy to understand *“what the fuss was all about as reported in the press.”* He further advanced the following facts:

1. *“I am not aware of the existence of any “original minutes of proceedings”.*
2. *I was not even aware that the PS of MOFED had been to Kenya to negotiate with Britam shareholders in November 2015, until he deponed before the Commission and the press made reports of same.*
3. *I was certainly not aware of any alleged decision taken in Nairobi dated 18 November 2015, and in reply to Question 1 above, I have lengthily addressed the issue of the visit of the PS of MOFED to Kenya as an unlawful procedure in breach of S 110 B of the Insurance (Amendment) Act 2015, which had been kept secret for unknown reasons.*
4. *I showed that document which had already been published, when I deponed, to show that it was in line with the letter of the Kenyan Cabinet Secretary dated 11 December 2015 addressed to the Financial Secretary and subsequent letters from Britam Group Managing Director addressed to the Financial Secretary of MOFED. I also wished to place on record that*

*I have never received any document from MOFED with regard to any alleged agreement entered into by the PS of MOFED convening the sale of Britam shares to Britam shareholders.”*

1021. On this matter, the Commission has extensively examined the Minutes elsewhere to conclude that he used the document used by the ex-Adviser to argue that the Nairobi meeting had ended up in a decision by the Kenyans to buy the shares at a price to be eventually decided and Mr Lutchmeeparsad had come home “*bredouille*” from his mission which had been to get the Kenyans to match the price of MMI Holdings. The Commission found that this document had been tampered with by deleting the words “**at the same price as MMI**” and substituting them with the words “**at a mutually acceptable valuation.**” How the Commission came to discover that has been particularised elsewhere.

1022. **Question 7 of our Salmon Notice was –**

**A transaction having to do with public affairs, has been done without a proper record causing a gap in institutional memory and public accountability contrary to the principles of transparency and good governance in the conduct of public affairs. Whose duty was it to ensure a complete and proper record for the transaction?**

1023. The ex-Minister’s response to the above question has been as follows: that as the Minister of Financial Services, he was not responsible of record keeping, the more so for transaction legally falling under the purview of the MOFED, FSC, SA and the NPFL.

*“In this context, the MOFED was responsible for keeping its own records, the FSC was responsible for keeping its own records, the Special Administrator was responsible for keeping its own records and the NPFL was responsible for keeping its own records as per the Company (sic) Act.*

*With regard to discussions held in my Ministerial office, the records of those meetings was kept in my then Ministerial Office at the Ministry at 13<sup>th</sup> floor, SICOM Tower.*

*I replied to a PNQ where the Special Administrator, NPFL, MOFED, FSC brought their records to inform me in the Treaty Room of the PMO and that there was no institutional memory gap that I was aware of.*

*In any case, with regard to the “gap in institutional memory” referred to in the question 7 above, I am not aware of same and unless I am provided with specific details, it is difficult for me to make any further comment.”*

1024. Our Comment on the above is that when the Commission probed into the existence and absence of records relating to the sale of Britam shares, it came to know that files had been opened at the MFSGG&IR but they contained next to nothing. Either decisions were taken by the team ousting public officers who are the repositories of records so that there is no trace. Or that, if there were files, they were literally taken away at an opportune time. It is the absence of files at the MFSGG&IR which formed the basis for ex-Minister Bhadain to make a case against the Ministry of Finance which had its files. We have stated elsewhere that the absence of records at the MFSGG&IR has not prevented the Commission from

reconstructing the events from materials existing elsewhere and depositions of witnesses.

1025. **Question 8 of our Salmon Notice was –**

**Before finalizing the deal, was there not a need to seek the approval of Cabinet?**

1026. The answer of the ex-Minister Bhadain was classical:

*“This question would be more appropriately answered by MOFED which agreed with the Kenyan Government and engaged the Special Administrator to finalise discussions on the sale of Britam shares and its Kenyan shareholders. I had not finalised any deal with anybody, nor had my Ministry.*

*As far as I am concerned, the statutory requirements of Section 110B of the Insurance (Amendment) Act 2015 was followed. Cabinet approval was also obtained, with regard to the assets transferred by the Special Administrator to NPFL, including the shares of Britam.*

*All relevant figures and amounts provided to me by the Special Administrator, after consultation with the FSC, were also disclosed in all transparency in the National Assembly on 3 May 2016, in answer to a PNQ of the Leader of the Opposition and, moreover, Cabinet was further informed on 24 June 2016 of the exact amounts obtained from sale proceeds of assets recovered by the Special Administrator to repay the SCBG policyholders and BAML investors, including the amount for the sale of Britam shares.*

*I cannot by law, provide further information as ‘Report of Cabinet proceedings,’ are prohibited under Section 4 of the official Secrets Act 1972. If the Commission, is of the opinion that it can lawfully ask for more information on this and that I can lawfully provide same, then I will certainly do so to assist the Commission further.”*

1027. The short answer of the Commission to the above response of the ex-Minister is: that he is continuing to evade the specific questions of his involvement by all the time implicating MOFED in the style of “*Pas moi ca, li ca!*”; that if he is so sure that Section 110A and Section 110B of the Insurance (Amendment) Act were followed, this constitutes an admission that he was involved in the transfer-cum-sale because by law that could only have been done with the approval of the Minister responsible for Financial Services; and that the Minutes of Proceedings of Cabinet had been perused with a negative result.

1028. It is worth noting that, had he gone to Cabinet, the doctrine of Collective Responsibility would have come to his rescue. As it is, he may have incurred personal responsibility in the matter, constitutionally speaking, on any loss which anybody may have suffered.

## **POST-SALMON NOTICE CONCLUSION**

1029. After perusal of the responses of ex-Minister Bhadain following the Salmon Notice issued to him, the Commission was able to conclude that there has been no

new fact/s which he had brought forward capable of negating the inference that he was involved with the process of the sale of the Britam shares. The supposed 49 facts which he only supports his personal view of the matter. At certain times they are so contradictory that they impair the veracity of his version.

## RESPONSE OF MR DEERPALSINGH FOLLOWING THE SALMON NOTICE

1030. Mr Deerpalsingh was served with a Salmon Notice dated 9 March 2020 with a deadline to respond by 27 March 2020. On account of the sanitary curfew imposed between 20 March 2020 to 29 May 2020, he could not comply with the deadline.

1031. His response to the Salmon Notice is as follows:

“3. *At the very outset and with great respect to you as Commissioner, I have strong reasons to believe that the presence of Mr. Sattar Hajee Abdoula on the Commission seriously compromises the concept of a full, faithful and impartial inquiry, free from bias and perception of bias. I have set out the specific reasons later in this letter. My legitimate concern is further enhanced by distributing information that has recently been made public, which reinforces the actual and/or perceived bias of Mr. Abdoula as Assessor of the Commission.*”

1032. **Our Comment on the above:**

**This matter has been dealt with elsewhere. It is not a new fact averred which impacts on the previous view of the Commission. The reader may wish to note that witness raises this issue only after a Salmon Notice has been served.**

“4. *In all good faith and transparency, I am replying to the Commission’s letter dated 9<sup>th</sup> March 2020, and I am advised of the requirements of Section 11 of the Commissions of Inquiry Act.*”

1033. **Question 1**

**You produced, inter alia, a copy of the Notes of Meeting held in Nairobi on 18 November 2015 between Mr. V. Luchmeeparsad (sic) and Kenyan representatives which the Commission has reason to believe was tampered with. The term “at a mutually acceptable valuation” in the copy you produced did not appear in the original Notes of Meetings. Who tampered with the copy and when?**

1034. **Witness Reply:**

“5. *In support of my previous depositions before the Commission, I wish to bring the following clarifications to the question which is being put forward by the Commission, to avoid any misunderstandings, if any.*

(a) *I am not the redactor or author of the purported notes of meeting and the question of tampering or not should be put to the respective redactors and authors.*

(b) *I was never made aware of that meeting at the material time, when it was held, and I was not privy to the discussions, nor the contents thereof.*

- (c) *The first time I became aware of this meeting of 18 November 2015, was through press reports in August 2017 after Mr. Lutchmeeparsad appeared and deposed before the Commission. This information came as a surprise to me.*
- (d) *During my tenure as consultant at the FSC in 2016, I had attended several meetings in relation to BAI Co Mauritius in Special Administration, alongside various institutions and Ministries. To my knowledge, the FSC had never been apprised of any offer from Kenyan buyers for an amount of Rs 4.3 billion and this was also confirmed by the previous Chairman of the FSC, Mr. Manraj. In fact, and in truth, I have never seen any official letter of offer from the Kenyans for the purchase of Britam Shares for Rs 4.3 billion. Indeed, if this was the case, then surely there must be an official offer from the Kenyans, like the well documented conditional non-binding offer from MMI, which would clarify this confusing situation.”*

**Our Comment on the above:**

- 1. A long-winded answer for a simple question;**
- 2. Mr Manraj never stated that there was no offer of MUR4.3bn by the Kenyan on 18 November 2015. He is being misquoted by Mr Deerpalsingh. What he stated was with respect to evaluation of shares at which they could be sold “a third method is if that is the best you can get, even 2.4 may have been the best price. If it is the only offer you are getting the best become the only offer.”**
- 3. There is independent evidence that there was an offer by the Kenyans that they had agreed to match the price of MMI Holdings which was MUR4.3bn. it is following this offer that Mr Manraj had requested Mr Lutchmeeparsad to send a mail to the Kenyans to request them to do better. If FSC was not apprised of that, the Commission had made comments on the degree to which after February 2016 there was under-reporting at FSC. It is worth noting that even the sale at MUR2.4bn was not reported to the FSC.**

**1035. Witness Reply:**

- (e) *“What I produced before the Commission is what I believe are the personal notes of meeting of one Mr. Khapre from BDO Kenya, who I have been made to understand was in attendance at the said meeting.”*

**Our Comment on the above:**

**Witness is resorting to a play on words “personal notes” or “notes of meeting”. The question in this was whether someone had tampered with this document emanating from Mr Khapre? Who forged it? When? Whether it was personal notes of Mr Khapre or Notes of Meeting, it was not for witness to say or judge. The simple question to which a reply was needed was: “was the document tampered with?”**

**1036. Witness Reply:**

- (f) *“To avoid any confusion, the document which I produced, including the source from where the document was shared with me (i.e. by email from Mr. Ebrahim which I submitted to the Commission during my previous audience in all good faith) is purported to be the personal notes of meeting of Mr. Khapre and not the notes of meeting of Mr. V. Lutchmeeparsad.*

- (g) *The point I made to the Commission during my previous deposition was that the confusing contents of what Mr. Lutchmeeparsad reported to the Commission, does not match the contents of the personal notes of meeting of Mr. Khapre, both relating to the same meeting but with different alleged outcomes.”*

**Our Comment on the above:**

**There is evidence independent as well as corroborative Ministerial team. Witness is deliberately trying to create a confusion around the issue raised. There was an offer of MUR4.3bn by the Kenyans on 18 November 2015 and this was known to the ex-Minister Lutchmeenaraidoo, the FS, Mr Lutchmeeparsad, as well as BDO. If that was not the case, Mr Lutchmeeparsad would not have sent an email on 27 November 2015 at 18hr55 to the following effect: “You proposed that some of the current shareholders of Kenya are willing to buy the shares at MUR 4.3 billion. .... I discussed the matter with Mr. D.D. Manraj, Financial Secretary and also Chairman of the Financial Services Commission (FSC) Mauritius and the latter is of the opinion that should your offer be better than what has been proposed to us by MMI (South Africa), you are kindly requested to send your best offer to the Chairman of the FSC Mauritius for consideration at the following address.....”**

**1037. Witness Reply:**

- (h) *“I was and still am as confused as everyone as to whether there really was an offer of Rs 4.3 billion or not. If such an offer existed, then there must be an offer letter from the shareholders of Britam and there would have been no need for the Special Administrator to engage in any negotiations to finalize the sale with the Kenyans.*
- (i) *I very humbly believe that this would have been the end of the matter had there been such an offer of Rs 4.3 billion. The Special Administrators would then have had no choice but to execute the sale at Rs 4.3 billion, which would have been great.”*

**Our Comment on (h) and (i):**

**Witness is right. This should have been the end of the matter. Indeed, the Kenyans wrote back seeking a follow up meeting in Nairobi. But then it is around that time that ex-Minister Lutchmeenaraidoo exited the scene. MOFED was thereafter not concerned. The process was taken over by the ex-Minister Bhadain and his team. The communication was by phone only and on 6 March, the Kenyans landed in Mauritius and ended up buying the shares at MUR2.4bn.**

**1038. Witness Reply:**

- (j) *“My humble opinion is that the letters from the Central Treasury Department of the Government of Kenya, as well as the letters from Britam Shareholders, addressed to Mr. Manraj, demonstrate that Britam Shareholders never made an offer of Rs 4.3 billion. I am saying this, because I have personally never seen or been made aware of any meeting of any Rs 4.3 billion offer at the time when I was with the FSC, or at any other time. Of course, if there really was an official binding offer from the Kenyans, I still remain confused as to why the FSC was never informed of same.”*

**Our Comment on the above:**

If witness says he was personally not aware, it does not follow that, that did not happen. We refer the reader to our Comments to the two preceding questions which reveal the existence of an offer by the Kenyans of MUR4.3bn. There would be a clear reference to this offer of MUR4.3bn by the Kenyans in a correspondence of Ms Gladys Karuri on 11 March 2016.

**1039. Witness Reply on the above:**

- (k) *“As far as I recollect, Mr. Lutchmeeparsad, during his deposition before the Commission, when answering to a question of the Commissioner and/or Assessors, stated that he forgot his original copy in a hotel room. In the question, reference is being made to an original notes of meeting. I have never seen this document and therefore I definitely cannot comment on same.”*

**Our Comment on the above:**

Witness is attempting to build on that confusion creation strategy. Mr Lutchmeeparsad never said he left the original in the hotel room. He said the original was given to him the next day in his hotel room.

**1040. Question 2**

**You were a core member of the Ministerial team that handled the sale of the Britam shares and finalized it. As adviser to the Minister, was it not your responsibility to advise the Minister that Public Officers should form part of the team so that the transaction is seen to be above board?**

**1041. Witness Reply:**

- “6. *No, I was not part of any ‘Ministerial team’. In 2016, I worked as ‘consultant’ for the FSC and Mr. Manraj was the Chairman. I am not aware of any ‘Ministerial team’ or ‘Minister’ who handled, negotiated and/or finalized any negotiation on the terms and sale of Britam shares.*
7. *All concerned institutions, the relevant Ministries and the FSC were kept informed of progress of BAI Co Mauritius in Special Administration at all times by the Special Administrator. In no way, did I advise any Minister or handled any negotiation and/or finalized the sale of Britam shares. This is the correct statement of fact.*
8. *I highlight the attention of the Commission to my previous statements before the Commission to the fact that I was no more an adviser to the MINISTRY of Financial Services, Good Governance and Institutional Reforms since December 2015.*
9. *I was a consultant at the FSC as from January 2016. Yet, I humbly fail to understand why the Commission is still stating in this question that I was the adviser to the Minister in 2016. I sincerely hope that this misconception is cleared.*
10. *Obviously, the question as to whether it was my responsibility to advise a Minister or not on any matter does not arise. Furthermore, as consultant of the FSC, I was regularly asked to attend several meetings, be it with Special Administrators, the Ministry/Minister of Finance, the*

*Ministry/Minister of Financial Services, the Bank of Mauritius, the then Board of Investment, the Financial Intelligence Unit, the Prime Minister's Office and others. I participated in discussions during every meeting that I was asked to attend and thereafter I reported back to my institution, the CEO or the Chairman of the FSC, wherever required. It is at the level of the Board of the FSC that decisions are taken, after we bring the relevant information to the Board. In the case of the sale of shares of Britam, there was no decision to be taken by the FSC, nor by me nor any other officers, directors or board members of the FSC. The Insurance Amendment Act is clear as to the responsibilities and powers of the relevant people in the case of an insurance company and its related entities which are in special administration.*

11. *I already confirmed to the Commission that it is the FSC which appointed the Special Administrators, as provided by law and I, as consultant of the FSC, was called to attend various meetings concerning BAI Co Mauritius Limited in special administration during the year 2015/2016, which was in the normal course of my duties as consultant of the FSC. I was also assigned the duty to follow up with the Special Administrator and relevant persons and institutions to ensure funds were being made available by the Special Administrator and relevant persons/institutions on time to honour the commitment of Government to repay the victims of Super Cash Back Gold and Bramer Asset Management within the timelines which were communicated by the State.*
12. *The FSC also does not have any authority nor legal obligation to approve sale transactions pertaining to Britam Kenya Shares, irrespective of its opinion or the opinion of its officers. The Insurance Amendment Act is clear to that effect and the powers of sale and transfer rests solely with the people empowered under the Insurance Amendment Act.*
13. *Also, with regard to the question asked about 'Ministerial team', a Minister has under the Insurance Amendment Act the power to authorize the transfer of undertaking from one insurance company and its related entities to another insurance company and its related entities. Other than that, a Minister does not have to approve a sale transaction or not, irrespective of whether he has or expresses an agreeable opinion or not. Of course, it is my humble view that the Minister can question the Special Administrator or any institutions as he has a duty to report back to Cabinet and Parliament. I am aware that a similar process was adopted for the sale of Apollo Bramwell Operations which was handled by the then Minister of Finance and Economic Development, Mr. Jugnauth. In this particular situation with the failed Omega Ark deal, the Ministry of Finance even went against the recommendations of the transaction advisor, i.e BDO, in the choice of the preferred bidder."*

**Our Comment on 6, 7, 8, 9, 10, 11, 12 & 13:**

**Witness is prevaricating and shielding himself behind technicalities. The simple question was; did he form part of the team? Yes, or No? Why was not any public officer involved? He gave a long literature evading the question.**



**There is documentary evidence as well as oral evidence to show that he was one of the key persons comprising the Ministerial team and public officers were ousted except for pushing the papers.**

**1042. Witness Reply:**

“14. *Moreover, I am aware that Mr. Lutchmeeparsad, after a heavy session of wining and dining with the representative of Omega Ark at the Suffren Hotel (he had also wined and dined and celebrated in Kenya), even went a step further to officially write to the representatives of Omega Ark to waive the mandatory requirement for them to make a deposit on escrow (you may wish to look for official correspondences at the Ministry of Finance during the week of 11 May 2016).”*

**Our Comment on the above:**

**Comments of this nature reflects upon the makers rather than upon those against whom they are made. The Commission prefers to ignore this as irrelevant to its TOR and ill-inspired of the maker.**

**1043. Witness Reply:**

“15. *Nevertheless, the deal failed because Omega Ark never had the funds they pretended. The Commission may wish to draw a parallel of both cases and determine the process of how assets were being sold. In any case, I have no doubt that someday, the facts on the sale of Apollo Bramwell/NIC Healthcare operations will come to light and the contrast will certainly be drawn, together with the role of those involved in negotiating with Britam shareholders for the sale of Britam shares.”*

**Our Comment on the above:**

**The Commission repeats the precedent comment in this case as well.**

**1044. Question 3**

**There were a number of drafts circulated for the proposed enactment of Section 110A and 110B of the Insurance (Amendment) Act emanating from Benoit Chambers and a few from the State Law Office. Who made the choice for the law that finally went to Cabinet for approval?**

**1045. Witness Reply on the above:**

“16. *On the basis of meetings which I attended in April 2015 at the Ministry of Finance and Economic Development at the peak of the BAI crisis, I understood that the decision to introduce the Insurance (Amendment) Act was that of the Cabinet of Ministers following a request from the Conservators and their lawyers. The objective was to address the legal deadlock the Government was facing with the Conservators of BAI Co Mauritius Ltd holding the insurance liabilities of some Rs 24 billion in relation to some 163,000 recurring policyholders and 24,000 Super Cash Back Gold policyholders on the one hand and the voluntary administrator, Mr. Sattar Hajee Abdoula holding the assets of the insurance company, worth some estimated Rs 10 to Rs 12 billions of rupees and which were parked in related party structures, in non-compliance and in excess of the prescribed limits of investments of an insurer in its related parties (limited to 10% of the assets of the insurer), as prescribed by the FSC rules and regulations.*

17. *The Conservators had also reported to the Minister of Finance, the Minister of Financial Services, the Attorney General, and the FSC, amongst others, in April 2015, that they needed a solution to the problems arising with Mr. Sattar Hajee Abdoula on several occasions. They reported that they tried to find a solution with Mr. Abdoula, in particular, on one Tuesday 14 April 2015, but without success. They came to the conclusion that the remedy to address this unique situation/deadlock, which posed a significant threat to the stability of the financial system of Mauritius, was a legal remedy which had to come from the Government and Parliament through legislative amends.*
18. *I refer the Commission to the Hansard of 28 April 2015 wherein several members of the Government, including the then Attorney General, Mr. Yerrigadoo explained the rationale behind the introduction of the Insurance Amendment Act.*
19. *The then Attorney General stated in Parliament on 28 April 2015, and I quote: “This Bill, Mr Deputy Speaker, Sir, has, at its roots, the protection of public interest. It provides an effective solution to a loophole in the existing law which ignores the greater interest of the public in the administration of an ailing insurance company. This element of public interest is safeguarded by the fact that the capital base having been eroded to such an extent that the shareholders’ interest in the company represents almost nothing and there is an imminent danger that policyholders’ interest will suffer irreparable damage. This is the element of public interest that this Bill attempts to address. Not only that, the stability and integrity of an economic and financial system is an element of public interest and it is the duty of any responsible Government to devise ways and means to protect and safeguard the systems.”*
20. *The first version of the draft bill was circulated by Benoit Chambers to the Ministry of Finance and Economic Development, as far as I remember, and thereafter, an array of people, public officials and advisers of different Ministries, institutions, regulators of the financial services industry and Ministers had their views, inputs and comments on the draft bill. I also remember being asked to collate the views and inputs of the Ministry of Financial Services and the FSC which we then had to share with the Ministry of Finance, the Attorney General’s Office and the Conservators during the process. So, it is very difficult for me to pinpoint and single out only one person who was involved in this process. What was certain was that Government had decided to legislate to address this unique legal deadlock posed by Mr. Sattar Hajee Abdoula’s position as administrator appointed by the directors of BAI Group, which had an alarming magnitude on financial stability, which had never before occurred in Mauritius.*
21. *As far as I recall, the final version of the Bill was circulated by the Attorney General’s Office, after taking into account the different inputs from Benoit Chambers, the Ministry of Finance and Economic Development, the Ministry of Financial Services and the Financial Services Commission, amongst others. I also recall that the Attorney General’s Office did make numerous amends from Benoit Chambers’s version so as to ensure the constitutionality test of the bill would stand in a court of law*

*in the event of any future legal disputes. But the substance of the new legislation was to create a new Special Administrator to address this unique situation and similar situations that may arise in the future.*

22. *I also recall that the then Right Honourable Prime Minister, Sir Aneerood (sic) Jugnauth along with Ministers, Vishnu Lutchmeenaraidoo, Sudarshan Bhadain, Ravi Yerrigadoo, Ivan Collendavelloo, amongst others had inputs to the cabinet memo containing the final draft of the bill which was submitted to cabinet for discussion and approval, before being circulated to Parliament. I verily believe that the Commission can obtain access to correspondences to that effect, including correspondences from Hon. Ivan Collendavelloo dated 23 April 2015. Subsequently, the then DPS of the Ministry of Financial Services, Good Governance and Institutional Reforms was asked by the PMO and Attorney General's Office to follow the administrative procedures to send the relevant cabinet memos, details of which I was not privy to.*

**Our Comment on paras 16, 17, 18, 19, 20, 21 and 22:**

The Commission did not need a whole literature on who did what when as regards Section 110A and Section 110B. The Commission has had ample evidence on that. The question simply was who made the choice, of the several drafts? Emails show that it was he, Mr Deerpalsingh, who had directed Mr Somdutt Nemchand, Mr Ram Prakash Nowbuth with Mr Faadeel Ramjanally in copy, who had directed them as follows: *“This is the version everyone should work on.”* The Version attached is a copy of the above mentioned amendment.

**1046. Question 4**

**Who drafted Section 110A and 110B of the Insurance (Amendment) Bill?**

- “23. *The answer is in Part (iii) of the letter as it relates to the same process.*”

**Our Comment on the above:**

The draft, textually as well as substantively, is one of a legal bricoleur. It is crafted but not grafted. Draftsperson do not grow on trees. They grow as trees. There is evidence that there were political advisers at the Ministry whose responsibility was to make amendments to the Insurance Act.

**1047. Witness Reply:**

**“Mr Sattar Hajee Abdoula as Assessor of the Commission”**

24. *Several proofs (including a recording published by Sunday Times) and witnesses have confirmed, including amongst others, Mrs. Laina Rawat, that Mr. Abdoula met with Mr. Dawood Rawat in Paris in April 2015. Mr. Abdoula referred to Hon. Pravind Jugnauth as his “boss” and went to great length to explain his relationship with Mr. Jugnauth and the favours he had done him. I also note that to date, Mr. Abdoula never denied these recordings and his statements therein. With all due respect, how do I, or for that matter any reasonable and fair minded person, not ask the legitimate question as to whether Mr. Abdoula can discharge his duties as Assessor to the Commission in a fair, just, impartial, equitable and unbiased manner*

*towards people who oppose themselves to his “boss” and who acted in a way which was financially detrimental to him. I include below links to some articles which are relevant and cannot be ignored.*

<https://www.lexpress.mu/article/372287/nomination-controverse-sattar-hajee-abdoula-au-seuil-sbm>

<https://www.sundaytimesmauritius.com/recompense-pour-services-rendus-sattar-hajee-abdoula-propulse-a-la-tete-du-sbm-holdings/>

<https://www.sundaytimesmauritius.com/renvoi-de-laudition-de-dawood-rawat-le-double-role-joue-par-lassesseur-sattar-hajee-abdoula-mis-en-cause/>

**Our Comment regarding these links is that:**

1. They have to be taken with a pinch of salt.
2. It is all too easy for witnesses before a Commission to try to influence the workings of a Commission through the media.
3. The law of evidence applies to a Commission even if not in the same way as in litigation before the courts.
4. Self-serving statements reflect adversely on those witnesses who resort to such underhand methods of making their case before a Commission.

**1048. Witness Reply:**

25. *“I also understand that the Commission has not yet heard Mr. Dawood Rawat, which is imperative in the light of the conflictual position of Mr. Abdoula as assessor on this Commission of Inquiry.”*

**Our Comment:**

**There was a ruling in law why Mr Rawat would not be heard via video link on account of the present state of our law of evidence.**

**1049. Witness Reply:**

- “26. *I also believe that as at to date, the Commission has not heard (i) Mr. Rawat; (ii) Mr. Abdoula; (iii) Mr. Pravind Jugnauth and (iii) (sic) Mr. Swadek Taher whose objection to departure was lifted and with whom Mr. Abdoula travelled to Paris to meet Mr. Rawat. The Commission would have been able to determine the conflictual and untenable position of Mr. Abdoula as assessor on this Commission of Inquiry.”*

**Our Comment on the above:**

**The law of evidence requires that only those things are to be taken into account which are relevant and material to the real issue in dispute. For a Commission, to go beyond its TOR would be an abuse of its powers.**

**1050. Witness Reply:**

- “27. *I also believe that is of utmost importance that the recording published by Sunday Times should have been secured by the Commission. The Commission cannot in its duty of impartiality choose to ignore this important piece of recording which clearly demonstrate the political proximity and conflictual situation of Mr. Abdoula and his inability to carry*

*out an impartial inquiry, which is a requirement of the Commission of Inquiry Act.”*

**Our Comment on the above:**

**Any recording which may have been made relating to events well before the sale has little to do directly or indirectly in a Commission of Inquiry on the circumstances whereby the Britam shares valued at MUR4.3bn were sold at MUR2.4bn. The issue of perceived bias has been elaborated upon at its right place and the reader is referred thereto.**

**1051. Witness Reply:**

“28. *I refer you to a letter (letter attached) which the Honourable Leader of the Opposition, who holds a Constitutional post, addressed to the director of insolvency service where he sets out very disturbing facts on Mr. Aboula’s (sic) behavior, acts and doings and asks for an independent inquiry on Mr. Abdoula. He further asks that matters be referred to ICAC wherever applicable. The contents and clear factual examples in the letter which relates to Mr. Abdoula is least to say very worrying and disturbing. How can I, or for that matter any reasonable person, have a legitimate expectation that the Commission will perform a full, faithful and impartial inquiry with the presence of Mr. Abdoula as Assessor and who has a significant influence on the Commission’s work.*

<https://www.lexpress.mu/article/376305/air-mauritius-arvin-boolell-demande-une-surveillance-accrue-performance-hajee-abdoula.>”

**Our Comment on this is the same as our comment as above. The Commission had to be wary on witnesses trying to depose before the Commission by the back door, with self-serving statements through the media and other informal means.**

**1052. Witness Reply:**

“29. *Today, it is of general public knowledge that Mr. Abdoula is referred to as and is a political nominee (links to relevant articles hereunder) and benefitted from substantial financial gains, political nomination, and professional assignments/engagements from the Government of Mauritius, Public Interest Entities, and various State Owned Enterprises, including listed enterprises since February 2017. For that matter, a political nominee is a biased person and cannot conduct an impartial inquiry as required by the Commission of Inquiry Act. Least to say, that is the perception as well. The list elaborated in the letter of the Honourable Leader of the Opposition (see attached) speaks volumes and cannot be ignored by the Commission. In this context, how do I or any reasonable person conclude that the presence of Mr. Abdoula as Assessor of the Commission is not tainted with actual or perceived bias, conflict and political or other bias and motive to settle scores against people who are of different political orientation than the one who he previously referred to as his “boss”.*

<https://www.lexpress.mu/article/375482/navin-ramgoolam-sous-lemprise-membres-kwizine-il-y-eu-ingerences-politiques-air>

<https://www.defimedia.info/air-mauritius-placee-sous-administration-volontaire-voici-les-reactions-darvin-boolell-xavier-luc-duval-et-reza-uteem>

<https://topfmradio.com/media-center/news/air-mauritius-la-nomination-de-sattar-hajee-abdoula-est-inacceptable-soutient-roshi-bhadain>

<https://topfmradio.com/media-center/news/air-mauritius-ladministrateur-sattar-hajee-abdoula-dans-une-position-de-plus-en-plus-inconfortable-apres-les-revelations-de-roshi-bhadain>

<https://defimedia.info/nomme-president-de-sbm-holdings-sattar-hajee-abdoula-maintenu-la-commission-denquete-sur-britam>

30. *In the light of all information that has come out in public in relation to the acts and doings of Mr. Abdoula and his relationship, including as a political nominee of the Government of Hon. Pravind Jugnauth, it is my contention that Mr. Abdoula has an axe to grind against me. If not actual, then I certainly have this perception, which I verily believe would be shared by any reasonable person. The extensive adverse media coverage and public commentaries on Mr. Abdoula's perceived conflict and bias is too apparent to be ignored."*

**Our Comment on the above:**

**Two matters of note on the above:**

- 1. Witness is attempting to play politics on an apolitical matter. And the Commission has long decided to depoliticize this public inquiry which is an investigation and not a judicial or quasi-judicial hearing. Witness is confusing both forum and forage.**
- 2. In law, the reference to the media links are regarded as hearsay and/or self-serving and/or ex cathedra and/or an unethical attempt at influencing an independent body by extraneous matters.**
- 3. Digital marketing by individuals or tiny groups is not a phenomenon decision makers are unaware of in this day and age of universal access to internet.**

**1053. Witness Reply:**

- "31. *In my capacity as Vice Chairperson and subsequently consultant of the FSC in 2015 and 2016, I was persistently asked to intervene (in due course, I will provide the dates and persons who were in those meetings and the one who gave the instruction) with the FSC in May 2015; June 2015; August 2015; October 2015 and July 2016 to instruct the Special Administrators to find a way to settle a claim of Rs 26,269,220.25 which Mr. Sattar Hajee Abdoula had made.*
32. *I had refused to do so on the following grounds: (i) there was a public statement of Mr. Abdoula dated 19 April 2015 wherein he stated that he had a deal with the previous directors of BAI that his fees would only be paid if he found money during the time he was Administrator of the BAI*

*companies. This was never the case. On this basis, neither the FSC nor the Special Administrators had any obligation to pay Mr. Abdoula; (ii) The fees of Rs 26 million for 18 days of work was grossly unreasonable and unjustifiable; (iii) the claim of Mr. Abdoula was in clear contrast to the provisions of Section 217 of the Insolvency Act which required that an administrator is entitled to charge reasonable remuneration; and (iv) with the coming into force of the Insurance Amendment Act, the only people who have a first right to receive payments are the victims, that is the insurance policy holders, irrespective if the assets were parked in other related party structures. Therefore, Mr. Abdoula's frivolous claim could not be entertained.*

33. *I highlight your attention to the FSC Board Meeting of 6 June 2015 (where I was present) where the Board also decided to reject the claim of Mr. Abdoula and decided that he could go to Court if he wished to."*

**Our Comment on the above:**

**Those conversant with Insolvency administration know that one may not be paid unless one puts in a formal claim. In a Presidential Enquiry relating to why some assets were undersold, who was historically involved in it is irrelevant and immaterial.**

**1054. Witness Reply:**

- "34. *For all this time, Mr. Abdoula has been sitting as Assessor for the Commission and putting questions to me, the person who refused to sanction his payment and refused to cede to pressures on numerous occasions from higher quarters in Government, which I considered unethical. My contention is that there are too many factors relating to the acts and doings of Mr. Abdoula in both his conducts and dealings with the Government of Mauritius that has come to light today for which I unfortunately have the belief that his presence as Assessor of the Commission is likely to make the whole process unfair, partial, and biased. He has cashed too much from the Government and State Owned Enterprises since 2017 while at the same time sitting as an Assessor on the Commission to pretend that these financial inducements do not impair his independence, objectivity, fairness, bias, professionalism and due care and diligence while exercising his role as Assessor of the Commission.*
35. *Mr. Abdoula, in addition is being an Assessor on the Commission, is also the CEO of Grant Thornton, a competitor of BDO, of whom Mr. Ramtoola and Ebrahim are Partners respectively. I know for a fact that in 2015 and 2016, the Special Administrators had also refused to pay Mr. Abdoula his frivolous claim of Rs 26 million. How can Mr. Abdoula reasonably convince any reasonable person that he does not have any axe to grind nor any element of partiality, bias and convenience when he puts questions to the Special Administrators. What guarantees are there that he will not retaliate with his powers to write anything he wants to settle scores with the very same persons who are his competitors and who had refused to pay him prior to 2017 and were thereafter instructed to pay him after January 2017?*
36. *In 2017, one month before Mr. Pravind Jugnauth swore in as Prime Minister of the Republic of Mauritius, I resigned from my post of consultant*

*at the Financial Services Commission. I am made to understand that the Board of the FSC was subsequently re-constituted and a new CEO appointed. Surprisingly, the FSC called the Special Administrators sometimes in 2017 and instructed them to pay Mr. Abdoula his fees forthwith. A thorough investigation would reveal the name of the “boss” who issued these instructions for the FSC to act upon. Today, after having bagged some Rs 26 million which the Special Administrators were instructed to pay without any justification, I cannot have any belief that Mr. Abdoula (sic) is acting or perceived to be acting independently, impartially and with due diligence and professionalism as Assessor of the Commission. Moreover, as Assessor, there is the perception that he has significant influence to settle scores through the Commission’s report against any person who has previously taken decisions against his financial interests.*

37. *Referring back to the letter of the Leader of the Opposition, I read that Mr. Abdoula and his firm have, while he is an Assessor of the Commission, obtained professional engagements from state owned enterprises such as National Property Fund Limited and its related entities. I am basing myself on what has been spelt out by the Leader of the Opposition in his letter. My question is whether Mr. Lutchmeeparsad was a director on any of the Board of Directors of these entities for which Mr. Abdoula was acting? If this is the case, then my legitimate question is how can Mr. Abdoula and his firm benefit from engagements with entities where Mr. Lutchmeeparsad has been the director and at the same time question the same Mr. Lutchmeeparsad so conveniently on the famous question as to whether there was a Rs 4.3 billion offer from the Kenyans or not. There are so many things that have come to light and public knowledge that it is impossible for me not to question whether Mr. Abdoula is really acting impartially and without bias as Assessor of the Commission.*
38. *This brings me to the last point. In his letter, the Leader of the Opposition puts forward in point 1 and 2 a list of what he refers as ‘inducements’ from the Government and State Owned Enterprises which Mr. Abdoula and his firm allegedly benefitted as a result of his notorious political proximities. Doubts are being expressed as to whether those inducements were obtained by following the due selection process to the detriment of other professionals and firms. As a result of this, the ability of Mr. Abdoula to discharge his duties in compliance with the principles of ethics, integrity, objectivity, professional competence and due care, confidentiality and professional behavior is being put in question in the letter of the Leader of the Opposition. I believe it is reason enough and reasonable for me and the Commission to put the same questions as to whether Mr. Abdoula is fit to continue hold the position of Assessor to the Commission when it is clear that he has all the leverage to act and retaliate against people who have taken previous decisions against his financial interests and that of his masters.*
39. *I am of the humble view that any conclusions or findings of the Commission with the presence of Mr. Abdoula on this Commission would be tainted with bias, partiality and acting as judge and party at the same time.”*



**Our Comments on 34, 35, 36, 37, 38, and 39:**

- 1. First, that witnesses in any judicial, quasi-judicial, administrative or investigative process resort to the media to make their case and attempt to influence decisions their way is a phenomenon that is known to judicious decision makers.**
- 2. Users of such device would be naïve not to know that what they cannot do directly, they cannot do indirectly as well. This doctrine is referred to as the doctrine of colourability. As may be noted, most of the references cited by Mr Deerpalsingh and ex-Minister Bhadain are what the law would regard at best as self-serving and/or hearsay or at worst simply inadmissible. The only weight they have is of the fact of their having been stated but not for their content.**
- 3. A Presidential Enquiry is not a judicial, quasi-judicial or disciplinary proceeding to determine rights of witnesses or deponents. It is simply to gather facts, weight them and to make such conditions as are warranted on these facts. If Mr Hajee Abdoula was not directly involved with how MUR4.3bn came down to MUR2.4bn, he is under no duty to recuse himself.**
- 4. It was open to Mr Deerpalsingh to proceed to the Supreme Court to seek the reconstitution of the Commission. It is to be noted that witness only raised this issue after he was served with a Salmon Notice.**
- 5. His politicisation of a Presidential Enquiry on the sale of shares is more than evident by his reference to a letter which the Leader of the Opposition has addressed to the Director of Insolvency Service on 04.05.2020. How did such a letter come in his possession? All the more so when it was not copied to anyone?**

## CHAPTER 12

### FACTS WHICH GIVE A LIE TO THOSE SERVED WITH SALMON NOTICES

*If you tell the truth, you do not have to remember anything – Mark Twain*

1055. In the previous Chapter, we commented point by point on the answers which those who had been served with Salmon Notices had given to the Commission.

1056. In the present Chapter, it is apt to put together, if in short, the facts from the oral depositions and from the documentary evidence in the light of the answers from the Salmon Notices with respect to each of the persons concerned: Ex-Minister Bhadain, Mr Deerpalsing, Mr Ramjanally, Mr Ramtoola, Mr Afsar Ebrahim, as regards their respective roles in the process of sale of the Britam shares.

1057. Their answers did not add anything new. They, in fact, reinforced the original views which the Commission had of their implication in the sale. Adults who think that they will not be caught lying live in a fantasy world. We explain.

#### A TIMELINE WHICH ENDS AT 12 JANUARY 2016

1058. It is agreed that the sale of the Britam shares were being dealt with at two levels: MOFED and MFSGG&IR. It is not unknown that Ministers between themselves are jealous to guard their respective turfs. There was enough acrimony between the two ex-Ministers concerned to suggest that ex-Minister Bhadain was uneasy with the involvement of MOFED in the matter. He would keep not recognising the fact that MOFED had obtained an offer at MUR4.3bn because it is the domain of SA by law. What he overlooked, in his narrative, is that the Nairobi meeting even if prompted by MOFED had been fixed with the SA involved and the SA represented.

1059. As a recap, in course of his depositions as a witness before the Commission, ex-Minister Bhadain stated, *inter alia*:

- a. that he had nothing to do with the sale of Britam shares and that the transaction was handled by MOFED;
- b. that he was not aware that there was an offer of MUR4.3bn from MMI Holdings for the purchase of Britam shares;
- c. that he had nothing to do with NPFL and NPFL was the creation of MOFED; and
- d. that he was not at all involved with the amendment brought to the Insurance Act 2005.

1060. Following Salmon Notice, he confirmed that he had “*nothing to do personally with the sale of the Britam Shares.*” He had added 59 further facts in support of his contention. But they were designed as “*attrape nigaud.*”

1061. All the facts advanced by him do not represent the whole story. In fact, if taken on their own, they make persuasive reading for the unwary. He deposed as an angered, embittered and vengeful witness.

1062. A thorough scrutiny of witness depositions, examination of documents submitted including the contents of emails and travel documents pieced together demonstrate that the ex-Minister's active interest in the transaction cannot be put in doubt. He did not tell the whole story.
1063. The Commission could not ignore his public address in the Press Conference which showed how disconcerted he felt when it did not work out for him for the portfolio of Minister of Finance. Late Sir Anerood informed us that if ex-Minister Bhadain had stated that he had complained to him that ex-Minister Lutchmeenaraidoo was mishandling the matter, that was not true. That never happened. Ex-Minister Lutchmeenaraidoo was to exit MOFED by early February 2016. The sale transaction was done in March 2016. Ex-Minister Bhadain's timeline with all the 59 facts end at 29 January 2016. He recitation of facts is muted for the period between the time the sale took place. All this goes to show that the story of ex-Minister Bhadain is cleverly warped with partial facts carefully selected.
1064. These facts chronologically end at 12 January 2016. The reader should note that the material period for consideration was after: more particularly, between early February and March 2016. Some witnesses told us that ex-Minister Bhadain wiped all the traces before he left office. We did not think it fit to inquire into this as it is outside our TOR. But if he has been throwing the blame on ex-Minister Lutchmeenaraidoo, it is worth noting that the latter had left MOFED by mid-February 2016. From then on, ex-Minister Bhadain was the sole captain of the ship.

#### **THE PERSONAL INTEREST OF A MINISTER**

1065. What ex-Minister Bhadain did not also mention in all the facts he put up to argue that he was not privy to what happened is his personal interest in the matter of the sale of Britam shares. This may be traced to a time as early as May 2015. What happened in May 2015? The ex-Minister had proceeded on an official mission to South Africa accompanied by the FS. It was a mission related to the Double Taxation Avoidance Agreement with South Africa. There, the Minister had met with a representative of Barclays Bank. That person was able to persuade the ex-Minister that Barclays Bank would more ably and competently be able to help secure one buyer for the Britam shares. While the ex-Minister was still there, Benoit Chambers received a call from South Africa. The caller stated that he had met the Minister who was in South Africa and that the Minister had appointed him to sell the Britam shares and that henceforth it was Barclays which would take on that responsibility.
1066. Me Benoit who had taken the call reminded the caller that by law it was only the SA who was empowered to do so. The next thing Benoit Chambers knew was a convocation a couple of days later at the 13<sup>th</sup> Floor, Sicom Tower. Apparently, the ex-Minister had come straight from the airport. It was around 23.00 hours. He harangued them as incompetent and also told them that Barclays would henceforth be handling the sale. The meeting went on till early in the morning. There were things to be done.
1067. Benoit Chambers advised the Minister that it could not be done without a proper procedure. They had to launch a Request for Proposals. Whereupon they set about that very night preparing a draft Request for Proposals for the purpose of issuing an invitation to bid. After the papers had been prepared, Benoit Chambers had to draw a list of potential participants, at which time Clarel Benoit asked the team teasingly

whether it was OK to insert the incompetent one also in the list for potential participants. For which there was no reply.

1068. The manner in which Barclays Bank was purportedly “appointed” without any procedural propriety has been the characteristic manner in which the Ex-Minister and his team conducted most of the process of sale: with excessive zeal, more in line with what obtains in the private sector than the public sector. The ex-Minister occulted this aspect in his story.

## **OCCULTING OTHER MATERIAL FACTS**

1069. He had occulted the fact that he had regular meetings with the players. After the replies to the Salmon Notice, he conceded that he had meetings with people who were involved but only to know what was happening because as Minister he should keep himself informed. But after the witnesses had spoken of his active involvement, he became less categorical. The SA, Mr Ebrahim and Mr Georges Chung confirmed in their depositions before the Commission that regular meetings were held not only with FSC but also with ex-Minister Mr Bhadain on BAI issues including Britam sometimes till very late in the night.

## **FACTUAL AND LEGAL RESPONSIBILITY**

1070. Late Sir Anerood Jugnauth, the then Prime Minister, stated in his deposition before the Commission that it was the “*sole responsibility*” of Mr Bhadain to deal with all matters pertaining to BAI and whenever he required the help of the Finance Minister, he would make a request to him.

## **THE SEMINAL MYSTERY MEETING: EX-MINISTER BHADAIN AND MR MUNGA**

1071. But the document of all documents which discloses what was happening behind the scene and which the ex-Minister placed right under the carpet is a correspondence from no other than the Kenyan business tycoon himself who was later to clinch the deal at MUR2.4bn. That letter is a one-page letter of 4 paragraphs each of which speaks volumes, especially the last line.

1072. Situating this event in the context is important. 14 November 2015 is the date. That happens to be 4 days before the Nairobi meeting of 18 November 2015. It is all happening in Mauritius in a meeting shrouded with mystery. This is the week end of weekends. FSC had been informed that Mr Peter Munga would be in Mauritius. It has also been informed that MMI Holdings also will be in Mauritius. Albeit the telephone conversation between MOFED officials and Kenyan Treasury, Mr Peter Munga did not meet anyone at MOFED but met Mr Ebrahim of BDO who took him to meet ex-Minister Bhadain!

1073. From the Passport and Immigration Office, the Commission has been able to find out that Mr Peter Munga and Mr Sandeep Raghunath Khapre of BDO Kenya were in Mauritius between 12 and 14 November 2015 and 12 and 17 November 2015 respectively. Mr Ramtoola, the SA was not in Mauritius. They met Mr Ebrahim who took them to meet ex-Minister Bhadain. There Mr Munga discussed the Britam sale with the ex-Minister and informed him that foreign buyers would not be welcomed to acquire the shares as they would not be aligned to the Kenyan vision. It should be noted that by 14 November 2015, MOFED had already agreed that the sale would

be made to the Kenyans. Fact 4 advanced by ex-Minister Bhadain is true. The only issue that remained pending was the price since MMI Holdings had already made an offer on 14 October 2015 for MUR4.2bn which had been improved to MUR4.3bn. That meeting where MMI Holdings had revised its offer upwards had been called by the FS and had been attended by Mr Ramtoola (the SA) and Mr Ebrahim (from BDO). Mr Ebrahim had this vital information when he accompanied Mr Munga to the ex-Minister. What happened at this November 14<sup>th</sup> meeting?

1074. The ex-Minister occults this crucial meeting in his narrative. Both Mr Ramtoola and Mr Ebrahim placed a shroud of mystery around this meeting. Mr Ebrahim stated that it was a Courtesy Call on ex-Minister Bhadain. Mr Ramtoola at first stated the same thing. The duration of the meeting was, according to their first version, less than 5 minutes. Later, Mr Ramtoola, after being probed into by the Commission, agreed that it was more than 5 minutes but preferred to say no more. On the basis of the depositions of other witnesses the mystery was cleared. It was not a Courtesy Call of less than five minutes but a meeting where substantive issues related to sales of Britam Kenya had been not only discussed but the line to be adopted agreed upon.
1075. After the first visit of Mr Peter Munga where the strategy had been laid down, Mr Munga returned to Nairobi and, 4 days later, chaired a meeting prompted by MOFED. The PS of MOFED, Mr Lutchmeeparsad, who was on another mission to Kenya, was requested through the SA, to meet the Kenyans to match the price of MMI Holdings.
1076. Papers examined by the Commission, showed that the Nairobi caucus had agreed to match the price of MMI Holdings except that they needed a longer payment period; that Minutes of Meeting had been drawn up by Mr Khapre of BDO (Kenya); that Mr Khapre of BDO (Kenya) had participated in the meeting; and that he had delivered a copy of the Minutes to Mr Lutchmeeparsad who brought it to the FS.
1077. It should be noted that relying on the Minutes, the FS would request the PS to write a letter to Kenya that they have to do better than the MMI Holdings offer.
1078. These are the Minutes that the Commission found forged in a material particular. The words “*at the same evaluation of MMI*” was substituted for “*at a mutually agreed price*” produced by Mr Ramtoola and Mr Ebrahim and relied upon by ex-Minister Bhadain to support their narrative that there had never been an offer of MUR4.3bn.
1079. Ex-Minister Bhadain will be questioned about this presumed falsification. And his answer would not be straightforward but argumentative. He came up with a theory that the PS was misled and misleading. The PS was misled into thinking that he had an offer when he thought he had such an offer.

## THE LETTER THAT RELAYS THE TRUTH

1080. The Commission came across the correspondence which demonstrated the insalubrious design conceived by the MFSGG&IR to undercut the MOFED. Nine days after the meeting of 14 November 2015 – supposedly a courtesy call of Mr Munga to the ex-Minister Bhadain - Mr Peter Munga takes the business precaution to write back to ex-Minister Bhadain to thank him for the meeting where substantial matters were discussed. There is more than meets the eye in the letter.

Mr Peter Munga reiterates the wish of the board of Britam Kenya to “*continue engaging BDO & Co and the SA on the lines agreed during our meeting*”. That letter had also been copied to Messrs Khapre and Ebrahim.

1081. This document did not form part of the deposition of ex-Minister Bhadain any more than that of BDO.

## **THE STATEMENT TO THE NATION**

1082. With this, we come to another document dated 03 May 2016. This date is long after the sale has been cast in stone in an MOU on 12 March 2016. The information became public on the sale of Britam shares only through a PNQ addressed to the ex-Minister. This is what he stated in Parliament:

*“The existing shareholders of Kenya came to Mauritius, but the Special Administrators had a meeting with me at the Ministry and all the team and they basically came up with that proposal of Rs2.9 billion. In view of the fact that, after having worked the figures, we could accept that figure; we went ahead and the Special Administrators accepted that by signing a MoU and now it is a done deal.”*

1083. The language is too obvious for equivocation. The meeting had taken place “with me at the Ministry,” “having worked the figures, we could accept,” and “we went ahead.”

1084. Had he been aware that there had been an offer by the Kenyans for MUR4.3bn? Even that may not be gainsaid. Mr Afsar Ebrahim had attended the MMI Holdings meeting in October 2015 where MMI Holdings had improved its offer from MUR4.2bn to MUR4.3bn. Mr Afsar Ebrahim it is who had taken Mr Peter Munga to ex-Minister Bhadain. Mr Ramtoola had been privy to the Nairobi meeting, attended by BDO (Kenya), the outcome of which he may not ignore.

## **EVIDENCE OF ORIGINAL OFFER OF MUR4bn**

1085. The ex-Minister’s actual knowledge of the ins and outs of the Britam sale starts as early as 17 April 2015 when, following an invitation to expression of interest, MMI Holdings made an offer for the purchase of the Britam shares for an amount of MUR4.2bn to Mr Bhadain on 14 October 2015. In his deposition before the Commission, he stated that apart from the letter of 14 October 2015 from MMI Holdings, he was not aware of any other offer of MUR4.3bn made by MMI Holdings. The facts are too overwhelming to discredit this version. The Britam sale was a collaborative work of the FSC, SA, BDO, Mr Deerpalsingh with the ex-Minister fully in the picture. The same arguments would also apply to his statement that he was not aware of the meeting Mr Lutchmeeparsad had with Mr Munga and the Directors of Britam in Nairobi on 18 November 2015. He was on tenterhooks with both Mr Ramtoola (the official SA) and Mr Ebrahim (the officious SA) directing the operation, as per evidence. It was audacious of him to pretend, and from that pretense, to seek to persuade the Commission that he was not aware, albeit his legal, ministerial, legislative and the public accountability.

## **MINISTERIAL APPOINTMENT OF EXPERTS**

1086. Ex-Minister Bhadain also stated that he had nothing to do with the NPFL. The ascertained facts show the contrary.

1087. The proposal for the creation of NPFL originated in the report submitted by BDO & Co Ltd to the FSC, recommending strategic measures to protect the value of underlying assets of BAI. At one of the strategic measures (Paragraph 9.1 of the report) it has been recommended that “*the government needs to set up a NPFL as a wholly owned subsidiary of NICL.*” The decision to entrust BDO & Co Ltd to produce the report was taken reportedly in a meeting chaired by ex-Minister Bhadain in his office in the presence of other Ministers and high officials of FSC, advisers of the Minister and BDO & Co Ltd as well. This is not the way public affairs are run. On matters of appointment of experts, Ministers do not gather condescending Ministers and officials to choose a contractor in the manner of a roving Mini-Cabinet. The manner in which BDO & Co Ltd was appointed to prepare the Strategic Measures in the aftermath of the BAI collapse leaves a lot to be desired.
1088. On 05 May 2015, NPFL was created as a subsidiary of NICL which itself was incorporated on 15 April 2015 under the purview of the MFSGG&IR. Ex-Minister Bhadain’s statement before the Commission that NPFL did not form part of his portfolio is an alibi that fails in face of solid facts. After all, it was the ex-Minister Bhadain who had obtained the agreement of Cabinet for the assets of BAI Co (Mtius) Ltd to be transferred to NPFL.
1089. One may also peruse the publication of the Ministerial publication which spelled out his 60 Achievements during his tenure of office as Minister. Mr Bhadain has emphasized it as Achievement 56 – in that he had “*set up the NPFL to alleviate sufferings of BAI victims.*”

## BRICOLAGE IN DRAFTING

1090. Regarding the source of Section 110A and Section 110B of the Insurance (Amendment) Act, he attributed it to MOFED. It emanated from his office; our inquiry reveals.
1091. In the aftermath of the collapse of BAI, FSC appointed Administrators under the Insurance Act 2005. However, it was noted that the existing legislations (Insurance Act and Insolvency Act) did not provide for a situation where government, in public interest, could ensure that the policy-holders be paid promptly and adequately. There arose, therefore, a need to come up with legislation to address that government concern. Benoit Chambers, the legal advisers of the administrators worked on a draft legislation. Several versions of the draft bill were exchanged among MOFED, MFSGG&IR and the SLO. SLO, while replying to MFSGG&IR drew attention to the short notice they were given for the vetting and at the same time raised concern on the shareholders/policy-holders rights.
1092. Finally, it was not the draft submitted by Benoit Chambers that saw the light of day but a draft selected by Mr Deerpalsingh, the origin of which was the MFSGG&IR. An email emanating from Mr Deerpalsingh directed everyone to follow the draft which was attached. It was the amendment *in lite* which had been attached.
1093. On the above issue, two matters may be mentioned here. The then Attorney-General did state that ex-Minister Bhadain had offered even to draft the Good Governance and Integrity Reporting Bill. Mr Ramjanally, his other Political Adviser had stated that his work included changes to be brought in legislation related to the Insurance Act. Further, Section 110A and Section 110B of the Insurance

(Amendment) Act contain so many obvious drafting blunders that it can be said to be the work of a *bricoleur*. The “short title” of the Act provides that “*This Act may be cited as the Insurance (Amendment) Act 2015*”. However, Section 5 (4) of the Amendment reads “*In the discharge of his functions under this Act, a special administrator appointed under subsection (2) shall have all the powers, duties and functions of an administrator under the Financial Services Act and Insolvency Act and of a conservator under this Act.*” when nowhere in the amended Act, the powers, duties and functions have been provided for.

1094. The above is one of the many indications that the drafting had been done by an ambitious novice with a belief that common law drafting is merely mastering English legal language. That must have been the secret of the Polichinelle because Cabinet did not give approval for same but only took note on 24 April 2015.

1095. With what subterfuge, such a law with so many flaws, not having received Cabinet approval, reached the National Assembly on 29 April 2015 on a Certificate of Urgency has been a matter of serious concern. Either some public officers have not been doing their work properly or they were ousted in the process. Ex-Minister Bhadain, previously Barrister of some standing having introduced it in the NA, defended it *bec et ongles*. He cannot shirk Ministerial and personal responsibility for same. That he failed to notice such a mistake and others in the Bill speaks of a preference of amateurism to professionalism in serious matters of the State. As to the suggestion by some that he may well have been the author, we are unable to draw any conclusion on that. That matters little when account is taken of the fact that, as Minister, he was answerable for it for having apprised Cabinet of its pending nature and introduced it in Parliament nonetheless, and under a Certificate of Urgency at that. The other flaw in the amendment is that it has no transitional provision. Yet Mr Basgeet and Mr Oosman already appointed as the conservators were appointed as SA, followed by the single appointment of Mr Ramtoola. What is seriously misleading is that the Explanatory Memorandum fails to state the fact that the law removes the consent of the investors on the manner in which their investment should be dealt with. On that account, that aberration passes unnoticed and unaddressed in the debates.

1096. It was audacious, an audacity proportional to his creativity - for ex-Minister Bhadain to pretend – and after pretending to attempt to persuade - a Commission that - that Section 110A and Section 110B was the product of MOFED. As a barrister in practice, he should have known what true professionalism is all about.

## THE FORGED MINUTES

1097. During his deposition as a witness before the Commission, Mr Deerpalsingh denied having any involvement. He said he was involved neither in the sale of Britam shares nor in the drafting of the amendments brought to the Insurance Act in 2015.

1098. On the basis of the depositions of other witnesses before the Commission and examination of documents submitted to it, there is ample evidence that Mr Deerpalsingh was a core member of the team constituted by ex-Minister Bhadain which handled and finalized the sale of Britam shares. He had a key presence in the meetings chaired by the ex-Minister. He even accompanied him in meetings in other Ministries and Departments and in missions abroad. At a certain point in time, he was the Vice Chairperson of FSC and ultimately consultant of the FSC also.



He was therefore, fully aware of all the details regarding the sale of Britam shares by virtue of his presence in the meeting chaired by the Minister and FSC Board meetings during which the SA was submitting his reports.

1099. The role which Mr Deerpalsingh played in the Britam sale can be stated to be two-fold basically: (1) choosing the draft of Section 110A and Section 110B of the Insurance (Amendment) Bill and directing everyone concerned to follow it; above all, keeping its source a covert; and (2) producing a forged Minutes of Proceedings on a matter material to the TOR.
1100. Who forged it? Who gave that idea? Who participated and who knowingly made use of it to advance his cause at the Commission? That is not within the TOR of the Commission. That would be for another investigatory body. For our present purposes, all we need to state is that Mr Deerpalsingh – well before any suggestion was made that the matter was one for criminal investigation– stated that he would proceed to the Police and report the matter. He knew of the forgery before the Commission had put it to him.
1101. That copy he had produced to the Commission on 06 September 2017 when he had first deposed. Since the copy was in Word and the Commission had a copy produced months before, it became the Commission’s duty to make cross verification. The Commission found that the tampering was so subtly done that it could simply have passed unnoticed. The author of the original notes of meeting was Mr Khapre of BDO (Kenya). A copy of the notes of meeting had already been submitted to the Commission by Mr Lutchmeeparsad during his deposition on 03 August 2017. A comparative exercise undertaken by the Commission revealed the tampering. In fact, the copy produced by Mr Lutchmeeparsad and also the copy produced by late Sir Anerood Jugnauth his deposition on 22 March 2018 made mention of the following *“Kenya are willing to buy the shares at the same valuation as MMI has offered, but they wanted a longer payment period”*. This must not have been known to ex-Minister Bhadain, Mr Deerpalsingh and BDO.
1102. The copy produced by Mr Deerpalsingh made mention that *“Kenya are willing to buy shares at a mutually acceptable valuation, but they wanted a longer payment period”*.
1103. There is no perfect crime. There is external and internal evidence of the tampering in the Minutes produced by Mr Deerpalsingh. The internal evidence shows how life is stranger than fiction. One single typo of 1 single figure (1) submitted by Mr Lutchmeeparsad and Sir Anerood regarding the date of the meeting would be found having been corrected in the one submitted by Mr Deerpalsingh. In short, “18/11/205” in the one given in the earlier hearing by the first two would have been corrected “18/11/2015” in the later two. This missing “1” had been inadvertently made good to betray the forger.
1104. If demeanour is what betrays a witness in his oral deposition, this was the patent demonstration. The tampering which Commission had discovered was still confidentially kept when Mr Deerpalsingh was convened again to depose on 26 April 2018. He was questioned on how he received the notes of meeting. He explained that a copy was sent to him on the eve of his deposition of 06 September 2017 by Mr Ebrahim. When the Commission was in the initial move to draw his attention about the possible tampering of the Notes of Meeting,

Mr Deerpalsingh one step too early anticipated the question straight away and replied that he was prepared to “*go to the Central CID to ask for an investigation*”. In a one-page text he knew what the change was.

1105. In answer to the Salmon Notice served, it would be good to mention that he proceeded to lengthily speak on the involvement of one of the assessor in the BAI matter and went as far as even submitting a copy of a letter dated 4 May 2020 from the actual Leader of Opposition addressed to the Director of Insolvency Service, Corporate and Business Registration Department. The Commission presumes that Mr Deerpalsingh has attached this letter to his reply only to politicize the whole matter. The Commission had already addressed at Chapter 11 of its report all the points raised by Mr Deerpalsingh and ex-Minister Bhadain on these issues. But one question lingers on. How could Mr Deerpalsingh have a copy of the letter written by the Leader of Opposition to the Director of Insolvency Service?

## **THE INHOUSE DRAFTING OF LAWS**

1106. Mr Ramjanally stated before the Commission that he was hardly involved in the sale of Britam shares as he was subsequently appointed director of NIC. He also stated that he had nothing to do with the drafting of the Insurance (Amendment) Bill 2015.
1107. In the light of depositions of other witnesses and perusal of documents submitted to the Commission, it is noted that like Mr Deerpalsingh, Mr Ramjanally was another core member of the team constituted by ex-Minister Bhadain to handle and finalise the sale of Britam shares. His degree of knowledge surrounding the issues relating to BAI including Britam shares may have been relative but sufficiently compromising. One of the Board Member of NPFL testified that he had been pressurized by Mr Ramjanally to sign a Board Resolution for retroactive approval of the sale of Britam shares. According to this witness who was credible, Mr Ramjanally went as far as proposing that he would hire a taxi to come to his office to secure his signature. An examination of the emails exchanged in the context of the drafting of the Insurance (Amendment) Bill 2015, it has been noted that Mr Ramjanally is in copy in his capacity as member of the team involved in the finalization of the draft bill.

## **AN SA OVERSHADOWED**

1108. Mr Yacoob Ramtoola, Managing Partner of BDO was appointed SA on 26 August 2015 following the resignation of Mr Yogesh Rai Basgeet. FSC at its 227<sup>th</sup> Board of meeting held on 26 August 2015 considered appointing SA from the five big firms in Mauritius possessing an Insolvency Practitioner Licence.
1109. For the appointment of the SA, FSC proceeded as follows: it listed the number of firms that were to be considered. They were: KPMG, PWC, Grant Thornton; Ernst & Young and BDO.
1110. Going through a process of elimination for one reason or another, the final choice fell on BDO. BDO was therefore invited to make proposals with a clearly defined TOR and a fixed fee. BDO was the auditor of BPFL. However, Mr Ramtoola informed that he was not the signing partner, therefore, BDO was not in a position of conflict of interest as he would be appointed as SA in his personal capacity, not in his capacity as BDO Managing Partner.

1111. The fact of the matter is that no firm could legally have been appointed for the purpose. Luckily, no firm was appointed and it was a partner who was. However, even that appointment was not in order. Mr Yacoob Ramtoola, Managing Partner of BDO should not have been appointed in view of the following provisions of the Insolvency Act 2009. FSC went not only against ethics but also the law in making the appointment.

1112. In law, Section 109(1) of the Act reads:

*“(1) A person other than the Official Receiver who is appointed provisional liquidator or liquidator shall not be qualified for appointment where he is – (a) or has been an officer or auditor or employee of the company or any related corporation during the preceding 2 years;”*

1113. Further, Section 109 (3) of the Act provides:

*“For the purposes of this section, an auditor means the auditor or partner of the audit firm that has been appointed auditor of the company”.*

1114. As may be noted, the above section covers even the case of a partner, as in the case of Mr Ramtoola.

That is not all. Section 215 (2) of the Act - Appointment of administrator

*“(2) A person shall not be appointed administrator where – (a) he is disqualified from being appointed as a liquidator, unless the Court orders otherwise”.*

1115. What FSC had decided is that BDO was disqualified but Mr Ramtoola of BDO could be appointed to act as SA with the staff of BDO. That we have stated is ethics applied without due regard to ethical principles.

1116. BDO was the auditor of BPFL until the collapse of the BAI in April 2015. It is to be pointed out that BPFL was a related entity of BAI (Mtius) Co Ltd. Mr Ramtoola confirmed before the Commission during his deposition on 24 April 2018 that BPFL was audited by BDO until the collapse of BAI. However, when the Commission inquired into the matter, by way of a letter dated 21 October 2019, BDO stated that BPFL was audited by BDO & Co Ltd up to 31 December 2013 only. That was tantamount to misleading information concerning BDO and gravely compromising of its lack of professionalism in the matter.

1117. Another aggravating instance is the self-drafted Letter of Engagement submitted to FSC where it was clearly spelt out that the SA would be assisted by professional staff of BDO. Even Mr Munga has in his supposedly letter of thanks dated 23 November 2015 addressed to Mr Bhadain stated that *“the Board of Britam Kenya will continue engaging BDO & CO, the Special Administrators on the lines agreed during our meeting”.*

1118. At paragraph 2(iv) of his engagement letter, he was also required to *“finalise the transfer of BRITAM Kenya to the NPFL subject to regulatory approvals in Kenya”.* The Commission has noted that the Britam Shares had been transferred to NPFL only cosmetically. Instead, only the proceeds of sale of the shares had been remitted to the NPFL.

1119. The Letter of Engagement also provided that the SA “*shall work with ENSAfrica who will cover all aspects except for the enforcement in Kenya.*” ENSAfrica would be paid MUR 1m exclusive of VAT for its services. The Commission has noted with concern that all legal aspects of the transaction had been dealt with by legal advisers of BDO who were the focal point to deal with Juristconsult, the local representatives of Coulson Harney, the legal advisor of the buyer. Mr Koenig confirmed before the Commission that he had not dealt with any of the legal documents regarding the sale of Britam shares. ENSAfrica, had therefore, never been approached to do the legal oversight of the transaction yet paid.

## THE OFFICIOUS SA

1120. The role of Mr Afsar Ebrahim has been particularly pronounced in the sale of the Britam shares. Did he act on behalf of BDO, on behalf of the SA, on his own behalf or on behalf of the ex-Minister Bhadain is a recurrent question. Mr Afsar Ebrahim was Deputy Managing Partner of BDO & Co Ltd. He stated before the Commission that he had been involved in the whole issue relating to Britam shares by virtue of the provision of the Letter of Engagement (self-drafted) of Mr Ramtoola as SA wherein it is spelt out that the SA would be assisted by staff of BDO.
1121. Yet in his activities as well as his participation, the Chinese wall was not drawn between Mr Afsar Ebrahim, the BDO man or Mr Afsar Ebrahim, the agent of the SA. The Commission has noted during the three depositions of Mr Ebrahim and also after examining all documents submitted to it that Mr Ebrahim meant only to assist the SA had finally marginalised the SA, not without the latter’s indulgence.
1122. The Commission noted that although being a professional and deposing before the Commission under solemn affirmation, Mr Ebrahim had all through been economical with truths. Indeed, in several instances he stated the contrary of what the documents produced by him revealed.
1123. In his deposition before the Commission on 24 April 2018, he stated, among others, that he was only involved in the Britam matter as from 16 December 2015. He stated before the Commission that he “*really got involved into the Britam shares when Mr. Manraj gave myself and Georges a copy of the letter I think in the meeting in December on the 16th of December 2015. We got the letter of Kenya to Kenya. That’s when we got involved.*” That the Commission found to be untrue. In fact, on the basis of documents and his own depositions, he was a very active member of the core team constituted by Mr Bhadain to handle the sale of Britam shares. His involvement in the matter can be traced to as far back as September 2015 when there was an offer from Barclays to act as transaction advisor. In his deposition of 13 December 2017, he stated before the Commission that “*discussions were also going on with Barclays Bank as Transaction Advisor and there was a letter addressed by Barclays Bank to the Chairman of FSC for them to be appointed Transaction Advisor.*”
1124. He further stated in his deposition on 13 December 2017 that he “*accompanied Mr Ramtoola and he got a copy of a letter from MMI through Mr Roshi Bhadain.*” He was referring to the initial offer dated 14 October 2015 from MMI Holdings, South Africa addressed to Mr Bhadain, a copy of which he submitted to the Commission.

1125. At the sitting of 13 December 2017, itself, he also confirmed that he was present in the meeting (along with Mr Ramtoola) which Mr Manraj had with MMI Holdings on 14 October 2015. He said “*I was party to the discussions with Mr Manraj as Financial Secretary with MMF*”. Again, in his deposition of the 13 December 2017, he stated on “*12th of November 2015 I got a call from my colleague, Mr. Sandip Kapare (sic) who is in charge of BDO in Kenya advising me that he has been approached by a certain Mr. Peter Munga who wants a meeting in Mauritius with the special administrator.*” If the 3 depositions of Mr Ebrahim are juxtaposed, they show how he forgot what he had said earlier.

1126. The Commission has noted that at the 233<sup>rd</sup> Board meeting of the FSC held on 12 November 2015 at 08.00hrs, the SA informed the Board that “*the Chairperson of Britam Kenya will be coming to Mauritius this week for discussions*”. In fact, he was referring to the proposed visit of Mr Munga. As per the travel documents the Commission examined, Mr Sandeep Raghunath Khapre of BDO Kenya was already in Mauritius during the period 12 November to 17 November 2015. It was Mr Khapre who would take Mr Munga to Mr Ebrahim who in turn would take Mr Munga to the ex-Minister for a full meeting with the key persons on 14 November 2015. Yet he represented to the Commission that the meeting with ex-Minister Bhadain was a courtesy call. We have said enough elsewhere that the 14 November meeting was no courtesy call.

1127. Why did Mr Ebrahim play down this meeting with ex-Minister Bhadain?

1128. Mr Ebrahim stated the meeting “*did not last more than five minutes*” or still “*unfortunately less than five minutes.*” According to the deposition of Mr Ebrahim himself “*Mr Peter Munga wants a meeting in Mauritius with the Special administrator.*” If that was so, what made Mr Ebrahim take Mr Munga to ex-Minister Bhadain? The letter dated 23 November 2015, emanating from Mr Munga came to discredit the ex-Minister as well as Mr Afsar Ebrahim. Mr Munga addressed the letter to ex-Minister Bhadain, copied to Messrs Ebrahim and Khapre, expressing his thanks for the discussions held and concluded that “*the Board of Britam Kenya will continue engaging BDO & Co, the Special Administrators on the lines agreed during our meeting*”.

**The obvious complicity between the ex-Minister Bhadain and BDO cannot pass unnoticeable.**

## **THE LEGAL DOCUMENTS**

1129. Mr Ebrahim had in his depositions of 13 December 2017 and 24 April 2018 forcefully stated that he had “*no involvement at all in the drafting of the MOU*”.

1130. Me Zaheena Tawheen Choomka had in her deposition on 21 November 2017 and thereafter in a letter addressed to the Commission on 28 November 2017, confirmed that she was given all the terms and conditions by BDO to be inserted in the MOU and she had to put it in the format of an usual MOU. The instructions emanating from BDO were communicated to her by Mr Afsar Ebrahim.

1131. It is a fact that Mr Ebrahim was the person who had provided the terms and conditions to be incorporated in the MOU as he himself conceded in his deposition on 13 December 2017 that he was the person who inserted the conditional

consideration to be paid later in the event the market price would pick up by 51%. The Commission is appalled at such a bizarre clause having been inserted in the MOU and ultimately in the Escrow Agreement and the SPA. Such an increase in the stock market index within such a short period of time was fanciful. It was never going to happen as Mr Manraj stated. It was only good on paper as Mr Manraj opined. Mr Manraj had rightly remarked during his deposition *“It would be a nonsense to think that the price would be increased by 51%.... It’s a no go situation. It was only good on paper to get satisfaction on paper but it would never happen.”*

1132. His involvement may also be evidenced by emails dated 12 March 2016 (**Annexes 27 & 28**) exchanged with Ms Gladys Karuri of Britam Kenya.

## THE ESCROW AGREEMENT AND SHARE PURCHASE AGREEMENT

1133. Mr Ebrahim was not only fully involved in the drafting of the MOU but also the Escrow Agreement and the SPA as evidenced in the emails exchanged between Mr Munga and himself dated 04 and 12 April 2016 for the Escrow Agreement. (Copies of emails are at **Annexes 29 & 30**).

1134. In an email addressed to Mr Munga by Mr Ebrahim on 12 April 2016 (**Annex 30**), it is evidenced that the latter was also acting as the mouthpiece of ex-Minister Bhadain. The ex-Minister’s wish was transmitted to Mr Munga for the transfer of funds to begin during the same week.

## WAS THERE PRICE NEGOTIATION?

1135. Yet, Mr Ebrahim denied any involvement in the negotiations of the sale price of Britam shares. Was he or was he not involved?

1136. To know the answer, we refer to the email dated 11 March 2016, sent by Ms Gladys Karuri, Group Finance and Strategy Director of Britam Kenya, addressed to Mr Ebrahim. She stated: *“following representation made by yourself and after consultation with the Chairman and other key shareholders, I am pleased to advise that the offer has been enhanced as follows: A cash offer of \$71m (MUR2.65bn) based o(sic) today’s market price of Ksh11.90 plus a premium of 35% resulting in an offer of Ksh16 per share. The timeline for the payment has been outlined in my mail below.”* In the same email she continued to state to Mr Ebrahim that *“The offer of Rs4.3bn you had, as verbally advised by yourself, was based on a share price of Ksh18,50% premium above market price and our December 2014 audited accounts.”*

1137. It is to be specially noted that this email shows:

- (1) the existence of a previous offer of MUR4.3bn by the Kenyans;
- (2) the one-to-one haggling between the Kenyan party and the Mauritian party;
- (3) email of 11 March 2016 following which the deal was struck was NOT produced by BDO even if they had been asked to produce all emails pertaining to the sale.

## POST-CONTRACT VISIT TO NAIROBI

1138. Mr Ebrahim, accompanied by Me Zaheena Tawheen Choomka travelled to Nairobi from 07 to 10 May 2016. What was the purpose of that international travel? The stated objective was to carry out searches at the Registrar there with a view to

ascertaining the ownership details of the Britam shares. They stated that they came “*bredouille*” because they found that the shares were registered in Bahamas. Does that make sense? A 4-day visit in May when all has been settled in March 2016? What for? When BDO has an office in Kenya to do that simple exercise which could well have been done online.

1139. Asked whether he had travelled to Kenya for that purpose only and did not have meeting with any person there, his reply was that they had no other items on their agenda.
1140. The Commission came across a letter dated 09 May 2016 from Mr Munga, addressed to Mr Ebrahim himself which had been produced to the Commission at **(Annex 31)**, Mr Munga made reference to “*our meeting of this morning regarding the disposal of 23.34% BRITAM shares*”.
1141. The number of things, Mr Ebrahim had to hide are many. All in all, he was the main intermediary between the ex-Minister and the buyers to the extent of overshadowing the SA who seemed to add only his name to the process which was being closely followed by the ex-Minister.
1142. The obvious complicity between BDO and ex-Minister Bhadain is too obvious not to be noticed all through.

## CHAPTER 13

### NON CO-OPERATION OF FOREIGN WITNESSES

1143. In the light of the depositions of witnesses in Mauritius and examination of the documents produced before it, the Commission felt the need to hear the following witnesses based in Kenya:

1. Mr Sandeep Raghunath Khapre Managing Partner of BDO;
2. Mr Peter Kahara Munga, Chairman of Britam;
3. Mrs Agnes Odhiambo, Director of Britam;
4. Dr Benson I. Wairegi, EBS, Group Managing Director of Britam;
5. Ms Gladys Karuri, Group Finance & Strategy Director of Britam;
6. Mr Wanyambura Mwambia, Deputy Director of Economic Affairs in Charge of Tax Administration and Private Sector Issues in the Ministry of Finance, Government of Kenya; and
7. Honourable Henry K. Rotich, Cabinet Secretary, The National Treasury, Nairobi.

### REQUEST FOR MUTUAL LEGAL ASSISTANCE WITH KENYA

1144. The above witnesses could not have given evidence without the co-operation of the Government of Kenya. Mauritius sought bilateral cooperation through the Commonwealth agreement for Mutual Legal Assistance for the purpose.

1145. Accordingly, in March 2018, the Commission sought the assistance of the Attorney-General, who is the Central Authority for Mutual Legal Assistance for the purpose of facilitating the procedure for obtaining written or oral deposition of witnesses who are in the jurisdiction of Kenya matters relevant to the Commission's TOR.

1146. It was not until August 2018 that the Attorney-General of Kenya, who is the central authority there responded to inform his counterpart in Mauritius that written statements from the witnesses identified would be submitted to the Attorney-General's Office by mid-September 2018 for onward transmission to the Commission. That target date was not met.

1147. By October 2018, as the Commission had not received any written statements from the Kenyan witnesses, it decided to formulate questions addressed to the identified Kenyan witnesses. At the same time, the Commission decided that if no answer was forthcoming by 30 November 2018, it would have no alternative than to travel to Kenya to conduct oral hearings. This time, the Kenyans responded.

1148. In February 2019, even if belatedly, written statements reached the Commission through the central authority in Mauritius. The Attorney General's Office in Mauritius transmitted to the Commission written statements emanating from the Kenyan witnesses. The following is a summary of what the Kenyan witnesses stated.

### **Mr Sandeep Raghunath Khapre, Chief Executive Officer of BDO East Africa**

1149. Mr S.R. Khapre stated that he was made aware by Mr Y. Ramtoola that the latter was appointed as SA of BAI Company (Mauritius) Ltd and its related entities with effect 26 August 2015. In his duties as SA, Mr Ramtoola would be assisted by



professional staff of BDO Mauritius. Mr Khapre stated that Mr Ramtoola contacted him in November 2015 to arrange for a meeting for Mr V. Lutchmeeparsad, PS of MOFED, with Mr P. Munga, Chairman of Britam to discuss the potential sale of shares held by BAI Mauritius in Britam, Kenya. He arranged for that meeting which took place at the Britam Centre in Nairobi on 18 November 2015 and the meeting also included Mrs Agnes Odhiambo, Mr Wanyambura Mwambia and himself. He stated that he did not contribute to the discussions in the meeting. He added that neither he nor BDO East Africa had any role in the sale of Britam shares and he did not have any duty to any of the parties and that he did not receive any fees or payment whatsoever.

**Mr Peter Kahara Munga, Director of Britam Kenya**

1150. Mr Peter Kahara Munga stated that in April 2015, he learnt that the Government of Mauritius had appointed a SA for BAI Company (Mauritius) Ltd for the purpose of selling the Britam shares ultimately to repay BAI policy-holders. He was concerned that the sale would introduce a significant investor who might not be aligned to the vision and strategy of other existing shareholders. Accordingly, he travelled to Mauritius to request the Government of Mauritius to consider selling the shares to them.

1151. On 18 November 2015, he had an informal meeting at the Britam Centre, Nairobi with Mr Lutchmeeparsad, PS of MOFED in the presence of other officials and Mr Khapre, Chief Executive Officer of BDO East Africa. During the meeting, Mr Lutchmeeparsad indicated that Government was willing to consider an offer from Kenyan investors. He stated that, subsequently, he made an offer to purchase the Britam shares which was accepted. He entered into a SPA dated 10 June 2016 through Plum LLP. The purchase transaction was completed in accordance with the SPA and the purchase price for the Britam shares was Kshs7,171bn and payment was made in USD.

**Ms Agnes Odhiambo, Controller of Budget and Non- Executive Director of Britam Holdings PLC (Britam)**

1152. Ms Agnes Odhiambo, for her part, stated that she recalled that on 18 November 2015, she attended an informal meeting at Britam Centre in Nairobi along with Mr. Peter Munga, Mr V. Lutchmeeparsad, Mr Wanyambura Mwambia and Mr Sandeep Khapre. During the meeting Mr Lutchmeeparsad indicated that the Government would be willing to consider an offer from Kenyan investors to purchase the Britam shares held by BAI Company (Mauritius) Ltd. The details of the sale were not discussed in the meeting. She added that it was much later that she knew that Kenyan investors had bought the Britam shares.

**Dr Benson I. Wairegi, Group Managing Director of Britam Holdings PLC**

1153. Dr Benson I. Wairegi stated that he was aware that in April 2015 the Government of Mauritius had appointed Mr Y. Ramtoola, Group Managing Partner for BDO Mauritius as SA for BAI Company (Mauritius) Ltd which held 23.34% stake in Britam Holdings PLC. The Government intended to sell the Britam shares to compensate BAI policy-holders. The sale of Britam shares raised a couple of concerns. One, the potential investors needed to be aligned to Britam's vision and strategy; and, two, they served the larger public interest of maintaining Britam's position as a firm of successful regional financial services. He stated that he raised

his concerns with the Cabinet Secretary for the National Treasury in Kenya who communicated these concerns to his counterpart in Mauritius and requested Mauritius to consider an offer by Kenyan investors.

**Ms Gladys Muthoni Karuri, Principal Executive Director of Britam Holdings PLC**

1154. Ms Gladys Muthoni Karuri, stated that she was aware that in April 2015, the Government of Mauritius appointed Mr Y. Ramtoola, Group Managing Partner for BDO Mauritius as SA for BAI Company (Mauritius) Ltd which held 23.34% stake in Britam Holdings PLC. To her, the appointment of the SA had an immediate adverse effect on the business of Britam which caused a drop in the share price. In the one-year period between April 2015 to March 2016, the Britam share price had dropped in excess of 40%.

1155. She stated that she travelled to Mauritius to obtain first-hand account of what was happening in Mauritius and thereafter worked closely with the Kenyan investors to facilitate the satisfactory conclusion of the transaction upon acceptance of the offer which included acquiring regulatory approvals from relevant authorities.

**Mr Wanyambura Mwambia, Deputy Director of Economic Affairs in Charge of Tax Administration and Private Sector Issues in the Ministry of Finance, Government of Kenya.**

1156. No statement was received from him. It is to be noted that the record as well as the other witnesses mentioned that he participated in meetings which led to the conclusion of the sale of Britam shares.

**Hon Henry K. Rotich, Cabinet Secretary, The National Treasury, Nairobi.**

1157. No statement was received from him either. It is to be noted that it is he who, on the 9 December 2015, had spoken to FS persuading him to sell the Britam shares to the Kenyans and on 11 December 2015, had written to the FS in Mauritius to mark his *“appreciation to you for agreeing to this request. My understanding is that the Board of Directors of Britam will need to make arrangements to have negotiations with the Government of Mauritius in order to agree on the suitable timeframe within which the sale will be effected as well as the sale price and payment terms.”*

**EXAMINATION OF THEIR STATEMENTS**

1158. The Commission has examined the content of the written statements and found that they were statements of the widest generality. The content was devised to evade the sensitive issues in the investigation. The Commission was struck by the short and guarded versions of each of the witnesses identified. They were evasive and reticent, characteristic of persons who have things to hide and are economical on factual details. The Commission was interested in filling these details.

1159. The Commission therefore decided for oral hearings of the witnesses to be conducted under the mutual legal assistance framework in Kenya. A request to that effect was made in March 2019.

1160. The Commission faced the stark silence of the Kenyan Authorities and all efforts to prompt them into action would be vain. Accordingly, the Commission would decide in January 2020 to issue a non-compliance Notice to the Kenyan Authorities informing them that the Commission may consider including in its Report that there has been little valuable cooperation by the Kenyan Authorities. The Kenyan

Authorities would pay a deaf ear to the notice also. In its efforts to make assurance doubly certain through the Kenyan witnesses, the Commission would attempt even through other diplomatic means with the Kenyan Authorities through the Attorney General of Mauritius and the Mauritian Consulate in Kenya but to no avail.

1161. All the efforts of the Commission to round up the depositions of the Kenyan having failed, the Commission had no choice, on the facts, to serve Salmon Notices on them in July 2020 for the purposes of giving a fair chance according to principle of due process. The Kenyan Authorities did not respond to the Notices either.
1162. Inasmuch as the Kenyan witnesses did not add anything further to what they had stated in their written statements, the Commission evaluated their evidence *quantum valeat*.

### FACTS TO RETAIN

1163. The 5 foreign witnesses seem to have got wind of what they needed to say and not to say. They were economical in their assistance to the Commission and when the Commission decided to probe further, they conveniently disappeared from the radar. They are:
1. *Mr Peter Kahara Munga*  
Mr P.K Munga is a business tycoon of Kenya who master-minded the transaction. How he evaded his crucial meeting with ex-Minister Bhadain on 14 November 2015 is patent. In this meeting, it will be recalled that the process of sale was to be conducted “*along the lines agreed at the meeting.*”
  2. *Ms Agnes Odhiambo*  
Ms A. Odhiambo was one of the Director of Britam who attended the meeting of 18 November 2015 but plays down its importance to a ridiculously low level. To her, Mr Lutchmeeparsad went to say that Mr Munga would like to sell it to Kenyans and that is it. The details were not discussed. This is discredited by written document to the contrary and purportedly supported by fake documents.
  3. *Dr Benson I. Wairegi*  
The Cabinet Secretary who contacted the FS of Mauritius and lobbied for the sale to be made to the Kenyan shareholders rather than to MMI Holdings. The silence in his statement speaks louder than words.
  4. *Ms Gladys Muthoni Karuri*  
Ms G.M. Karuri, Principal Executive Director responsible for finance, strategy and operations is a key person in the Kenyan team. She has been the intermediary and the one who got the pieces together to clinch the deal in Mauritius on 12 March 2016 by way of an MOU. Correspondence from her shows that there was an offer of MUR4.3bn on 18 November 2015 but she withholds this information in her letter.
  5. *Mr Sandeep Raghunath Khapre*  
Mr S.R. Khapre of BDO Office (Kenya) who had actively participated at various stages in the process by attending meetings, getting people together organising logistics and at the request of the SA and BDO pretended that he had played only the role of an onlooker at the meeting of 18 November 2016.

**OF NOTE**

1164. It is a matter of regret that the Mauritians had bent backwards to sell it to the Kenyans and when Mauritius sought their co-operation under an existing legal framework of mutual legal assistance, there was no reciprocity.
1165. If they stood by their generalities, why did they frustrate an oral hearing for the specialities found in relation to the actual implications? Why not respond even to the Salmon Notices individually served upon them? They had been given the assurance that the Commission was seeking their mutual legal assistance for their testimony as witnesses only and no jurisdiction to pronounce on the misconduct of foreign parties.
1166. The Commission has no choice but to regretfully comment on the lip service which many jurisdictions pay to the legal framework which countries have subscribed to in the matter of mutual legal assistance. As Kimberley Prost has put it:
- “A country may have excellent legislative and treaty scheme for mutual legal assistance and an established administrative process and it still be virtually impossible to provide effective assistance; because the best designed system is only as good as the people who operate it on a practical level.”*

## CHAPTER 14

### TOR (I) –WAS THE TRANSACTION IN THE BEST INTEREST OF THE SELLER?

*Procedure is the handmaid of justice –  
Lord Esher in Coles v Ravenshear*

1167. Chapters 14 to 20 will give replies to every paragraph of the TOR, with reasons for same.

1168. Paragraph (i) of the TOR requires us to enquire into –  
*whether the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller.*

#### WHO WAS THE SELLER?

1169. Before we address the issue of the method that was used for the sale, it is apt that we deal with the issue of the seller so that we may determine whether the sale was in its best interest. The amended legislation had rendered it controversial. The determination of who was the seller became a big question? Was it Government of Mauritius? Was it NPFL? Was it the SA? Was it BAI Co. (Mauritius) Ltd? Was it the policy-holders? Documents are mutually contradictory on this matter.

1170. The newly conceived regime of Section 110A and Section 110B of the Insurance (Amendment) Act had something to do with the resulting legal penumbra. With the law as existed prior to the amendment, the respective statutory duties and responsibilities of all stakeholders were fairly well settled. But the amended law had entered the Minister into the scenario. And it was quite clear what to do and what to expect. The situation with the new law was like dealing with a new creature which was neither fish nor fowl. In the MOU dated 12 March 2016, mention is made of SA, of the buyer as well as the seller. However, who is the seller is left undefined. The same is the situation with the Escrow Agreement. The circular issued by Plum LLP on 30 June 2016 to the shareholders of Britam Holdings Ltd referred to the seller being British American (Kenya) Holdings Ltd.

1171. Coulson Harney, the Legal Chambers of the Kenyan buyers, would identify the problem and would decide that for the preparation of the final papers, it was safest to go by relying on the registration status: i.e. who was the “registered owner of the Shares” at that point in time? It was the “*British American (Kenya) Holdings Limited, a company registered under the laws of Bahamas bearing number 6564 B and having its registered office at 4 Georges Street, Mareva House, P.O. Box No. 3937, Nassau, Bahamas (the Seller).*” Coulson Harney Chambers had to clear the matter through a Deed of Variation and Novation.

1172. Cabinet decided on 10 July 2015 that the shares be transferred to the purpose-built NPFL which in the normal course of things would have become the eventual seller at some point in time, after the assets had been transferred to it. The decision of Cabinet was duly communicated to the FSC. The CEO of FSC reminded SA of that fact, following it up with a formal letter addressed to him. FSC would even write to the Minister to seek his approval. There is written evidence of the fact that this matter was

discussed with the Minister the outcome of which has been “*FSC should be advised to proceed as decided by Cabinet at minute 30, in file FS/NPFL/39.*”

1173. Why was it not transferred in the real sense of the word but, on the contrary, transferred-cum-sold against the decision of Cabinet is a moot point. In fact, Cabinet was kept in the dark when the sale took place. Coulson & Harney used a legal gymnastic to effect both the transfer and the sale. The device is elaborated as follows:

*“(iii) the Parties have agreed that the sale of the Shares to the Purchaser (and/or its nominees) will be effected as follows:*

- a. a transfer by BRITISH-AMERICAN FINANCIAL SERVICES LTD (under special administration) (through the Special Administrator) of the entire issued share capital of the Seller to the NPFL; and*
- b. a sale by the Seller (then wholly owned by the NPFL) of the Shares to the Purchaser (and/or his nominees).”*

1174. Thus, the transaction was done via a concurrent mechanism “*both the transfers to NPFL and the Investors.... documented concurrently.*” To be able to do so, the sole shareholder which was the BAFSL (under special administration through the SA) replaced the then existing Directors. The new Directors were: late Mr Issary, Mr Ramjanally and Mr Saddul. Late Mr Issary, be it noted, was at that time the CEO and Mr Saddul was the Chairperson of the NPFL Board with Mr Ramjanally as one of the Directors of NICL. The shares were transferred by decision of the new Board as per the Share Certificate dated 21 June 2016. It is worth noting that the SPA had been signed on 10 June 2016, with all payments having been received by 16 June 2016, all this without any NPFL Board approval. When belatedly, on 20 June 2016, the Board was convoked to give its approval, it declined to do so inasmuch as it had been kept in the dark all along the line. The deadlock would be resolved in a very imaginative way. The Board would finally take note of the decision on the representation that Government as sole shareholder had agreed to the transfer-cum-sale. There is no record that Cabinet had ever gone against its own decision. Such was the administrative gymnastics which had been played to give a veneer of legality to the transaction.

1175. For our purposes, whoever was the seller may only be material in the sense of who was prejudiced by the events which happened.

#### **THE ISSUE UNDER PARA (i) OF THE TOR**

1176. The core issue of the TOR is that an offer by MMI Holdings to buy the Britam shares at MUR4.3bn, although it had been agreed upon by the parties for the price of MUR4.3bn had not been pursued. Within a period of around 5 months, they were sold at MUR2.4bn to the Kenyan shareholders. Is there an explanation for this huge under selling? If there is an explanation, is there a justification for same?

1177. Explanation has been attempted. The explanation is that the price of Britam shares on the NSE had fallen drastically from 18Kshs to 11.90Kshs at the material time. MMI Holdings had offered 26Kshs (18Kshs + 50%). Mr Ramtoola, the SA, explained that they had to meet the set target date of 30 June 2016 which had been fixed by government for the intended payment to the policy-holders. One bird in hand was worth two in the bush. Before it fell further, the deal had to be done. It is to be noted that Mr Ramtoola was not directly involved with the haggling for finalisation of the deal. It was Mr Ebrahim. To ex-Minister Bhadain, MUR2.4bn was the best price that could be obtained in the circumstances. To the FS, considering the falling prices on the NSE, “if

*it is the only offer you are getting the best become the only offer.”* He also commented that *“a big chunk of shares can have premium attached to it.”* To the SA, he solemnly affirmed that they could not have struck better.

1178. Explanations for the fact that MUR2.4bn was the best deal in the circumstances, there might be many. But others there would be who would point a finger and, rightly so, and whether that was right. If we have agreed that nothing may be properly sold or bought without a proper evaluation of the subject matter, we have touched the real issue in this dispute. Was there proper evaluation of the subject matter of sale?
1179. In this case, the price at which the shares were given away was with reference to the share price in the NSE at that point in time. Was that proper valuation of the subject matter of the sale?
1180. Was that properly considered by the Mauritian side? How transparent was it? Was there negotiation? What record exists on the matter? Were there independent advisers to oversee the transaction? Was the need to sell at all at that point in time ever examined? Was the very decision to sell made out of an artificially created panic or mishandling of public opinion? Could the sale have waited for better times? Why was Cabinet decision that the undertaking should be transferred to NPFL flouted? If there was dire urgency for sale, why did not the ex-Minister Bhadain go back to Cabinet in the matter to seek a change of government decision? Why did not the ex-Minister go to Cabinet anyway? It was a big asset and it involved considerable public interest, all the more so when Government had publicly announced that they would not use tax payer’s money to pay the investors who had lost their investments.
1181. A reasonably prudent seller would have struck to the quick because his assets as prime assets which had been valued at almost double the price would be going for almost half. He would tarry a while. While waiting, he would first go into a sense of denial. He would check and cross check the information concerning the fall in price. He would seek second opinions. He would ask himself whether he would sell his prime assets at that price at all. He might even wish to take the risk to wait and see how the share price would behave at the stock exchange, all the more so when he has in front of him a sole bidder. Where there is a sole buyer, the issue of fair and reasonable price would arise.
1182. When he decided to sell, thereafter, he would invoke his negotiation skills to get a good bargain. When the buyer has come with one methodology for evaluating the assets, he would use other methodologies. Even on share price methodology, share prices fluctuate in value for a number of reasons. Not to be circumspect is to be imprudent. The nature of the assets, their magnitude and the public interest they invoked were vital factors in decision making. Was there a proper appreciation of these factors?

### **No proper appreciation of the nature of the assets**

1183. Was there a proper understanding of the nature of the assets? Why were not the obvious questions asked? The Britam shares were no longer private shares to be dealt with privately. From the moment Government had decided to repay the policy-holders, borrow money from the Central Bank and recoup the amount from the sale of the assets, the shares had assumed the character of public assets. They were not minimal assets. They were huge. As Barclays put it, the sale should be in a manner which should be above board, considering the huge amount involved and the public interest shown to the shares. The nature of the assets and the responsibilities involved in dealing with them had been outlined by Mr Oosman who stated that, when on their return from an official

mission from South Africa, the ex-Minister, the Chairman and Vice Chairman of the FSC, brought a proposal to them that Barclays (South Africa) had offered to act as broker for the sale of Britam shares, he and Mr Basgeet had advised that there should be transparency in the matter inasmuch as Britam shares constituted a big asset. There was a need to get proposals from other entities with a view to acting in the best interest of the seller.

1184. We have corroboration from Benoit Chambers on the matter. The Ministerial delegation had proceeded on mission related to the Double Taxation Avoidance Agreement with South Africa. There the Minister had met a delegation of Barclays Bank which had been able apparently to lobby with him to act as broker for the sale of the Britam shares. While the delegation was still there, Benoit Chambers received a call from South Africa. The caller stated that he had met the Minister who was in South Africa and that the Minister had appointed him to sell the Britam shares and that, henceforth, it was Barclays which would take on that responsibility.
1185. Me Clarel Benoit reminded the caller that, by law, it was only the SA who was empowered to do so. The next thing he knew was that, when the ex-Minister Bhadain arrived in Mauritius, a couple of days later, he convoked a meeting at the 13<sup>th</sup> Floor, SICOM Building, late even if it was, possibly around 23 hours, presumably having come straight from the airport. He called them incompetent and told them that Barclays would henceforth be handling the sale. Benoit Chambers advised the Minister that it could not be done without a proper procedure. They had to launch a Request for Proposal (“RFP”). Whereupon, they set about that very night preparing a draft RFP for the purpose of issuing an invitation to interested parties. After the papers had been prepared, Benoit Chambers had to draw a list of potential participants. Nothing was to come out of this procedure.
1186. A number of procedural cautions had not been heeded. The Mauritian team proceeded with the sale, despite the fact that funds had been received from the Bank of Mauritius to effect payment of the second tranche of the SCBG and there was no *feu en la demeure* for rushing into it, all the more so to a single buyer lined up, having been incorporated on the very day of the sale, with Mr Peter Munga at the controls from the start to the finish, posing as the agent when he was in truth and in fact the principal behind it all. Some rudimentary due diligence would have revealed the truth behind the buyer.
1187. Should such huge assets have been sold so incautiously when we know that as a consequence of the legislative enactment, Cabinet had taken a decision to warehouse it at NPFL? The list of queries has no end? Even legally, by virtue of the amended law it was incumbent upon the SA “*to transfer the undertaking to such insurer ....as the Minister may approve.*”
1188. What with Cabinet decision of 10 July 2015 or the exercise of Ministerial approval procedure for their sale, the shares had assumed the character of either publicly acquired assets, publicly owned assets or assets with a public interest in it. Whichever may be the category in which one would place them, they became subject to public scrutiny and public accountability. The ex-Minister stated that he had gone to Cabinet and obtained Cabinet agreement (found to be untrue) with that objective. He had the law passed and proclaimed as a matter of urgency. The SA had it written in his Letter of Engagement. The FSC had been informed of Cabinet decision with regard to the transfer to NPFL. The FSC had written to the Ministry concerned. Why were they sold and not transferred? Why were they sold at that price? NPFL was directed to hold on to the shares. NPFL



became, in the events which followed, the receiver of proceeds of sale instead. The fundamental question which we need to answer under the 1<sup>st</sup> part of the TOR is whether *the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller.*

1189. The facts show that there was no method at all. If the methodology of share price has been argued, then it has been both incautious and misapplied. With this, it would be apt to take cognizance of what are the methods that are used conventionally for an evaluation of shares and sale of shares when it has to do with sale of the totality or a big chunk of them. Even the FS agreed that when a big chunk is involved, that fact has to be factored in.

## CHOICES IN VALUATION MODELS

1190. We stated above that Mr Peter Munga and his team were able to have their way stating that all the models they had used pointed to the figures they had offered, and that their offer was one on the generous side. What were the models they had used, they did not disclose. Nor did the Mauritian team care to ask.

1191. It is apt here to comment a little of the issue of valuation. One reality about it is that there is no clear-cut formula for same. The other is that there are too many models to choose from. The third is that one needs not only to choose the right model but also to have an understanding of how to use the model of choice.

1192. In the broadest possible terms, firms or assets can be valued in one of four ways:

1. **Asset-based valuation** approaches where you estimate what the assets owned by a firm are worth currently;
2. **Discounted cash flow valuation** approaches that discount cash flows to arrive at a value of equity or the firm;
3. **Relative valuation approaches** that base value on how comparable assets are priced;
4. **Option pricing approaches** that use contingent claim valuation.

1193. Within each of these approaches, there are further choices that help to determine the final value. There are at least two ways in which one can value a firm using asset-based valuation techniques:

1. **Liquidation value:** where you consider what the market will be willing to pay for assets if the assets were liquidated today;
2. **Replacement cost:** where you evaluate how much it would cost you to replicate or replace the assets that a firm has in place today.

1194. The question which begs itself from the above is the following: when Mr Peter Munga and his small team represented to the Mauritian team that they had used all models to reach the figure they were proposing, did the Mauritian team directly involved with the conclusion of the transaction care to put the Kenyan team to the test? Did the Mauritian team seek the benefit of an independent expertise on the matter? Were they under no duty to do so? Were they under no duty to be professionally sceptical about what the Kenyans were representing? Did the Mauritian team accept it as a given? If yes, did they see themselves as somehow constrained to do as they did? What were the constraints? Was it that they had to have funds ready to pay to the policy-holders by 30 of June 2016? If it was the latter, was there a check to find out what was the situation at NPFL?

1195. We were told that the firm BDO is not foreign to the business of evaluations. That may well be. But the facts show that, in this particular case, for a reason best known to them they either lacked that expertise or if they had it, they did not use it or preferred not to use it. Why did the SA play second fiddle to Mr Ebrahim on such a critical issue at such a critical time? Did not the Mauritian sellers have an inkling that the Kenyan team having arrived in Mauritius was playing “Operation Seduction” or “Operation Manowari” for that matter? The impression one gets is that, the Mauritian team was playing into the hands of Mr Peter Munga and his team with an unprofessional ease.

1196. The problem with being the Devil’s Advocate in defending the position of the Mauritian team for the price at which they gave the assets away is: what they did flies in the face of international best practice on the matter. One may usefully refer to materials freely available worldwide, one of which is the CFA Institute and a survey carried out and documented on the issue of valuation of firms and shares.

### **CFA Institute Survey of the equity valuation practices<sup>120</sup>**

1197. The CFA Institute had carried out a Survey of the equity valuation practices of its members, “*Equity Valuation: A Survey of Professional Practice*” (Pinto, Robinson, and Stowe 2015). The objective was documenting professional practice in the selection of equity valuation approaches. The survey also asked whether a specific tool was viewed by the analyst as widely or narrowly applicable. A mean frequency of greater than 50% would suggest that the tool was viewed as a general tool, and a mean frequency of less than 50% would indicate that use of the tool was limited to special cases.

1198. The survey found (see Table below) that among the absolute valuation models used to determine the intrinsic value of a firm, nearly 80% of the survey participants reported that they use a discounted present value approach. Slightly more than 60% reported using an asset-based approach, but a lower mean frequency (just under 37%) indicates that its use is more restricted.

**Table 2.1. Most Widely Used Valuation Approaches among Respondents to the 2015 CFA Institute Study**

Valuation Approaches: Global ranking. In evaluating individual equity securities, which of the following approaches to valuation do you use? <i>N</i> = 1,980	Percentage of Respondents	Percentage of Cases in Which the Respondent Uses Each of the Approaches <sup>a</sup> (mean)
A market multiples approach	92.8	68.6
A discounted present value approach	78.8	59.5
An asset-based approach	61.4	36.8
A (real) options approach	5.0	20.7
Other approach	12.7	58.1

<sup>a</sup>Respondents using an approach were asked for the percentage of valuation cases in which the approach is used. Thus, this column reports conditional frequencies.

Source: CFA Institute.

<sup>120</sup> **EQUITY VALUATION:** Science, Art, or Craft?- Frank J. Fabozzi, CFA, Sergio M. Focardi, and Caroline Jonas

1199. As can be seen, the discounted present value approach is very common. We have no evidence that the valuation of the Britam stake was done with sufficient circumspection, other than by referring to the price on the Stock Exchange of Nairobi for sale of individual shares. The other important consideration is what obtains in our own established practice in Mauritius.

### **Established Practice in Mauritius**

1200. A lot of insight may be gained from the regime obtaining under the Takeover Rules for local listed companies. The Offer Price is determined in accordance with Rule 14(2) (c) of the Takeover Rules. The Offer Price usually represents a premium on the average of the weekly high and low of closing prices of the shares of the Offeree, as listed over the previous 6 months (emphasis added). The shares will be acquired pursuant to the Offer, fully paid and free from any liens, charges, encumbrances and any other interests of any nature whatsoever and together with all rights attaching thereto, including without limitation voting rights and the right to receive and retain in full all dividends and other distributions that may be declared after the acquisition.

### **COMPULSORY ACQUISITION**

1201. We have stated above that this was not a case of selling a couple of shares over the counter but one of wholesale acquisition of shares in the nature of a take-over. Such a transaction is entrenched by our Rules. Thus, if the Offeror, by virtue of acceptance of the Offer, acquires or contracts to acquire not less than 90% of the voting shares, to which the Offer relates, the Offeror is required to mandatorily “give notice to all Dissenting Shareholders that it intends to acquire their Shares, within 28 days from the last day on which the Offer has been accepted, as prescribed in Rule 37(2) of the Takeover Rules.” At the end of the day, the Offeror is to mandatorily “acquire the Shares of any Dissenting Shareholder on the same terms as for the accepting Shareholder.” The rationale behind this is that there is a goodwill value when a critical portion of the shares is being sold.

1202. One may also refer to Rule 41 of the Takeover Rules, “*where the offeror, by virtue of acceptance of the offer, has acquired or contracted to acquire not less than 90% of the rights attached to voting shares to which the offer relates, any dissenting shareholder may require the offeror to acquire his shares, within 28 days from the day after which the dissenting shareholder has been informed under Rule 37.*”

### **ENTRENCHED GENERAL PRINCIPLES FOR TOTALITY OF SHARES**

1203. When the shares are being sold in all its totality, the procedure on account of its criticality is entrenched by formal rules. Thus, it is provided by the Rules that the Board of Directors of the Offeree will receive a letter from the Offeror, specifying the latter’s firm intention to offer to purchase all the shares held by the shareholders at the above-mentioned price. The Offer price will normally have been determined in compliance with Rule 14 (2)(c) of the Takeover Rules.
1204. Once the offer price has been determined as per Rule 14(2)(c), the ball is in the hands of the Board of the Offeree. It is, thereafter, for the Board of the Offeree to consider the Offer and make a recommendation to the Shareholders but along a line once again statutorily entrenched to ensure that the investors exercise their ownership rights in total transparency.

1205. We are hereunder giving an idea of how the procedure is implemented when the professionals involved are all minded to ensure that all the rights of all the players in the scenario are given effect to through adherence to rules of transparency and accountability.
1206. The opprobrium contained in the “concurrent” transfer-sale device – whosoever’s brilliant idea it was – lay in the fact that while the transfer of assets had its source of authority, the sale of them lacked any source whatsoever. But worse, it could only be done through a number of stages entrenched in the laws relating to sale of shares. The latter entrenchment by law had been pointed out to the ex-Minister when the latter came back from his mission in Kenya, chastised Benoit Chambers as incompetent and insisted that the matter should be handled by Barclays.
1207. The transfer of the assets to NPFL had its source of authority in Cabinet decision, communicated to FSC which had, in turn, communicated it to the SA. The Secretary of the legal Chambers of the ex-Minister who acted as his PRO at the Ministry had apprised the Acting PS of the Ministry of FSGG&IR also of that fact. The latter had discussed it with the ex-Minister who had agreed – as per the Note hand-written in the Minutes - that Cabinet decision should be followed. It was also imparted to the SA. It had also been one of the engagements undertaken by the SA as per his Letter of Engagement.
1208. But the sale had no such authority or any authority whatsoever. Even as per the amended section 110 of the Insurance Act, the undertaking could only be transferred as long as the Minister had approved it. Which could only have meant that, once transferred, it was for NPFL to sell it at an opportune time and at a fair and reasonable price, following the best practices and the applicable regulations obtaining in the sale of shares.
1209. Now the sale of shares – all the more so when it is compulsory, without the consent of the shareholders - is jealously entrenched by law, procedure and best practices. A has no power to sell the property of B and transfer it to C. That is basic. If A by force of circumstances is to do that, A has to seek the consent of B. Thus, the shareholders as owners should be afforded an opportunity to exercise what is referred to as their shareholders’ ownership rights: the right to be fully informed of the intended transaction, the right to have them properly valued and the right to obtain the best price. That again is basic. But what is interesting is that law imposes a procedure upon A to enable B to exercise his key ownership functions.

### **Principles of Corporate Governance for Sale of Shares**

1210. Reference may be made here to a most important document, the G20/OECD Principles of Corporate Governance (2015) which are meant to guarantee the rights and equitable treatment of shareholders and their key ownership functions. The text reads:
- The corporate governance framework should protect and facilitate the exercise of shareholders’ rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.*
1211. In this regard, shareholders, including corporate shareholders, should be allowed to consult with one another on issues concerning the exercise of their shareholder rights as per an open and transparent mechanism so as to prevent abuse.

1212. In the matter in hand, when the sale was done concomitantly with the transfer, NPFL or the Government for that matter, the parties had overlooked that they had to follow the law and the best practices in the matter. NPFL was denied not only the substantive rights but any opportunity to exercise their key ownership functions. Good governance is not just high-octane governance but democratic governance, still less cosmetic governance. In the corporate context, it is effective governance. As Best Practice on the matter lays down:

*“Effective corporate governance means that shareholders should be able to monitor and assess their corporate investments by comparing market-related information with the company’s information about its prospects and performance. When shareholders believe it is advantageous, they can either use their voice to influence corporate behaviour, sell their shares (or buy additional shares), or re-evaluate a company’s shares in their portfolios. The quality of and access to market information including fair and efficient price discovery regarding their investments is therefore important for shareholders to exercise their rights.”*

1213. In practice, we illustrate below how it should have been done and was not done. The Board of NPFL should have come with a recommendation after examining the Offer Document of the dubious pool of investors with the views of the Directors expressed to the shareholders.

## **VIEWS OF THE BOARD AND RECOMMENDATION OF DIRECTORS**

1214. At the meeting the Board after an examination of the Offer Document should have drawn the attention of the shareholders to the salient features: whether the Offer price was arrived at in compliance with the pricing mechanism as set out in the applicable rules; the price offered and terms of payment; the percentage of premium; details of the weekly high and low of the closing prices of the company as listed on during the previous six months preceding the date of public announcement of the proposed acquisition etc. Above all, in this case, who were the “pool of investors?” Where is the Government of Kenya in all this?
1215. The Board, thereafter, would have made or not made a recommendation in good faith to the shareholders. In so doing, it would have taken into consideration a number of critical factors. On the matter of the price, the consideration would have been: that during the six-month period preceding the public announcement of the firm intention of the Offeror, the share price traded at an average discount of \*\*\*% to Net Asset Value; that the Offer indeed gives the shareholders an opportunity to sell their shares at an appreciable \*\*\*% premium, calculated as per a set formula. It would then have decided, the status of the Offeror being right, whether to recommend or not in clear terms: whether it would be beneficial to those shareholders who wish to realise their investment or not.
1216. If the Board would have had any qualms, it would have appointed an independent adviser to carry out the valuation as at a certain date or a legal consultant to do the CDD or both.
1217. In such a case, the Adviser may report that the Offer is not fair and reasonable so that the Board is of the opinion that shareholders should not sell their shares as per the Offer made to them as per the method adopted for the valuation of the shares, as to whether it was a market approach or Net Asset Valuation approach.

1218. Fairness is the rule right across the board. Thus, even minority shareholders are able to exercise their rights fully. It would be good to note that even in Kenya the authorities have been vigilant on the need of company boards to recognise, respect and protect the rights of shareholders. As per the CMA guidelines:

*“There should be shareholder participation in major decisions. The board should, therefore, provide the shareholders with information on matters that include, but are not limited to, major disposal of the Company’s assets, restructuring, takeovers, mergers, acquisitions or reorganisation.”*

1219. The prime consideration is that shareholder rights and investor protection are key factors to consider when determining the ability of companies to raise the capital they need to grow, innovate, diversify and compete effectively. If the legal and governance framework does not provide such protection, investors may be reluctant to invest unless they become the controlling shareholders. It is critical that the governance framework ensures the equitable treatment of all shareholders, including the minority.

1220. NPFL in the matter was never given the proper papers, let alone the statutory papers, to sell to the Kenyans. The MOU had been signed by the CEO who was candid enough to admit to us that it took him some time to digest the papers he had been made to sign. There is no indication that he had signed the SPA with the authority of the Board. Much later after the SPA had been signed on 10 June 2016, the Board was convened to give a veneer of legitimacy to the irregularities committed in the finalization of the sale. The outcome was more irregularities. When the Board asked some simple questions, they were taken to the office of BDO where Mr Chung made a presentation of some sort, without clear answers.

1221. It is worthy of note that the Best Practices above are universal. Even amongst the East African Community, member states are agreed on the rules, including shareholders’ powers to reject hostile acquisitions.

1222. If Mr Peter Munga was the Offeror, NPFL was the shareholder, become so by the concomitant transfer. The MOU dated 12 March 2016 should have come to the Board first before the SPA was signed on 10 June 2016 for a green light. But the ex-Minister was announcing on 5 May 2016 to the NA that it was *“now a done deal.”* One of the obvious questions which the Board would have raised to apprise the shareholders is the outcome of its Buyer Due Diligence and Mr Peter Munga’s capacity to pay at all the proper price. Documents examined show that he was at the beginning of the transaction, a Director of Britam and minority shareholder but at the FSC he was referred to by the SA as a “major shareholder willing to buy the shares.”

### **No proper valuation before sale?**

1223. As far as Mauritians are concerned, there never was any proper valuation. Britam shares represented more than a 20% holding with some privileges available to the shareholders. This gave the shareholders significant influence over the actions of Britam, including senior appointments. By the acts and doings of the ex-Minister and his team in using the transfer-cum-sale device, NPFL and/or government as sole shareholder was denied the exercise of their shareholders’ functions and as a consequence, their shareholder’s rights.

### **No proper needs assessment before sale on 12 March 2016**

1224. It is known that when it comes to sale of assets and the prices are low on the Stock Exchange, the buyer will want to buy them at all costs. It is an investor's golden opportunity to grab. That is conventional wisdom. It is equally conventional wisdom that it is the seller's strategy to shy away. It is a cat and mouse game between the buyer who chases the seller and the seller who resists the sale, while he is checking his sounding board for better times. The more precious the assets, the greater his resistance to slip into the trap. That is first. The facts show that when the Kenyans travelled all the way to Mauritius to buy the shares at a price showing at the Stock Exchange at that time, the Mauritian team gave in with the principle of accountability cast to the wind. There is no record to show that they questioned the arguments and figures advanced by the Kenyans.

### **No proper comparison before sale**

1225. Another conventional wisdom is that you need not sell your prime assets when there is no dire necessity to sell them. What was the dire necessity of selling on the 12 March 2016 for a commitment taken for 30 June 2016? The facts show that the Kenyans came up instilling panic in the Mauritians with the narrative that the share prices had lately been falling. The Mauritian sellers bought that narrative. There was no evidence that the Mauritians proceeded upon proper inquiry to check whether the Kenyans story that the shares were falling drastically held water. It should be noted that when the MMI Holdings had offered the sum of MUR4.3bn in October 2015, the share price may not have been the same in mid-March 2016 but was comparable in 10 June 2016. If the IFC were later to buy the shares at the same price as the Kenyans had bought them, the IFC must have considered that it was a good deal for the buyer.

1226. When Ms Gladys Karuri, on behalf of the Kenyans, sent an email on 11 March 2016 at 12.12hrs to Mr Afsar Ebrahim giving the number of reasons why the Kenyans were reneging on their previous offer of MUR4.3bn and in its place offering MUR2.65bn(sic), there is very little to show that the Mauritian team challenged either the reasons which the Kenyans gave or their strategy to open discussion on the price previously agreed upon. We have it from Mr Afsar Ebrahim that he caused the clause of 51% premium to be inserted. This premium itself is so illusory that it provoked a comment by the FS to the effect that *"it would be nonsense to think that the price would be increased by 51%,"* within a period of 113 days. He added that *"It's a no go situation. It was only good on paper to get satisfaction on paper but it would never happen."*

### **NON-DISCLOSURE AGREEMENT**

1227. It would be important to note that the MOU contained a confidentiality clause of the widest scope. Even if with the consent of parties some information could have been disclosed. That clause was not used by the Mauritian team to disclose the details to FSC and Cabinet, as it should have done.

1228. What does the Commission conclude on the matter, objectively, independently, reasonably reached, based on solid facts?

### **A rush in where angels fear to tread ...**

1229. The Commission concludes that it was sold at that figure for reasons best known to ex-Minister Bhadain and his team. No independent assessment had been made of the situation. The FSC had been kept in the dark on the matter. Even when, after the price has been agreed upon, BDO reported equivocally to the FSC Board *"the deal has not yet been*

*finalised. A major shareholder has made an offer which has been accepted. The major shareholder has been requested to pay by next week Rs 1.5 bn in an escrow account opened at the Mauritius Commercial Bank Ltd.”* An MOU had been signed with the price already agreed and the details were concealed. Cabinet’s views had not been solicited. The need might well not have arisen if the sale had been struck at MUR4.3bn. Nor if MUR4.3bn had increased to a higher figure. But when it had fallen as low as MUR2.4bn, conventional wisdom required that both FSC and Cabinet should have been apprised. As the FS rightly pointed out, if the Minister did not go to Cabinet in the matter, he did so at his own risk.

### Artificial Pressure to Sell

1230. Was there pressure on government to sell it at that time? BDO wanted us to believe that they had to gather funds for the payment of the tranche payable by 30 June 2016. The money for the payment of the second tranche payable by 30 June 2015 had already been provided for by the BOM with a Letter of Comfort from the FS. Mr Oosman rightly stated that whatever time pressure had occurred with the public announcement to pay policyholders by 30 June 2016 had been diffused. In his own words *“the pressure was lifted with the loan of Bank of Mauritius.”*<sup>121</sup> We were still in mid-March when the parties entered into an MOU. There was no dire need to fix the sale price, more particularly when the share price was so low. The date of 30 June was still 2½ months away and there were other assets due to be sold locally. What was the need to rush? It was struck on 12 March 2016 while the rest of the country was celebrating Independence Day. If the Kenyan party had a flight to catch, that would have been an additional leverage on the Mauritian side, aside the fact that Mauritians were playing home. But it did not occur to the Mauritians that they could use the time constraint of the departure date of the Kenyans to their advantage. The Mauritians bent backwards to please the Kenyan counterpart.

1231. There is a third reason for our conclusion that the sale was done unconventionally. The meeting was supposed to take place in Nairobi. The Kenyans arrived in Mauritius with the intention of negotiating the term of payment, which was the only item on the agenda left after the Nairobi agreement. They had come with a small team but fully equipped with the legal papers. Who were the negotiators for the Mauritians? Who sat round the negotiating table to negotiate? With what authority? How skilled were they? What happened at the meeting of 11 March 2016 before the paper was sent to Me Choomka? There are no Minutes. Why was Cabinet kept in the dark? Why on Independence Day? How could they assume that they had no account to give to anyone in the country despite the fact that the sale was done at a price having fallen from MUR4.3bn to MUR2.4bn? It would have occurred to any lay person to seek authority for same. The drop was too sharp, especially when the preoccupation of Government was to maximise on the realisation of assets to reimburse the investors.

1232. To situate the enormity of what happened, it would be good to recall the following. On 18 November 2015, the Kenyans had agreed to match the price of MMI Holdings at MUR4.3bn except that they needed more flexible payment terms. Mr Lutchmeeparsad had brought the good tidings confirmed by Mr Khapre in the notes of meeting which followed the meeting. Letters had been written to Government for proceeding with the transaction. But then when Minister Lutchmeenaraidoo ceased to be the Minister concerned, the matter was entrusted to ex-Minister Bhadain. Mr Peter Munga paid two visits to him from November 2015 to March 2016 and everything changed. What happened during those meetings is anybody’s guess? We have written evidence of the meetings where substantial matters were discussed, including the line to be followed and the people who would be

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<sup>121</sup> Page 66 of the deposition of Mr Oosman



involved. But there is no record of what took place between early February and mid March 2016. All was done by phone following which the Kenyans landed in Mauritius, and after four days signed an MOU for MUR2.556bn. FSC was not informed as it should have been. In fact, as far as the FSC is concerned, there was not only absence of reporting but also misreporting and underreporting. There is total black-out over how the final figure was arrived at.

### **The Myth Regarding the Falling Share Price at NES**

1233. It should be noted that there is a myth about the falling share price which was bought by the Mauritian side. True it is that the prices had been falling since the appointment of the Conservators. However, the share prices at the time Barclays, MMI Holdings and the Kenyans had offered MUR4.3bn and the time the SPA was signed, curiously at arm's length, were comparable. All in all, there was no openness and transparency in the procedure; no independence and impartiality in the evaluation of assets; no involvement of investment advisers, no legal advisers; and no skilled negotiators; and Cabinet was not in the picture.

1234. Negotiation is a specialist skill that is acquired by training and perfected by practice. The Kenyans had faced two captains in the ship: the ex-Minister of Finance and the ex-Minister of Financial Services. With one they had decided that they would pay MUR4.3bn but they were asking for better terms which would be negotiated. With the other, they had agreed that they would come to Mauritius to continue engaging BDO & Co. *"along the lines agreed during our meeting."* After the ex-Minister Lutchmeenaraidoo exited the scene, ex-Minister Bhadain was left the sole captain of the ship. If they really went by the price at the indicated stock market price, they did not challenge the arguments of the Kenyans in their short stay in Mauritius to the effect that MMI Holdings which they had ousted as a bidder through the indulgence of the Mauritian Government had agreed to pay MUR4.3bn. There was also no time pressure that they should have clinched the deal on 12 March 2016 (a public holiday in Mauritius) for money that was needed until the third week of June.

1235. Even a novice knows that when share prices have fallen on the Stock Exchange, one does not create a pressure upon oneself to sell. Share prices can pick up sharply afterwards as seen in a number of stock markets around the world. The buyer for his part will create a pressure on the seller. It serves him. One had rather make an error on the safer side of studying the market behaviour and not giving in to panic and sell. There was in this case a sale with rudimentary knowledge ignored. Whether it was done intentionally or otherwise, it is hard to say. In this case, with the sale of shares, prudence required that there be an assessment as to the time factor, a resort to independent advice, involvement of Cabinet for its views, retention of the services of an investment adviser or a negotiator because there were so many variables involved. All in all, the least that can be stated is that the facts and circumstances look suspicious.

1236. As to whether, it was in the best interest of the seller, the Commission takes the view, from the facts and circumstances, that by law, the then Minister of Financial Services, Good Governance and Institutional Reforms was accountable for underselling the shares and the price paid was not in the best interest of the seller. In answer to the question, therefore, *"whether the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller,"*

**OUR ANSWER IS -**

- a. **There was no formal method used for the disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya).**
- b. **It was by one-to-one discussion taking place behind closed doors where Cabinet, the FSC and NPFL Board were all kept in the dark.**
- c. **Lack of method was coupled with lack of record, lack of science and lack of professionalism of those who were involved.**
- d. **The result of that lack of method, lack of record, lack of science and lack of professionalism has been that it has caused tangible prejudice to the NPFL which as per the law should have been the seller.**
- e. **The NPFL as the shareholder was debarred from exercising any key ownership function in the exercise of its ownership rights in the sale of the shares. So was the government as the sole shareholder.**
- f. **Shareholders, if prejudiced in their rights, have a cause of action against the author/s.**

## CHAPTER 15

### TOR (II) – WHAT LED TO THE UNDERSELLING

*A civilization is not destroyed by barbarian invasion from without, but it is destroyed by barbarian multiplication within - Will Durant*

1237. Paragraph (ii) of the TOR requires us to enquire into -

*the circumstances in which the Special Administrators, Messrs Yacoob Ramtoolah(sic) and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of Rs 4.3 Billion offered by a potential buyer, namely, MMI Holdings Ltd (South Africa) and, instead proceeded to sell the said shares to the existing shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only Rs 2.4 Billion.*

1238. In the preceding Chapter, we dealt with the issue of the lack of method and the lack of marketing strategy on the part of the small Mauritian team when the assets were undersold. In the present chapter, the Commission will look at the circumstances which led to it.

1239. First thing first. Mr Georges Chung was not appointed SA. Mr Yacoob Ramtoola was. The circumstances of the appointment of Mr Ramtoola raise a number of ethical concerns. However, our focus on para (ii) of the Terms of Reference is to examine the circumstances whereby a sale agreed with MMI Holdings at MUR4.3bn was sold at MUR2.4bn to the Kenyan buyer barely some 4 months later. The ethical issue regarding BDO and Mr Yacoob Ramtoola have been dealt with at part C of Chapter 9.

1240. What were the circumstances? To set an event in point of time near the sale would be missing the larger picture. The circumstances which led to that may be traced to well before the hours, days, weeks and months that led to the sale.

1241. What happens when, at the start of one's journey, one takes the wrong road at the very first roundabout? The roundabout was the unique post-electoral situation, barely months after the General Elections of December 2014. On 02 April 2015, the licence of BBCL had been revoked. On 03 April 2015, the unintended consequence of that decision had to be dealt with: its impact on the non-banking sector, i.e. the insurance sector. A decision needed to be taken with respect to a major related entity: the BAI Co (Mtius) Ltd, the jewel in the crown of the BAI Group as described by ex-Minister Bhadain. For the first time since 2005, we have a dedicated Minister responsible for financial services. He was also assigned the responsibility of good governance as well as institutional reforms in his portfolio. This happened to be the perfect chemistry for this sector to move into higher gears. The FSC directly responsible for regulating the insurance sector, amongst others, had been under criticism for not having taken more robust and timely action earlier against BAI. FSC previously under MOFED now fell under MFSGG&IR.

1242. The Minister who was entrusted this portfolio was Hon. Bhadain, as he then was, a barrister of some standing with specialization in forensic accounting with some impressively relevant *curriculum vitae*. A perfect fit, one would have thought. He was first elected in December 2014 and entrusted with such an important Ministerial portfolio as Financial Services, Good Governance and Institutional Reforms. To get a Ministerial

position soon after one's first election happens only to a few fortunate ones, one would argue. Except that when he took his Ministerial chair, he had everything that goes into it except the little desk experience essential for running public affairs. Generally speaking, many zealous enthusiasts enter public affairs with immense experience in running their office, their profession or their business but little or next to no experience how public affairs are conducted, hedged by the need to keep records, seek levels of approvals and abide by principle of accountability and transparency.

1243. It cannot be gainsaid that the BAI matter was a crisis of an exceptional and unprecedented kind. Basically, our new Minister, albeit his various strengths elsewhere was just learning to swim on the shores when he found himself in charge of a rescue mission on the high seas. What with his enthusiasm, acumen and drive, wisdom in public life does not descend upon a new incumbent to a Ministerial position overnight?

1244. Also, when he chose a couple of professionals as his advisers, each undoubtedly proficient in his own field, showed no practical knowledge of how decisions are taken in public affairs. Landlubber boys embarking on a rescue mission on the high seas without buoys. The SA, for his part, was basically a master reduced to servant by an intervening amended law.

1245. What was that law? Why was an amendment needed? Government had in its hands a hot iron ball. It had publicly declared that it would pay the SCBG policy-holders 70% of their investment by certain dates. They hoped that within those dates they would be able to realise the assets which were in the hands of the then Conservators. Discussion was held for the amendment of the law with Benoit Chambers for the introduction of a DOCA system in our laws relating to insolvency. The latter proposed and submitted a draft after a number of exchanges between officials.

1246. Government had to ensure in public interest that policy-holders recouped a fair share of their investment. This is a legitimate public interest. However, when the new law was enacted: i.e. Section 110A and Section 110B of the Insurance (Amendment) Act, it was anything but what Benoit Chambers had drafted. Where the draft amendment emanated from has remained a mystery well kept by the ex-Minister and his team. No one amongst them is prepared to claim authorship. That does not alter the fact that it is the ex-Minister who apprised Cabinet of its intended introduction, of which the Cabinet took note. His responsibility, therefore, may not be gainsaid.

1247. But there is more to the amended law than meets the eye. It is with grave concern that the Commission found that, on such a matter which goes to the very root of our democratic system based on the rule of law, ex-Minister Bhadain was misleading the Commission to the same extent as he had been misleading the public, including his colleague parliamentarians. He stated that Cabinet had *“agreed that this legislation had to be passed as a matter of priority.”* The Commission, intrigued by the number of the flaws, called for the Minutes of Cabinet regarding this issue. The discovery was shocking.

1248. In fact, Cabinet had never “agreed” to this legislation. Still less, had it agreed to its being passed as a matter of priority. In fact, the Minutes bear witness to the fact that Cabinet had simply taken note of the introduction of the Insurance (Amendment) Bill. Cabinet may not have been asked to give its agreement to same but only to take note. It should be noted that when Cabinet gives its imprimatur to the introduction of a Bill, it says so in so many words and the term used is “Cabinet has agreed...” in this case there is no agreement. Yet, the ex-Minister made sure that he told us that Cabinet had agreed.

1249. It is the view of the Commission that this was the beginning of all the trouble. Had the Minister followed the draft of Benoit Chambers, properly involved the Public Officers, obtained SLO vetting and unequivocal approval of Cabinet, he would have taken the correct turning at this roundabout, the outcome may well have been different.
1250. It is counsel of prudence that when one has missed the road, one does not persist pursuing along the wrong road. Because one never knows where one will end. The ex-Minister sought a Certificate of Urgency to introduce the ill-conceived Bill in Parliament. As little as he gave the Government time for reflection, he gave the Opposition little time for consideration. Cabinet had “noted” the existence of the Bill on Friday 24 April 2015. The Bill was passed on Tuesday 28 April 2015 and received presidential assent on 29 April 2015. Such short-circuiting is, like all short-circuits, dangerous to everyone including the authors. If our system of government there is a Cabinet to decide, a set procedure for Cabinet decision, a cursus for introduction of Bills in Parliament, stages of First Reading, Second Reading, Third Reading, an office of Leader of the Opposition and a Parliament for debates, there is a democratic rationale in it. Apart from the fact that in this particular case, a number of red lights had been shot, the voices of the Leader of Opposition and others had been ridiculed. The suggestion of the then Leader of the Opposition had not been headed that there had been no consultation, no opportunity for input from the sector and any amendment should be done with *‘à tête reposée’*.
1251. What was bad about the law? Drafting issues and substantial issues. Matters of distribution of realized assets of ailing businesses should have been in the Insolvency Act. It had no place to be in the Insurance Act, even if the issues arose in the insurance sector. The law set up a creature called SA which for all intents and purposes - we have commented above - was neither fish nor fowl. If the first appointed SA exited the scene, one through abusive revocation and the other through resignation, it was because the new law had brought confusion in the professional practice of insolvency. The primary purpose of law is to bring clarity. Where a law brings confusion, it serves power rather than people. The law also entered an elected Executive – a Minister - into the affairs of an independent State regulator such as the FSC. It overlooked the fact that the institution was a Service Commission. Giving a space to an elected Executive in such a body is to introduce the virus of politics. FSC, after all, regulated a vital sector as the financial services very much under the scrutiny of the international community including FATF, European Community and ESAAMLG.
1252. One may argue that the space given to the Minister was limited in that he could only exercise it in circumstances where the liabilities of an insurance business exceeded its assets by MUR1bn and it was likely to be a threat to the stability and soundness of the financial system of Mauritius. But the fact remains that an elected Representative given one-inch of legal space in the legal framework of an independent state regulator would take miles if he was ambitious and overbearing. What is more, every abuse will be lauded under the name of legality. When elected representative give in to the temptation of entering into the affairs of independent bodies and professions, they do harm to the country, the institutions and themselves.
1253. There was another circumstance which did not do anyone any good. Policy-holders are private investors. When their investment fails by law, they are taken fully on board to decide on their plight. They are put into the complete picture of the state of the financial affairs and their consent is needed by a professional handling the situation as to what should be the outcome. It is their agreement that is needed to decide what happens to their failed investments. It is not in order for the State to decide in an open market economy what the

investors will gain from their failed investment. It is they who decide it, if under the oversight of a professional in insolvency practice or an independent institution. In this particular case, their consent to decide how their investment should be dealt with in the aftermath of the BAI debacle was taken away from them. True it is that there was a public interest involved in ensuring that the policy-holders get some satisfaction for their failed investment. But that same thing could have been achieved through the oversight of an independent body such as FSC and but not through the instrumentality of the Minister. The heresy in the law had been raised in Parliament by the Opposition but not heeded. In the words of Hon Bérenger, there were serious issues “*both in the legislation and in giving the FSC the means to perform its duties under the law as a really independent regulator*”.

1254. Ex-Minister Bhadain had stated in Parliament that the law would not “*take effect retrospectively*.” The very same conservators appointed under the previous law were made SA under the new law. They were at pains to know where their loyalty lay: to their professional practice as they knew it or to the Minister under the amended law.

1255. A chemistry of circumstances was gradually forming for the concentration of executive power at the level of the Ministry: basically, a pocket of autocracy in a democracy. It was a climate of a Minister riding rough-shod on institutions, dismissing or engaging professionals according to whether they were toeing the line or not, marginalizing public officers and deriding fellow parliamentarians who were opposed to his views.

1256. The next circumstance was his move for remote controlling FSC. At the same sitting where Cabinet was apprised of the matter of amendment to the Insurance Act, an approval we see for the appointment of his political Adviser, Mr Deerpalsingh, at no less a position than the Vice Chairperson of the FSC.

1257. Entry by legal amendment of an elected Executive into the affairs of an Independent Regulator such as FSC was bad enough. Having now his political Adviser at FSC Board as the Vice Chairperson of the FSC added factual control to his legal power. Fortunately, this encroachment would soon come to broad day-light and Mr Deerpalsingh would cease to be the Vice-Chairperson. Not for that reason, he would cut off with FSC. He would be appointed Consultant to FSC. Whether a change in appellation changed the factual control in substance is debatable. We have evidence that all continued same because he became the Consultant to FSC.

1258. Armed with this legal power over FSC, the SA and BDO and vicarious control over the FSC Board, the ex-Minister had achieved full control over the process of sale for the purpose. Mr Ramtoola could only be likened as a castrated SA who had no choice but to follow power where power lay when it came to dealing with the Britam assets: a professional caught as they say “*between the devil and the deep blue sea*.” He gave us the impression he was astute enough to escape both by putting Mr Ebrahim forward to do what he had been appointed to do, with minimal intervention on his part.

1259. Whether ex-Minister Bhadain himself created all the circumstances is difficult to say. Some came by him unasked. Take for example the exit of ex-Minister Lutchmeenaraidoo from the Britam transaction. We know for a fact that there were two captains in the ship at the beginning, Ex-Minister Bhadain was the Minister of Financial Services, Good Governance and Institutional Reforms with the subject of insurance falling under his portfolio and ex-Minister Lutchmeenaraidoo, the Minister of Finance, the No. 5 in Government.

1260. That Ministers fight for turf is not an unknown phenomenon in Cabinet Government. In this case, even if it was a matter having to do with insurance – the non banking sector – which fell under the portfolio of the ex-Minister Bhadain, the Ministry of Finance of Mauritius had stolen some marches over the MFSGG&IR. It was the MOFED which had dealt with the Cabinet Secretary of Kenya who had lobbied for selling the shares to the Kenyan shareholders. It was at the instance of the Minister of Finance that a meeting had taken place in Nairobi on 18 November 2015. It was the PS of ex-Minister Lutchmeenaraidoo who had told that the Kenyans had agreed to match the price of MMI Holdings. It was he who had brought back the news that the Kenyans had agreed for the amount of MUR4.3bn. Soon after the arrival of the PS and his report of the meeting, it was the MOFED which had asked the PS to request the Kenyans to do better and to send them a firm offer. Until January 2016, the MOFED gained some vital grounds on the turf of the MFSGG&IR.

1261. It was these arguments which ex-Minister Bhadain mustered before us to say that he had nothing to do with the Britam sale. It was all the doing of the Ministry of Finance. Ex-Minister Bhadain in the meantime was hardly playing low. He was on a parallel line with the FS as the common denominator of both ex-Ministers. Ex-Minister Lutchmeenaraidoo by a quirk of misfortune would find himself exiting the scene. Early January 2016, the parallel MOFED line would suddenly snap. On his return from mission in Washington in early January 2016, ex-Minister Lutchmeenaraidoo would end up in a sick bed in a private hospital. He would never come back to MOFED. His stint at the MOFED had ended. This novel situation put a new opportunity to the benefit of ex-Minister Bhadain who would thereby end up being the sole captain. We have it from late Sir Anerood Jugnauth, that responsibility for the sale of Britam shares has been entrusted to ex-Minister Bhadain.

## **CIRCUMSTANCES SURROUNDING THE SALE**

1262. We now come to circumstances nearer the sale.

1263. On 30 October 2015, we read a Minute from the flimsy file of the MFSGG&IR a note making reference to a document having been sent by one, Mrs Shaikmamode reportedly the then Public Relations Officer and Confidential Secretary of the Legal Chambers of ex-Minister Bhadain. Pursuant to that note, the APS deems it proper to write to the then Ag. PS, late Mr Nemchand, apprising him of the fact that FSC has recommended that the offer of MMI Holdings for MUR4.3bn which is higher than that offered by Barclays Bank which was MUR4.2bn be submitted for approval to the Minister. A note handwritten by the then Ag. PS is to the effect that the matter was discussed with the Minister to have his approval under Section 110B (1) of the Insurance (Amendment) Act 2015. The outcome was that FSC should be advised to proceed as decided by Cabinet and letter should be issued accordingly. In other words, the shares should be transferred to NPFL.

1264. As to what happened thereafter, we can only infer from the Minutes of FSC. As per the Minutes of the Board Meeting dated 12 November 2015, FSC is informed of the imminent arrival of the Chairperson of Britam Kenya. It is also informed that representatives of MMI Holdings will also arrive in the coming weekend. The Commission has not been able to lay hands on any record in respect to the meeting of MMI Holdings. On the other hand, it has been able to lay hands on a document which witnesses what took place with respect to the Chairperson of Britam Kenya, Mr Peter K. Munga. A meeting took place on Saturday 14 November 2015 in the office of ex-Minister Bhadain at the end of which an agreement had been reached. Mr Peter Munga was to follow “*the lines agreed during our meeting,*”

engaging “*BDO & Co., the Special Administrators.*” It is this meeting that changed the history of this transaction.

1265. Suspicion was aroused when BDO played down this important meeting stating that it was a mere courtesy call on the Minister, of less than 5 minutes. By courtesy, a courtesy call upon a Minister cannot be just for five minutes. It was a Saturday. The ex-Minister has breathed not a word of it. No public officer was present. Mr Peter Munga had been here for a couple of days.
1266. It is hard for one to countenance a scenario at this meeting that either the Minister or BDO, all present at the meeting would not mention the fact that MMI Holdings had made an offer for MUR4.3bn, which has been accepted. The unlikeliness of that figure not being mentioned when the Kenyans broached the topic of the sale of Britam shares to Kenyans instead of MMI Holdings is very remote indeed, by any standard. Four days later, Mr Peter Munga would chair a meeting prompted by MOFED, mandated by Mr Ramtoola. Mr Lutchmeeparsad the then PS of MOFED attended a meeting comprising representatives of BDO, Kenyan officials and Britam shareholders at the Britam Centre in the evening of 18 November 2015. Oral as well as documentary evidence show that the mission of Mr Lutchmeeparsad was to make the Kenyans to match the price of MMI Holdings or do better. However, Mr Lutchmeeparsad came back with the news that the Kenyans had agreed to pay the same evaluation as MMI Holdings.
1267. We have seen that the sale of the Britam shares was being handled by two Ministries: MOFED and MFSGG&IR, headed by ex-Minister Lutchmeenaraidoo and ex-Minister Bhadain, respectively up to around early February 2016.
1268. The last correspondence the Kenyans had with the MOFED was when, following the offer to match the MMI Holdings offer of MUR4.3bn, the FS requested Mr Lutchmeeparsad to write to the Kenyans to tell them to send a firm offer and do better. After that ex-Minister Lutchmeenaraidoo exited the scene.
1269. How the matter progressed, thereafter, we have it from Mr Ramtoola. The communication was not by mail but by phone between the Mauritians and the Kenyans. What they talked about over the phone is not known. Only they who talked would know. Dealing with a substantive matter over the phone in public administration evokes its own suspicions and would be regarded in this age of transparency and accountability as an attempt to leave no documentary trail for a covert transaction. It is a mark of bad governance rather than good governance.
1270. The Kenyans had invited FS to Nairobi in the week of 15 February 2016 to finalise discussions. That did not take place. They landed in Mauritius instead - between 8 and 12 of March 2016. They did not follow up on the letter of Mr Lutchmeeparsad of the MOFED which urged them to do better than the MUR4.3bn which MMI Holdings had agreed to pay and MOFED has accepted. But in line with what had been agreed on 14 November 2015 they met ex-Minister Bhadain’s team. At the end of the 4 days, the deal for which on 18 November 2015 the Kenyans had offered to pay MUR4.3bn was struck at MUR2.4bn on 12 March 2016. An MOU was signed on the Public Holiday, the 48<sup>th</sup> Independence Day and the 24<sup>th</sup> Republic Day of Mauritius, with all the details of the final price and the payment details. An Escrow Agreement for payment by instalments followed. Well before the SPA was signed, part payment had already been done. On 9 May 2016, Mr Munga had written to SA that the money had already been transferred to the Escrow Account.



1271. What happened during the four days is a mystery since they met confidentially and entered a clause in the MOU that they would keep the agreement confidential. Why they should do that is anybody's guess, all the more so when the transaction was a public transaction. The actual buyer or buyers were still not known but that did not matter to them. The Kenyan business tycoon Mr Peter Munga had come with his business strategic partner. The Mauritian party, on the other hand, was without negotiator, without transaction advisor, without legal consultant, a perfect symphony to enable the Kenyans to strike a good deal with the Mauritians.
1272. The small Kenyan team, were buyers but they had come with draft documents to be submitted to the Mauritian counterparts. Would they have come so prepared without having been so invited? They stayed here for five days between 8 March to 12 March 2016. They opened up discussion on the price, despite the fact that the price had been agreed upon on 18 November 2015. Negotiation should have been engaged only on the "*longer payment period.*" That was not something that was unknown to the Mauritian team. Mr Ramtoola had been involved in setting up of the 18 November meeting through Mr Khapre of BDO (Kenya) who had prepared the Notes of Meeting where it was clearly written "*at the same valuation as MMI has offered, but they wanted a longer payment period.*" The Kenyans were to concede in the March discussion that they had offered to match the price of MMI on 18 November 2015. But they succeeded in opening discussion on the matter of price and equally successfully contrive the argument that that price had been arrived at by reference to the value of the shares on the stock market in that even if Britam had nothing to do with the banking sector, its shares had suffered a decline from 26Ksh to 11Ksh with the appointment of the Conservators. The argument, albeit its speciousness, went unchallenged. That the shares had suffered a decline was an attractive argument but specious. That could not justify a sale at MUR2.4bn.
1273. MUR4.3bn offered at Stock Exchange price of 15Ksh in November 2015 sold at MUR2.4bn on 12 March 2016 at the share price of 11.90Ksh. *Le compte n'est pas bon.* Could this elementary mathematics have escaped the eyes of the Mauritian team? The following facts may be noted with respect to the share price between the date when MUR4.3bn was offered by MMI Holdings and 12 March 2016 when it was sold to the Kenyans. The share price in September/October was 17/15Kshs and in mid-March 11.90Kshs.

## ONE TO ONE DISCUSSION

1274. In September 2015, Barclays Mauritius had written to the FS to make an offer for Barclays to have an exclusive mandate to coordinate the sale process. In the morning of 14 October 2015, FSC at its 231<sup>st</sup> Board meeting, decided that the offer of Barclays be kept in abeyance until 31 December 2015 on the expectation of a better offer. On the same day, MMI Holdings made an offer for the purchase of Britam shares at MUR4.3bn which was considered at the 232<sup>nd</sup> Board Meeting of FSC held on 15 October 2015 and it was decided to recommend the offer of MMI Holdings to the Minister of Financial Services, Good Governance & Institutional Reforms for approval, supposedly under Section 110B (1) of the Insurance (Amendment) Act 2015. The Minister of Financial Services, Good Governance and Institutional Reforms rightly referred the matter to FSC to go according to Cabinet Decision, i.e., "*the transfer of the assets of BAI Group of Companies to the NPFL Ltd and the National Insurance Co Ltd with a view to safeguarding investments made by policyholders in the insurance company*". One is simply intrigued by the fact that, when the sale was reported to have been made to Plum LLP, FSC did not question as to why the shares had not been transferred to NPFL but, in its place, sold. One is further intrigued by the fact that when BDO reported that a sum of MUR1.5bn would be paid into an Escrow

Account, the critical information of what was the price at which the shares were sold was withheld. Nor did anyone at the Board ask that obvious question.

1275. Ex-Minister Bhadain made bold statement as to say that when the Minister of Finance struck the deal at MUR2.4bn, there was no negotiation. That must have been a Freudian slip because it is clear that when he and his team struck the deal at that price, there was no negotiation. *Les feux mal éteints n'en éclatent que mieux.*

1276. Had there been negotiations, the strength of the Mauritian situation would have emerged. The price which had been offered on 18 November 2015 was not to be on the discussion table. Only the longer payment terms would be. Otherwise, Mauritius had so many options beside that of MMI Holdings.

1277. These were after all assets in billions under the responsibility of a Minister. The sale was done with a Clause in the MOU that the prices would not be disclosed and it was not even disclosed to FSC. There was no public officer, no negotiator, no independent consultant, no legal adviser and no Cabinet decision in the matter. The height of the audacity is mind-boggling.

1278. In the view of the Commission, no reasonable seller would have done what ex-Minister Bhadain and his team did. On the assumption that the Mauritian team was not complicit with or complacent to the Kenyans, they would have advised themselves that faced with the Kenyans reneging on their original offer of MUR4.3bn, a novel situation had arisen. And that this novel demanded further reflection, independent advice or a second opinion.

1279. Such an offer would have provoked the Mauritian team, to a reality check. Do we sell at all? Would not the share price stabilize? What was the cause of the falling share price? Had not Britam declared dividends earlier? Do we have to sell now? Is there “*feu en la demeure?*” that we have to sell now? We were in March. We needed the money at the end of June. Not even at the end of June because funds for repayment had been found elsewhere. This was a huge sum. It was no longer private property. Government was custodian of the assets? The obvious questions would have arisen: Do we apprise Cabinet? Do we consider the other options than selling? Do we apprise FSC? Do we seek a Transaction Advisor, even at this stage? Do we probe what caused the fall in prices? Are we not answerable to the public? Should there not be complete transparency in this? Shall we not be held to be accountable both as regards the manner and the outcome? Do we need to check whether the prices have really fallen so badly? Had they checked, they would have seen that the fall was for no more than 3Ksh per share, 15Ksh from November 2015 to 11.90 Kshs to March 2016. The prices were publicly available because we were dealing with listed companies. If the rate of fall from 15Ksh in November 2015 to 11.90Ksh on 12 March 2016 was 20.66% the fall from MUR4.3bn to MUR2.4bn was 44.2%.

1280. The sheer plummet in price would have sent a shock wave in the Mauritian team in a normal case. After all, the price on the stock market is only one of the many methods of evaluating shares for conclusion of transactions. We have no evidence that ex-Minister Bhadain and his team ever pondered on the myriad of questions provoked. It is a mystery.

## OTHER RELATED CIRCUMSTANCES

1281. The identity of the buyer/s was not yet known or disclosed. Mr Peter Munga was on the front-line, the principal but all through posing as the agent of a “pool of investors” who did not exist. No Client Due Diligence had been done. Barclays was known. MMI Holdings was known. IFC was known. They stand tall in the open market. But “a pool of investor”

represented by Peter Munga? How could no one spot this non-legal entity in a legal document? Kenya had placed such a flawed document before the Mauritian team and the Mauritian team had glossed over it as though it was normal. One Attorney went as far as saying that this is current practice. Two counsels disagreed with him. Finally, it was found out that the one who bought the shares was Mr Peter Munga himself through Plum LLP which came in existence on the same day of the sale: 10 June 2016.

1282. The deal was struck in an MOU instead of a formal agreement to sell. Ex-Minister Bhadain and his team had proceeded to sell it with an artificial as well as untimely pressure - on 12 March 2016, a public holiday and Independence Day - a sale that could have waited a couple of months more.

1283. The agreement as per exchange of emails was struck on 11 March 2016 between 12.12 and 16.51hrs. Asked about the extent of her engagement, Me Choomka, counsel of BDO, after checking her papers, confirmed by letter dated 28 November 2017, as follows: *“I maintain that on the day I drafted the MoU, the instructions were verbal and accompanied by a paper already containing the terms of the offer to be incorporated in the MoU.”*

1284. After stating that he had nothing to do with the sale of the Britam shares, ex-Minister Bhadain argued that the price at which they went was a good price. His argument was that IFC of the World Bank later bought the shares at the same price as Mauritius sold to the Kenyans. That, to us, is no argument. It is Mauritius that set the lower benchmark. Existing shareholders also had their stake diluted following the IFC transaction. That argument does not hold in favour of the defenders of the MUR2.4bn. IFC had at the beginning offered its assistance to act as the financial adviser for the sale. Mauritius had paid scant regard to same. If it came to buy it at the same price as Mauritius sold, they must have seen it to be a welcome business opportunity. It may well have bought it because it knew that Mauritius had sold it cheap and the shares had a great potential for increase in value. As it is, the role of the SA had been usurped by the Mauritian team which was responsible for the sale at that price and in such a manner.

## **AGAINST CABINET DECISION**

1285. The whole exercise was shielded from the public, the Cabinet and even FSC. Those who dealt with it knew that they had to transfer it to NPFL.

1286. The other disturbing factor in the sale is: did the team have the power and the authority to sell, in the first place? As per Section 110A and Section 110B of the Insurance (Amendment) Act 2015, the undertaking should have been transferred to an insurer approved by the Minister. It is the proceeds of sale which were transferred. Was not NPFL in the picture?

## **NPFL AS FACADE**

1287. In the whole matter, ex-Minister Bhadain and his team had taken NPFL as a mere rubber stamp. Those who had the brilliant idea to use a mechanism of concurrent transaction, i.e, in that the transfer would be done with the sale had overlooked the fact that they would need the approval of the Board for the sale. That struck them some 7 days after the SPA had been signed. For a sale which had been concluded on 11 March 2016, they set about seeking an approval from the Board, through the indulgence of the Chairperson. That was on 17 June 2016 and when the Board started asking legitimate questions, the team exerted

unfair and indecent pressure upon them to do so. Under the pressure, the Board just “took note”.

1288. So as to exonerate themselves, the ex-Minister and his team attempted to shift the blame to the Minister of Finance. It produced fake minutes thus rendering themselves liable to an investigation in criminal proceedings for forgery.

1289. In his zeal to do well, the ex-Minister found his way through Cabinet, Parliament, the SLO, colleagues, public officers and professionals. The paradox is that it was all happening at a Ministry the responsibility for good Governance. Section 110A and Section 110B of the Insurance (Amendment) Act 2015, is authoritarian law. It is a stark reminder that our democracy is not guaranteed against authoritarianism but an opportunity for it. It affords opportunity for zeal, dynamism and enthusiasm to be directed, applied and managed to the same extent as to be misdirected, misapplied and mismanaged. It even allows dynamic representatives of the people to gift themselves of powerful legal engine and run it without brakes.

1290. Parliament is expected under the Constitution to pass laws for the peace, order and good government of Mauritius. Neither peace, nor order nor good government may be achieved if people in positions of responsibility created pockets of autocracies in our democracy.

#### FOOLS RUSH IN .....

1291. One positive aspect of the Britam phenomenon is this: it all shows to what extent elected representatives when given Ministerial portfolio too soon, are inherent political and national risks. They end up making a mess of the public affairs and their own lives. Novices in politics can cause harm – not only to the country, but also to independent institutions and themselves. One is reminded of the E.M’s Foster’s “... *Where angels fear to tread.*” Except that in this case, they were all intelligent people. In fact, probably too intelligent for their own good. Either an up-front risk assessment should be carried out or they should be properly accompanied in the transition phase.

1292. In answer to the interrogation therefore as to what were “*the circumstances in which the Special Administrators, Messrs Yacoob Ramtoolah and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of Rs4.3 Billion offered by a potential buyer, namely, MMI Holdings Ltd (South Africa) and, instead proceeded to sell the said shares to the existing shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only Rs2.4 Billion,*” the answer is as hereunder.

1293. The facts dug out from the bottom point to the following set of circumstances which led to the sale at such a low figure. It all started very early: when as a newly elected Parliamentarian Mr Bhadain walked into a Ministerial portfolio with a newly set up Ministry without logistics and manpower, with an *excès de zèle*. Power had gone into the head. He set up a team to deliver with Political Advisers, marginalizing public officers. In handling the crisis of the SCBG policy-holders, he broke through the barriers of Cabinet and the NA to give himself the legal vehicle to enter into a domain which was not his business as a Minister. He encroached into the independence of institutions and of professionals. He confused public office for a private enterprise. SLO was used as a cosmetic.

1294. Nearer the time of the sale, one event will change the course of history regarding the price at which it went. That was his meeting with Mr Peter Munga, a Kenyan business tycoon. That was in his office, on a Saturday, without the benefit of the experience of public officers and in company of some condescending BDO professionals. Here the ex-Minister and Peter Munga would agree on a line to follow. And the people who would be involved: i.e. BDO, the ex-Minister's favoured firm. From then on, what was overt with MOFED became covert with MFSGG&IR. The small Kenyan team would be no match for the small Mauritian team, in all respects. Even if the price of MUR4.3bn had been obtained by MOFED, the Kenyans would win over the naïve Mauritian team. There would be no formal negotiation. In the natural order of events, the two parties should have met to discuss the only item left after the MUR4.3bn had been agreed upon: the longer time to pay. But the Mauritians would be indulgent enough to open discussion on even the price and settle it for MUR2.4bn. In the whole process, they overlooked the fact that they were dealing with assets of immense value and had acquired a public character. He entered political Advisers where public officers should have been. His office seems to have become its own draftsman, its own lawyer, its own financial adviser, its own legal adviser for the transaction. They chose to keep the transaction confidential, away from Cabinet scrutiny, FSC scrutiny and public scrutiny until the matter came into public knowledge through a PNQ.

1295. The number of legitimate questions which loom large over the matter are many.

1. If MUR2.4bn was right, why did ex-Minister Bhadain put up a defence that he was not involved in the face of preponderant evidence, including his public statements?
2. Whose interest was it to tamper with the Minutes of Proceedings of 18 November where Peter Munga had agreed to match the price of MMI? Whom did it serve to do that? What was that interest?
3. Why did they keep everyone concerned in the dark? Even Cabinet? Why was not FSC not given the price at which the MOU had been signed at the time the report was made that a first payment would be made to the Escrow Account? Why conceal such vital information at such a vital moment?
4. What was hidden behind the expression in the letter of Mr Peter Munga: namely, "*on the lines discussed during our meeting*" on 14 November 2015?
5. Why did they sell at all when all they had to do by law and by Cabinet decision was to transfer the shares to NPFL?
6. Why did BDO have to go to Nairobi in May 2016?
7. What did Mr Peter Munga come to do in Mauritius in February 2017, soon after the ex-Minister left office?
8. Why is it that there is no record of proceedings of a transaction of such a magnitude and such a character?

The above questions carry with them their own answers.

1296. Our answer may be summed up by one short sentence an attempt at autocratic governance in a democratic government under the name of good governance.

1297. To the question in para (ii) as to whether *the circumstances in which the Special Administrators, Messrs Yacoob Ramtoolah(sic) and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of Rs 4.3 Billion offered by a potential buyer, namely, MMI Holdings Ltd (South Africa) and, instead proceeded to sell the said shares to the existing*

*shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only Rs 2.4 Billion.*

**OUR ANSWER IS:**

- (a) the source of the problem was Section 110A & Section 110B of the Insurance (Amendment) Act 2015;**
- (b) on 14 November 2015, Mr Peter Munga has met ex-Minister Bhadain along with BDO and decided to proceed “along the line agreed at our meeting”;**
- (c) On 18 November 2015, Mr Peter Munga chaired a meeting in Nairobi and responded to MOFED that they were prepared to match the price of MMI (i.e. MUR4.3bn);**
- (d) MOFED exited the scene in early February 2016;**
- (e) from then on, matters were followed by phone calls following which Mr Peter Munga and his team landed in Mauritius on 8 March 2016 with a draft MOU incorporating in what must have been decided not in the meeting of 18 November 2015 with MOFED but in the meeting of 14 November 2015 with ex-Minister Bhadain and BDO;**
- (f) had the undertaking been transferred to NPFL as had been decided by Cabinet and known to the ex-Minister Bhadain, SA and BDO, the NPFL would have gone through the procedures of the sale and exercised its key ownership rights as per established procedure;**
- (g) the short-fall of MUR1.9bn was obviously:**
  - (i) the lack of proper methodology and evaluation;**
  - (ii) the absence of proper negotiation; and**
  - (iii) the non-existence of a transaction advisor and legal oversight.**

## CHAPTER 16

### TOR (III) - NEED OF A TRANSACTION ADVISOR?

*Know your client is a fundamental requirement of legal practice. Who is behind the scene? As the Mossack Fonseca legal firm practices show, had the legal department shown vigilance on the Know your Client, a host of corrupt practices at the highest level of the State in various countries would have been avoided -  
Bastian & Frederick Obermaier, The Panama Papers*

1298. **Paragraph** (iii) of the TOR requires us to enquire into -  
*whether there was any transaction advisor for the said sale and to inquire into the role of BDO in the said transaction and to inquire whether there was any conflict of interest in relation to BDO's involvement;*

1299. We shall split the subject-matter of Paragraph (iii) of the TOR into three parts:  
a. Whether or not there was a transaction advisor;  
b. What was the role of BDO in the matter; and  
c. Whether there was any conflict of interest in relation to DDO's involvement.

#### NO TRANSACTION ADVISOR

1300. With respect to (a) above as to whether or not there was a transaction advisor:

Our investigation reveals that even if the need had been felt from the very start that there should have been one, none was appointed. There is no evidence that BDO or anyone in the firm had acted as one in the sale of the shares. What they had done is to follow a line of action chartered in a meeting they had attended between ex-Minister Bhadain and Mr Peter Munga. It is that line of action which has greatly contributed to the underselling. The appointment of one would have gone a long way to shield both the BDO and the ex-Minister from any criticism of impropriety. Their actions would have been seen to be above board. Public officers and independent experts are institutional shields of Ministers. When they enter into a business where they have no right to be, they give up the shield and render themselves vulnerable to all types of attacks. The right person, at the right place using the right procedure leading to the right outcome is the mark of any exercise in public affairs. As it is, the deal was done more in the nature of a private commercial transaction characterized by a number of irregularities, procedural and substantive. The involvement of a Transaction Advisor would have ensured a step by step process of action in the disposal of the sale for the right price reached along principles of accountability and transparency. As it is, document trail had to be put together from pieces because the deal was done in the dark, without a legal adviser overseeing the transaction as a whole and without a skilled negotiator at the critical time of discussion for the sale.

1301. The need for a Transaction Advisor had been felt and spelled out openly in the very early stages of the process. A procedure was even engaged for the appointment. But nothing came out of it. The Commission asked this specific question to Mr Ramtoola. His answer was that there was no need for same as his firm was knowledgeable in the area and they are in this line of business themselves. It is to be noted that BDO's specialization relates much more to auditing and accountancy than brokering and procurement, even if they may be

trusted for having acquired enough practice over the years in the field. Basically an accounting and auditing firm, they are nothing compared to firms with solid international reputation to act as Transaction Advisors. And when BDO was being led by the nose by extraneous forces, it would have been a counsel of prudence for them to assess that threat to their independence and avoid it by the appointment of a Transaction Advisor.

1302. As early as 11 September 2015, Barclays Bank had written to Mr Manraj, then Chairman of FSC, offering its services to act as Transaction Advisor for the sale of the Britam shares.

1303. We also have it in evidence that, on their return from an official mission to South Africa, ex-Minister Bhadain, the Chairman and Vice Chairman of FSC, brought a proposal to the then SA, Mr Oosman, that Barclays (South Africa) had offered to act as broker for the sale of Britam shares. Thereupon, the SA proposed that there should be transparency in the matter inasmuch as Britam shares constituted a big asset. There was need to get proposal from other entities with a view to acting in the best interest of the seller. However, the discussion on the matter did not progress as the sale of Britam shares was put on the hold following funds received from the Central Bank to effect payment of the second tranche of the SCBG.

1304. Mr Ramtoola was in the picture when Barclays Bank had written to FS, Mr Manraj, offering its services to act as Transaction Advisor; that Barclays had valued the assets tentatively at USD120m, the whole enterprise at Kshs54bn and the Mauritian component at Kshs13bn.

1305. In his deposition, Mr Suhootoorah, Lead Analyst at MOFED, ex-Board Member of NPFL, stated that the matter was also broached in the urgent NPFL Board meetings which had been called. To him, the SA could not sell the shares of Britam to a third party as it had to go through NPFL. At the meeting, the Directors of NPFL had taken the view that, since the assets were to be transferred to NPFL, it became the responsibility of NPFL to sell them and that the way to do it would have been through a Transaction Advisor appointed for the purpose to ensure that NPFL obtained the right price through a proper procurement exercise. He continued that it was not clear how BDO had been appointed for the transaction. It was decided that there would be another meeting where BDO would give details as to how to proceed to select a buyer for the shares.

1306. Mr Virasami stated that the sale of Britam shares was not a case of liquidation as in receivership under the Insurance Act or the Insolvency Act. Following the amendment to the Insurance Act, a SA had been appointed. But whatever it was, the proper procedure would have been the appointment of an expert say a Transaction Advisor who would have invited offers for the purchase of the shares; and, made an assessment of the value of the shares before disposing them.

1307. There was more to the transaction as Barclays had pointed out than mere expertise. The disposal required openness, considering the amount involved and the nature of the transaction. It is the view of the Commission that the presence of a Transaction Advisor would have ensured the legal due diligence at every stage of the transaction. That would have revealed that after all it was Mr Peter Munga who was intending to buy the assets and was in the process of forming a company with the members of his family.

1308. We would barely dispute the proposition that, in a classical case where the task involved the liquidation of a business which has gone bust, a professionally qualified in insolvency administration may not need a Transaction Advisor. However, this was not such a classical



case. This was a situation with international ramifications, the sum involved was huge and public interest and accountability were involved.

1309. The Commission takes the answer of Mr Ramtoola that there was no need for one as an attempted after-thought. The reason is that when Barclays had proposed to FSC and offered its services to act as a Transaction Advisor, it was no other than Mr Ramtoola himself who had *“put in the proposal of Barclays to the FSC.”*

1310. Thus, if neither Mr Ramtoola nor any other person in the team of the ex-Minister felt that they could do away with the need of a Transaction Advisor, they were taking a huge risk and exposing themselves.

1311. It was axiomatic that once Government had taken over responsibility for the realization of the assets of the BAI - which prior to that take-over was essentially a private matter between the investors and the invested entity – the assets had assumed the character of a public transaction and its disposal would have entailed the appointment of a Transaction Advisors to advise on the proper way of disposing the shares to obtain good value for money.

1312. If the Minister was entrusted with the matter, he needed to ensure that, considering the huge amount involved and other characteristics of the assets - a Transaction Advisor was appointed. By not ensuring that there was one involved in the matter, ex-Minister and his team had taken serious risks that, if the price was questioned in any forum, they would have to explain. And this is exactly what has happened.

1313. **To the question, therefore, whether there was a Transaction Advisor in the matter,**

**OUR ANSWER IS -**

**There was a dire need for a Transaction Advisor to be appointed and there was none. BDO faced a number of threats in the exercise of its independence of mind and action in the work all of which could have been parried if it had taken the decision to appoint a Transaction Advisor. But it chose not to do so.**

**ROLE OF BDO**

1314. With respect to (b) above, as to what was the role of BDO in the sale at such a price: our inquiry reveals that BDO had a lot to do with the fact that the sale was clinched at that price. The facts reveal a compromising proximity between BDO and the ex-Minister. According to the ex-Minister, BDO was appointed by FSC. It is true that BDO was paid by FSC. But there is no document to show that it was appointed by FSC. What we have is that BDO was appointed to prepare a Strategic Plan for the disposal of the shares in a meeting at the office of the ex-Minister where other Ministers were present. The manner of the appointment had rendered both the ex-Minister, those who has participated in the decision-making as well as BDO vulnerable to a number of ethical breaches. As regards BDO – with which we are concerned here – it failed to identify the statutorily articulated threats which that appointment involved: such as, Self-interest threats, Self-review threats, Familiarity threats. It was a situation characterized by these threats to its independence of mind and action.

1315. As would later happen, after that dubious appointment of the BDO for the Strategic Plan, BDO would later be called upon to replace Mr Basgeet and Oosman as SA through another dubious procedure.
1316. Mr Peter Munga arrived in Mauritius and met Mr Ebrahim at the BDO office whence they proceeded to the office of the ex-Minister. This was the meeting that changed the course of history of this sale which would ultimately end with the big fall from MUR 4.3bn to MUR2.4bn.
1317. BDO was mentioned by Mr Munga in his letter to the Minister as those he will have to engage with for the purpose.
1318. Mr Ebrahim of BDO was the one Ms Gladys Karuri would interact with when the item on the price would be opened and reached on the basis of the then share price at the NSE. It is Mr Ebrahim who would send the papers to BDO in-house counsel, Me Choomka, for the vetting of the MOU, with materials provided by BDO.
1319. BDO would be the firm that would lend its office to give a PowerPoint presentation on 20 June 2016 to explain the *fait accompli* of 10 June 2016 to the unsuspecting members of the NPFL Board where the late CEO and the Chairperson would try to obtain the Board's *ex post facto* approval.
1320. BDO(Kenya) has something to say about where the tampering of the Minutes of Proceedings of the meeting of 18 November 2015 in Nairobi may have been done. The presumption is that they were privy to it with the ex-Minister and his team. The latter stated that they had received the Minutes in the Word Format.
1321. Mr Ebrahim of BDO and Me Choomka travelled to Kenya after the transaction was over and done with. Their explanation is that they went looking for details of registration for the seller, an explanation that looks suspect when such particulars could have been obtained without a physical travel, all the more so when BDO has an office in Kenya. They may only have proceeded for material which needed to be handled physically between BDO and Mr Peter Munga. When asked whether he had met other persons during the two days he had been in Kenya, he stated he had not. We have come across a letter which shows that he had met Mr Peter Munga in the morning of 09 May 2016 referring to “*our meeting of this morning.*”
1322. When Mr Basgeet resigned as SA, the matter of replacing him arose. When the list of the big 5 was being considered, BDO was the only one present in course of that exercise. BDO was rightly stated to be disqualified but still Mr Ramtoola was appointed to do the work in his personal capacity with support of the BDO staff. As it would happen, it was a work done by BDO and FSC made a payment for the work to BDO and not to Mr Ramtoola in his personal capacity.
1323. To the question, therefore, what was the role of the BDO in the matter –

**OUR ANSWER IS:**

**The facts reveal that BDO had a major role to play in the transaction, a role which was unethical, unprofessional and irregular but that the ex-Minister had something to do with it.**

## CONFLICT OF INTEREST OF BDO

1324. With respect to (c) above, as to whether there was any conflict of interest with BDO in relation to the transaction: our inquiry reveals that there was a serious conflict of interest in BDO having been entrusted with the task of SA.

1325. We would not be able to determine this without going back in time to the years preceding the demise of the BAI. During the preceding years, BDO was the auditor of the BPFL one of the related companies of BAI. Upon inquiry by the Commission whether BDO had ever audited the accounts of any of the related companies, by letter dated 21 October 2019, BDO informed the Commission that BPFL was audited by BDO & Co up to 31 December 2013. The Commission has reason to believe that BDO has not provided the correct information as Mr Ramtoola, the Group Managing Partner of BDO who was also the SA had confirmed before the Commission in his deposition on the 24 April 2018 that “*at the time of the BAI collapse*” BDO & Co Ltd was the auditor of BPFL.

## BRAMER PROPERTY FUND LIMITED (BPFL)

1326. BPFL was among the three main businesses of the BAI Group along with the BA Insurance and Bramer Bank.

1327. BPFL started as a Mutual Fund investing in real estate. As from 2008, BPFL added Related Party Investments to its portfolio of assets. It raised funds from the investing public through the issuance of BPF Preference Shares. Preference shares were offered with high returns to lure investors. BPFL Preference Shares were offered with returns ranging from 8.5% to 20% per annum and repayment of principal at maturity. BPFL was regulated under the Securities Act 2005.

1328. With a view to maintaining public confidence in the BPFL Preference Shares, BPFL had projected an image of sustainability, profitability and financial strength. BPFL relied on a number of questionable transactions and accounting practices to window dress its affairs and show its financial position in a good light.

1329. In each of its audited financial statements BPFL presented misleading accounts that appeared to be in good financial health.

1330. BPFL had been operating without a licence as required under Section 9 (1) & (2) of the Securities Act 2005 since 2008. It was only on the 28 January 2014 that FSC licensed BPF as a closed-end fund with the following conditions:

1. BPFL was not to accept new investors or new subscriptions from existing investors;
2. BPFL was not to create any new classes of shares;
3. BPFL was not to make any new investments, loans or advances; and
4. BPFL was to submit a “*phasing-out plan*” to redeem all BPFL Preference Shares over a number of years. This submitted plan was referred to as the “BPFL Roadmap”.

1331. In September 2014, BPFL submitted the BPFL Roadmap to FSC. The Roadmap was intended to assure FSC that the BPF would be able to meet its commitments towards investors as and when they fell due.

1332. FSC did not raise any issues with BPFL with regard to a number of assumptions made in the Roadmap. The question that arises is whether FSC critically assessed the BPFL

Roadmap to determine whether BPFL was sustainable and would be able to meet its commitments, when they fell due.

1333. BDO, as the auditor of BPFL, had also reviewed the Roadmap and has stated in its opinion that the forecast was properly prepared on the basis of assumptions made.

1334. The question which again arises as to whether BDO had critically assessed the BPFL Roadmap. Whether BDO had properly assessed the information and underlying assumptions adopted in the Roadmap when determining whether BPFL was a going concern during BDO's conduct of the Audit for the financial year 2013. BDO had even issued an unqualified (clean) audit opinion for the financial year 2013.

1335. It appears that BDO had not properly discharged its duty of ensuring due care and professional scepticism when performing its audit duty for the financial 2013.

1336. The Commission has also noted with concern that, upon inquiry from BDO by the Commission, the former, has for reason known to itself, provided wrong information to the Commission stating that BDO has conducted the Audit of BPFL up to December 2013.

1337. We have it as given that BDO prepared the Strategic Plan for the manner in which the situation should be managed with the objective of paying the policy-holders. We also have it as given that, when Mr Bageet and Mr Oosman ceased to be the SA, Mr Ramtoola was appointed as the SA. He was appointed as a result of a process of elimination by FSC. BDO's conflict of interest was known to FSC. The process of the appointment had been recorded in the Minutes of FSC as follows: The manner in which he was selected was to say the least a semblance of propriety without propriety. Five firms were listed and considered. There is no record of how they were there, in the first place. BDO was considered eligible. We read the following not in the Minutes of the 227<sup>th</sup> Board meetings of FSC.

*“BDO was also considered eligible and Mr Yacoob Ramtoola was invited to make a proposal and indicate whether he was ready to be appointed as Special Administrator with a clearly defined Terms of Reference and fixed fee. Mr Ramtoola informed the Board that BDO was the auditor of Bramer Property Fund but he was not the signing partner. Mr Ramtoola also informed the Board that he is not in a position of conflict as his potential appointment as a Special Administrator is done in his personal capacity and not in his capacity as BDO Partner.*

2.3 *After considering issues relating to each of the big five companies, Board agreed to appoint Mr M. Yacoob Ramtoola of BDO Mtius Ltd as Special Administrator with effect from 26 August 2015 to provide services as mandated and instructed by the FSC, which include, without being limited, to the following:*

- a) Transfer, in whole or in part, of the undertaking of BAI Co. (Mtius) Ltd and its related entities to the National Property Fund Ltd;*
- b) Finalise the disposal of Iframac Limited (Retail division – Courts) undertaking to Mammouth (Mauritius) Limited forthwith;*
- c) Finalise the transfer of all assets of Iframac Limited (Transport division) to the NPFL;*
- d) Finalise the transfer of BRITAM Kenya to the NPFL subject to regulatory approvals in Kenya.*

2.4 *The proposed fees are as follows:*

- (a) *Rs5.5 million exclusive of VAT and net of taxes for the transfer undertaking, in whole or in part, of BAI Co. (Mtius) Ltd and its related entities to the National Property Fund Ltd;*
- (b) *Rs3.0 million exclusive of VAT and net of taxes for the transfer of Britam Kenya to NPFL.*
- (c) *Rs1 million exclusive of VAT and net of taxes for the legal costs for each of the above.*
- (d) *Disbursements in respect of any other fees shall be subject to the prior approval of the Commission”.*

1338. The appointment of Mr Ramtoola was flawed in a number of ways. True it is that the situation which arose was one which required very urgent decision in that a vacuum had been left with the termination of Mr Mushtaq Oosman and the resignation of Mr Basgeet. However, ethics were cast to the wind once again. Mr Ramtoola was present at the meeting where and when he was appointed as SA by FSC. He should not have been appointed in the first place inasmuch as BDO had been the auditors of BPFL. BDO had issued an unqualified audit report in the financial statements 2013 despite the fact that it had noted questionable transactions and unsound accounting practices by BPFL toying as it had done with the concepts of “fair value” of the shares and BPFL being “a going concern.”

1339. And among the members, we see no other than the Adviser of the ex-Minister as Vice Chairperson of FSC, an independent regulatory body, not an Authority as such but a Commission. He had been appointed by the ex-Minister.

1340. BDO has also been subject to adverse comments in the NTan Report of BOM regarding

- (i) its valuation methodology adopted by BPFL in computing the fair value of its shares; and
- (ii) the information and underlying assumptions adopted in the BPFL Roadmap when determining whether BPFL was a going concern having kept a blind eye in the audit exercise of 2014.

1341. By accepting the assignment, Mr Ramtoola put himself in a situation of perceived threats to comply with the fundamental principles governing the performance and conduct of Insolvency Practitioners set out by the Director of the Insolvency Service, Mauritius **(General Notice no 2260 of 2012 Annex 18)**

1342. The assignment was given to Mr Yacoob Ramtoola in his personal capacity finally. Even that was questionable in the circumstances because of his association with BDO. The facts show that it was not Mr Yacoob Ramtoolah who was doing the job but BDO and that Mr Yacoob Ramtoola was only lending his name for BDO to do the job.

1343. All this confusion would not have happened had FSC Board not mistaken its own role in the matter. When the resignation of Mr Basgeet was reported to the Board at 8.30 a.m on 26 August 2015 at a meeting at FSC House Ebene, the Board decided to replace him at a FSC meeting at 13.00 hrs called at the Conference Room of MOFED, Port Louis. By so doing, FSC Board was rushing into a sensitive matter where great caution was needed. It short-circuited the established procedure for decision making. It took upon itself to draw up a notional list of firms when firms were ineligible. It then ruled them out

individually to appoint Mr Ramtoola as SA. gather the information regarding the potential candidates, do the evaluation and make the appointment.

1344. Not any of the members present breathed a word about the legality of the process: such was the confusion created by Section 110A and Section 110B of the Insurance (Amendment) Act as to the nature of SA and his role in the context.

1345. FSC set out on that slippery road. The usual method was for the management to apprise the Board with a proposal and for the Board to take a decision on how Mr Basgeet should be replaced. Here the Board was entering into management issues and messing it up.

1346. There was enough mess in the law. Now the mess was between politician and professional. And the situation not any less messy. It was the case of FSC, at the time of the appointment of Mr Ramtoola, that he was engaged in *“his personal capacity and not in his capacity as a BDO partner.”* We read in the Minutes of 227<sup>th</sup> FSC Board Meeting of 26 August 2015 the following:

*“BDO was also considered eligible and Mr Y. Ramtoola was invited to make a proposal and indicate whether he was ready to be appointed as Special Administrator with a clearly defined Terms of Reference and fixed fee. Mr Ramtoola informed the Board that BDO was the auditor of Bramer Property Fund but he was not the signing partner. Mr Ramtoola also informed the Board that he is not in a position of conflict as his potential appointment as a Special Administrator is done in his personal capacity and not in his capacity as a BDO partner.”*

1347. This provokes anxiety. If Mr Ramtoola was appointed SA because there was a conflict of interest with BDO how can one reconcile the fact that Mr Ramtoola took up the responsibility to do the work but with the staff of BDO.

1348. The question now is who did the work? Did BDO do the work or Mr Ramtoola? The facts show that after all it was BDO which did it all and Mr Ramtoola was more or less only lending his name to the papers when that was required. He was not there at the critical meeting of 14 November 2015 which took place between Mr Peter Munga and ex-Minister Bhadain when the line to be taken was decided. He was not there when Mr Peter Munga chaired the meeting in Nairobi. He was barely there when the Kenyans came to discuss and sign the MOU. He was not there when the NPFL Board met to obtain the retroactive approval of the sale. Those who were active at all the critical stages were: Mr Ebrahim, Mr Khapre and Mr Georges Chung. This is what the Commission would refer to as an unethical use of ethics.

1349. What was the conflict of interest which BDO had in taking the assignment as SA? The conflict arose in relation to BPFL.

1350. In relation to its appointment as Financial Adviser of FSC for being entrusted with the assignment to recommend strategic measures to protect the value of underlying assets of the BAI with focus on the SCBG policies, there were a number of disturbing features.

1351. Firstly, BDO was appointed during a meeting chaired by ex-Minister Bhadain in his office wherein representatives of BDO were, among others, present. The decision was taken in the presence of representatives of BDO. In so doing, the Minister was encroaching on the power of FSC.

1352. Secondly, BDO was entrusted with the assignment without procurement procedure being followed.

1353. Notwithstanding the fact that no proper procurement procedure had been followed to appoint BDO, the Engagement Letter emanated from BDO, instead of FSC. The letter was dated 22 April 2015 and the date of the report was 24 April 2015. The whole exercise had been completed within 48 hours. The cost of the exercise was MUR1m.

1354. Incidentally another Engagement Letter from FSC dated 06 May 2015 was produced to the Commission. Upon inquiry, the Commission was informed that the letter was issued to facilitate payment of fees.

1355. The Commission is seriously concerned on the appointment of Mr Y. Ramtoola, Group Managing Partner of BDO as SA. Mr Ramtoola was appointed by FSC at its 227<sup>th</sup> Board Meeting held on 26 August 2015. FSC had not complied with Section 109 (1), 109 (3) and 215 of the Insolvency Act 2009. The provisions are as follows:

Section 109(1) of the Act stipulates that

*“(1) A person other than the Official Receiver who is appointed provisional liquidator or liquidator shall not be qualified for appointment where he is – (a) or has been an officer or auditor or employee of the company or any related corporation during the preceding 2 years;”*

1356. Further, Section 109(3) of the Act provides:

*“For the purposes of this section, an auditor means the auditor or partner of the audit firm that has been appointed auditor of the company.”*

1357. Section 215 (2) of the Act – Appointment of administrator

*“(2) A person shall not be appointed administrator where – (a) he is disqualified from being appointed as a liquidator, unless the Court orders otherwise”*

1358. Mr Ramtoola informed the Board that BDO was the Auditor of BPFL. However, he was not the signing partner and he was not therefore in a position of Conflict of Interest. The Board relied on the saying of Mr. Ramtoola instead of examining closely the relevant provisions of the Insolvency Act.

1359. In the Engagement Letter of Mr Ramtoola as SA it is stated *“The Special Administrator will be assisted by professional staffs of BDO in the performance of his duties.”*

1360. In the documents submitted to the Commission and after examination of the deposition made by Mr Afsar Ebrahim, Deputy Managing Partner of BDO, Mr Georges Chung Ming Kan, Senior Partner of BDO and Me Tawheen Z. Choomka who legally cleared the MOU with factual details supplied to her, it was clear to the Commission that it was BDO under the guise of Mr Ramtoola who was in fact doing the work of the SA. There are many instances where the Senior staff of BDO namely Messrs. Ebrahim and Chung had taken primary roles.

1361. Mr Ebrahim, accompanied by Me Choomka travelled to Kenya to obtain information regarding the incorporation of BAKHL in Kenya. Mr Ebrahim discussed and finalised the various agreements: namely, the MOU, the Escrow Agreement and the SPA between the parties to the transaction. At no point in time there had been any involvement of Mr

Ramtoola in any of the discussions. Me Choomka's correspondence was with Mr Ebrahim to clear the legal documents.

1362. Mr Ebrahim was the person who had been dealing with Mr Munga. When the latter came to Mauritius, he went to the office of BDO to meet Mr Ebrahim who thereafter accompanied Mr Munga to a supposedly Courtesy Call upon the ex-Minister Bhadain on 14 November 2015. In fact, for it was for substantive discussions which led to an agreement as to the line to follow.

1363. The Commission had also noted that part of the proceeds of sale of Britam shares which were credited to the Escrow Account had not been paid straight into the account of the NPFL but into a BDO Account. It is from there that the proceeds were credited to the NPFL Account. Asked about this, the late CEO stated that it was because NPFL did not have a foreign account. That looks to us to be too lame an excuse to be accepted by any standard.

### DISCREPANCY IN ENGAGEMENT AND DELIVERY

1364. Another matter of concern has been the discrepancy in the assignment undertaken by Mr Ramtoola and the delivery of the services. From the Letter of Engagement, the sale of the Britam shares was never on the cards.

1365. As per his Letter of Engagement reportedly prepared by himself, he had subscribed to the following services:

(i) *“For transfer of Undertaking, in whole or in part of BAI Co. (Mtius) Ltd and its related entities to the National Property Fund Ltd (“NPFL”) pursuant to Section 110B (1) of the Insurance Act 2005, ..... The assignment shall be carried over a period of 2 weeks starting from the date of execution of this agreement.*

(ii) *For the transfer of BRITAM Kenya to NPFL, ...”*

1366. He had also undertaken to

*“ ..... work with ENS Africa who will cover all legal aspects except for the enforcement in Kenya. Prior approval will be sought from the FSC in respect of legal costs and other disbursements for transactions pertaining to Kenya operations.”*

1367. When he entrusted the work to Mr Ebrahim, there is no record that ENSAfrica was ever engaged to oversee the transaction, even if ENSAfrica was paid for it. In fact, Me Koenig would deny that he was ever instructed in that regard, even if he acknowledged have been engaged for certain court cases regarding the BAI matter.

1368. With regard to the fees for the above, he had proposed and FSC had agreed to the following:

(i) *For transfer of Undertaking, ....., I propose a fee of Rs5,5000,000 exclusive of VAT and net of taxes and Rs1,000,000 exclusive of VAT and net of taxes for the legal costs to ENS Africa. The assignment shall be carried over a period of 2 weeks starting from the date of execution of this agreement.*

(ii) *For the transfer of BRITAM Kenya to NPFL, I propose a fee of Rs3,000,000 exclusive of VAT and net of taxes and Rs1,000,000 exclusive of VAT and net of taxes with respect to legal costs to ENS Africa. Disbursements in respect of*



*travel, hotel and legal costs in Kenya will require prior approval from the FSC.”*

1369. The engagement letter is as clear as could be that the assignment was for transfer of undertaking to the NPFL. There is no equivocality all the more so when the fees were directly related to the fact of transfer. There was no question of sale of NPFL assets, once they had been transferred.

1370. With regard to the manner of payment, the Letter of Engagement continued as follows:  
*“The above fees are payable upon presentation of our invoice in respect of the work to be carried out as detailed in Section 2 above.”*

1371. The question is whether the above engagement had been followed as professional standards and ethics set out in the contract required. Asked as to why the sale was done, one of the witnesses answered that it was because NPFL lacked the expertise to sell. If that was the case, it was arrogance to the extreme. At the Board meeting called on 20 June 2016, the Board had opined how they would have done it: by appointing a Transaction Advisor and launching a RFP.

1372. Whoever had come up with the brilliant idea of a concurrent transaction of transfer-sale had overlooked the fact that there was a law for the transfer to NPFL but not one for the sale which could only be done according to principles of open procurement rules and, if undertaken by BDO, a revision of the Letter of Engagement to include the sale component of the transaction.

1373. Ex-Minister Bhadain is right when he stated that he did not choose the buyer. In fact, it is MOFED which had chosen the buyer. But the choice had been done after IFC, Barclays and MMI Holdings had each given a figure of between MUR4.2bn to MUR4.5bn. If the preferred buyers had agreed to match the MMI Holdings offer, the question would not have arisen.

1374. The question has arisen because MUR 4.3bn had de-escalated to MUR2.4bn. When it had, the preferred bidder should simply have been told that it was out of the race. The assets should have been transferred to NPFL for the latter to warehouse them or to sell them at an appropriate time engaging a Transaction Advisor appointed for the purpose. In the light of the depositions and the documents, we can safely conclude that there was a dire need for the appointment of an independent Transaction Advisor and by not doing so, ex-Minister Bhadain and his team did a bad job without looking at the interest of the seller which was NPFL. Furthermore, on the matter of ethics, FSC had bent backwards to entrust the work of the SA to BDO because it was known to FSC that there was conflict of interest in BDO undertaking the work. FSC cannot be heard to say that the work had been entrusted to Mr Ramtoola and not to BDO because at that very meeting it was obvious that the work would be carried out by the BDO Staff. It was a case of bad risk management that FSC had agreed, while rightly disqualifying BDO to participate, to appoint Mr Ramtoola to be assisted by BDO staff.

1375. Just as NPFL was being used as a façade for the doings of the ex-Minister and his team, Mr Ramtoola was being used as a façade for the doings of BDO work, subservient to the ex-Minister and his team.

**1376. To the question, therefore, whether there was a conflict of interest in the involvement of BDO in the transaction -**

**OUR ANSWER IS -**

- a. there was clear conflict of interest in the involvement of BDO in the transaction;**
- b. The conflict of interest went well beyond perceived conflict;**
- c. It was actual conflict of interest and statutorily prohibited conflict.**

## CHAPTER 17

### TOR (IV) - HAVE ALL SALE PROCEEDS BEEN RECEIVED?

*Poor and liberal, rich and covetous - Proverb*

1377. Paragraph (iv) of the TOR requires us to enquire into -  
*whether all proceeds from the said transaction have been received to date, including dividend, if any, prior to the said sale.*
1378. We have seen that contrary to what the Kenyans had agreed upon on 18 November 2015 (to match the price of MMI Holdings), they reneged on that offer. After the Nairobi meeting, parties were to discuss the longer payment terms which they had asked for. However, with the indulgence of the Mauritian side, they opened discussion on the sale price as well. And the price came down to MUR2.65bn.
1379. For recapitulation we reproduce below the relevant part of the correspondence of Ms Gladys Karuri. She specifically makes mention of the previous offer of MUR4.3bn that had been made on 18 November 2015 in the following words:
- “The offer of Rs4.3bn you had, as verbally advised by yourself, was based on a share price of Ksh18,50% premium above market price and our December 2014 audited accounts, publicly available, reported profit of Ksh3.2bn and a Comprehensive Income of Ksh6bn. Our price has since gone down by 39% to Ksh11.90 and the USD:KSH exchange rate has come down by 11%. Our financial performance for year ending December 2015 is not public yet but is estimated to be around Ksh500m and a Comprehensive Loss of around Ksh3bn. The Company had to issue a Profit Warning in December 2015 so that market expectations are aligned.”*
1380. The sum settled, accordingly, as per the same email sent by Ms Gladys Karuri to Mr Afsar Ebrahim on 11 March 2016 at 12.12 hours based on the narrow share price methodology as at that date was, in her own words:
- “A cash offer of \$71m (MUR2.65bn) based o(sic) today’s market price of Ksh11.90 plus a premium of 35% resulting in an offer of Ksh16 per share. The timeline for the payment has been outlined in my mail below.”*
1381. As a favour to the Government of Mauritius and especially to ex-Minister Bhadain, she stated, they were “prepared to offer an additional KES 1.4bn (equivalent to USD14m at current exchange rate),” provided that:
- “The 90 days volume weighted average price of Britam goes back to Ksh 18 by 30<sup>th</sup> June 2016 or earlier (directly as a result of the overall price improvement across the entire Nairobi Securities Exchange, for which purpose the NSE Share Price Index will be used as a guide. Given that the current share price of Britam is Kshs 11/90 a movement to Kshs 18/00 will require the NSE Share Price Index as at 30<sup>th</sup> June 2016 to improve by 51%);*

1382. The Kenyans did state that they were making this offer as a gesture of goodwill. But it had all the characteristics of a bait rather than a boon. The gesture of good will was not apparent and the 51% was illusory. As Mr Manraj opined emphatically regarding the latter: *“It was never going to happen.”* It was only good on paper.

1383. With regards to the payments, the Accountant of NPFL was convoked to show that payments have been received for and into the Account of the transferee-cum-seller NPFL. Table of Payments as at:

**Payments received from sale of Britam Shares**

Sn	Date	Amount (USD)
1.	29/04/2016	988,087.29
2.	18/05/2016	1,982,105.55
3.	31/05/2016	25,653,620.38
4.	03/06/2016	41,216,824.29
		<b>69,840,637.51</b>
		<u>(5,000)</u>
	<b>Total</b>	<b>69,835,637.51</b>
	01/07/2016	<u>(11,000,000)</u>
		<b>58,835,637.51</b>
	01/07/2016	<u>(58,835,000)</u>
		<b><u>637.51</u></b>

1384. Our Comments:

- (1) As per Letter of Engagement, the fees were paid into a BDO Account. This should never have been the case.
- (2) The deliverer of services was Mr Ramtoola not BDO.
- (3) The sum should never have transited into the BDO Account from which the latter deducted its fees from the Account of NPFL. Mr Ramtoola should have invoiced the FSC for the FSC to pay against invoice.
- (4) As per Letter of Engagement of Mr Ramtoola, his claim was MUR5,500,000 for the transfer of undertaking to NPFL and MUR3,000,000 for transfer of Britam Kenya to NPFL. As may be seen, on the face of it, there is a possible case of double-counting in that the transfer of undertaking to NPFL and the transfer of shares to NPFL was one and the same transaction. Here there have been two payments done for the same transaction.
- (5) Mr Ramtoola had also claimed MUR1,000,000 for legal costs for ENS Africa. However, we had from the deposition of Me T. Koenig that ENS Africa had nothing to do with Britam Kenya. Such a sum, if it had been paid, should be recovered from ENS Africa. If it had not been paid, it should be recovered from Mr Ramtoola.

1385. On the question as to why the sum of USD58,835,000 had been transferred first to BDO Account, the Commission was informed that that it was because NPFL did not then have a foreign currency Account. The foreign currency Account was opened only on 4 July 2016.

That looks for us to be an unacceptable explanation from the NPFL. The greater likelihood was that in the absence of a legal oversight over the transaction, BDO Personnel taken it upon themselves to do as they found fit.

### CONCLUSION ON THIS PART OF THE TERM OF REFERENCE

1386. We note that the MUR2.4bn in 4 instalments had been transferred into the Escrow Account.

1387. To the question as to whether all proceeds including dividends have been received to date,

**OUR ANSWER is –**

**(a) as far as proceeds are concerned is reflected in the table below:**

**Payments received from sale of Britam Shares**

Sn	Date	Amount (USD)	Remarks
1.	29/04/2016	988,087.29	
2.	18/05/2016	1,982,105.55	
3.	31/05/2016	25,653,620.38	
4.	03/06/2016	41,216,824.29	
		<b>69,840,637.51</b>	
		<u>(5,000)</u>	Bank Charges
	<b>Total</b>	<b>69,835,637.51</b>	
	01/07/2016	<u>(11,000,000)</u>	Transferred to BAI Co on instruction of Mr O.P. Issary
		<b>58,835,637.51</b>	
	01/07/2016	<u>(58,835,000)</u>	Transferred to BDO & Co on instruction of Mr O.P. Issary
		<b><u>637.51</u></b>	

1388. Our comments on the table above are:

On 01 July 2016: USD5,000 for bank charges approximately MUR180,000 to SBI

On 04 July 2016: USD335,000 for fees of BDO approximately MUR12,060,000

On 4 July 2016 for conversion from USD to MUR at Afrasia Bank

The bank charges were paid by NPFL to SBI.

The whole sum of USD 58,835,000 was paid to the BDO Account at MCB from which BDO deducted USD 335,000 as its fees.

(b) as regards whether dividends, if any, prior to the said sale have been paid,

**OUR ANSWER is –**

**A dividend of Kshs0.30/share for the year ending 2015 had not been paid to NPFL although the last date for registration of members was set for 09 June 2016 and the ex-dividend date as per [www.investing.com](http://www.investing.com) was 10 June 2016 and**

**coincidentally the share purchase agreement was signed on 10 June 2016 being itself the date on which Plum LLP was registered.**

**Our comments on the above is -**

We however draw attention to Clauses 3.5 and 3.6 of the Share Purchase Agreement. As per these clauses, the NPFL would never be entitled to the 2015 dividend. This is not usual or good practice. The Commission notes with utmost concern that such clauses do not seem to have been questioned by the NPFL or even the Special Administrator. It is also not clear whether this SPA had been duly vetted by the legal advisers of the NPFL.

The Commissioner therefore considers that NPFL had been unfairly deprived of an amount of approximately Rs 43M representing dividend calculated on the basis of 0.30 KES yield per share for the year ending 2015 in view of the fact that the “Completion Date” referred to at clause 6.2 of the SPA is well after the 10 June 2015.

## CHAPTER 18

### TOR (V) - HAVE FUNDS BEEN TRANSFERRED OTHERWISE?

*Millers and bakers do not steal. People bring it to them*  
- Proverb

1389. Paragraph (v) of the TOR requires us to enquire into -

*whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third party account, the currency in which it was so received, and any amounts retained as fees or commissions by or paid to other parties;*

1390. We shall answer the above in three parts:

- a. *whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third party account,*
- b. *the currency in which it was so received, and*
- c. *any amounts retained as fees or commissions by or paid to other parties.*

1391. With regard to (a) above, as to whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third party account -

#### **OUR ANSWER IS -**

1. **the Commission can only regretfully state that this would have come to light if there had been co-operation from the Kenyan buyers who had promised to do so but when it came to their walking their talk, they did not show up. They had replied to us in the form of letters making statements of the greatest generality. But when a second set of questions were raised to pinpoint certain sensitive issues arising in course of the proceedings, they disappeared from the radar. They failed to respond even when Salmon Notices were served upon them. The Commission also received an anonymous note to the effect that the difference of money between MUR4.3bn and MUR 2.4bn can be traced in an UAE bank and that UK will co-operate. The Commission sought the co-operation of the FIU in the matter and was informed of the procedural difficulties involved in accessing information from UAE Bank.**
2. **the facts raise grave suspicion that it is more likely that the ex-Minister and his team have hidden the truth from the public and the manner the transaction has been carried in Kenyan shillings and payment done in US dollars through a bank in Kenya have frustrated any attempt to seek co-operation from UAE whether funds have been remitted there or not to clear the names of those involved or to cite them.**
3. **What did Mr Ebrahim go to do in Kenya after the sale. He said he went to look for the registration of BAKHL and denied he had met Mr Peter Munga. Yet we have a letter from Peter Munga which mentions the fact that they had met on a particular morning.**
4. **What did Mr Peter Munga come to do in Mauritius on a Business visit from 05 to 7 February 2017, long after the deal was done, soon after the resignation from Government of the Minister?**

1392. The Commission did not give up on this matter. If the payment had been made in US dollars, then the co-operation of the US was an avenue worth pursuing. But, too soon, we saw why those involved had forestalled even this move. If the transaction had occurred in US dollars and a Mauritian bank was involved, that avenue could have been pursued through the co-operation of the U.S. But the transaction had been done in Kenyan shillings and, what is more, when the money was transferred in US dollars, the bank involved was a Kenyan Bank, that of Peter Munga. Regretfully, this aspect will continue to hover around the head of those involved until it is cleared by other authorities.
1393. What we can say is that the Kenyans had things to hide for them to stop co-operation when the matter came to a crux. They had no reason not to co-operate with the inquiry, if things had been done with the openness and transparency required. The degree of their business sense is remarkable. They came to negotiate payment terms of MUR4.3bn but there is no record of negotiation. The MUR4.3bn price agreed upon spiralled down to MUR2.4bn. Both parties rubbed their hands in satisfaction, decided to keep it from the public until the matter came into the public domain by way of a PNQ by the Leader of the Opposition.
1394. A number of questions which only the Kenyans could have elucidated, have remained unanswered. The answers would have gone a long way to establishing whether there was any criminal corrupt practice which was involved as regards the apparent short-fall.
1395. In the absence of a record for same, in the light of the mysteries surrounding the transaction, on account of the silence of the Kenyans and the conduct of the ex-Minister and his team, it is more likely that such a transaction could not have been completed without serious suspicion hanging over the heads of the ex-Minister and his team.

**OUR ANSWER IS -**

1396. With regard to the question (b) above as to the currency in which it was so received –

**OUR ANSWER IS –**

**the payments were done in US dollars even if the currency of the transaction was Kenyan shillings. However, the bank which did the conversion was a Kenyan Bank so that any possibility we could pursue to trace funds in the alleged UAE Bank has been thereby rendered futile as per the relevant authorities in Mauritius.**

1397. With regard to (c) as to whether any amounts retained as fees or commissions by or paid to other parties –

**OUR ANSWER IS**

- 1. However, a probe into it has been frustrated on account of the international dimension of the transaction and the non-co-operation of the Kenyan authorities to enable the Commission to complete this exercise.**
- 2. It is clear to us that the Kenyans avoided all efforts from Mauritius to come clean, even if they were assured that Mauritius has no jurisdiction over Kenyan nationals;**



3. Were they attempting to hide the Mauritian national involved? If they were not, what prevented them from being transparent and open despite that reassurance.
4. The allegation that any kick-back may be concealed in a foreign jurisdiction in the name of persons directly involved with the transaction or in the name of third parties or “prête noms” could also have been infirmed or confirmed from the foreign jurisdictions. Again, however, co-operation from the banks from those jurisdictions has been lacking.
5. All in all, a lingering doubt will hover over the heads of those involved, all stemming from the opaque nature and the mysteries shrouding the transaction that there have been undisclosed benefits accruing to the persons involved.
6. These mysteries would potentially necessitate a police investigation with the co-operation of Interpol. The Commission in its present legal framework may only direct criminal investigation along the lines indicated.

## CHAPTER 19

### TOR (VI) - ANY FRAUD, MALPRACTICE, CORRUPTION, UNDUE INFLUENCE OR MISDEED/S?

*A new level of accountability .... will force these actors to rethink their existing operations ... – Branson & Isaacson, p.8, The New Digital Age*

1398. Under paragraph (vi) of the TOR, the Commission is to report on *whether there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of said shares and whether any financial prejudice has thereby been caused to any person in Mauritius.*

#### OVERLAPPING CONCEPTS

1399. The terms fraud, malpractice, corruption, undue influence and misdeed are overlapping concepts. But the Commission will draw a workable demarcation line among them. It would regard fraud and corruption as offences under our criminal law. On the other hand, malpractice, undue influence and misdeed are civil and/or ethical breaches.

1400. For that reason, the Commission would treat corruption and fraud as a separate category from the others and pronounce on them together. (See Paras. 1422 to 1425 below)

#### MALPRACTICE

1401. With regard to malpractice, we have given it the meaning it carries in law. Malpractice connotes the *a priori* existence a practice which falls below acceptable standard. It usually applies to professionals in the practice of their profession. When they fall below the standard practice to a certain degree, that would be regarded as malpractice. It is more commonly applied in the practice of medical, dental, legal, accounting, auditing and engineering disciplines.

1402. We read in **Black's Law Dictionary, 5<sup>th</sup> Edition:**

*“Malpractice. Professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. Matthews v. Walker, 34, Ohio App.2d 128,296 N.E.2d 569,571,63 O.O.2d 208.”*

1403. With respect to legal malpractice, we read:

*“Legal malpractice. Consists of failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage, it gives rise to an action in tort. Neel v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal.3d 176,98 Cal.Rptr. 837,838,491 P.2d 421.”*

1404. With regard to medical malpractice, we read:

*“Medical malpractice. In medical malpractice litigation, negligence is the predominant theory of liability. In order to recover for negligent malpractice, the plaintiff must establish the following elements: (1) the existence of the physician’s duty to the plaintiff, usually based upon the existence of the physician-patient relationship; (2) the applicable standard of care and its violation; (3) a compensable injury; and (4) a causal connection between the violation of the standard of care and the harm complained of. Kosberg v. Washington Hospital Center, Inc, 129 U.S.App.D.C. 322,394 F.2d 947,949.”*

## MINISTERIAL MALPRACTICE

1405. Can there be Ministerial malpractice? Malpractice is a generic term characterised by *“unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. Matthews v. Walker, 34, Ohio App.2d 128,296 N.E.2d 569,571,63 O.O.2d 208.”*

1406. As such, malpractice is not limited to professions. It is not inconceivable that malpractice may be applied to elected representatives as well. Standards vary in politics from country to country, from party to party. But in a democratic system of government under a Constitution which clearly states that Parliament may make laws for the peace, order and good government of Mauritius (see article 45(1) of the constitution), the rules are fairly known, the breach of which may constitute malpractice in the sense that there has been *“an unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.”*

1407. It would not be amiss to say that government has become an exceedingly complex business. It has become increasingly salutary for governments to govern by law, regulations, rules, best practices, guidelines, codes, guidance notes, protocols, benchmarks etc.

1408. Winning a seat in Parliament is no mean achievement. Being assigned Ministerial duties doubly so. Both positions carry honour and nobility. In our democratic system of government, Ministers decide policies. The choice of policy is in consultation with various stakeholders and then deciding which one is going to work best in the circumstances. Mauritian public affairs have been regressing with lack of literature that gives guidance to power holders. Lack of directions has resulted in a situation of free for all. *“Là où il n’y a pas de loi, le roi perd son droit.”* That has rendered Mauritian Ministers vulnerable to a lot of abusive practices, especially in circumstances where the role of public officers has been marginalized. The moment politicians realize that when they play roles they are not expected to play, they become personally responsible and vulnerable to attacks sometimes unfair.

1409. It may well amount to a malpractice to run public affairs without a proper record which shows both the procedure adopted for a particular decision, the decision and the reasons for the decision. Paradoxically, this was happening at no less a Ministry than MFSGG&IR. It is not wrong to re-invent government to make it more result-oriented, speedier, less bureaucratic, more effective and efficient. But it is wrong to turn government into, as it were, a one-man corporate business and direct operations without record so that independent institutions have no choice but to toe the political line. In this case, short thrift was made of Cabinet, the NA, the SLO, FSC, NPFL, SA. It was not government affairs by institutions and public officers but government affairs by power centralized in a Ministry.

1410. It may also amount to a malpractice for elected Executives to oust public officers from discussions involving public assets and use them minimally, and only to push papers as that. This is what happened in this case. There was only minimal use made of public officers in a matter which involved assets which had donned a public character. The sale had taken place on 12 March 2016, a non dies. Whoever is involved in such an unusual course of action in public affairs renders himself vulnerable to a maker of legitimate questions.
1411. Who among the key persons involved in the sale may have exposed themselves to malpractice. That, if the Commission decides, it would be encroaching on the powers of other competent jurisdictions under our system of law. However, what the Commission is perfectly entitled to do is to infer that from the facts, as ascertained, the matter needs to proceed to the detriment of the responsible authorities for whatever decision they may deem fit.
1412. We refer the reader here to our decisions with reference to:
- (1) Ex-Minister Bhadain
  - (2) Mr Deerpalsingh
  - (3) Mr Khapre
  - (4) Mr Ramtoola
  - (5) Mr Ebrahim
1413. The panoply of laws and regulations in Mauritius is many. But there is a patent paucity in the manner in which people in positions of responsibility discharge their duties and responsibilities. This gap allows elected Executives to come in where they have no business to be.
1414. It is equally a malpractice for professionals assigned with duties related to public affairs to have dealings with political advisers rather than with public officers in transacting public business. Emails in this case show that public officers were dealing directly with Advisers appointed under Article 89(3)(h) of the Constitution and not through their counterparts. In one particular case, it is a political Adviser who directed all concerned to follow a particular course of action: namely, to adopt a particular law: i.e. amendment to Section 110 of the Insurance Act. The risk that this poses in our democracy based on the rule of law is grave. Law will not then be law but will be politics.
1415. It may equally amount to a malpractice for elected representatives to exert pressure upon professionals and members of corporate bodies or the Administrators of corporate bodies to do their bidding. It is not wrong to exert pressure to cut down on bureaucracy. It is not wrong to exert pressure to reduce delay and chase progress of files to meet reasonable deadlines. It is not wrong for elected executive to forcefully advance second or third views to be considered in the process of decision making. But it is wrong for him to exert pressure upon them to do their bidding. For example, when the Board of NPFL which comprised some knowledgeable public officers refused *ex post facto* approval after querying on a sale which had already taken place, pressure was exerted upon them with Advance Forms of Approvals offered to be signed at any convenient public place.
1416. It may amount to a malpractice for a Minister to make an appointment on the Board of independent institutions persons who are at the same time their political Advisers. In this case, ex-Minister Bhadain sought the appointment of Mr Akilesh Deerpalsingh, his political adviser – and indeed obtained it – to the position of political Adviser from March

2015 to December 2015, at the same time Vice Chairperson from May 2015 to October 2015.

1417. It may amount to a malpractice for an elected Executive to use his power as a Minister to change the law without ensuring that he has had proper advice on the matter as to its soundness and its impact. In this case, the real object of Section 110A and Section 110B of the Insurance (Amendment) Act 2015 was to enter the Minister into the affairs of FSC and to take away the consent of the policy-holders to decide how their assets should be dealt with. These two essential objects were not mentioned in the Explanatory Memorandum of the Bill. This could well be regarded by some as an attempt to mislead Cabinet as well as the NA.

1418. It may amount to malpractice for any elected Executive to take major decisions with regard to public affairs without seeking Cabinet sanction. It is malpractice for him to give free rein to political advisers and allow them to run public affairs to the exclusion of public officers. It is malpractice for political advisers to dictate to public officers and exert pressure on public officers to do their bidding. It is malpractice for CEO or the Chairperson of Board of independent institution to allow elected representatives to enter into their decision-making process.

1419. It may amount to a malpractice to get Boards of public institutions to meet at short notices on matters of substantial interest to the organization, especially at venues not their own. It is malpractice for Minutes of Board meetings not to properly reflect items on the Agenda, discussions held and decisions taken thereon. It is malpractice to involve political advisers without ensuring that they know the scope and the limit of their roles in public affairs.

1420. It is not in order for a political adviser to exercise management functions in the public service.

1421. On the present state of the inquiry, the Commission can safely state that the facts give rise to a *prima facie* case of malpractice, undue influence and misdeed, as enumerated above against the named persons, which have to be determined by competent jurisdictions.

## **CORRUPTION AND FRAUD**

1422. Now with regard to corruption and fraud, these happen to be generic terms in criminal law. The number of offences detailed in the Mauritian Criminal Code and the Prevention of Corruption Act is many, with varying constitutive elements.

1423. Investigating criminal offences does not fall within the purview of a Commission of Inquiry. As an *Ad Hoc* body, it may only adumbrate upon the possible existence of fraud or corrupt practice for eventual criminal investigation to the proper competent authorities existing under our legal and judicial system.

1424. The facts and circumstances delved into by the Commission do indicate the existence of subject-matter due for criminal investigation. They are the act of:

1. tampering with minutes of proceedings of 18 November 2015 under the Criminal Code against 4 Mauritian witnesses and one Kenyan witness;
2. making use of the forged document by the 5 above-mentioned witnesses;
3. refusing to answer or omitting to answer fully and satisfactorily all questions put to them in the case of the Kenyan witnesses constituting a breach under the

Commissions of Inquiry Act, even if, it would be an exercise in futility to engage in that process which involves a foreign jurisdiction;

4. wilfully giving false evidence before the Commission under the Commissions of Inquiry Act.

1425. Corruption and fraud are also generic terms in civil law under a number of different articles of the Mauritian Criminal Code. The Commission has found that the law whereby the policy-holders were divested of their respective investments had not obtained Cabinet approval. Cabinet had only taken note of the introduction of this Bill. The situation in law where a Minister pilots a Bill where there is no collective responsibility may engage his personal responsibility. This does mean that were Government to be sued for any reason whatsoever for prejudice caused to a plaintiff on account of that law, it would be open for government to plead *Non Est Factum* and implead the personal responsibility of the Minister who did not do so.

## UNDUE INFLUENCE

1426. With regard to undue influence, we read in **Black’s Law Dictionary, 5<sup>th</sup> Edition:**

*“Undue influence. Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely. Influence which deprives person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own. Misuse of position of confidence or taking advantage of a person’s weakness, infirmity, or distress to change improperly that person’s actions or decisions.*

*Undue influence consists in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; in taking an unfair advantage of another’s weakness of mind; or in taking a grossly oppressive and unfair advantage of another’s necessities or distress. Calif.Civil Code, 1575.”*

1427. As underlined above, there is undue influence exerted upon someone where his acts and doings may, on the face of them, constitute improper, or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forebear an act which he would not do or do if left to act freely. The Commission has two situations:

- (a) In the case of Section 110A and Section 110B, the ex-Minister may have created a sense of urgency in the passing of the Bill which left Cabinet with “Note” only as opposed to approval, yet it was introduced in the NA under a Certificate of Urgency.
- (b) In the case of the sale of the Britam shares, persons may have been misled into thinking that they needed the proceeds to pay the policy-holders by 30 June 2016 when it was known that funds for the repayments may have been obtained elsewhere.

## **MISDEED**

1428. With regard to misdeed, according to Chambers Dictionary, misdeed is a wrong doing or an evil deed.

1429. The above acts and doings have not been without financial prejudice caused to the public. Had the sale been properly conducted, it would not have been sold at MUR2.4bn but for a higher sum. The Government had undertaken to reimburse the policy-holders. Only a class of them had been reimbursed 70% of their investment. The rest, we understand, are still waiting. Had the amendment to the Insurance Act in 2015 not been passed, the route that the process would have followed is a completely different one, with the consent of the policy-holders and at their expense: resort would not have been made to public borrowing.

1430. In answer to the question as to whether there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of said shares and whether any financial prejudice has thereby been caused to any person in Mauritius.

1431. **Our ANSWER is -**

**That the acts and doings are suggestive of all those offences and/or breaches incurring criminal or civil liability as the case may be.**

**We make such recommendations as are necessary on the above at the end of this Report.**

## CHAPTER 20

### TOR (VII) – CHOICE OF KENYAN SHILLING FOR SALE?

*These days man knows the price of everything,  
but the value of nothing – Oscar Wilde*

1432. Paragraph (vii) of the TOR requires us to enquire into -  
*whether Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred to USD.*
1433. The transaction was parleyed, discussed one-to-one and struck in Kshs. In an MOU for that matter signed on 12 March 2016, the Kenyan currency was never ever questioned at any time, not even at the time the formal SPA agreement was entered into. That is odd and in itself exacted an explanation.
1434. The person from whom an explanation was asked was the SA. His timid answer was that it was so because the Britam share was quoted in the Kenyan currency on the Stock Market. A lame explanation, in the view of the Commission, as the sale did not relate to shares of Britam on the NSE. It was related instead to the sale of the shares in an unquoted investment holding company. It would have readily accepted that explanation had the buyer and seller both been Kenyans; in other words, had the transaction been a purely local one. But it was not a local purchase. It was an international transaction between a Mauritian seller and a Kenyan buyer. The norm in any international transaction is the USD or the English pound or the Euro. That Kenyan shilling was chosen to be the currency of the transaction speaks volumes about the sheer levity with which such a huge transaction of public importance was concluded who in an international transaction uses a currency other than the current ones?
1435. Was not thought whatsoever given to the international practice in such international sale, that an international currency should have been used in accordance with international practice?
1436. That oddity is doubled by another. The sale – for a reason best known to the two parties – was contractually characterized as a private transaction of a confidential nature not to be disclosed to third parties in the MOU. Why? Was it to forestall a public outcry on the matter?
1437. That double oddity is trebled by another fact. It is specifically provided in the MOU that the conversion would be done by the buyers at a bank chosen by them. In fact, this is what happened. Mauritius received it in USD but after conversion from Ksh to USD at a bank in Kenya. That conversion was done in Kenya at the instance of the buyer who chose his bank for the purpose. Was any thought ever given to why it was the buyer who had to convert the Kshs into USD at a bank chosen by remitting the sum? The bank was no other than Equity Bank.
1438. For such a huge amount of money, how much did the Kenyans obtain by choosing the right time to purchase the USD and to remit the sum in USD in Mauritius. What was the shortfall in the amount received by NPFL following the post conversion in USD?
1439. To the question as to whether Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred to USD.



1440. **Our ANSWER is -**

**Kenyan shillings, indeed, was the underlying currency of the transaction. As to why Kenyan shilling was preferred to USD, one obvious reason has been that had it been done by USD, US would have been able to trace any foreign account where kick-backs may have occurred – which is not possible in the case of a transaction struck in Kenyan Shillings. The Kenyans have not cooperated with the Commission’s request for mutual legal assistance.**

**Why, despite the underlying currency being Kshs, the payments were remitted in USD by the Equity Bank of Mr Peter Munga is another curious factor in the choice of the currency of the transaction.**

## CHAPTER 21

### CRIMINAL AND CIVIL RESPONSIBILITY OF THOSE INVOLVED

*... there's a special name for the people who discreetly  
remove all the traces after the act: cleaners –  
p. 167, The Panama Papers, Bastin & Frederik  
Obermaier, One World, 2017*

1441. The concluding paragraph of the TOR requires us to report on matters ancillary to TOR (i) to (vii) and to situate criminal and civil responsibility of all persons, entities, companies involved in the said transaction.

1442. With regard to the ancillary matters, our report should be:

- (i) with respect to whether the method of disposal of the shares of the BAI Company (Mauritius) Ltd and related entities in Britam Holdings Ltd (Kenya) was in the best financial interest of the seller are –
- (ii) respect to the circumstances in which the SA, Messrs Yacoob Ramtoolah and Georges Chung, did not proceed with the sale of the BAI Company (Mauritius) Ltd and related entities shares in Britam Holdings Ltd (Kenya) for the sum of MUR4.3bn offered by a potential buyer, namely, MMI Holdings and, instead proceeded to sell the said shares to the existing shareholders, namely, Messrs Peter Munga and other investors (Kenya) for the sum of only MUR2.4bn;
- (iii) with respect to whether there was any transaction advisor for the said sale and to inquire into the role of BDO in the said transaction and to inquire whether there was any conflict of interest in relation to BDO's involvement;
- (iv) with respect to whether all proceeds from the said transaction have been received to date, including dividend, if any, prior to the said sale;
- (v) with respect to whether funds have been transferred otherwise than into the account of the seller, and the amounts received if any, into any third party account, the currency in which it was so received, and any amounts retained as fees or commissions by or paid to other parties;
- (vi) with respect to whether in relation to the above transaction there has been any fraud, malpractice, corruption, undue influence or, other misdeeds by any person involved in negotiating and finalizing the sale of said shares and whether any financial prejudice has thereby been caused to any person in Mauritius;
- (vii) with respect to whether Kenyan Shilling was the underlying currency of the transaction and why the Kenyan Shilling was preferred to USD;

- (viii) with respect to establishing responsibility both criminal and civil, of all persons, entities, companies involved in the said transaction and make recommendations thereon.

1443. The question under the concluding paragraph is whether the facts gathered under (i) to (viii) engage the civil or criminal liability of any person, entity, company involved in the transaction.

1444. We need here to go back the fundamental character of a Commission of Enquiry. A Commission of Enquiry is not a parallel civil or criminal investigation on any matter. It is an Enquiry into facts the purpose of which is to set to the bottom of the matter which has caused public concern. That has also been laid down in Section 12(2) of the Commissions of Inquiry Act which reads:

*“No evidence given before a Commission shall –  
(a) give rise to any civil or criminal proceedings, other than a prosecution for perjury, against any person giving such evidence”*

1445. From the above, it follows that the evidence received by the Commission cannot form the basis for a criminal or civil action by any person other than for perjury if it has been so committed.

1446. It follows that, if on the facts disclosed at the Commission, there is substance for a criminal or civil action, that substance has to be separately and independently investigated by the relevant authorities other than this Commission.

## CRIMINAL LIABILITY

1447. With reference to criminal liability, we take the view that there is matter for investigation by the authorities as to whether there was or there was no “forgery” or attempt at forgery in the Minutes of Proceedings.

1448. The Commission has analyzed the document which was produced by Mr Deerpalsingh and relied upon by ex-Minister Bhadain, Mr Ramtoola and Mr Afsar Ebrahim, for their contention that there never was an agreement on 18 November 2015 for MUR4.3bn. They represented thereby that the Kenyans had agreed to buy the shares at a “mutually agreeable price.” This document, they said, was retrieved from BDO (Kenya), Mr Khapre, after the Commission had started its work, more specifically at the time they were being summoned to depose.

1449. But the Commission already had a copy of the Minutes, obviously unknown to the four persons – ex-Minister Bhadain, Mr Deerpalsingh, Mr Afsar Ebrahim and Ramtoola, where the impugned words did not exist. It was obvious that the Minutes had been tampered with on a matter material to the investigation.

1450. The Commission concludes that the Minutes produced by Mr Deerpalsingh, and made use of by ex-Minister Bhadain, Mr Afsar Ebrahim and Mr Ramtoola was on the face of it.

1451. This matter will need to be referred to the Police for investigation and, if found to be warranted, for whatever action the Police may deem fit.

1452. We say the document has been forged for the reasons as hereunder stated:

1453. In terms of logic and common sense, Mr V. Lutchmeeparsad was requested to find out whether the Kenyans, if they wanted to oust MMI Holdings from the competition, could either match the price or do better. We have evidence to the effect that Mr V. Lutchmeeparsad did as he was told. He had a meeting with the key persons concerned present in Kenya at that particular time, confirmed later by written notes by other key persons. He reported back to the then MOFED that he had the commitment of the Kenyan Authorities to buy the shares at the same price offered by MMI Holdings MUR4.3bn, except that they needed a longer period of payment.
1454. Mr V. Lutchmeeparsad did produce the Minutes of proceedings prepared by Mr Khapre as well as a correspondence by way of email addressed to Mr Peter Munga in support. There is corroborative evidence that the authentic Minutes are those circulated soon after the meeting by Mr Khapre to Mr Lutchmeeparsad which the latter carried with him to the Ministry to be filed by him soon on his return to the Ministry in November 2015. This was produced to the Commission on 3 August 2017 well before Mr Deerpalsingh produced his copy on 6 September 2017. The forgery was so subtle that it could have easily missed the eyes of any investigator. But when the Secretariat compared them, they found the fraud.
1455. It is this fraud that Mr Deerpalsingh was examined on, on 26 April 2018. His explanation was that he had received it on the eve of his deposition from Mr Ebrahim who had received it by mail on 19 April 2017 from Mr Khapre. It should be noted that those dates are a couple of months after the dates of Mr Lutchmeeparsad. It was not in the interest of Mr Khapre to forge those minutes. They could only have been forged in Mauritius by Mauritians.
1456. Mr Deerpalsingh was about to be asked the question of forgery. He anticipated our question straightaway and responded by saying that he was prepared to go to the Central CID to report the forgery. It looked much more like the thief being run after himself running after a phantom thief to divert attention.
1457. It is to be noted that the ex-Minister Bhadain constructed his whole version on the inserted wording of “mutually agreeable price” to argue that fact that the agreement reached in the Nairobi meeting of 18 November 2015 was not for sale at MUR4.3bn.
1458. The notes of meeting for a meeting which had taken place in Nairobi in 18 November 2015 formed part of documents produced by Mr Deerpalsingh in course of his first deposition on 6 September 2017 to the Commission. Thereafter, both Mr Ramjanally and Mr Ebrahim referred to them.
1459. We conclude that this Paper is fake and has been forged. This document was forged for the sake of supporting the version of Ex-Minister Bhadain as well as BDO & Co Ltd (Mauritius) that there had never been an agreement for the sale at MUR4.3bn of the Britam shares but an agreement that they be sold at a “mutually agreed price.”
1460. The Commission received this Paper in August 2017, after it had started its work, to say that the agreement was not for MUR4.3bn but for a price agreeable to parties.
1461. We consider that this document produced by BDO on which ex-Minister Bhadain relies is fake and has been tampered with. It boggles the mind that those involved has so much audacity as to produce fake paper to hoodwink the Commission.

1462. When the ex-Minister Bhadain was confronted with the issue of forgery of minutes, his explanation was that it was a question of the word of Mr Lutchmeeparsad against the word of Mr Khapre.
1463. The Commission is persuaded that it was not the word of one against the word of another. It was not in the interest of Mr Lutchmeeparsad to state in November 2015 what did not happen. On the other hand, it was in the interest of the ex-Minister and his team to state what did not happen and seek to support it by some concocted document.
1464. In any case, we have corroborative evidence with respect to the forgery.
1465. There is another reason for which the document is to be taken as a fraud. We heard witnesses who stated that after the Kenyan meeting dated 18 November 2015 where the Kenyan agreed with Mauritius for the sale of the shares at MUR4.3bn subject to flexibility in payment terms, there was a celebratory dinner which followed. At this celebration dinner, BDO Kenya was present. It follows that had there not been an agreement for MUR4.3bn, there would have been no celebration but a return to Mauritius on a mission gone “*bredouille*”.
1466. The common-sense dictates that the Kenyans would not have landed in Mauritius so forcefully and promptly knowing full well that an agreement had already been reached between MMI Holdings and Mauritius for a sale at MUR4.3bn
1467. The conduct of Kenya is consistent with the fact that they wanted to strike the iron while it was hot. And on finding that the ex-Minister and his team were indulgent, they pushed their business acumen to the sharpest.
1468. Additionally, the document speaks for itself. The very document which was tampered with bears testimony to the fact that there is no perfect crime. When the original is compared to the fake, the original contains a typing error. This typo has been corrected in the fake now. It required the meticulous eye of a vigilant panel to identify the genuine from the fake.
1469. If that was not enough reason, we may refer to no other than the paper from Ms Gladys Karuri which refers to the actual figure in so many words.
1470. A criminal investigation may find that there is ample evidence to support a *prima facie* case of forgery in breach of Section 108 of the Criminal Code. This section reads:

*“108. Forgery by private individual of public or commercial writing*

*Any other person who commits a forgery in an authenticated and public writing, or in a commercial or bank writing –*

*(a) by counterfeiting or altering any writing, date or signature, or by the use of a fictitious name;*

*(b) by fabricating any agreement, condition, obligation or discharge, or inserting it in any such act after it has been completed; or*

*(c) by adding to any clause, statement or fact which such act was intended to contain and certify, or by altering such clause, fact or statement, shall be punished by penal servitude.*

*109. Making use of forged public writing*

*In every case specified in sections 106 to 108, any person who makes use of any forged document or writing knowing it to be forged, shall be punished by penal servitude for a term not exceeding 20 years. Amended by [ Act No. 36 of 2008] [ Reprint No. 2 of 1983]*

1471. Who between them committed the forgery and who between them used the forged document knowing that the document was forged is not for us to sort out but for the competent authorities.

### **CIVIL LIABILITY**

1472. With reference to civil liability, we take the view that there is material on which a legal opinion may be sought by persons prejudiced by the short-fall between MUR4.3bn and MUR2.4bn by which the investors were prejudiced.

1473. The question is who is the person or persons liable in the circumstances in which it happened?

1474. On one view, it is the State. But it would be opened to the State to plead that it was not a decision of government inasmuch as Cabinet was never involved in the matter so that it was ex-Minister Bhadain and his team who were jointly or severally the authors.

1475. On another view, it was the team which did so in an individual capacity inasmuch as Cabinet was not involved in the matter so that ex-Minister Bhadain and his team took it upon themselves to do as they did.

1476. It is not within the mandate of this Commission to establish civil or criminal liability and it will guard itself from doing so. However, it is well within its mandate to suggest that such liability may be engaged and these matters are within the precincts of other relevant authorities in our legal system.

## CHAPTER 22

*I am terrified of submarines – Autumn Reeser*

### THE SALE OF THE BRITAM SHARES - A MANOWARI PROJECT

1477. In this penultimate Chapter, just before the Recommendations, it serves to know what is the truth which has emerged. The sale of the Britam shares was by law the responsibility of the then MFSGG&IR through the then Minister. When we speak of good governance, it implies 8 essentials: government that is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive all resting on the rock of the rule of law. The sale of the Britam shares may be said to have failed on each of these essentials.

1478. Two key persons whose intimate knowledge of the whole matter was next to none would put it succinctly. Dawood Rawat would put what had happened in one curt sentence. And Mr Peter K Munga would describe it all in one Swahili word. The truth lies in what they said and the way they said it. More about what they said below.

1479. Ex-Minister Bhadain would put his hands in the fire, while maintaining that he was not involved, argue that there was nothing wrong. Those few who handled the matter stood by that equally. They were directly involved. But there were others who held the contrary, even on partial facts and on the face of it. The Commission dug up all the relevant and material facts. It concludes therefrom that there were many things wrong. What were they? Why did it go wrong? How did it go wrong? Where did it go wrong? Wherefore did it go wrong? When did it go wrong? Who got it wrong? The Commission would give it the same name as did no lesser a person than Mr Peter Munga himself. It was a Manowari project, par excellence. What is Manowari. It is a Swahili word which Mr Peter Munga himself utilised to describe this project. We explain below what it means and how he, of all people, described it so aptly. Why he utilised the word is manifest.

#### 1. WHAT WENT WRONG?

1480. Those who stated that there was nothing wrong argue that the sale price of the shares was determined by the open market price at the time of sale. They advance that the market value of the shares had fallen drastically with the decision of the Mauritian government to revoke the license of BBCL which had a serious knock-on effect in the non-banking sector: in this case, the value of the Britam shares.

1481. On the face of it, the argument looks valid and persuasive except for the fact that the assumptions on which it is based are fallacious. The Commission checked the facts: it found that the price of the shares in November 2015 when the Kenyans had offered to buy them at MUR4.3bn was comparable to the price on 10 June 2016, the day of the sale and signature of SPA when they were sold at MUR2.4bn i.e. the price inserted in the tentative MOU. That happened to be the time when the share price was at its lowest on the NSE. Mr Peter Munga obviously had with remarkable ruse walked out of his MUR4.3bn offer and able to drive home to the Mauritians that the share price had fallen in between. And the ex-Minister and his team had bought that argument without doing their factual due diligence. Or if they had cross-checked, they had chosen to simply ignore. The market price value argument then is a red herring which the Kenyan party had used to hoodwink the Mauritian party which had swallowed it wholesale. They were taken for a ride. And they would want others to join them in the ride. The Commission discredits it.

1482. A thousand words would not convey what Mr Dawood Rawat expressed in a few words, coming out of the mouth of someone whose deep intimate knowledge in the matter is incomparable. “*What oft is said but never so well expressed*” goes the expression. He commented:

*“The Kenyans either duped the Mauritians or made a covert deal which is rather intriguing.”* **Dawood Rawat, weekly, Issue No 3261. The Britam Scandal. The Inside story of the Fiasco, Issue 3261, p23.**

1483. Mr Dawood Rawat made both scenarios mutually exclusionary. The Commission takes the view that one scenario does not exclude the other. The deal was covert and the Mauritians were duped. And who is the one who gained by it, only the front-liners will know.

1484. Basically, Mr Peter Munga, on the facts ascertained, was duping the Kenyans and the Mauritians alike. He was able to do that because he was astute enough to making a covert deal with the Mauritians. Would it surprise anyone that he had himself given this project a fitting name of considerable eloquence: *a Manowari Project*?

1485. Intrigued by this lone Swahili word in the business language of the deal which was all through in English, the Commission went to source in search of its meaning. Manowari is, no more and no less Swahili for the Mauritian word “sous-marin”! With all its connotations. It had struck no one from the Mauritian side to as little as inquire why the term *Manowari* had been used. Had anyone done so, front-door governance would have prevailed over back-door governance. Why would any buyer for that matter of public assets give such a connotative name to a project of billions? This was not an intended police raid, still less a projected strategy for a battle-ground. Be that as it may, this is the way Mr Peter Munga shrewdly decided to get his way, having rallied some Kenyan high officials to his cause. On the surface of the sea, all was smooth, clear and quiet to the public eye. It was all happening below the surface. The term “sous-marin” was a perfect fit to describe the process. He was the sole bidder and he dictated the terms hidden from the public eye, with indulgences, accommodation and illusory terms.

1486. In sum, what went wrong was that: (1) the Mauritians were duped and (2) Mr Peter Munga had a *Manowari* deal with them!

## 2. WHY DID IT GO WRONG?

1487. Now for why did it go wrong? Many things went wrong. The ex-Minister and his small team were no match for Mr Peter Munga, a business tycoon of considerable clout, and his small team. The latter travelled to Mauritius on 14 November 2015 on a tourist visa, a couple of days prior to the Nairobi meeting of 18 November 2015. Not the SA but Afsar Ebrahim of BDO took him to ex-Minister Bhadain on the same day where a strategy was developed between themselves as to how the transaction should pan out. He was fully aware that MMI Holdings had offered MUR4.3bn. Then he, Mr Peter Munga, left Mauritius on 16 November 2015 and chaired a meeting in the afternoon of 18 November 2015 in Nairobi in presence of Kenyan government officials to agree, after a fifteen-minute deliberation, to match the price offered by MMI Holdings. A meeting in Kenya was proposed to MOFED for early March. It did not take place. The then Minister of Finance had left office by end of February 2016. MOFED exited the scene. The MFSGG&IR too over. On 8 March 2016, Mr Peter Munga landed in Mauritius with his small team dealt with BDO and left having signed an MOU which was more in the nature of a formal contract than an MOU with all the terms laid down in black and white for MUR2.4bn. It happened on 12 March 2016, the



Independence Day of Mauritius, a *non dies*. After the ex-Minister left office, Mr Peter Munga visited Mauritius on 05 February 2017 on a business visa. His whereabouts are unknown. Whom did he meet? How he met them? For what he met them? Only those who received/met him will know. These are questions the Commission would have asked him, had he co-operated fully with the Commission. But after the Kenyans had represented to the Commission that they would co-operate fully with the inquiry, they walked out of their talk when the stage had reached for them to answer the crucial questions in the investigation.

1488. When the BDO witnesses had been questioned about this important meeting of 14 November 2015 between Mr Peter Munga and the ex-Minister Bhadain, their prevarications were so obvious that they would provoke anyone on enquiry. They low-keyed the meeting saying at first that it was a mere courtesy call. No more than 5 minutes or so. Probed further, one finally agreed that it was more than that. The Commission found out that it was a crucial meeting. The Commission retrieved an email which Mr Peter Munga had written to the ex-Minister Bhadain let the cat out of the bog. Substantial matters were discussed and decisions arrived at, including an agreement that he, Mr Peter Munga “*will continue engaging BDO & Co, the Special Administrator on the lines agreed during our meeting.*” BDO was in copy of the e-mail of Mr Peter Munga to the ex-Minister. But it did not produce that document to us despite having been required to produce all the e-mails exchanged in relation to the transaction. That is not the only vital document which BDO failed to produce to the Commission.

1489. Admittedly, if the meeting had been for Mr Peter Munga to merely express the Kenyan position to the ex-Minister that a foreign buyer (MMI Holdings for that matter) was not welcome as a buyer, one could dismiss it as an innocuous meeting which Ministers usually have with key persons in the discharge of their duties and responsibilities of being fully informed. But here there was more than that: an agreement had been reached between the ex-Minister and Mr Peter Munga in presence of Mr Afsar Ebrahim of a line of action which had to be followed. That rings much more like a private office transaction than that of a public office.

1490. The Mauritian counterpart of the deal could have very well used a double screen to protect themselves: (i) a legal consultant and (ii) a Transaction Advisor. A legal adviser for the transaction as a whole would have first queried the couple of dubious words and phrases used in the MOU, amongst which the term “a pool of investors.” This non-legal term would have blown the eyes of any student of law but which was glossed over by each and every member involved in the small Mauritian team including the law professionals vetting the individual documents. One law professional went to the extent of stating it was current practice to use such terms and it is found in Company Law. He never produced anything to show that such a malpractice was current and legitimated by the Companies Act. The historical long-standing Chambers of Mossack Fonseca has crumbled and disappeared for that reason. On the contrary, all others, questioned on this strange term, agreed that it was not in order. If such a malpractice is current practice in certain law Chambers, we have serious cause for concern. A Transaction Advisor would have advised on the method to be used to obtain the best price of assets of such value.

1491. In sum, regarding why it went wrong, it is because a line of action had been agreed upon between ex-Minister Bhadain and Mr Peter Munga, the details of which only those who participated in the meeting will know: Mr Peter Munga, the ex-Minister, Mr Afsar Ebrahim and Mr Khapre. The ex-Minister stated he had nothing to do with the sale. Mr Afsar Ebrahim stated it was a mere courtesy call. The SA did not attend the meeting. He only

stated he wished he had been handling the matter. The opaqueness characterizing this meeting would have been dissipated had Mr Peter Munga had co-operated.

### 3. HOW DID IT GO WRONG?

1492. How did it go wrong? The manner it went wrong was that Cabinet was kept in the dark all through. Why did not the ex-Minister think it fit to engage collective responsibility of Cabinet for a transaction of such a magnitude and such national sensitivity simply boggles the mind. Even FSC was kept in the dark. Worse, there was misreporting and underreporting to the Board in the periodical meetings. What is shocking is that the parties had entered into an NDA which is not in itself wrong. An NDA is used to protect trade secrets and sensitive information regarding the parties and the manner in which they conduct their business. But a properly constituted NDA has limits to which it can go. In this case, properly read, it meant complete secrecy of the whole transaction. Albeit very widely worded, it still left the possibility that disclosure was subject to the consent of parties. However, that saving clause was never used by the Mauritian party to apprise either Cabinet or FSC. Indeed, it was not until a PNQ was raised in Parliament long after the fact that the public came to know – not what was happening – but what had already happened. In other words, the nation was presented with a *fait accompli*. In the words of the ex-Minister in answer to the PNQ: “*Now it is a done deal.*” It is not unreasonable to conclude that had the matter been broached in Cabinet, a lot of the mischief in and surrounding the transaction would have come to light. And it may well have been prevented.

1493. In sum, as to how it went wrong, the black-out surrounding the transaction was meticulously adhered to all through and the widely expressed NDA was applied not in the best interest of the seller.

### 4. WHERE DID IT GO WRONG?

1494. Where did it go wrong? It went wrong where Mr Peter Munga and the ex-Minister agreed on 14 November 2015 to “*continue engaging BDO & CO, the Special Administrators (sic) on the lines agreed during our meeting*”. The Mauritian party had thereby fallen into the net of Mr Peter Munga’s covert deal, his project “sous-marin” or his Manowari Project. Mr Peter Munga was a Kenyan business tycoon. He was, in fact, the principal all through but projecting himself as an agent of a number of investors who never in fact existed and using Kenyan officials to have his way. It was all he, Mr Peter Munga, who was buying it. There was in fact no pool of investors, after all. It was not a question of Mr Peter Munga being agent of any principal. He was at once the agent and the principal, a one-man show. This would have come to light once some basic due diligence had been done prior to sale. But it was kept from the public eye. Was the SA in charge? He denied that he was. He only wished that he were.

1495. In sum, as to where it went wrong: where the deal was done hidden from the public eye, public affairs run along business lines. Not a single record exists at the Ministry to show for it. All information was gathered from other places.

### 5. WHEREFORE DID IT GO WRONG?

1496. Wherefore did it go wrong? The end objective was to pay the policy-holders by 30 June 2016. The pressure had been lifted with a loan from the Bank of Mauritius and there were still other local assets to be sold. Accordingly, there was no “*feu en la demeure*” unless it was a false fire alert. There was no absolute necessity for the prices and the terms to be agreed and cast in stone on 12 March 2016, the independence day of Mauritius, and at that

indulgent price. Had the matter gone to Cabinet, the ex-Minister would have benefited from the cover of collective responsibility. Would also have emerged the fact that Cabinet had earlier decided that the shares should be transferred to NPFL and not sold. Even FSC was kept in the dark. Had it been kept abreast, even FSC would have reminded the team that the shares were not to be sold yet. Why did they sell then? The ex-Minister was as good as running a one-man government in a democratic society.

1497. It is not that the ex-Minister was in the dark that the Central Bank had advanced MUR3.5bn for the repayment of the policy-holders. In his reply to the PQ of B/31 of 29 March 2016, this is what he made public:

*“The then Minister of Finance and Economic Development, Mr V. Lutchmeenaraidoo dealt with the Central Bank and got a loan of MUR3.5bn. .... Our priority is to alleviate the suffering of the victims of BAI fraud, the Super Cash Back Gold policy holders. We will repay them first and then, of course, we will, through the recovery process, address the issue of 3.5bn for the Central Bank.”*

1498. Why did they sell and not transfer them to NPFL leaving it to NPFL to decide what to do with them and how to do it according to NPFL’s exigencies? A question that looms large over the head of those who stated he had nothing to do with it at all.

1499. Indeed, given an opportunity to review his stand through a Salmon notice, the ex-Minister confirmed that he had nothing to do with the sale; it was all MOFED.

1500. And what is more, the transaction was done with great *astuce*. For cosmetic compliance with Cabinet decision, the transaction was christened a transfer-sale: transfer to NPFL to sell in one transaction. Form had primed over substance and opaqueness over openness.

1501. In sum, the ex-Minister and his team chose to sell the shares not only against Cabinet decision but also when the urgency to pay the policy-holders with those proceeds of sale had been mitigated by several material factors. Why did they sell then?

## **6. WHEN DID IT GO WRONG?**

1502. When did it go wrong? It had started going wrong from the very first all through to the end. But it all started with the ill-drafted, ill-conceived amendment to Section 110 of the Insurance Act which was introduced in the NA, and rushed through it. This was decried by the members of the Opposition. But what the Opposition did not know was that the Bill had never received Cabinet approval. Cabinet had simply noted the existence of such a proposed amendment. The amendment had also vested power in the Minister to enter into the affairs of FSC, an independent Regulator. By the same token, a political adviser was appointed Vice Chairperson of the Commission. The law had also created the creature, the SA, whose powers and functions were dubious. That was the beginning of the wrongs. That tied in with the unethical appointment of BDO, a decision reportedly taken in the office of ex-Minister Bhadain with other Ministers to boot. But the one which primes all is the one-to-one meeting which the ex-Minister had with Mr Peter Munga, the sole buyer, on 14 November 2015, to reach an agreement between the two parties of the line of action which was to be adopted through the engagement of BDO and the SA.

1503. In sum, *les carottes etaient cuitent* when lack of border control at vital institutions of the State allowed institutional manipulation. Section 110A and Section 110B – from a dubious drafting source - of the Insurance (Amendment) Act was rushed through

Parliament by the ex-Minister, an amendment which had not obtained Cabinet approval, as per our records. That brought in its trail other wrongs one after the other, above all concentrating power of action – legal and factual - upon the Minister. An eye opener to how vulnerable our democracy is institutional subterfuges.

## 7. WHO GOT IT WRONG?

1504. The Mauritian side got it wrong altogether. Mr Peter Munga was a business tycoon and all the Mauritian professionals involved put together were no match for him singly alone. He was able to dictate both time and terms, price and party. That the Mauritians enjoyed the trip Mr Peter Munga gave them is evident from the public statements made on it in Mauritius and in Kenya.
1505. True it is that the decision to sell to the Kenyans was taken by MOFED. But MOFED had also decided that it should be sold at a price to match the price offered by MMI Holdings or do better and had held to that line steadfastly until MFSGG&IR took over. The sale was not done by MOFED but by ex-Minister Bhadain and his team at the price of MUR2.4bn, without record and behind the back of the nation.
1506. The Minister of Finance had exited the scene by the beginning of February 2016. Thereafter, it was Minister of Financial Services Good Governnace and Institutional Reforms who was given and took over the responsibility. Mr Peter Munga had already had an eye on the Britam shares. He had discussed the matter with Dawood Rawat before the death knell many in April 2015. He knew how to handle both the Kenyan as well as the Mauritian top brass.
1507. The Commission was aghast at the extent to which the Mauritian side – the MFSGG&IR, FSC, NPFL and BDO as well as the Mauritian professionals involved – all put together gave in to Peter Munga and have kept conning others to this day on the sale of Britam shares. Mr Peter Munga represented to them and the world at large that he was doing Mauritius a favour. He had perfected his art of buying gold for the price of chaff.
1508. Who got it wrong? In sum, can ex-Minster Bhadain be believed that he was not involved at all, a position he insisted upon even after he was served with a Salmon Notice. The 15 facts he advanced to say it was not he but MOFED were carefully selected to pass the buck on MOFED. He did not submit materials which he had and which compromised him.
1509. It all went wrong in all aspects because all was done in the dark. If it came out of the horse's mouth, the single buyer, Mr Peter Munga, that it was a Manowari Project, who is anybody to conclude the contrary?
1510. The MFSGG&IR was, admittedly, a hyper dynamic Ministry, the type many applaud. But it only shows how many things can go wrong in the State, whether in open or subtle forms, and at what cost to the nation when high octane dynamics are misdirected through lack of wisdom in statesmanship.
1511. When Ministers ignoring professionals and public officers take the wrong road, some professionals and public officers like to keep a discreet distance and some adopt an attitude of resignation and some are just happy to be absent.

## CHAPTER 23

### REALITY CHECKS FOR RECOMMENDATIONS

*Never let it be said that liberty and justice, having with difficulty been won, were suffered to be abstracted or impaired in a fit of absence of mind.  
- Lord Heward of Bury in the New Despotism*

#### THE AUTOCRATIC HIGHWAY

1512. The Judicial Committee of the Privy Council in the case of **Khoyratty v State [2006] UKPC 13** commended the fact that on the accession of Mauritius to its status of Republic, an amendment was made to the Constitution which rendered it next to impossible to change the democratic set up of the country. It was “*an exceptional degree of entrenchment.*” It had to be by way of a Referendum which secures 75% of electorate first. Then at the next stage, the whole Assembly had to vote to give effect to the outcome of the Referendum.

1513. The paradox is that what is “practically unamendable” by law and procedure was made so easy in practice. The facts show that actually it is as easy to install autocracy in Mauritius in point of fact as it is difficult to do it by the Constitution. It is as easy as running a hot knife through butter. Just turn into an autocrat in the exercise of power and *le tour est joué*. This is the reality that facts and circumstances surrounding the sale of the Britam shares have shown. Talk not of this law or that law. Talk of this lord or that lord.

1514. We all agree that the people of Mauritius hold fast to their democratic model of government and development under the rule of law. This has served us well hitherto. We all agree that Mauritius owes its success hitherto to the existence of its vital institutions, which compensates for the sheer lack of natural resources. If we are agreed on those two incontestable assumptions, then the sale of the Britam shares and the facts surrounding it reveal a stark truth to us all. All the entrenched provisions of our democratic Constitution are writ on water, if our power-holders flout them in the daily exercise of their power.

1515. This enquiry has revealed that the number of real threats to our democracy are many. We identify them. Our vital institutions are at risk in the hands of a few who are ill-inspired. And with it, our democracy. The foundation of our success, has revealed cracks. Unless reinforced in concrete, promptly and appropriately, nothing may remain of our success. The exercise of fundamental rights and freedoms go hand in hand with the necessary corollary of responsibilities.

#### THREATS TO OUR DEMOCRACY

1516. The Ministry answerable to Parliament for whatever was happening in the non-banking sector of financial institutions, and for that matter, the sale of the Britam shares was the MFSGG&IR. Paradoxically, what happened was anything but good governance under a Ministry responsible for good governance. It was also a Ministry responsible for the subject-matter of institutional reforms. Was the ex-Minister and his team attempting to invent or experiment with a new way of running government? This was a major transaction the assets of which, valued some months before at MUR4.3bn, were sold at MUR2.4bn, and without any proper record at that. Whatever files existed, whatever meetings had been recorded, whatever minutes had been taken, whatever signatures had been given, whatever record had been kept existed elsewhere but not at the Ministry responsible for good

governance. When questioned about this, the ex-Minister's response was that *"This whole colonial system of taking files and minute sheets and signing and bringing it to Port Louis and taking it into the other... I mean we gone past that. The world has moved on."* The ex-Minister had a point. In the digital age, there is a digital network and communication public service cannot be trapped in the tunnel of time.

1517. But, even in that world, the principles of transparency and accountability are inbuilt and record is secured and retrievable. In this case, the Registry had opened a file but contained next to nothing as documents representing the sale. Either no institutional memory existed or it had been wiped clean.

1518. That, fortunately, did not prevent the Commission from putting pieces together through documents and files existing at other sources: hard copies or soft copies, more especially e-mails exchanged. Who did what, when and how could be safely reconstructed? The facts are strongly suggestive of a way of running a democratic government, with dynamism, euphoria or zeal but not for that reason despotic and opaque.

### **WHICH REFORM?**

1519. We all want reform. We all want to emerge from a current rut. But which reform? The facts of this enquiry one hard truth: namely, that the type of reform we need is not of institutions but in institutions. When democratic institutions became undemocratic in the wrong hands, what reform are we to reflect on? Of the institution or the men and women in it. There is very little wrong with our institutions. Democracy may not be the best form of government invented but ages of trials and errors but there is no other which ensures the widest of interests, rights and voices. Persons who were involved in the sale were professionals of no mean standing but, in the matter, they had supplanted democracy with autocracy, run public affairs along private business lines, blacking and blocking out the essential details of a sale of state acquired asset from the public eye, including Cabinet. The reform we need is a change of mindset to manage institutions. The wrong is not with our vital institutions but with some of the people called upon sometimes to lead or head them. Our model for running government with independent vital institutions has been inherited from the British after they had gone through centuries of long and painful gestation. The model was exported to other countries just like to Mauritius hitherto with proven success. We certainly need, with the advent of the digital age, to step up to the digital dynamics in all sectors, above all in the public sector. But, under the name of institutional reform, we do not need to jettison acquired gains to replace democratic governance with despotic governance and sell parochial interest under the label of public interest whether by choice, by design, by naivete or error of judgment.

### **CHECKS ON POWER**

1520. The characteristics of the sale transaction at the MFSGG&IR were: power concentration – both legal and factual - upon an Elected Executive with Civil Service marginalized, professionals made to toe the line, short cuts taken through Cabinet and NA, major decision-making in the hands of political advisers, including that of the sale of major assets, procedure and substance of the deal behind the back of the people and accountability to the nation only after a PNQ had been raised in Parliament, and to inform at that to the effect that *"now it is a done deal!"* It is in the nature of a democratic society to sometimes elect some representatives who fall into the temptation of running public affairs as if they were running private enterprises.

1521. Time has certainly come to renovate and inject new dynamics in our public sector so that it is more responsive, result-oriented, efficient and effective, with state-of-the-art means and men. But that is a very different matter from replacing openness with opaqueness.

### **THE NEW PEOPLE PARADIGM**

1522. The reform we need for a major part is a change in our mindset as a people, our work ethics, our work culture, our commitment to the country. It is not enough to be literate. It is vital to make good use of our literacy. The fault lies not in our democratic system, not in the institutions that support it but in the people, not all of whom are equally responsible, even if never so erudite.

### **THE IF'S OF THE BRITAM SALES**

1523. Assets of MUR4.3bn would not have been sold at MUR2.4bn:

- if the men and women, a few excepted, had properly understood what it means to be a Mauritian and stand for Mauritius;
- if the men and women, a few excepted, had put their might where their mouth was: democracy, the rule of law, good governance, transparency and accountability;
- if the men and women, a few excepted, behind the system had not set up a pocket of autocracy in our democracy;
- if the men and women, a few excepted, behind the system had known that public office is a matter of public trust to do the right thing in the right way for the right reason;
- if the then Minister, the public servant, the political adviser, the independent professional men and women, a few excepted, had taken the safer road with well demarcated lanes and not jumped the red lights;
- if the then Minister had not sought to encroach upon the independence of the State Regulator concerned and the independence of the insolvency practitioner;
- if all the members of the State Regulator concerned had fully lived up to their functional and operational independence roles in a vital sector of the economy;
- if the peer in the SROs and the professionals comprising them had lived up to the public expectations placed upon them as SROs and professionals;
- if the two Arms of our democratic State had been duly enlightened as to the manner in which the high seriousness of their process could be and was being abused;
- if the professionals involved had placed their professionalism above their business interest and not given in to the politics surrounding the matter;
- if the citizens, a few excepted, investing as insurance policy-holders in the SCBG scheme had been duly sensitized, alert and alerted on the risks underlying their investment;
- if the civil service was fully, ably and competently playing its role in the running of government of the day;
- if the elected Executive concerned was properly advised, well-inspired, advising himself, had not taken expensive risks and had heeded some of the cautions raised in Parliament and elsewhere;
- if the elected Executive concerned was not taking for granted the office of the Attorney-General, the legal adviser to Government;

- if the personnel involved in the preparation of the Bill had heeded the caution expressed by the State Law Office and trusted the professionals in drafting;
- if the law that was passed had not been the work of a bricoleur;
- if, in the choice of the manner, the procedure and the finalization of the sale, those involved had abided by principles of good governance doing justice to the Ministry that was handling the matter;
- if the political advisers had known the scope and limits of their roles and not taken decisions which only public officers with an oath of allegiance to the State could take;
- if public officers had not been reduced to the role of just pushing the papers;
- if the Ministry concerned had walked its talk on good governance, transparency and accountability;
- if those involved with the passing of Section 110A and 110B of the Insurance (Amendment) Act had proceeded by the rule book at the level of both Cabinet and the National Assembly and not abused the respective processes of these two vital institutions of the State;
- if all involved were equally concerned with what it takes to build a country patriotically as opposed to parochially, scientifically rather than rhetorically;
- if the Mauritian team had only learnt nationalism from the Kenyan team;
- if they were all alike enhancing the carat in the quality of its people to match the carat in the quality of its natural beauty.

1524. In sum, it all comes down to just a few of the men and the women whom you trust will play according to the rules but who do not, with dire consequences to the nation. Their attitude. Their approach. Their mind-set. Their experience or lack of it in the relevant area.

1525. The Commission refuses to believe that any political party coming to power wants a scandal in its hands. It wants achievements on its score-board. The scandals are the creation of the men and the women involved whom the party trusts and fields as candidate whom the people trust and elect them but who fail in the office. Some do it as novices in politics, some do it by naivete, some by design, some by gaps in their knowledge, some by gaps in their ignorance. But the common factor in all of them is a misunderstanding of what holding a public office is. Some may take it as easy business opportunity and some as a welcome drink for power.

### **RE-APPRAISAL OF PUBLIC OFFICE**

1526. A public office is not a state apparatus for any parochial interest. Public office in Mauritius should be Mauritianism for Mauritius. Mauritius is not destined to be a jungle of ferro-concrete and glass structures, whose bipeds bear quadruped instincts but a society of social animals with human instincts, knowledgeable and trusted in the role they play in our small but plural society, in a small but congested space allotted to them under the sun. They know what civilization is. They know what cultural creation is. They know what social order is. They know what economic provision is. They know what political organization is. They know what moral principles are. They know what peace and order is. They know how to create the right chemistry for the pursuit of knowledge and the arts. They know that freedom is not a licence. They know that the rights of one individual are subject to the rights of others and the general good. They are sensitive on the independence of institutions and the professions and they are aghast when anyone is trying to tinker with their independence. They know of no Mauritius without the peace, order and good governance



of its people. And they know of their vital institutions working with their functional and operative independence. They know of their dispassionate independent thinkers, players and stake-holders.

### **THE RULE OF THE LORD**

1527. And now by the facts and circumstances of the Britam sales, they have known that labels like good governance hide content, rhetoric hides reality, democracy can slip easily into autocracy in the hands of a few.

### **OUR FUTURE**

1528. Our recommendations, accordingly, are geared towards the men and the women whose responsibility will make Mauritius and whose irresponsibility will break it. It engages our national conscience. We risk losing our paradise for ever like we lost our Dodo for ever. It was the work of the humans. It will still be the work of the humans if we lose our Eden.

1529. If the ultimate objective of a Commission of Inquiry is to make Recommendations, they should stem, in the Commission's view, from the realization that Mauritius for all its beauty is fragile and vulnerable and nothing is to be taken for granted. Our future lies in learning from the values we gave up in the past and the values we need to retrieve and restore. That is the reason for which we stress in the Recommendations change of mindset. They inhere a rationale so that what went wrong should not go wrong a second time. They should be contextualized in the higher norms and values which the country holds at heart: our vision of the society we want to live in, our present position and the distance between. What it is to be Mauritius and Mauritian and how far do we fall short of it?

### **NATIONAL VALUES**

1530. Every nation on earth represents a set of values proper to itself. We speak of Western values, Eastern values in the larger sense and, in the national sense, of African values, American values, Australian values, Chinese values, English values, French values, European values, Indian values, Islamic values, Japanese values etc. What are Mauritian values?

### **MAURITIUS EMBODIES A VALUE ON THE WORLD STAGE**

1531. Recognition was given to same at no lesser a pedestal than the highest international organisation on the world stage. It is of no mean significance that the United Nations Security Council (UNSC), the very apex of the political organisation of world order, visioned the vocation of the small fry of the Mauritian state at its birth. It has been to give a lead to the world. A plural society - multi-racial, multi-religious, multi-lingual, multi-ethnic, multi-cultural – living in peaceful co-existence and mutuality of respect amongst citizens of all shades, origins, colours, backgrounds and beliefs, unified in diversity, celebrating their differences. These are the Mauritian values. This is what the Security Council enjoined Mauritius to pass on and propagate to the world at large as the messiah at the very birth of the Mauritian nation.

1532. In the very words of the UNSC:

*“All of us here welcome and praise that courageous step into the future and all of us will join in wishing that the newly independent Mauritius will draw from its diversity fresh strength and unity. Mauritius will, we trust, give a lead to us all in showing how people of different origin and religion and race can live and work together in peace and brotherhood. The world is in sore need of such an example”* United Nations Security Council 1414<sup>th</sup> Meeting on admission of Mauritius held in New York on 18 04 1968.

## MAURITIUS TO LEAD THE WORLD?

1533. Who remembers this unique value which the UNSC ascribed to Mauritius on accession to its sovereign independent status? Sadly, passed into oblivion? Yet peaceful co-existence is the pledge that the nation took as the Mauritian value, in keeping with the objectives of the United Nations itself. Has Mauritius lost its way? When and how? Has it lost sight of its universal vocation? Mauritius has a number of things common with the United Nations. Peaceful co-existence is in their DNA.

1534. The reason we flag the Mauritian vocation is because of the lesson learnt in the subject matter of our enquiry. The people involved were not lay men and women. They were all professionals of no mean standing, some at the middle of their career and some at the near end. If they got it all wrong it was because of their wrong motivation. Peaceful co-existence is inbuilt in our Constitution, starting with democracy in article 1, rule of law for peace, order and good government in articles 2 and 45, the rights and freedoms of any individual are subject to the rights and freedom of others or the public interest in articles 3 to 16; the doctrine of separation of powers inbuilt in Chapters IV to VII; functional and operative independence of vital institutions of the State in Chapters VIII and IX; financial transparency and accountability in Chapter X; in the methods of appointment of heads of constitutional posts and bodies in Chapter XI.

## THE MAURITIAN MODEL OF DEVELOPMENT

1535. Of the very many development models existing in the world, Mauritius chose the most challenging, if the most lasting: peace, order and good government under a democratic Constitution enshrining the rule of law. How has peace, good order been kept alive in a democratic system of government under the rule of law? It is by the creation and maintenance of independent institutions of the State and independent professional organisations all working in synch which have ensured stability and inspired investor confidence.

## THE VALUE OF INSTITUTIONS

1536. Adam Aft and Daniel Sachs have conducted a professional research study of the Mauritian model of development. This is what they have stated: *“Mauritius has reached lofty rankings despite having few natural resources, no home-grown technology, no defence force, little capital and import most of its food.... Mauritius’s success can be largely attributed to its institutions.”* Indeed, without the minerals, diamonds, gold and oil of the African continent, our resources are found overground: in the independence of our institutions and the manner in which they have been jealously guarded hitherto. Those institutions may not be dissociated with the men and women who comprise them. What an institution does and does not do is what the men and women in them do and do not do. And what they do or do not do is in relation to what they understand their individual role to be in the national and international context. It is they who make it. It is they who break it, depending upon how well or ill they regard themselves therein.

1537. If the decision-makers from start to finish who were involved in the rise and fall of the BAI Empire had well understood their roles in larger context of the Mauritian nation and its higher global norms and values, the multi-billion business would have stayed today to further progress the Mauritius economy. But the institution and the professionals involved had taken their independence for granted and pushed the limit too far.

## **CORNERED BY CUTTING CORNERS**

1538. Happened what invariably does happen in such cases. They made victims of others and themselves. But the greater paradox is that when it came to the task of stopping the rot, those few responsible and entrusted with setting it right changed only the style and not the substance. And all this was taking place at no lesser a Ministry than the MFSGG&IR, the Ministry tasked to inculcate a culture of good governance and institutional reforms.

## **THE MEN BEHIND THE INSTITUTIONS**

1539. The fault lay not in the institutions but in the work ethics of those who headed and drove the process of the sale of the Britam assets. They created a pocket of autocracy in a democracy, in the name of government dynamics. Civil service barely present, public office run along business lines, professionals and politician working hand in glove, political advisers taking decision which public officers should take, parochial interests brandished as public interest, etc. It was an attempt to create a power house with power concentration on a political head, only accountable unto himself, not even to his colleagues in Cabinet.

1540. We speak about advisers elsewhere. Speaking only about professionals here, the question arises how could they – as professionals - have felt so powerless and vulnerable? The answer may lie in the lack of supportive environment that professionals live in in the face of arrogant might. Professionals construct the country and politicians decide policies. It is not given to politicians to construct with professionals kowtowing to them. As was the case here.

1541. It is a sad reflection that in an age of increased professionalism worldwide and a country comprising a panoply of promising and varied professionals, institutional professionalism never really took off in Mauritius. Indeed, Mauritius soon after its independence missed the boat of institutional professionalism.

1542. If we had – half a century after independence – an umbrella organization overseeing our SROs, our SRO's would not be engaged in calling meetings in an attempt to address matters of professional misconduct under such alarming titles as "Rogue (Professionals.)" Our institutional professional culture would have parried such blots and blows long before they occurred. Instead, professional meetings would have been held to cover substantive issues: *inter alia*, to impart state of the art knowledge in the respective professional fields and practices; to commission and publish articles for the profession and the public; to launch periodicals and journals; to organize public lectures by luminaries on the frontiers of knowledge in the areas of expertise; to sensitize the public, above all, investors and politicians, on issues of national importance; to inspire investment confidence in the delivery of their services; to fill the gap in people's understanding of what their science is all about. For, after all, it is this ignorance which was exploited in this particular case and may continue to be exploited.

1543. A truly professional society may be recognized by the following basic characteristics *inter alia*:

- (1) SROs functioning effectively;
- (2) editorial boards producing, publishing and disseminating updated professional materials in areas of present day concerns;
- (3) peer groups taking appropriate disciplinary measures to sanction the greedy and mentor the needy;
- (4) role models inspiring a work culture and work ethics enhancing the independent role and the developmental agenda of the professions in the building of the nation;
- (5) Identifying the scarcity areas and advise on the emerging sectors.

1544. We are way away from that achievable vision of professionalism in Mauritius. Indeed, despite the dire need felt for heightened proficiency in this age of increased professionalism, most of our Mauritian SROs are visible only sporadically and irregularly. There is hardly any professional publication to ensure lifelong learning. Lost in a mire, many make no difference between practicing a profession and running a business. The professional codes of conduct are more known for the breaches than for compliance.
1545. Look for professional publications, guidelines, guidance notes, protocols, rules of best practice: you hardly find any which is Mauritian grown. What SROs do for the fees they claim from members is unclear. If some professional practices have succeeded, it is due to a family legacy of work ethics and work culture left behind. Bar these exceptions, there is very little institutional support either of members or SROs for that matter.
1546. Institutional professionalism never really took off in Mauritius. The reason for it is historical. The Commonwealth of Nations had recognized the crucial call of the post-colonial time of the treble need: that of professionals to build the country with policies decided by the elected representatives, a peer group to regulate them and an umbrella organization to empower and support the SROs. It did not only encourage but it also funded the creation and logistics of such an oversight organization before it became fully autonomous.
1547. Such countries as Singapore, Malaysia, Malta, India (to name just a few) took the cue and, with the financial and other support from the Commonwealth Foundation did establish their apex para-national professional body along the models of what emerged economies have historically done such as United Kingdom, United States, Canada, Australia, New Zealand. SROs in Mauritius grew apart from one another and grew as unloved and stray orphans, without any apex body to ensure their healthy growth. How did that happen? There is a historical reason for same.
1548. It was all happening in the late sixties and early seventies. As early as 1968, Mr John Chadwick, the then Director of the Commonwealth Foundation took up the agenda through the Commonwealth Foundation and exhorted the newly independent states to create a common platform which professionals could use, where they could meet to share experiences and learning and which they could exploit to advance the national development agenda.
1549. At a meeting held in Singapore in 1971, the idea started taking concrete shape. Many delegates returned home to establish their national umbrella organization or their professional centres. Mauritius had attended the meeting and its delegates had returned with the assignment. But the Mauritian umbrella professional Center never took shape, despite the offer of the seed money. Because the two persons who had been entrusted to do the follow up decided instead to emigrate to other climes. Those who stayed never bothered to pick up the loose thread. The country set up SROs but not the body that ensured that SROs were duly empowered to duly empower professionals. Our professionals were left in the lurch, some to work as true professionals and others to travesty them. This failure of self-regulation has led to state regulation in some cases such as financial services. But the necessary institutional and professional culture has been left much to be desired. Professionals with gaps in knowledge exploit gaps in knowledge of the people in many situations. When they should be involved in filling those gaps.

1550. SROs in Mauritius have grown disparately, each with varied degrees of success and failure, some more in theory than in practice, more as creatures on the statute book than active effective SROs, more working for themselves than for the community and the country, more along business lines than professional lines. It is this state of affairs which caused politicians to come in and fill the vacuum. This, it would be fair to say, has done neither our politicians nor our professionals any good in many cases. The Britam affair is a classical example of this sorry state of affairs. We have an umbrella organization for corporate governance but no umbrella organization for professional governance.

## CHAPTER 24

*In a world divided by differences of nationality, race, colour, religion and wealth, the rule of law is one of the greatest unifying factors, perhaps the greatest ... It remains an ideal, but an ideal worth striving for, in the interests of good government and peace at home and in the world at large - The Rt Hon Lord Bingham of Cornhill KG*

### LESSONS LEARNT, RECOMMENDATIONS AND RATIONALE

1551. In this Chapter, the Commission will make Recommendations based on the number of stark lessons learnt. Our Recommendations are not limited to systems, methods and techniques. It is a myth to assume that when laws, rules, systems, methods and techniques are in place, everything will work out well and God will be able to go and enjoy his sleep. God's great issue is with some of the great guys who crack His Head. Some of our Recommendations, accordingly, are directed to people and not to logistics. Mind-sets need to change.

1552. We start with the lesson learnt before making each Recommendation and round it up with the rationale behind. The rise and fall of the BAI Empire has rung a series of alarm bells at every aspect of our national life, political life, professional life and personal life. True it is that democracy is not a guarantee against mistakes. But it is a guarantee against the repetition of mistakes. Mauritius has the highest degree of literacy in this part of the world. Literacy in this day and age of the digital citizen often referred to as *netizen* or *digizen* is barely enough. It is the proper use of the choice knowledge that one has acquired. Knowledge is not wisdom. Proper use of knowledge is. Plato advocated that only wise people should be at the head of government and government entities. Except that there is no text-book to teach wisdom. It is acquired over time, how many days in one's life one has seen the sun rise and set on planet Earth with benefit.

#### THE FIRST LESSON LEARNT

**Various persons must have drawn various lessons from the events which preceded the sale of Britam shares, which led to it and the manner in which it was concluded. The lessons learnt will depend upon how close they were to the events or how far. But what is the lesson the nation for its part, has drawn from it all? The nation elects representatives for peace order and good government but not all of them pass the test. Some Mauritians become Martians. Some mistake statecraft for statesmanship. Some create pockets of autocracy in a democracy. Some use rhetoric to gloss over reality. Some pass personal, parochial or undisclosed interest for public interest. Some cast the nation's pristine vocation to the winds and begin to trade in hate, making their one-time friends in arms as their new foes at arms.**

**The sands of time have buried what it is to be a Mauritian. This noble vocation which was fixed at the birth of our nation has passed into oblivion. Mauritius was destined to be a showcase to the world community that humanity is plural and its salvation of the human race lies in their living in peace and harmony among themselves under the rule of law. Who recalls this today, 53 years down the line?**

## **OUR FIRST RECOMMENDATION**

### ***Star and Key of the Global People***

**Inasmuch as the destiny of Mauritius was fixed at the birth of the nation by no less an international organisation as the United Nations Security Council (UNSC) -**

#### **WE RECOMMEND THAT:**

**Every Mauritian worth his salt shall:**

- 1. do a soul-search on what it means to be a Mauritian;**
- 2. discharge his duty to himself, to his society, to the country and the world at large;**
- 3. introspect on, and give effect to, the role he has to fulfil in meeting the high objective destined for him by the UNSC;**
- 4. serve to live up to that expectation of the world at large in that it is not only possible but salutary to live in harmony and peaceful co-existence in a plural human society;**
- 5. resist trading in hate;**
- 6. strive to make what was once the Star and the Key of the Indian Ocean, henceforth the Star and the Key of the global village; and**
- 7. retrace his step to be back on track.**

#### **THE RATIONALE FOR OUR FIRST RECOMMENDATION**

*It is the view of the Commission that once the memory of its people is refreshed on the role Mauritius has been called upon to play on the world stage, its pristine role will synch with its destiny. With that sense of direction, they are likely to make fewer mistakes in their conduct, their dealings in private and public office and pass on values to the oncoming generations for their own good and the general good. It is the civic duty of every Mauritian to “amene so bloc” in fulfilling the expectation of the world community in word as well as in deed, in public office as well as in private office, in public life as well as in private life. Any risk taken on peaceful co-existence, this plural society will meet the fate of its national bird: the extinct Dodo.*

#### **THE SECOND LESSON LEARNT**

**The Rawat Empire would have stayed today to serve the Mauritian nation if all those involved had understood that democracy is not a mere word in our Constitution. It is an active pledge by, for and of every citizen. Cutting corners is inimical to the rule of law, democratic traditions and principles. Businesses, professionals and people who cut corners ultimately corner themselves.**

## **OUR SECOND RECOMMENDATION**

### ***Putting our might where our mouth is: a democratic culture***

**Inasmuch as democracy is not a set of black letters on the white pages of a Constitution but the meaningful translation of the words into the day-to-day living of the citizens through an active process of putting all our might where our mouth is -**

**WE RECOMMEND THAT:**

Every Mauritian worth his salt regularly, more particularly on independence day, dedicate a short time for doing a soul search of whether he is giving to the nation what he takes from it, whether he is paying lip-service to the national anthem, whether democracy proper really is his act of faith and whether by his act or omission, consciously or unconsciously, directly or indirectly, overtly or covertly, partially or otherwise, he is biting the very finger that feeds it. Our education system should ensure that these prime values do not vanish in the air over time.

***THE RATIONALE FOR OUR SECOND RECOMMENDATION***

*If Mark Twain had commended the physical beauty to comment that Mauritius was made first and then Heaven, UNSC, for its part, had commended its people to comment that Mauritius is a show-case for the world of what peaceful co-existence is.*

**THE THIRD LESSON LEARNT**

It takes little to squander generations of acquisitions. One innocuous omission, one small irresponsibility, one small act too many and the virus has gone on rampage over a whole civilization of acquisitions. Autocracy in a democracy has small beginnings. Democracy watch is everybody's business not only that of international organizations, domestic institutions and bodies but first and foremost that of citizens in Mauritius. A democratic constitution is the Charter of its people, which each one of them has to guard as responsibly as is incumbent upon him or her.

**OUR THIRD RECOMMENDATION**

***Power holder and Article 1***

Inasmuch as the concept of democracy as per Article 1 of our Constitution vests and devolves power upon various bodies, institutions, offices, officers and others -

**WE RECOMMEND THAT:**

Every power holder shall subscribe to a Personal Code of Democratic Governance. As such, he shall take concrete steps to grow the spine of a mini democrat in his field of action, resist the temptation of becoming a mini autocrat at all times. Accordingly, as per his personal code of democratic governance, he should exercise the power entrusted upon him

- responsibly and not irresponsibly,
- altruistically and not selfishly,
- judiciously and not arbitrarily,
- properly and not abusively,
- independently and impartially, and
- not ill-inspired by extraneous motives.



### ***THE RATIONALE FOR OUR THIRD RECOMMENDATION***

*A democratic Constitution is dead letter without a democratic culture in the men and women who comprise the nation and above all the power holders in various positions. It is the people's nature, nurture and culture that give it life and sustain the constitution.*

### **THE FOURTH LESSON LEARNT**

Democratic process can be abused. Its abuse may come in subtle ways. The predators of democracy have their tongues sweet. The Judiciary has been the first of the three Arms of the State in democratic systems which developed the concept of abuse of process of the court so that users do not use the court system to wreak injustice with the system of justice. Should the other Arms of the State follow suit under different names? Both the other Arms followed in their own ways under different names. In this case, the facts show that matters came before Cabinet in an unconventional way. The same matter came before the NA in an equally unconventional way. The manner in which a law the source drafting of which has remained dubious came to be legislated show that our other two Arms of the State may need to reinforce their borders. If they had their way to that extent they did through Cabinet and the Legislature alike, we should have cause for concern that some potential hot-headed someday abuse our democratic system to make a mockery of our rule of law. The conventional way of drafting law was short circuited. The vetting of the Bill was cursory. The choice was made between drafts by a political Adviser. The Explanatory Memorandum omitted to explain a most essential object. Having been brought under a Certificate of Urgency, the legislature had little time to properly debate over it. What is more, there was evidence of threats and reprisals in course of the debate.

### **OUR FOURTH RECOMMENDATION**

#### ***Border Control at both the Executive***

**Inasmuch as evidence has shown in this inquiry that a Bill short-circuiting administrative procedures, without Cabinet approval had reached the National Assembly and become law, not without a cost to the nation -**

#### **WE RECOMMEND THAT:**

**Cabinet as one of the three Arms of the State may seriously consider for whatever decision it may think fit following the example of the Judiciary which has introduced the concept of Abuse of Process. Our Cabinet system may not afford that its supreme authority to decide as the Government of the day be flouted by stealth. Border control of what goes in Cabinet for approval and what comes out of it is sacrosanct for a democratic system to function properly, mindful of the sanctity and gravity of procedure and substance.**

### ***THE RATIONALE FOR OUR FOURTH RECOMMENDATION***

*Woe the day when in our democracy Cabinet is marginalized and the very source of democratic government is unclean and flows unclean through stream to the very end. Executive decisions at the apex of the State is taken with the highest seriousness. Collective responsibility to take decisions, more especially, to give approvals for the passing of laws is taken with gravity. It brooks of no stealth, no surreptitiousness, no subterfuge. As per the doctrine of colourability what cannot be done directly cannot be done indirectly.*

## THE FIFTH LESSON LEARNT

### *The National Assembly*

Scant regard was made of the views expressed by the Opposition. And the shrine of democracy which embodies free and open debate on laws that govern the country and rule over the people was desecrated by threats, intimidation and repartees for reprisal. In another liberal democracy, this would be a very serious matter, subject to sanctions. Parliament may be a forum of intelligent repartees and not a street for unruly behaviour by members to whom the people have given the title of “Honourable”.

## OUR FIFTH RECOMMENDATION

### *Legislature: The Shrine of Democracy*

Likewise, absence of proper Border Control at the level of the Legislature has shown that the NA was instrumentalized to serve ill-inspired interests

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### WE RECOMMEND THAT:

The Legislature may seriously consider, for whatever decision the August Assembly may think fit, developing the concept of abuse of legislative process. Only such Bills should come to the NA which have been properly vetted by the State Law Office and approved by Cabinet. Where the nature of the Bills has required consultation with key-holders, consultation should be undertaken. In course of the parliamentary debates, sensible views of the Honourable Members should not be derided by other Honourable Members by means of threats, intimidation and menaces or otherwise. The risk should be averted that the shrine of democracy is desecrated through manipulation process and procedures.

## THE RATIONALE FOR OUR FIFTH RECOMMENDATION

*It is a matter of serious concern that till today it is an issue whether the law that was passed in such an unconventional way was a private law of the Minister concerned or a public law inasmuch as the procedure for neither had been followed before it came to the National Assembly. There was abuse of procedure at Cabinet level and also abuse of procedure at the National Assembly. Was everybody doing his job in the process or closing his/her eyes when corners were being cut? The Commission takes the view that rot sets in a democracy when institutions are taken for granted and due process circumvented, as has been the case in this instance. It is often overlooked that our National Assembly plays a double role: that of a Lower House and that of an Upper House. It is high time our Parliamentarians give us the best in themselves rather than otherwise. In the absence of a Second House, there arises a duty on the National Assembly to play the double role of First House and Second House.*

## THE SIXTH LESSON LEARNT

Had professionals lived up to their name, abided by their Code of Ethics, resisted professional threats and stood by their rigor and discipline; had the public officers involved played their proper roles and kept watch, the disaster could have been prevented. But professionals began to run along business lines and institutions began to run for themselves. And those called upon eventually to set it right did no better.

## **OUR SIXTH RECOMMENDATION**

### ***Public office: A matter of trust***

**Inasmuch as all those involved with delivering for and in a public office is in law fulfilling a public trust and are bound by a fiduciary duty -**

#### **WE RECOMMEND THAT:**

**Every public officer as well as independent professional delivering service to Elected Executives or any public office be bound by a strict fiduciary duty; resist becoming a conduit for his appointer; and albeit appointed by the government of the day, discharge that duty with an independence of mind and action, *sans peur et sans reproches*.**

### ***THE RATIONALE FOR OUR SIXTH RECOMMENDATION***

*Holding a public office is a public trust like exercising a profession is. Belonging to an SRO is a public trust. There is a fiduciary duty involved so that it is done with the public as the beneficiary. The Elected Executive needs independent advice more than most on account of his vulnerability to public scrutiny.*

### **THE SEVENTH LESSON LEARNT**

***La ou il n'y a pas de loi, le roi perd son droit.*** By lack of definition of roles, duties and responsibilities, the public office was non-existent to ensure that all was done according to the rule book.

## **OUR SEVENTH RECOMMENDATION**

### ***Definition and Demarcation of Roles***

**Inasmuch as lack of definition of roles and demarcation of boundaries among the key players has been a systemic cause of the many irregularities in the sale of the Britam shares -**

#### **WE RECOMMEND THAT:**

**Concrete measures be taken to define, demarcate and set the boundaries as regards the duties and responsibilities amongst the Elected Executives, the Public Officers, the Political Advisers and any independent professional assigned a task in the respective decision making process so that there is clarity of roles and accountability of actions all along the line.**

### ***THE RATIONALE FOR OUR SEVENTH RECOMMENDATION***

*“A chacun son métier et les vaches seront bien gardées.” Such a protocol is likely to consolidate good governance and protect all the agents involved, more particularly the Elected Executive against unfair comments.*

### **THE EIGHTH LESSON LEARNT**

**The facts showed how easy it is in practice to manipulate independent State Regulators: by appointing not independent professionals but political advisers at their Boards.**

## **OUR EIGHTH RECOMMENDATION**

### ***Independent Regulators***

**Inasmuch as the independence of State Regulators is *sine qua non* for the proper functioning of a democracy and inspires public and investor confidence -**

#### **WE RECOMMEND THAT:**

**Governments of the day shall ensure that political advisers are not appointed to influence decisions of State Regulators; that State Regulators exercise their functional and operational independence; that public officers and professionals forming part of those institutions are able to progress the entities with an independence of mind and action, if in the interest of the nation, fulfilling their statutory roles pro-actively on government policy but not unethically.**

### ***THE RATIONALE FOR OUR EIGHTH RECOMMENDATION***

*Each government in power should ensure that politicization of regulatory institutions will have the effect of a boomerang. It is in the interest of any government in power to ensure that when the table turns one day which is bound to happen in a democracy, it will not be hoist by its own petard.*

### **THE NINTH LESSON LEARNT**

**Professional independence has little to do with how near or far one is from the corridors of power. One can be as detached as possible from corridors of power but still keep to and not compromise on one's independence. At the same time, one can be a blood relation but still tender independent professional service.**

## **OUR NINTH RECOMMENDATION**

### ***Right man in the right place***

**Inasmuch as evidence has revealed that the right men were at the right place but, having taken the wrong road at the round-about, they became the wrong man at the wrong place -**

#### **WE RECOMMEND THAT:**

**Anyone appointed to carry out a public duty shall owe allegiance to the State and not to the appointer, subscribe to an oath and his commitment to his profession and not otherwise. He should have in mind the need of the appointer to his independent professional advice and deliver in line with Government policy but without compromising his professional integrity and expertise.**

### ***THE RATIONALE FOR OUR NINTH RECOMMENDATION***

*The crux of every appointment lies not in the one who appoints or how close in blood or water is the appointer to the appointee, but the independence of mind with which he or she discharges the public duty entrusted to him or her. For in an island state, everybody is related to everybody*

*by family or friend, by paper or picture, by history or social intercourse, by profession or association. If we are looking for people who are altogether unrelated to take decisions, Mars is not yet manned to produce the human resource for same.*

#### **THE TENTH LESSON LEARNT**

**The BAI collapse was the work of professionals doing their work unprofessionally hand in gloves with clients and institutions. Idem for the sale of Britam shares. The politician and the professional were bent upon kowtowing to each other. It was all politics over professionalism.**

#### **OUR TENTH RECOMMENDATION**

##### ***Marked Failure of Self-Regulation***

**Inasmuch as Self-Regulating Organisations are the *delegataire* of a portion of the sovereignty of the State with duties and responsibilities akin to the state within their domain of activity and the facts have revealed a marked failure of self-regulation among the several professions involved-**

##### **WE RECOMMEND THAT:**

**All SRO's carry out a self-audit of their strengths, weaknesses, opportunities and threats as regards themselves, their members, society and in general to the country as a whole, take concrete and visible steps to upgrade their professional and normative activities and establish state of the art enforcement monitoring, mentoring capacities and logistics so that they may play a primary role as robust SROs in public interest.**

#### **THE RATIONALE OF OUR TENTH RECOMMENDATION**

*Mauritians did excellently at one time as a nation of amateurs. But time is now for professionalism and enhanced professionalism. A lot of rot that has set in our society of through a culture of anything goes. A culture of professionalism and increased professionalism is the call of the time and country.*

#### **THE ELEVENTH LESSON LEARNT**

**How well those involved did they not talk of constitutionalism and public interest yet how badly did they not betray both and themselves!**

#### **OUR ELEVENTH RECOMMENDATION**

##### ***Inculcation of a culture of constitutionalism***

**Inasmuch as the Constitution is the People's Charter and there should be no disconnect between culture and Constitution -**

##### **WE RECOMMEND THAT:**

**Every decision-maker in public affairs exude and inculcate a culture of constitutionalism through concrete, explicit actions such as development of such citizen's charters, protocols, guidelines, best practices, benchmarks or guidance notes as may be necessary, at all levels, hierarchical and vertical, demarcating on what is permissible and what is prescriptive in the conduct of public affairs. These should be enforced by discipline, monitoring and mentoring programmes so that these become the DNA of the nation.**

### **THE RATIONALE FOR OUR ELEVENTH RECOMMENDATION**

*Constitutionalism is not a rhetoric, nor a facade nor a political gimmick. It is an incessant positive activity and creativity. Mauritians need to develop a culture of constitutionalism. Developing a culture of constitutionalism means to know that in a democracy one's rights are subject to the rights of others and the public interest.*

### **THE TWELFTH LESSON LEARNT**

Two of the eight criteria of good governance is accountability and transparency. Paradoxically, in this case, record was not kept or went missing at a Ministry responsible for good governance and the transaction was done behind the back of the nation.

#### **OUR TWELFTH RECOMMENDATION**

##### ***The Civil Service and Open and Accountable Government***

**Inasmuch as Good Governance is democratic governance is accountability is transparency -**

##### **WE RECOMMEND THAT:**

**The Civil Service shall ensure that every milestone in the discharge of public service is reduced in writing in real time in a public record faithfully and that the institutional memory of relevant and material events be kept and preserved for as long as the law requires.**

### **THE RATIONALE FOR OUR TWELFTH RECOMMENDATION**

*In public affairs, it is a temptation to leave no trace on the myth that the author of any mischief will not be found. There is no perfect crime. In today's world, more particularly, pieces will be put together to reach the author. Besides, eternal suspicion will ever loom over the head of those who do things in the dark and survive their demise. It is a counsel of wisdom that the best protection is the record and the best betrayer the absence of record, the defaced record or the tinkered record. It all surfaces one day.*

### **THE THIRTEENTH LESSON LEARNT**

A Minister is what his team is. Good governance is what democratic governance is. The lines between the key players involved in the transaction were hazy. The neighbour encroaches upon one's property where the boundary lines are left unmarked. *La ou il n'y a pas de loi le roi perd son droit.*

#### **OUR THIRTEENTH RECOMMENDATION**

##### ***Entourage of Elected Executives***

**Inasmuch as the entourage of Elected Executives may not all be fully conversant of their own roles as well as the scope and the limit of their duties and responsibilities -**

##### **WE RECOMMEND THAT:**

**Boundary lines be drawn with regard to the roles of the entourage of elected Executives to ensure, being so near the corridors of power, that power does not go into their heads; that they work within the strict bounds set for them; that actual and potential abuses are nipped in the bud; that in the context of public affairs, they defer to public officers; and that they fully apprise themselves of the do's and don'ts of public service and public administration.**

### ***THE RATIONALE FOR OUR THIRTEENTH LESSON***

*If the road is well demarcated for each road user in his lane, there is less likelihood of accidents. Prudent drivers may be safe. But not the reckless ones.*

### **THE FOURTEENTH LESSON LEARNT**

What happened would not have happened had the institutions involved the professionals engaged and the public officers concerned played their proper roles all along the line.

#### **OUR FOURTEENTH RECOMMENDATION**

##### **Independence, impartiality and neutrality**

Inasmuch as the proven salvation of our democracy has resided in the independence of our institutions, the impartiality of our professionals and the neutrality of public service -

##### **WE RECOMMEND THAT:**

Institutions, professionals and public service identify, list and review periodically the threats that come their way in the proper discharge of their functions and address them with appropriate remedial actions for the purpose of negating any inroad into their independence, impartiality and neutrality.

### ***THE RATIONALE FOR OUR FOURTEENTH RECOMMENDATION***

Mauritian success depends upon independence of institutions, impartiality of professionals and the neutrality of public officers but, in the hands of a few zealous ones, these are the very areas where our democracy is threatened.

### **THE FIFTEENTH LESSON LEARNT**

What happened shows that public administration was non-existent to watch the interest of the State or marginalized to do so.

#### **OUR FIFTEENTH RECOMMENDATION**

##### ***Civil Service and its role proper***

Inasmuch as there is a need to make Civil Service pacier, more responsive, result- and service-oriented, efficient and effective -

##### **WE RECOMMEND THAT:**

The Civil Service should undertake a re-appraisal of the proper role it should play in the effective functioning of modern government, the values it represents, the manner in which it should give effect to those values, the means by which it will empower itself to strike a healthy, efficient and effective working relationship with the Elected Executives, develop sound work ethics and draw the appropriate demarcation lines between itself and the Elected Executives while at the same time delivering on government policy.

### **THE RATIONALE FOR OUR FIFTEENTH RECOMMENDATION**

*Elected Executives in a Cabinet Government have a very important role to play to deliver within an electoral mandate of 5 years what they have held out to the electorate over 5 weeks. But they may not be able to do so without a dynamic civil service empowered with state of the art tools and techniques, methods and systems, culture and collegiality to deliver.*

### **THE SIXTEENTH LESSON LEARNT**

The sale of valuable assets was done behind the back of *inter alia*, Cabinet. The law that was passed had not received Cabinet approval. The text was of doubtful origin and did not sit comfortably in the legal regime of insolvency laws. The Explanatory Memorandum omitted one important aspect of the change it was making namely, that it was removing the consent of the policy-holders in the recovery process. The appointment of the firm to prepare the Strategic Measures to deal with the aftermath of the collapse of the BAI was done with ethics applied unethically.

### **OUR SIXTEENTH RECOMMENDATION**

#### ***Principle of Legality and Ethics***

**Inasmuch as it is a democratic imperative that any law passed should involve proper collective responsibility of Cabinet and should inhere the principle of legality and the application of ethics should itself inhere the principle of ethics -**

#### **WE RECOMMEND THAT:**

**Those entrusted with the responsibility for proposing Bills and applying ethics should remind themselves that as laws inhere the principle of legality so do ethics inhere an ethical principle in their application. All laws shall comply with the principle of legality inherent in every amendment to the law and any application of ethics shall comply with the principle of ethics.**

### **THE RATIONALE FOR OUR SIXTEENTH RECOMMENDATION**

*The knife that cuts the cake is the very knife that kills. Laws can be misused and ethics too. Legislations should have a legitimacy in process and purpose. Likewise, ethics should not be applied cosmetically.*

### **THE SEVENTEENTH LESSON LEARNT**

The Office of the Attorney General as per Section 69 of the Constitution is the principal adviser to the legal adviser to Government of Mauritius. The facts surrounding the appointment of BDO which was reportedly taken in the office chaired by the ex-Minister which the then Attorney General has attended as well as the then Vice-Prime Minister. There was not only an issue of protocol in the matter but also one of the impropriety of a Minister chairing a meeting wherein a Vice Prime Minister is present and also involving the Attorney General to take administrative decisions regarding a Minister landed there to take that executive decision to award the contract to BDO to prepare a Report of Strategic Measures. Such occurrences leave a perception that this Office is anything but on apolitical office. As a Constitutional Office it certainly has a duty to give due consideration to the views of as many players as possible but by keeping politics at bay. Everyone concerned with working with that constitutional office should give it the cachet of constitutionalism where professionalism primes over extraneous consideration. It is



one thing for stakeholders to enlighten the office to properly advise government with the sanctity and detachment that goes with providing independent, impartial and well informed professional advice to government. It is quite another to use it to pursue one's ends.

#### **OUR SEVENTEENTH RECOMMENDATION**

##### ***The Office of the Attorney-General***

**Inasmuch as the decision to appoint BDO as the firm assigned to prepare post-BAI strategic measures was taken reportedly in the office of the ex-Minister with the Attorney-General present amidst breaches of protocol and abuse of power -**

##### **WE RECOMMEND THAT:**

**The office of the Attorney-General being a Constitutional Office of the highest order under section 69 of the Constitution, take measures to dispel any perception that it is advised by Government rather than advising Government. It shall develop and adhere to a protocol of the manner in which Elected Executives relate to the Office. While it should lend a ready ear to the myriad of concerns generated from a myriad of quarters, it should avoid becoming vulnerable to any extraneous pressure; exercise institutional scepticism on advice emanating from sources other than the established trusted sources; do whatever it takes to watch the interest of the State but without compromising on its image of being apolitical and independent.**

#### ***THE RATIONALE FOR OUR SEVENTEENTH RECOMMENDATION***

*Independent legal advice is the cornerstone of a democratic society. Otherwise there would have been no need in the Constitution to create an office to give independent advice to Government. While it is true that the views of Elected executives may be considered but such should not prime over law.*

#### **THE EIGHTEENTH LESSON LEARNT**

##### ***The State Law Office***

**Who drafted the law to set up a regime entering a Minister into the affairs of an independent Commission and ultimately led to the sale of the assets without the consent of policy-holders? No one knows. Short shrift was made of the SLO.**

#### **OUR EIGHTEENTH RECOMMENDATION**

##### ***The State Law Office vetting***

**Inasmuch as the SLO is the sole source of Bills under our system based on the rule of law and facts suggest that there was a surreptitious by-passing of its expertise in that cursory opportunity was afforded to the SLO for the passing of an important Bill and the Explanatory Memorandum did not faithfully reflect its object -**

##### **WE RECOMMEND THAT:**

**The SLO may consider issuing a Protocol to all Ministries or authorities reminding them of the number of phases which are involved in the procedure for the passing of sound laws and caution them that the gestation period may be short-circuited only at the risk and peril of the proposer.**

### **THE RATIONALE FOR OUR EIGHTEENTH RECOMMENADTION**

*A democratic society based on the rule of law ensures that all laws passed are forged in the five fires of drafting. The rule of law does not brook of bricolage or Do It Yourself in legal drafting.*

### **THE NINETEENTH LESSON LEARNT**

**Government is today a complex engine. The ex-Minister and his team were learner drivers in charge of driving on a risky road before they had learnt to drive on a smooth road. The sale of Britam shares has been a Learner Driver Accident.**

### **OUR NINETEENTH RECOMMENDATION: AN ACADEMIA FOR POLITICIANS**

#### ***Learner Driver Accident***

**Inasmuch as being a Parliamentarian as well as an Elected Executive is an honourable and noble vocation to which is attached an honourable title yet so many lose their way and end up being a party risk, a public risk, a family risk and a personal risk to themselves -**

#### **WE RECOMMEND THAT:**

**Each political party should ensure that those taking on such honourable titles to their names are fully grounded and well-groomed in living up to public expectations. Parties fielding candidates may wish to consider undertaking some up-front risk assessment so that no candidate, after an election, becomes so intoxicated with power that, through sheer inexperience and immaturity, he becomes his own victim in the honourable and noble task of serving the country.**

### **THE RATIONALE FOR OUR NINETEENTH RECOMMENDATION**

*Short of an ideal to have an academia for politicians, a formal or informal system should be devised so that our would be politicians are sufficiently grounded and groomed on their roles and responsibilities, including the number of risks they encounter in Mauritian politics so that they are not mauled by tigers. Serious thought should be given by political parties to ensure that the new generation of politicians in their field are imbued with what statesmanship is all about and duly exposed to the travails of public life so that they are neither disillusioned nor misguided nor make expensive mistakes. An ill-formed politician is an embarrassment to everyone, including himself. Many advanced countries have set up Institutes in Public Administration.*

### **THE TWENTIETH LESSON LEARNT**

**The ease and zeal with which the then Minister went about his tasks marginalizing through public officers and public institutions, not to speak of Cabinet and the National Assembly was disquieting. Amendment to our Constitution to replace democracy with autocracy has been rendered a practical impossibility yet in point of facts, mini-autocracies may be created so easily.**

## **OUR TWENTIETH RECOMMENDATION**

### ***Statesmanship v/s Statecraft***

**Inasmuch as there is a clear distinction between statesmanship and statecraft and the enquiry has revealed as unhealthy confusion of both -**

#### **WE RECOMMEND THAT:**

**Elected representatives should draw a Chinese wall between statesmanship comprising their fiduciary duty to public office and statecraft comprising the pursuit of personal and/or parochial interest by making use of the apparatus of the State for the underlying purpose.**

### ***THE RATIONALE FOR OUR TWENTIETH RECOMMENDATION***

*Those assuming public office would play safe if they drew a distinction between discharging duties in a public office and running a private enterprise, between public law and private law, between public interest and private interest.*

## **THE TWENTY-FIRST LESSON LEARNT**

### **Relation between the Political Executive and Civil Servants**

**In the years immediately after the independence, the relations between Ministers and Civil Servants were characterized by mutual respect and understanding of each other's respective roles with both working in tandem but neither encroaching upon the domain of the other. However, that solid culture was not passed on to the new generations that succeeded. The result has been that Ministers turned public officers into mere civil servants who willingly accepted that reduced role. When Advisers were appointed to work with Ministers, public officers were delegated to the role of pushing the papers, resulting on a gradual erosion of the fundamental values and principles of the public service. Yet each of the three components, if none encroaches on the work of the other, would be the salutary way forward for the country.**

## **OUR TWENTY-FIRST RECOMMENDATION**

### ***A new order in government functioning***

**Inasmuch as there is a dire need for the establishment of a new order in government functioning -**

#### **WE RECOMMEND THAT:**

**There be a re-appraisal and a reinvention of the manner in which synergy is set for public affairs to be given their pride of place with due regard to political advisers whose specialist professional role may not be underrated so that government becomes more aligned to the eight principles laid down in a UN document: i.e., participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive.**

### ***THE RATIONALE FOR OUR TWENTY-FIRST RECOMMENDATION***

*Time has come for the Civil Service to be restored to its proper role in democratic governance. The Commission is of the view that the political neutrality and impartiality of the Civil Service needs to be preserved. Ministers must uphold the political neutrality of the Civil Service and*

*not ask the Civil Servants to act in any way which would conflict with the duties and responsibility of the Civil Servants. It is the lack of an updated model which has prevented public officers from fulfilling their obligations and responsibilities and carrying out their duties to the best of their ability and with impartiality, objectivity and integrity.*

#### **THE TWENTY-SECOND LESSON LEARNT**

##### ***The Independence of State Regulators***

The facility with which the independence of the State Regulator and the professionals was interfered with and abused is simply mind-boggling. In one case it was by law. In another case by appointment of an adviser as the Vice President on the Board of a Commission.

#### **OUR TWENTY-SECOND RECOMMENDATION**

##### ***Independence of State Regulators***

**Inasmuch as this enquiry has revealed serious inroads into the functioning of an independent State Regulator -**

##### **WE RECOMMEND THAT:**

**State Regulators should ensure that they fulfil the objective for which they have been set up, identify threats to their functional and operational independence and parry them in good time. Those at the head should ensure that the corporate culture of independence and impartiality are inculcated right across the institution from the Board to the base.**

#### ***THE RATIONALE FOR OUR TWENTY-SECOND RECOMMENDATION***

*Remote control of the functional and operative independence of State Regulators through political advisers or anyone for that matter is inimical to democratic governance. If our democratic set-up is to be preserved at all for the future, it is the consolidation of the independence of our institutions.*

#### **THE TWENTY-THIRD LESSON LEARNT**

##### ***The Professionals***

The damage was done when political power was centralized at the level of the ex-Minister for directing the operations with serious financial prejudice to the State and impairment of democratic norms using the professionals and persons involved as a façade only.

#### **OUR TWENTY-THIRD RECOMMENDATION: PROFESSIONALS 2.0**

##### ***Professionalism among professionals***

**Inasmuch as enhanced professionalism is the call of the country at this stage of a cross road where it has to face multiple global challenges and competition-**

##### **WE RECOMMEND THAT:**

**SROs and members comprising SROs redouble their efforts to become robust SROs with dedicated and committed members, regularly updating and enforcing their codes, enhancing their professional activities, placing professionalism above other considerations, avoiding to run professions along business lines and dedicating a part of their time and resources to serve. If called upon to provide service to or in a public office, a professional should**

**keep his relationship strictly professional. Should a service provider face threats to his independence, he should define himself, cross the t's and dot the i's. If he cannot, he should simply recuse himself in a timely and discreet manner.**

### ***THE RATIONALE FOR OUR TWENTY-THIRD RECOMMENDATION***

*All in all, the manner of the sale of the Britam shares at the end of the day was an ex-minister at his best in terms of autocratic governance yet worst in terms of democratic governance. No doubt, that caused a number in the surrounding to raise eyebrows. The answer to the criticism was given by a publication of the ex-Minister. His answer was that when stones had been thrown at him, he picked them up to build a road. Such was the power of his delusional rhetoric.*

### **THE TWENTY-FOURTH LESSON LEARNT**

#### ***The Civil Service***

**The impression one gets is the absence of civil service in the whole matter or the minimal engagement of the civil service at the level of the MFSGG&IR. Had the public officers played their proper role, a lot could have been avoided. The Civil Service should never allow itself to be steam-rolled into the dictates of the elected Executive.**

### **OUR TWENTY-FOURTH RECOMMENDATION**

#### ***The Elected Executive and the Public Service***

**Inasmuch as it is unlikely that the Britam shares would have fetched only MUR2.4bn, had a properly functioning Ministry with competent public officers and well advised Advisers been handling the transaction and, public officers not been reduced to merely pushing the papers -**

#### **WE RECOMMEND THAT:**

**Elected Executives and Establishment Executives create the necessary synergy so that there is mutual trust in the various human components of a Ministry in the modern form of government and where Advisers bring in their specialized skills in their area of expertise but without marginalizing public officers in the public service who are neutral officers of the State working to deliver as per government policy.**

### ***THE RATIONALE FOR OUR TWENTY-FOURTH RECOMMENDATION***

*Government today is a complex matter. Time was when the existence of government could be noted with just a police station and a post office. But today government is everywhere. It is not right in today's age that public officers be raised as technocrats to deliver tasks assigned to them. They should perform their proper role as public officers in service of the state with all the challenges that modern government face everywhere in the world.*

### **THE TWENTY-FIFTH LESSON LEARNT**

**A law for which there was hardly any consultation with key players, the origin of which was suspect, which entered a Minister into the affairs of a regulatory body whose vetting had been cursory had been rushed through Cabinet and National Assembly by an overbearing Minister.**

## **OUR TWENTY-FIFTH RECOMMENDATION**

### ***Rule of law as opposed to the rule of the lord***

Inasmuch as any legislation passed by stealth constitutes abuse of the due process both at Cabinet level and at the National Assembly and creates a pocket of autocracy in a democracy -

#### **WE RECOMMEND THAT:**

Those responsible for conceiving, preparing and tabling laws should make sure that the laws have been forged in the five fires of the legislative process: consultation, legal drafting, SLO vetting, proper Cabinet approval as well as opportunity to parliamentarians for open and free debate.

## **THE RATIONALE FOR OUR TWENTY-FIFTH RECOMMENDATION**

*Opposition views, sometimes very pertinent, should be heeded and not scoffed at. In the absence of an Upper House to comment objectively on a Bill, it is essential that the Minister tabling the Bill should lend an ear to what the opposing views are. It is the ethical duty of members knowledgeable in law to lift the debate to a level above the mere political, populist and partisan. The Hansard debates here showed that the ex-Minister's attitude to the debates was one mixed with threats and acrimonious exchanges, not becoming of an august assembly. Mauritian participatory democracy should be inclusive.*

## **THE TWENTY-SIXTH LESSON LEARNT**

### ***Panic, phantom creation and scare mongering***

The whole exercise of the process of sale at such a low price may be explained by a phenomenon whereby an artificial reality was sold for actual reality through instilling panic, raising phantoms and scare mongering. There is a need for sobriety, rationalization and wisdom in dealing with public issues. As the UK Supreme Court commented in one of the judgments: truth pursued zealously results in the opposite of itself. While the matter was being dealt with rationally and soberly at one level, those involved were working with a spectre of panic and megalomania. Mess happens when amateurs do what professionals should do. Ministers who are their own public servants and their own technicians, their own legal advisers are a risk as Ministers, as public servants, as technicians and as legal advisers.

## **OUR TWENTY-SIXTH RECOMMENDATION**

### ***Elected Executives, if also a Professional -***

Inasmuch as the transition between a professional in practice and a parliamentarian taking a Ministerial portfolio is not an easy transition and many succumb to the temptation of wearing two hats in the discharge of his Ministerial functions -

#### **WE RECOMMEND THAT:**

Elected Executives should limit themselves to taking policy decisions, entrust technical matter to technicians and the discharge of public affairs to public officers. An Elected Executive, if a professionally qualified, shall resist wearing his professional hat along with his Ministerial hat in the discharge of his portfolio as a Minister.

**THE RATIONALE FOR OUR TWENTY-SIXTH RECOMMENDATION**

*When Ministers take decisions which technicians should take, they may be courting trouble when things go wrong. They give away the shield that should protect them.*

**THE TWENTY-SEVENTH LESSON LEARNT**

The professionals directly involved in this case had allowed themselves to be led by the nose by the Elected Executive, not a good model for the up-coming generation of professionals.

**OUR TWENTY- SEVENTH RECOMMENDATION**

***The New Generation Professionals***

Inasmuch as the state of professional landscape in Mauritius shows the emergence of new generation of professionals who have dynamism and drive but lack guidance and direction in the enhancement of their professional practice -

**WE RECOMMEND THAT:**

The nature of the up-coming new generation of Young Professionals be properly nurtured through proper guidance from such peers who are role models; establish themselves to play their proper roles as professionals, having in mind the public interest as opposed to their personal interest; continually upgrade the quality of their profession; ensure that the ethics of the professions are continually and continuously assimilated; avoid travestying their professions; identify and parry the threats to the independence of mind and action that go with their professions; and above all, avoid running their respective professions along business, unethical or unprofessional lines.

**THE RATIONALE FOR OUR THIRTY-SEVENTH RECOMMENDATION**

*Civilizations collapse when values are not passed from generations to generations. So do nations. So do families. So do professionals. The values of out-going professionals should be passed on to the New Gen Professionals.*

**THE TWENTY-EIGHTH LESSON LEARNT**

Specialist Advisers have become an undeniable part of Government work but they are needed for their expertise. But in this case, the Advisers were not properly advised nor were they properly advising.

**OUR TWENTY-EIGHTH RECOMMENDATION**

***Code of Conduct for Advisers***

Inasmuch as the use of Specialist Advisers in areas of expertise has become a necessary component in the running of modern Government but are no substitutes for public officers but complementary -

**WE RECOMMEND THAT:**

**A Code of conduct be drawn for Advisers so that they fill the gap in the specialist areas of need in any Ministry so that they become a boon to the Civil Service rather than a bane and they deliver their services in mutual trust but without mutual encroachment in the respective domains.**

***THE RATIONALE FOR OUR TWENTY-EIGHTH RECOMMENDATION***

*It is the hope of the Commission that once the scope and the limits of the role of Advisers are defined, there would be greater confidence in their own work, that of the civil service and of the elected Executive.*

**THE TWENTY-NINTH LESSON LEARNT**

Section 110A and 110B of the Insurance Amendment Act, the author of which has remained unknown, was the source of all the trouble. Had the Minister followed legal advice tendered and addressed the legal issues with the composure required in handling public affairs, the story may well have been different.

**OUR TWENTY-NINTH RECOMMENDATION**

***Section 110A and 110B of the Insurance (Amendment) Act***

**Inasmuch as the passing of Section 110A and 110B of the Insurance (Amendment) Act was obtained by procedural irregularities and entered a Minister into the affairs of an independent Commission -**

**WE RECOMMEND THAT:**

**Section 110 A and 110B should be amended to remove the Minister from having anything to do with the work of the independence of action of the Special Administrator. If public interest is to be taken into account, it should be through an independent body in the manner other jurisdictions have done in identical situations.**

***THE RATIONALE FOR OUR TWENTY-NINTH RECOMMENDATION***

*It is undemocratic for a Minister to seek an inch of space in the affairs of a State Regulatory body. The risk is that if he does, the next incumbent will walk a mile with it.*

**THE THIRTIETH LESSON LEARNT**

Professionals and politicians use their potential to destroy one another for their narrow short-term gains which they could have otherwise used for their own advancement and the common good. That power of self-destruction is now seeking to enter our psyche, the entry of which we need to block for the sake of the coming generations.

**OUR THIRTIETH RECOMMENDATION**

***Mauritian Professional Silos: Setting up of a Professional Centre***

**Inasmuch as Mauritian professional organisations exist in more or less invisible silos and are remembered more for their inaction than their actions, unlike in other emerged jurisdictions which long abandoned such archaic and outdated ways of delivering professional service, it is high time**



**that Mauritius creates an overarching platform which will take professional development to the next level of state of the art professionalism -**

**WE RECOMMEND THAT:**

**A Professional Centre be set up, the prime objective of which will be:**

**to drive professionalism in modern-day Mauritius to its required heights;**

**to provide an overarching professional cross-disciplinary environment for all SROs and its members;**

**to ensure and sustain excellence in professional culture and services; and**

**to engage in international exposure, networking and exchanges.**

**As an umbrella organization, its function will be to ensure that all SROs live up to their names and their public duties and responsibilities as well as meet the expectations public has on them and carry out some public sensitization on material issues relating to the respective professions. It should accompany all SROs in doing their duties and building a professional culture to be duly passed on to the up-coming generations, mentoring those going astray and disciplining serious or recurrent offenders. The Centre should be endowed with a faculty to produce peer professional materials for the consumption of other professionals as well as the public. This centre should be set up with seed money from Government. Whether Commonwealth Foundation would still be interested in assisting Mauritius in the process some 60 years later is anybody's guess.**

**THE RATIONALE FOR OUR THIRTIETH RECOMMENDATION**

*There is a lot of time which true professionalism need to catch up with, if our development is not to be lop-sided. Mauritius has done excellently hither to as a country of professional amateurs but amateurism has its limits in space and time. In an age of enhanced professionalism, our true professionals should be recognized by their name and fame rather than their visiting cards and their bank balance. The Commonwealth idea of an umbrella professional centre to oversee and accompany professionals stemmed from a vision in the international economic order. Those who conceived it knew that without it natural development would be lop-sided and politician lost in a mire. Enhanced professionalism is a development issue encompassing the individually, the community, the nation, the region and the global. The launch-pad in the present economic order has been lately trade in services and our new professionals will need to compete with themselves as well as professionals from other successful jurisdictions to bring their practice to the next level. What happened in the case of the sale of Britam shares may happen again if professionals lose their vocation?*

**THE THIRTY-FIRST LESSON LEARNT**

**From the point of view of civics, there is a distance to cover between where we are and where we should be as a people - which distance can only be covered when all the people are aligned to the cause for which Mauritius stands for Peace Justice and Liberty should not be empty words sung in our National Anthem.**

## **OUR THIRTY-FIRST RECOMMENDATION**

### ***Fairness: The End-All and the Be-All***

**Inasmuch as progress is only achieved and secured when there is fairness in word and deed, in law and in fact in the basic elements which comprise human civilization: that is economic provision, political organization, moral traditions and the pursuit of knowledge and arts -**

### **WE RECOMMEND THAT:**

**Every Mauritian under the sun adopts and abides by a culture of fairness all across the board in all aspects of his living, bent upon building a fair society where everyone can breathe on an equal measure according to his just deserts so that he may move by natural impulse to wealth creation with regard to human values and the meaningfulness of being a responsible Mauritian living in a free country.**

### ***THE RATIONALE FOR OUR THIRTY-FIRST RECOMMENDATION***

*Philosophers are agreed today that Adolf Hitler was not born Adolf Hitler. The then German society created him. Some people by design, ignorance, ambition, inadvertence or otherwise began creating a society of negative values with fear, suspicion, dread and hatred. They raised phantoms for a couple of succeeding generations. Adolf Hitler took birth to complete and terminate the cycle with his own suicide. A country is what its people are or become. To take price for value, fiction for fact, rhetoric for reality, half-truths for truths, war for peace, to deal in lies, to do politics with everything, to mislead, to misinform, to rake up passions, to trade in hate, to supplant high-sounding rhetoric for cool rationalization, to think with the behind rather than with the head are the pathways to create monsters. Angels fit for the Garden of Eden are made of Mauritian and not Martian stuffs.*

## **RECOMMENDATION FOR CRIMINAL AND CIVIL LIABILITY UNDER TOR (VI) AND ANCILLARIES**

Facts elicited in this enquiry reveal the possible commission of criminal offences by a certain number of persons. We, accordingly, recommend the following matters for criminal investigation by the relevant authorities. They also reveal that the persons involved may have incurred civil liability for the manner in which they conducted the sale, keeping Cabinet in the dark, engaging their personal responsibility as opposed to Cabinet responsibility.

### **A. CRIMINAL INVESTIGATION FOR FORGERY AND/OR MAKING USE**

Possible offences relating to forgery or making use of a forged document under the Criminal Code and/or giving false evidence in the proceedings before the Commission may have been committed. The persons, entities and companies involved specified hereunder in alphabetical order:

1. Mr Bhadain Sudarshan;
2. Mr Deerpalsing Akhileshwarnath;
3. Mr Ebrahim Afsar;
4. Mr Khapre Sandeep;
5. BDO and
6. such others as the progress of the inquiry will uncover.

The document concerned is the Minutes of Proceedings of the meeting held on 14 November 2015 in Nairobi.

### **SECTION 109 AND SECTION 125 OF THE INSOLVENCY ACT**

Possible offenses relating to breach of Section 109 and Section 215 of the Insolvency Act may have been committed by the persons hereunder specified.

They are in alphabetical order:

1. Mr Afsar Ebrahim;
2. Mr Yacoob Ramtoola; and
3. BDO

This relates to a prohibition by law to take up professional assignment in conflict of interest and/or giving false information to the Commission regarding the dates of professional engagements and/or giving false evidence in proceedings before the Commission.

### **REFERENCE**

We, accordingly, recommend that the above be referred for criminal investigation by the relevant authorities.

### **B. CIVIL RESPONSIBILITY**

May the facts and circumstances which led to Mauritius underselling the assets engage the civil responsibility of anyone who was involved in the sale? A Commission of Inquiry is not the appropriate forum to decide this. What it can do, however, is to state whether they suggest a civil liability.

Civil liability is based upon the existence of such acts and omissions which amount to a “*faute*” in law of a person who causes a “prejudice” to another. That there has been a prejudice in the

sale is not unarguable: a sale valued at MUR4.3bn was sold at MUR2.4bn. It may well constitute lesion to the seller, NPFL. As to what were the acts and omissions? Who were involved to what degree? Why was the price agreed in an MOU with all the characteristics of a proposal taken to be a fixture not to be departed from when the SPA was signed? Why was it taken to be a done deal when even the real buyer was not in existence? Why was that particular deal done in confidence when the Barclays figure was public and so was the figure of MMI Holdings? Why did they insert in the document that the deal would be kept confidential? Why did they not cover themselves and seek independent advice from a transaction advisor? Why was Cabinet not put into the picture? There is authority in law which establishes that where a Minister has not engaged Cabinet in taking a decision which should have gone to Cabinet, his personal responsibility is engaged.

For the purpose of arriving at the figure whether in the MOU or the SPA, why did they not resort to open formal negotiation? Why did they not keep minutes? Why did they sell at all? They had to transfer the assets to NPFL and not sell them? Why did they go against Cabinet decision *en toute connaissance de cause*? What was that colourable device “concurrent” transaction which was at once a transfer to NPFL and by the same token a sale? What was so particular about BDO for its appointment by an Ad Hoc Ministerial meeting to prepare the Strategic Report and for it to receive a direct contract as Financial Advisor. Was BDO ever appointed as the Financial Advisor? Did it do the job as a Financial Advisor? Why did BDO misreport, under-report and fail to report to FSC the facts as they were taking place? What was the civil consequence of the breach of ethics and law of the BDO personnel?

These are matters on which legal opinions may separately have to be sought and pursued by all those who regard themselves as prejudiced by, *inter alia*, the answers to the above questions. The possible persons and bodies referred to at Para A above may have incurred civil liability by their acts and doings. Additionally, FSC may have a claim for refund of MUR1m paid to ENSafrica for a work not done.

## CONCLUDING WORDS

The independence of the people we talk about when referring to the independence of Mauritius is not of the territory only, not of the people only but of their intellect. Having attained political independence, economic independence, time has come for intellectual independence. That will not happen in a society that raises ghosts, feeds prejudices and revels in high-sounding rhetoric at the expense of cool rationalization. *For as Will Durant has stated: civilization happens when “fear is overcome, curiosity and constructiveness are free, and man passes by natural impulse towards the understanding and embellishment of life.”*

*(The Story of Civilization, Our Oriental Heritage, Simon and Schuster, New York, 1954.)*

It is the responsibility of each and everyone to help in the creation of a free and fair society, to have a proper work ethics, to give to society as much as it gives us. Mauritius and Mauritians have a tryst with destiny on the world stage for humankind. Fairness is the first step in achieving intellectual, professional and scientific independence.

*“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that you’ll do things differently”- Warren Buffett*

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**ANNEXES**

<b>ANNEX</b>	<b>DOCUMENTS</b>
1 & 2	Swearing in Ceremony - Chairperson & Assessors
3	Press Communiqué from the Commission dated 15 May 2017
4	Declaration by witness
5	Terms of Reference of the Commission
6	Supreme Court Judgement 2010 SCJ 164 - ANNE M.A.C. v STATE OF MAURITIUS & ANOR
7	Press Article from Top FM dated 12 April 2017
8	Press Article from Le Mauricien dated 13 April 2017
9	Press Article from L'Express dated 19 April 2015
10	Copy of mise en demeure from Mr Sattar Hajee Abdoula to Special Administrators dated 15 December 2015
11	Press Article from Defimedia dated 14 April 2017
12	Press Article from Le Militant dated 27 May 2017
13	Narrative on Appearance of Bias from Mr S. Bhadain
14	Ruling No 1 of the Commission
15	Ruling No 2 of the Commission
16	Notice from FSC dated 03 April 2015 – Appointment of Messrs A. Bonieux & M. Oosman of PWC as Conservators of BAI Co (Mtius) Ltd
17	Notice from FSC dated 30 April 2015 – Appointment of Mr. Y.R. Basgeet and M. Oosman as SA
18	General Notice 2260 of 2012 – Rules Governing the Performance and Conduct of Insolvency Practitioners
19	Brief of Report from NPFL
20	Communique from FSC dated 14 August 2015- Termination of Appointment of Mr M. Oosman as SA
21	Communique from FSC dated 26 August 2015 - Resignation of Mr Y.R. Basgeet and appointment of Mr Y. Ramtoola as SA
22	Letter dated 26 October 2015 from MFSGG&IR to Ag. Chief Executive of FSC
23	Letter dated 28 October 2015 from Rothschild to A. Ebrahim & Y. Ramtoola
24	Letter dated 03 November 2015 from FSC to Permanent Secretary MFSGG&IR
25	Letter dated 06 November 2015 from MMI Holdings to FS
26	Letter dated 06 November 2015 from FSC to SA
27 & 28	Emails dated 12 March 2016 from Ms Gladys Karuri of Britam Kenya
29	Email dated 04 April 2016 from Mr Afsar Ebrahim to Mr P.K. Munga
30	Email dated 12 April 2016 from Mr Afsar Ebrahim to Mr P.K Munga
31	Letter dated 09 May 2016 from Mr P.K. Munga to Mr A. Ebrahim

## GLOSSARY OF TERMS

<b>Administrator</b>	Administrator appointed under Section 215 of the Insolvency Act 2009
<b>Afrasia Bank</b>	Afrasia Bank Limited in Mauritius
<b>Assessors</b>	Assessors of the Commission
<b>Attorney General</b>	Attorney General in Mauritius
<b>BAICL</b>	British American Investment Company (Kenya) Limited
<b>BA Investment</b>	British American Investment Co. Mauritius Ltd
<b>BAI</b>	British American Insurance Ltd
<b>BAI Group</b>	BA Investment, its subsidiaries and recognized related entities
<b>BAFSL</b>	British American Financial Services Limited
<b>BAKHL</b>	British American Kenya Holdings Ltd
<b>BBCL</b>	Bramer Banking Corporation Limited
<b>BAML</b>	Bramer Asset Management Limited
<b>Banking Act 2004</b>	Banking Act 2004 in Mauritius
<b>BDO</b>	BDO & Co Ltd
<b>BOM</b>	Bank of Mauritius
<b>BPFL</b>	Bramer Property Fund Ltd
<b>BRITAM</b>	Britam Holdings PLC (Kenya)
<b>Cabinet</b>	Cabinet of Ministers, supreme authority for taking policy decisions in Mauritius
<b>CEO</b>	Chief Executive Officer
<b>Chairman</b>	Chairman of the Commission
<b>CMA</b>	Capital Markets Authority in Kenya
<b>Commission</b>	Commission of Inquiry appointed by the President of the Republic
<b>Conservators</b>	Messrs A. Bonieux and M. Oosman of PWC appointed by FSC under the Insurance Act 2005 on 3 April 2015
<b>Coulson Harney LLP</b>	Law firm in Kenya
<b>DPS</b>	Deputy Permanent Secretary
<b>DTA</b>	Double Taxation Agreement
<b>EY</b>	Ernst & Young
<b>FATF</b>	Financial Action Task Force (Mauritius)
<b>FIU</b>	Financial Investigation Unit
<b>FRC</b>	Financial Reporting Council
<b>FS</b>	Financial Secretary in Mauritius
<b>FSC</b>	Financial Services Commission
<b>FY</b>	Financial year in Mauritius
<b>Government</b>	Government of Mauritius
<b>IFC</b>	International Finance Corporation
<b>IMF</b>	International Monetary Fund
<b>Insolvency Act</b>	Insolvency Act 2009 in Mauritius
<b>Insurance Act</b>	Insurance Act 2005 in Mauritius
<b>Insurance (Amendment) Act</b>	Insurance Amendment Act 2015 in Mauritius
<b>IRSA</b>	Integrity Reporting Services Agency
<b>Juristconsult</b>	Juristconsult Chambers -Law firm in Mauritius
<b>KES/KSH</b>	Kenyan shillings
<b>KLAD</b>	KLAD Investment Corporate Ltd
<b>KLAD Group</b>	Group of companies comprising KLAD and its subsidiaries

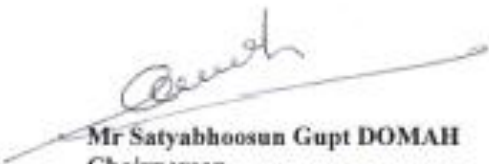
<b>KPMG</b>	KPMG partnership represented in Mauritius
<b>MFSGG&amp;IR</b>	Ministry of Financial Services, Good Governance and Institutional Reforms
<b>MKR</b>	Me Kavidass Ramano
<b>MMI Holdings</b>	A South African based financial services group
<b>MOFED</b>	Ministry of Finance and Economic Development in Mauritius
<b>MOU</b>	Memorandum of Understanding
<b>MUR/RS</b>	Mauritian Rupees
<b>NA</b>	National Assembly of Mauritius
<b>NIC</b>	National Insurance Company Ltd
<b>NPFL</b>	National Property Fund Ltd
<b>NSE</b>	Nairobi Securities Exchange
<b>Official receiver</b>	Official Receiver appointed under Section 374 of the Insolvency Act 2009
<b>PIE</b>	Public Interest Entities
<b>Plum LLP</b>	A limited liability partnership registered in Kenya
<b>Prime Partners Ltd</b>	Private Limited Company registered in Mauritius providing corporate and secretarial services
<b>PS</b>	Permanent Secretary
<b>PWC</b>	Pricewaterhouse Coopers registered in Mauritius
<b>SA</b>	Special Administrator - Refers to Messrs M. Oosman and Y. R. Basgeet of PWC and Mr. Y. Ramtoola managing partner of BDO appointed by FSC on 1 May 2015 and 26 August 2015 respectively
<b>SBI Mauritius</b>	State Bank of India (Mauritius)
<b>SCBG</b>	Super Cash Back Gold
<b>SLO</b>	State Law Office in Mauritius
<b>SPA</b>	Share Purchase Agreement
<b>SRO</b>	Self Regulatory Organization
<b>TOR</b>	Terms of Reference of the Commission
<b>USD</b>	United States Dollars

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**Mr Satyabhoosun Gupt DOMAH**  
Chairperson

  
**Mr Saltar HAJEE ABDOULA**  
Assessor

  
**Mr Imrith RAMTOHUL**  
Assessor

COMMISSION OF INQUIRY  
ON  
DISPOSAL OF SHARES  
OF  
BAI COMPANY (MAURITIUS) LTD  
IN BRITAM HOLDINGS LTD  
(KENYA)

30 June 2021