THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-02263

IN THE MATTER OF THE JUDICIAL REVIEW ACT No. 60 of 2000

AND

IN THE MATTER OF AN APPLICATION BY:
(1) PEOPLE UNITED RESPECTING THE ENVIRONMENT ('PURE'),
AN INCORPORATED BODY UNDER THE COMPANIES ACT, IN A REPRESENTATIVE CAPACITY PURSUANT TO SECTION 5 (6) OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000, ON BEHALF OF ANSLYM CARTER AND
(2) THE RIGHTS ACTION GROUP ('RAG'),
AN INCORPORATED BODY, FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT AUTHORITY DATED 2ND APRIL 2007, TO ISSUE A CERTIFICATE OF ENVIRONMENTAL CLEARANCE TO THE NATIONAL ENERGY CORPORATION FOR THE CONSTRUCTION OF AN ALUMINIUM SMELTING COMPLEX BY ALUTRINT LIMITED, A COMPANY REGISTERED UNDER THE LAWS OF TRINIDAD AND TOBAGO AND BEING A JOINT VENTURE BETWEEN THE NATIONAL ENERGY CORPORATION OF TRINIDAD AND TOBAGO AND SURAL, C.A. VENEZUELA

BETWEEN

(1) PEOPLE UNITED RESPECTING THE ENVIRONMENT (PURE)

AND

(2) RIGHTS ACTION GROUP (RAG)

CLAIMANTS

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY

DEFENDANT

AND

ALUTRINT LIMITED

DEFENDANT /INTERESTED PARTY

AND

THE ATTORNEY GENERAL **DEFENDANT**

BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER

APPEARANCES:

Dr. Ramlogan and Ms. M. Narinesingh for PURE and RAG

Mr. D. Mendes S.C. and Mr. I. Benjamin instructed by Mr. W. James for the EMA

Mrs. D. Peake S.C. and Mr. K. Garcia instructed by Ms. M. Ferdinand for ALUTRINT

Mr. R. Martineau S.C. and Mr. S. Young instructed by Mr. M. Quamina for the ATTORNEY GENERAL

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JUDGMENT

Introduction

1. In this application for judicial review, the Claimant, a public spirited organization, challenges the decision of the Environmental Management Authority (*"the EMA"*) to grant a certificate of environmental clearance in respect of the construction of an Aluminium Smelter at Union Village, La Brea.

2. This application canvasses issues relating to environmental law. It is however, fundamentally an exercise in judicially reviewing the decision of the EMA, according to the principles of administrative law as established by the common law and by the ***Judicial Review Act of 2000***.

3. Issues relating to environmental law fall to be determined according to the ***Environmental Management Act***, the ***Certificate of Environmental Clearance Rules***, and decided cases. Environmental jurisprudence relies on a host of abbreviations and acronyms, the meanings of which are set out at the end of the decision.

Procedural History

1. On the 29th June, 2007, the Claimants ***PURE*** and ***RAG*** filed their application for leave to apply for judicial review.

2. The Claimants both described themselves as incorporated bodies registered under the provisions of the Companies Act, being non-profit entities.

3. PURE described its principal objective as *"… the conservation and protection of the environment."*

4. RAG described its principal objective as follows:

"… to sensitise and mobilize all citizens about the value of the preservation of the natural environment."

5. The Claimants sought the Court's leave to apply for judicial review under section 5 (6) of the ***Judicial Review Act*** on behalf of Anslym Carter, a person who is economically disadvantaged.

6. Simultaneous with the application of ***PURE*** and ***RAG***, two other Claims were filed seeking leave to apply for judicial review of the very decision of the ***EMA***. One application for leave for judicial review was filed by ***Smelta Karavan***. The other Application was filed by four Applicants, namely ***Harris Maxime***, ***Janet Alexander***, ***Chatham/Cap-de-Ville Environmental Protection Company*** and the ***Trinidad and Tobago Civil Rights Association***.

7. The three separate applications, initially docketed to different judges, were placed together in the docket of the Honourable Justice Jamadar (as he then was). The Honourable Justice Jamadar, on 31st July, 2007, directed that the application for leave to apply for judicial review be taken together on 13th September, 2007. The learned Judge granted leave to all the intended Claimants to proceed for judicial review in terms of the relief sought and upon the grounds stated in their respective Notices of Application.

8. On 13th September, 2007, the learned Judge also granted special leave to the ***Attorney General*** to participate in the actions and directed further that:

"The EMA be named as the Defendant herein and Alutrint Limited and the National Energy Corporation be named as the Interested Parties."

9. The applications brought by the ***Rights Action Group (RAG)*** in CV 2007-02263 and the action brought by ***Chatham/Cap-de-Ville Environmental Protection Company*** in CV

2007-02272 were stayed pending the hearing and determination of the actions brought by the other Claimants.

10. Accordingly, from the 13th September, 2007, the three actions were being heard together. It is significant that notwithstanding the apparent tri-partite quality of these proceedings, there was no order for consolidation and the matters remained separate and distinct.

11. Usual directions were given for the filing of affidavits. There was no application for cross-examination.

12. When the three actions were transferred to the docket of this Court, in August 2008, the Court heard and ruled on evidential objections and then heard oral submissions, which supplemented earlier written submissions.

Relief Sought

In this Application, the Claimant, ***PURE*** seeks the following items of relief:

1. *A declaration that the decision of the Intended Defendant ("the EMA") to issue a certificate of environmental clearance dated the 2nd April, 2007 to the NEC … is unreasonable, illegal, procedurally improper, irrational, null and void and of no effect.*

2. *An order of certiorari to bring into the High Court and quash the decision.*

(The 3rd and 4th items of Relief sought were interlocutory and appear not to have been pursued).

5. *An Order that the Intended Defendant be required to disclose the evidential basis upon which it reached its conclusion as to likely air emissions from the proposed facility and in particular the means by which such conclusion s were subjected to peer review.*

6. *Damages*

7. *Costs*

Grounds

The Grounds upon which ***PURE*** seeks judicial review are set out in brief at page 5 of the Application for Leave, filed on 29th June, 2007, pursuant to Part 56.3:

> *"(i) The EMA acted ultra vires and/or perversely … in breach of its duties to consult under Rules 5 (2) and 5 (3) of the CEC Rules.*
>
> *(ii) The EMA acted ultra vires section 28 (2) of the EM Act in that it failed to include within the administrative record certain key documents.*
>
> *(iii) The EMA acted unfairly in allowing insufficient time for any meaningful consultation.*
>
> *(iv) The EMA acted unfairly in permitting only a selection of invitees to participate in consultation.*
>
> *(v) The EMA acted ultra vires the EM Act and/or in breach of national policy … without accounting for material considerations by failing to supervise the Interested Party's purported consultation with the public.*
>
> *(vi) The EMA failed to have proper regard to the effect of the proposal on human health and thereby erred in law.*

(vii) The EMA acted ultra vires Regulation 4 (1) of the Fees and Charges Regulation in failing to budget for and/or commission external expertise to properly inform itself of the risks of the proposal to human health or the environment.

(viii) The EMA failed to consider the cumulative effect of the constituent elements of the Smelter plant and thereby acted ultra vires Rule 10 of the Rules and/or failed to have regard to a material consideration.

(ix) The EMA acted ultra vires section 28 (2) of the EM Act and/or in breach of the legitimate expectations of affected persons, by deferring until after the grant of the CEC and the conclusion of the purported process of consultation, the determination of certain key issues likely to have implications on the environment and/or on human health.

(x) The EMA failed to apply the precautionary principle and therefore failed to account for a material consideration and/or erred in law.

(xi) The EMA failed to take account of numerous defects in the EIA and thereby erred in law.

Statement of Issues

Pursuant to the order of the Honourable Justice Jamadar on 13th September, 2007, the Claimants ***PURE*** and ***RAG*** filed the following Statement of Issues. In my view, the Claimant is bound by this Statement and the following comprise the issues for the Court's consideration in this matter:

"1. Whether the public consultation process for obtaining comments on the draft TOR through the use of selective invitations and the absence of a public consultation on the draft TOR contravened Rule 5 (2) of the CEC Rules and was illegal and/or irrational and/or unreasonable.

2. *Whether the issuance of a final TOR without proper input from stakeholders drawn from the public consultation contravened Rule 5 (3) of the CEC Rules and was illegal and/or irrational and/or unreasonable.*

3. *Whether the failure of the NEC to have a first public consultation prior to embarking on an EIA study and to have a second public consultation upon acquisition of baseline findings as required by the Final TOR contravened Rule 5 (3) of the CEC Rules.*

4. *Whether the failure of the Intended Defendant to make available to the public for written comment during the statutorily required written public comment period, the Review Comments on the Supplementary Report, the Addendum to the Supplementary Report, the Human Health and Ecological Risk Assessment and the Report on the Cumulative Impact Assessment for the Proposed Establishment of an Aluminium Complex with Brighton Port La Brea (CIA) contravened Section 28 (2) of the EM Act and was illegal and/or irrational and/or unreasonable.*

5. *Whether a first written public comment period of 47 calendar days (or 32 working days) set by the Intended Defendant was unreasonable having regard to complexity of the smelter project and/or contravened the intent of Section 28 (3) of the EM Act which did not stipulate a maximum period for the written public comment period but merely a minimum period of at least 30 days and was illegal and/or irrational and/or unreasonable.*

6. *Whether a second written public comment period of 30 calendar days (or 21 working days) set by the Intended Defendant was unreasonable having regard to the complexity of the smelter project and/or contravened the intent of Section 28 (3) of the EM Act which did not stipulate a maximum period of at least 30 days and was illegal and/or irrational and/or unreasonable.*

7. *Whether the Intended Defendant by limiting its invitation to the public hearing on the smelter to residents of La Brea and the Environs contradicted Section 28 (3) of the EM Act*

which creates no such authority to limit attendants at public hearings on a geographical basis and was illegal and/or irrational and/or unreasonable.

8. *Whether the deferral of the following key issues such as the Buffer Zone Management and Monitoring Plan (Clause (ii) (a) of the CEC); Medical Monitoring Plan intended to establish a baseline and periodically monitor employee and community health in consultation with the Ministry of Health (Clause (ii) (ff) of the CEC); Electromagnetic Radiation Monitoring Plan (Clause (ii) (nn) of the CEC); Spent Pot Lining Management Plan (Clause (ii) (vv) of the CEC); and Decommissioning Plan (Clause (ii) (ccc) of the CEC); Community Awareness and Emergency Response (CAER) (Clause (iii) (e) of the CEC) to the post CEC period is contrary to Section 28 (2) and 28 (3) of the EM Act and breaches the legitimate expectations of the public as there is no opportunity for public consultations in the post CEC period and these documents are critical for the proper assessment of the Smelter project by the public.*

9. *Whether the failure of the Intended Defendant to make available or have made available to the public for consultation the Report on the Cumulative Impact Assessment for the Proposed Establishment of an Aluminium Complex with Brighton Port La Brea (CIA) and was illegal and/or irrational and/or unreasonable.*

10. *Whether the Intended Defendant failed in its statutory duty to manage and/or supervise public consultations undertaken by NEC with respect to the draft TOR, the EIA, the First Deficiency Report, the Second Deficiency Report and the Human Health and Ecological Assessment Report pursuant to Rules 5(2) and 5(3) of the CEC Rules, Section 16 (1) and Section 31 of the EM Act and Chapters 5 and 7 of the National Environmental Policy (NEP) and was illegal and/or irrational and/or unreasonable.*

11. *Whether the failure of the TOR to properly identify, evaluate or select actions to prevent and/or to reduce risks to human health and to the environment contravened Rule 10 (e) (i) of the CEC Rules and was illegal and/or irrational and/or unreasonable.*

12. *Whether the failure of the Intended Defendant to obtain maximum fees and to commission external expertise to prepare the draft TOR in light of its lack of expertise contravened Regulations 4(1) (d) and 4(2) of the CEC Fees and Charges Regulations and was illegal and/or irrational and/or unreasonable.*

13. *Whether the acceptance of an EIA without key information such as the Buffer Zone Management and Monitoring Plan (Clause (ii) (a) of the CEC); Medical Monitoring Plan intended to establish a baseline and periodically monitor employee and community health in consultation with the Ministry of Health (Clause (ii) (ff) of the CEC); Source Emissions Testing Plan (Clause (ii) (jj) of the CEC); Ambient Air Quality Monitoring Plan (Clause (ii) (kk) of the CEC); Electromagnetic Radiation Monitoring Plan (Clause (ii) (nn) of the CEC); Spent Pot Lining Management Plan (Clause (ii) (vv) of the CEC); and Decommissioning Plan (Clause (ii) (ccc) of the CEC); Community Awareness and Emergency Response (CAER) (Clause (iii) (e) of the CEC) is contrary to Rule 10 of the CEC Rules and Section 28 (2) and 28 (3) of the EM Act and was illegal and/or irrational and/or unreasonable.*

14. *Whether the failure of the EIA to address issues such as decommissioning, emergency response plan, social impact or community management plan as required by the TOR contravened the requirement of Rule 4(1) (d) that the EIA must be in compliance with the TOR and was illegal and/or irrational and/or unreasonable.*

15. *Whether deficiencies in the EIA as it dealt with spent pot lining, air modelling and the health report renders the reliance of the Intended Defendant on the EIA.*

16. *Whether the decision of the Intended Defendant to accept the three applications for a single interconnected project comprising a smelter, a power plant and a port contravened Rule 10 of the CEC Rules which requires that EIAs examine cumulative effects of a proposed development and was illegal and/or irrational and/or unreasonable.*

17. *Whether the choice of the external consultant created an apparent bias and was unreasonable and/or irrational.*

18. *Whether the decision by the Intended Defendant to grant the CEC in the presence of scientific uncertainty with respect to air pollution and hazardous waste disposal violates the precautionary principle as contained in Section 2.3 of the NEP and Section 31 of the EM Act and was illegal and/or irrational and/or unreasonable.*

19. *Whether imposing a condition for crushing and disposal of spent pot liner when this was not addressed in the EIA and contravened Sections 35 and 36 of the EM Act and was illegal and/or irrational and/or unreasonable."*

The Facts

There are two categories of facts in the instant matter. The first category relates to the chronology of events between the application by NEC for a Certificate of Environmental Clearance (CEC) and the eventual grant of the CEC in April, 2007. There is no dispute of fact arising in this category. The second category relates to the scientific facts, surrounding which there is much dispute arising out of the affidavits.

Undisputed Facts

1. In 2005, the Government of the Republic of Trinidad and Tobago (GORTT) approved the establishment of an aluminium complex capable of producing 125,000 metric tonnes per annum. Part of the proposed complex, that is, the aluminium smelter, anode plant and rod mill, wire and cable plant and associated infrastructure, is to be sited on approximately 100 hectares of land at Main Site North, Union Industrial Estate in La Brea.

2. A local joint venture company, *Alutrint Limited,* was formed to manage the project development and ownership of this complex. Alutrint's equity ownership is 60% National Energy Corporation (NEC) and 40% Sural, a Venezuelan based company that specializes in the manufacture and retail of aluminium products.

3. The establishment of the proposed aluminium complex falls under activity 21 of the ***CEC Order, 2001***, that is, *"the establishment of a facility for the production or reforming of metals or related products"*. Under section 35(2) of the ***EM Act 2000***, no applicant shall proceed with an activity designated under the ***CEC (Designated Activities) Order 2001***, unless the applicant applies for and receives a Certificate of Clearance from the Authority.

4. On 25th April 2005, the ***NEC*** applied to the ***EMA*** for a CEC. The ***EMA*** made two requests for further information and by letter dated 11th July 2005, the ***EMA*** informed the ***NEC*** of its determination that an EIA was required for the project. Pursuant to rule 5 of the ***CEC Rules, 2001***, the ***EMA*** prepared and submitted to ***NEC*** a draft Terms of Reference (TOR) for the conduct of the EIA.

5. By a second letter dated 11th July, 2005, the ***EMA*** advised the ***NEC*** in accordance with rule 5(2) of the ***CEC Rules 2001*** that it was required to conduct consultations with relevant agencies, non-governmental organizations or other members of the public on the draft Terms of Reference (TOR) and thereafter, to submit a report to the ***EMA*** on the relevant issues that would have been discussed and also make representations for changes to be made to the draft TOR within 28 days, effective 29th June 2005.

6. In compliance with the direction of the ***EMA***, ***NEC*** sent packages to thirty five (35) stakeholders[1]. Each stakeholder was advised of the proposed aluminium complex and invited to comment on the proposed project. ***Alutrint*** also published an advertorial in the three national newspapers, and posted a copy of this advertorial, as well as a poster presentation on the key issues, risks and benefits of the proposed complex, at the Union Estate Communications Center on 29th July 2005. On 28th July 2005, ***Alutrint*** arranged through TTPOST, for the distribution of approximately 3,200 flyers to the following

[1] The 35 stakeholders are as follows:

1. Town and Country Planning Division
2. Ministry of Labour
3. Ministry of Energy and Energy based Industries
4. Forestry Division
5. Fisheries Division
6. Institute of Marine Affairs
7. Water and Sewerage Authority
8. National Emergency Management Agency
9. Trinidad and Tobago Solid Waste Agency
10. Trinidad and Tobago Solid Waste Management
11. Maritime Services Division
12. Lands and Survey Division
13. Siparia Regional Corporation
14. Fire Services Division
15. La Brea Police Station
16. Ministry of Health
17. La Brea Constituency Office
18. Council of Presidents for the Environment
19. Fisherman and Friends of the Sea
20. Aripero Heritage Division
21. La Brea Village Council
22. National Mon Desir Foundation
23. Rousillac Community Council
24. Rousillac Women's Group
25. Square Deal Squatters Association
26. Union Village Council
27. Vance River Village Council
28. Vessigny Village Council
29. Councilor-Otaheite Rousillac
30. Attorney at Law
31. Concerned Citizen
32. Concerned Citizen
33. NGO
34. Concerned Citizen
35. CEDHRAM – concerned citizen

communities: Rousillac, Chinese Village, Sobo Village, Point D'or, La Brea Proper, Brighton, Vessigny, Union Village and Vance River.

7. By a letter dated 5th August 2005, Prakash Saith, President of ***NEC*** reported on NEC's consultations on the draft TOR. ***NEC*** reported that it held consultations with a wide stakeholder group, to whom packages were sent containing a brief description of the project and a copy of the Draft Terms of Reference. The ***NEC*** also reported on other steps taken, that is to say: the publication of a centre-fold advertorial as well as a poster presentation on key issues; the maintenance of a regular presence at the Union Estate communications Centre to provide information to persons requesting information. The ***NEC*** complained that of the 35 stakeholders to whom packages were sent, only 3 had submitted comments. The NEC annexed the list of stakeholders, as well as the comments received and sought the EMA's approval of suggested amendments to the Draft TOR.

8. On 19th August 2005, the ***EMA*** issued the final TOR to ***NEC.***

9. Salient aspects of the TOR are reproduced hereunder:

In its introduction the ***EMA*** writes:

> *"The TOR will serve as a guide for the conduct of the EIA and the preparation of an EIA Report in an effort to understand the scope of the project, the potential impacts and the measures that should be taken to mitigate these impacts …"* (paragraph 1 of the Final TOR)

"2.4 Description of the Environment

… The Applicant shall undertake field studies to fill identified data gaps … to provide a comprehensive description of the human and natural environments …"

The Applicant was required to undertake studies of (among other things):

- Climate, Air Quality, Noise and Light.
- Surface Water Quality.

"2.6 Determination of Potential Impacts of the Proposed Project

… The potential impacts to be determined, but are not limited to:

- *Human Beings …*
- *Water (Surface and ground) quality*
- *Solid Waste …*
- *Soil …*
- *Dust …"*

"2.10 Stakeholder Consultation and Participation

Consultation and participation can assist in identification and mitigation of impacts while preventing environmentally unacceptable development, controversy, confrontation and delay.

You should determine the stakeholders that can assist in the provisions of information relevant to the project.

A minimum of two public meetings should be held … At least one meeting should be conducted at the start of the EIA Study to sensitise stakeholders to the project."

At page 19, detailed Guidelines were provided for the hosting of Public Consultation Meetings.

10. ***NEC*** held two (2) pre-EIA public meetings, to which the national community was invited. The first meeting was held on 9th November, 2005, and the second was held on 14th November 2005. Learned Senior Counsel for the ***EMA*** and for the Interested Party both conceded that there had been no public meeting at the start of the EIA process.

11. The parties have exhibited documentary records of both public meetings. For each meeting, there was exhibited in the Core Bundle a Briefing Note as well as Minutes of the proceedings.

12. The first meeting was held on the 9th November, 2005. By that time the EIA study had been completed and Dr. Ahmad Khan led the audience through the EIA findings. The audience comprised more than 75 persons from the surrounding communities. The major issues raised were relocation, alternative housing, compensation, employment opportunities, training, the conversion of rural communities into an industrial park; the impact of the smelter on human health, treatment and disposal of waste such as SPL; the effect of air emissions particularly Hydrogen Fluoride (HF) and Polyaromatic Hydrocarbons (PAH) on the health of surrounding residents.

13. The second public meeting was held on 14th November, 2005. Parties exhibited a Briefing Note as well as a full record of the proceedings. The issues raised at this second meeting included relocation of residents of Square Deal and Union Village; Health Impacts of an Existing Smelter; a call for no smelter in Trinidad and Tobago. The second meeting was held from 18:00 to 22:30 hours, and was approximately ½ hour longer than the first meeting.

14. The EIA report for the proposed aluminium complex was submitted by ***NEC*** to the ***EMA*** on 2nd February, 2006. This comprised of the Environmental Impact Statement (EIS), the Social Impact Assessment (SIA) and the Air Dispersion Modeling Report (ADM) for the proposed complex. By letter dated 13th February, 2006, the ***EMA*** acknowledged receipt of the EIA report and advised ***NEC*** that the acceptability of the submission was based on its adherence to the TOR and that it was subjected to a preliminary review of seven (7) working days from the date of receipt, to determine its acceptability for further processing.

15. The first public comment period spanned 13th March, 2006 to 28th April, 2006. By Legal Notice dated 8th March, 2006, the ***EMA*** gave notice that the Administrative Record concerning the proposed project was available to the public for viewing and that comments

from the public on the EIA were welcome from Monday 13th March 2006 to Friday 28th April 2006. The affidavit of Dr. Dave Mc Intosh shows that some 14 persons examined the Administrative Record. Persons examining the Administrative Record included Dr. Peter Vine. Numerous written comments were also received by the ***EMA*** from individuals and groups.

16. Jacques Whitford Limited conducted a Peer review of the EIA Report, on behalf of the ***EMA***. In its report dated 7th April 2006, Messrs. Jacques Whitford identified 8 items of deficiencies.

17. Following their identifications of deficiencies, Messrs. Jacques Whitford provided a *"Summary and Recommendations"* as follows:

> *"The technical work in both documents is reasonable. The presentation of the results in the Dispersion Modelling Report is not well done and could be improved….*
>
> *The prediction of environmental impacts described in detail in the EIA appear to be reasonable, however, the bases for the changes in the significance rating regarding mitigation are not completely clear in the case of air quality. In particular, the case of the acceptability of chronic HF exceedances off site needs to be more thoroughly and clearly made …"*

18. Messrs. Jacques Whitford concluded by finding *"no major deficiencies …"* They expressed the view that, "*suggested improvements would strengthen the case …"*

19. In the course of their review, Messrs. Jacques Whitford recommended a human health risk assessment in the following way:

> *"The risk assessment is qualitative and addresses the short-term hazards of the proposed operation. There is no assessment of long-term risk to human or ecological health due to exposure of pertinent air contaminant emissions such as PM^{10} or HF directly from the process. A human health risk assessment, at a minimum may be warranted in the light of the predicted exceedances values for the ambient ground level concentrations for HF. Such a risk assessment would also be a valuable tool in communicating the risk to potentially affected members of the public and other stakeholders …."* (emphasis mine)

20. On 27th May, 2006, the ***EMA*** hosted a public hearing of its own at the La Brea Community Centre. The hearing had been advertised in daily newspapers between 24th May, 2006 and 27th May, 2006.

21. On 29th May, 2006, the ***EMA*** forwarded the Review and Assessment Report to ***NEC***, under cover of a letter dated 20th May, 2006. The Review and Assessment Report outlined deficiencies and informed the ***NEC*** that their application would not be determined unless the deficiencies identified in the Report were addressed.

22. In its 26th May, 2006 letter, the ***EMA*** indicated its inability to make a determination because of the requirement of amendments to the report. The ***EMA*** described the EIA as *"… an important tool in the decision-making process …"*

23. Under cover of letter dated 26th May, 2006, the ***EMA*** forwarded its *"Review and Assessment Report."*

24. The following significant aspects of the *Review and Assessment Report* are extracted and set out below:

- At the second paragraph, the ***EMA*** writes:

> *"This Review and Assessment Report provides an overview of the EIA Report, a statement of deficiencies and general comments gathered from the review process that included State Agencies and the general public participating through independent review.* (Emphasis mine)

25. This is a contemporaneous document showing that the ***EMA*** considered the comments of the public.

26. In the *Review and Assessment Report* (page 2), the ***EMA*** indicated:

> *"The decision to grant or refuse a … CEC will be dependent on the satisfactory resolution of the issues outlined below …"*

27. At page 3 of the *Review and Assessment Report*, the ***EMA*** wrote:

"At the EMA's public consultation residents of surrounding communities indicated that the EIA public consultation conducted by the Applicant did not provide a forum for the EIA team to answer their questions or address their concerns fully …

28. Under the heading *"Risk Assessment":*

"The risk assessment did not address the long-term risk to human and ecological health due to exposure to air emissions … A human health Risk Assessment is required …"

29. EMA's Review and Assessment was placed on the National Register not long after 30th May, 2006, and on the EMA's Website on 27th September, 2006.

30. The ***EMA*** informed the ***NEC*** that a determination would be provided by 28th August, 2006, provided that a written response to the Review and Assessment Report was submitted by 30th June, 2006.

31. When the ***NEC*** failed to meet the stipulated deadline the ***EMA*** indicated its inclination to refuse the CEC. The ***EMA*** granted an extension of time and eventually received NEC's Supplementary Report on 18th August, 2006. On 21st August, 2006, the ***NEC*** responded to the EMA's Review and Assessment Report with a document entitled the Supplementary Report. The Supplementary Report was dated 18th August, 2006. ***EMA*** acknowledged receipt and indicated that the application would be determined by 17th October, 2006.

32. The ***EMA*** fixed a second public comment period. By Legal Notice dated 6th September, 2006, the ***EMA*** issued a notification under section 35 of the ***EM Act,*** 2000, of *"submission for public comment on a Supplementary Report submitted by Alutrint Limited …"*

33. In the course of the Legal Notice, the ***EMA*** referred to the submission of the EIA and indicated that it had determined *"… the document to be deficient and requested the NEC to address the deficiencies …"*

34. The ***EMA*** then notified the public that pursuant to section 28 (1) (b) of the ***EM Act***, it had established an Administrative Record including inter alia, *"… a written description of the proposed action …"*

35. The Administrative Record was made available for public viewing between September 11, 2006 and October 10, 2006. According to the evidence of Dr. Mc Intosh the record consisted of the documents contained in the record during the first public comment period as well as the Review and Assessment Report and Alutrint's Supplementary Report.

36. According to the evidence of Dr. Mc Intosh, the ***EMA*** held a meeting on 11th September, 2006, between officials of the ***EMA*** and interested individuals, including Dr. Peter Vine and Dr. Wayne Kublalsingh. The discussions focused on the risks associated with smelters, as well as the application by ALCOA for clearance for a smelter at Cap-de-Ville.

37. The Supplementary Report was also submitted to Messrs. Jacques Whitford for their Peer Review.

38. According to the evidence of Dr. Dave Mc Intosh (paragraph 90), the ***EMA*** considered the Supplementary Report together with public comments and the report of Messrs. Jacques Whitford. The ***EMA*** determined that the ***NEC*** should conduct a Human Health and Ecological Risk Assessment (the HHERA).

39. The ***EMA*** communicated its decision to the ***NEC*** by letter dated 17th October, 2006, under cover of which the ***EMA*** also forwarded its *"Review Comments on the Supplementary Report."*

40. It is significant that October 17th, 2006, marked the second occasion at which the ***EMA*** rejected the assessment of the Applicant, returning it for further processing.

41. By its review of the Supplementary Report, the ***EMA*** made two significant requests of the Applicant:

    (i) the preparation of the HHERA;

    (ii) the development of a plan for the conduct of Public Consultation meetings.

42. It is apt to consider carefully the portions of the 17th October, 2006, Review that called for the HHERA and the public consultation plan.

43. At the second paragraph of the Review, the ***EMA*** writes:

"An integrated Human Health and Ecological Risk Assessment needs to be conducted …

The information provided indicates that the predicted 24-hour maximum concentration for Hydrogen Fluoride (HF) outside the buffer zone exceeds the proposed value … The HHERA is recommended for this project because it provides a systematic approach for evaluating the potential environmental effects of both aquatic and atmospheric releases of potentially contaminating substances on human health and a variety of relevant terrestrial … and aquatic … receptors."

44. ***EMA*** wrote further (quoting Messrs. Jacques Whitford):

"The risk assessment would also be a valuable tool in communicating the risks that are likely to be posed or imposed by the construction and operation of a new facility to potentially affected members of the public or other stakeholders. In many cases, it is not known a priori simply from the dispersion modelling results, whether the risk will be acceptable, especially when the smelter risk is assessed on its own and cumulatively with other nearby facilities …"

45. It is curious that the foregoing statement is thematically similar to the plaintive cries of the Claimant.

46. On the last page of the Review, the ***EMA*** alluded to the need for public consultation:

"The EMA advises that subsequent to addressing the concerns highlighted above, Alutrint is required to develop… a plan for the conduct of Public Consultation meetings based on the EIA and all subsequent revisions including the Supplementary Report and Alutrint's response to the concerns highlighted … with the project affected community."

47. ***EMA*** continued:

"These meetings should establish a forum for effective information sharing and constructive dialogue."

Then:

"The plan should be submitted for review by the EMA to ensure an appropriate methodology for the conduct of these meetings is identified."

48. ***EMA*** then requests the findings which follow the meetings:

"Subsequent to the conduct of these meetings, Alutrint shall submit to the EMA the findings which will assist in an informed and fair decision-making with respect to a determination of Alutrint's application …"

49. EMA's directions and the Claimants submissions appear to echo each other. It is clear from this October, 2006 document that the ***EMA*** was acutely sensitive to the need for

public consultation and the need to take account of the results of such consultation in its decision-making.

50. ***Alutrint*** protested by letter dated 20th November, 2006. ***Alutrint*** wrote to ***EMA*** expressing its objection to the request for ***Alutrint*** to carry out a HHERA and additional formal public consultations. ***Alutrint*** expressed the view that *"… the late timing and justification for the new and substantial requests are unreasonable …"* Nonetheless, ***Alutrint*** agreed to undertake the performance of the HHERA and additional public presentations to the project affected community of La Brea.

51. On 23rd November, 2006, ***NEC/Alutrint*** submitted the *Addendum to the Supplemental Report* (*"the Addendum")* to the ***EMA***.

52. ***NEC/Alutrint*** wrote to the ***EMA*** on 5th December, 2006, outlining its *"Action Plan for Completion of the EMA's requirements re: CEC application."* Annexed to Alutrint's letter was its Action Plan for completion of EMA's requirements. Two (2) main public meetings were scheduled for the La Brea community: 7th December, 2006 and 16th January, 2007. Additionally, ***Alutrint*** planned to continue its open house policy and to hold a cottage meeting on 19th December, 2006. ***Alutrint*** proposed further to submit the HHERA to the ***EMA*** the week of 15th January, 2007; and the final report on update meetings by the week of the 31st January, 2007.

53. On 7th December, 2006, ***NEC/Alutrint*** held its public consultation meeting in La Brea and submitted a transcript of the proceedings to the ***EMA***.

54. Jacques Whitford submitted its review of the Addendum to the Supplemental Report, to the ***EMA*** on 10th January, 2007. The Report concluded that overall the responses in the Addendum addressed most of its queries on the Review of the Supplementary Report.

55. On 11th January, 2007, ***Alutrint*** sent a copy of its Public Update Strategy and Implementation Report, to the ***EMA***. This report summarized the methodology used to perform the public update exercise which was requested by the ***EMA*** and included feedback data assembled during the Public Update exercise for the project-affected community of La Brea. In this 11th January, 2007 document, the Applicant asked the ***EMA*** to note that an addendum to the report would be submitted upon completion of the HHERA.

56. In its 11th January, 2007 update, the Applicant/Alutrint outlined the strategies which it had adopted as follows:

- Face to face meetings each Wednesday and Friday, commencing November, 2005.

- In its update, the Applicant/Alutrint commented on the usefulness of the face to face meetings where persons *"who are normally silent at public for have seized the opportunity to share their views and concerns."*

- Distribution of a Bi-Monthly letter from June, 2006.

- The hosting of a Public Update Meeting on 7th December, 2006. Approximately 150 persons attended. Residents had been invited via a

roving loudspeaker and formal invitations had been issued to community-based organizations.

- The hosting of an Open House on 14th December, 2006, at Union Communications Centre at three Lands Junction, La Brea. Residents were informed by roving loudspeaker.

- The hosting of a Cottage Meeting for fence line communities on 19th December, 2006. Formal letters of invitation were sent to key community organizations.

- The 11th January, 2007, update report states that some 75 persons were in attendance along with prominent anti-smelter activists.

- The distribution of questionnaires at the Open House and Cottage meetings. The update identifies the following as the main concerns: health impacts, environmental impacts and disaster management.

57. The ***EMA*** wrote to ***Alutrint*** on 30th January, 2007, attaching the preliminary findings of its review of Alutrint's '*Addendum to Supplementary Report*' and '*Public Update Strategy* and *Implementation Report*', in a document entitled "*Interim Addendum Review Report*'. The ***EMA*** advised ***Alutrint*** that it reserved the right to issue a subsequent review on receipt of the HHERA and the Final Report on Public Update Meetings.

58. On 12th February, 2007, ***Alutrint*** held its second Public Update meeting in the project affected community of La Brea. The purpose of the meeting was the presentation of the

HHERA to the community. The transcript records a very lucid and simple presentation by Dr. Harriet Phillips of SENSES, the Consultants who prepared the HHERA.

59. Alutrint submitted the HHERA Report, conducted by SENSES Consultants, to the ***EMA*** on 14th February, 2007. ***Alutrint*** confirmed that the terms of reference for the HHERA included the ***Alutrint*** Aluminium Complex as well as the UAN facility and the proposed power plant. ***Alutrint*** reported results of the HHERA indicated that there was no likely health or ecological effects to the people, plants, fish and wildlife in the surrounding community of La Brea.

60. On 8th March, 2007, Messrs. Jacques Whitford submitted its review of the HHERA to the ***EMA***. The review identified substantive deficiencies in the HHERA under the following headings:

- Air Quality
- Human Health and Risk, specifically in relation to the availability of drinking water for local residents
- Ecological Risk Assessment

61. In their review of the HHERA, Messrs. Jacques Whitford concluded as follows:

> *"Overall the approaches and methods followed to predict the potential effects of emissions on the environment and the related risks to nearby receptors, both human and ecological are reasonable."*

62. Messrs. Jacques Whitford alluding to the substantive deficiencies stated:

> *"These deficiencies should be addressed by the proponent to the complete satisfaction of the EMA …"*

63. The ***EMA*** prepared a review of its own entitled *"Review of the Human Health and Ecological Risk Assessment"* and forwarded it to ***Alutrint*** under cover of a letter dated 9th March, 2007.

64. On 12th March, 2007, ***Alutrint*** responded to the EMA's review of the HHERA. The document entitled *"Responses to the Review of the Human health and Ecological Risk Assessment"* addressed *"Air Quality"; "Human Health Risk"* and "*Ecological Risk"*.

65. By its letter dated the 15th March, 2007, the EMA expressed concerns as to Mercury emissions. ***EMA***, stated:

> *"If Alutrint is confident that there would be no Mercury emissions from the proposed facility because of some distinct difference between its proposed plant and other operating Aluminium Smelter facilities, this should be demonstrated to the EMA…"*

66. ***Alutrint*** responded by a letter of 16th March, 2007.

67. On the 21st March, 2007, ***EMA*** requested an update on the disposal of SPL. ***Alutrint*** provided a letter of intent under a confidential letter dated 21st April, 2007, that is, following the grant of the CEC.

68. The CEC was made subject to a number of conditions. These include the following:

(i) Buffer Zone Management and Monitoring Plan.

(ii) Sediment and Storm Water Management Plan.

(iii) Particulate and Monitoring Plan.

(iv) Road Traffic Management Plan.

(v) Noise Monitoring.

(vi) Archaeological Finds.

(vii) Environmental Management System.

(viii) Medical Monitoring Plan.

(ix) Source Emission Testing Plan.

(x) Ambient Air Quality Monitoring Plan.

(xi) Soil Monitoring Plan.

(xii) Ground Monitoring Plan.

(xiii) Electro-Magnetic Radiation Monitoring Plan.

(xiv) Waste-Water Treatment System.

(xv) Spent Pot Lining (SPL) Management Plan.

(xvi) Pesticides and Toxic Chemicals.

(xvii) Decommissioning/Abandonment Plan.

(xviii) Emergency Prevention and Response Plan.

(xix) Community Awareness and Emergency Response (COER).

The Evidence

Evidence in this matter was purely affidavit evidence. There was no application on either side for cross-examination.

The following affidavits were filed in support of the application by ***PURE***, on 29th June, 2007:

(i) Affidavit of Anslym Carter)
(ii) Affidavit of Dr. Raid Al-Tahir)
(iii) Affidavit of Dr. Peter Vine) all filed on 29th June, 2007
(iv) Affidavit of Norris Deonarine)
(v) Affidavit of Michael Lopez)
(vi) Affidavit of Steve Smith)

- Affidavits filed on behalf of the Defendant, ***EMA*** were:

(i) Glen Goddard filed on 1st April, 2008
(ii) Mike Murphy filed on 4th April, 2008
(iii) James Knight filed on 18th April, 2008
(iv) Dave Mc Intosh filed on 1st April, 2008

- Affidavits were also filed on behalf of ***Alutrint***, the Interested Party:

(i) Joseph Scire filed on 7th April, 2008
(ii) Ahmad Khan filed on 7th April, 2008

(iii) Joseph Morton on 7th April, 2008

(iv) Harriet Phillips on 10th April, 2008

Affidavits filed on behalf of the Applicant PURE

Affidavit of Anslym Carter

- This affidavit was filed in support of the application for Leave.

- Anslym Carter, at the date of swearing the affidavit was a Stevedore, residing at Square Deal Road, Union Village. He swore that owing to his economically disadvantaged position he was incapable of filing an application for leave to apply for judicial review.

- Mr. Carter attended meetings organized by the La Brea Industrial Development Company. He deposed that Square Deal Road Community is one of the closest communities to the proposed smelter and yet a public consultation has never been conducted in Square Deal Road.

- Mr. Carter deposed that he had in fact attended public consultations hosted by LABIDCO and ALUTRINT at the Vessigny Government Secondary School, but that his questions concerning health, safety and environmental issues were left unanswered and were postponed to subsequent meetings.

- He referred to the public consultation held by the ***EMA*** on 27th May, 2006, and stated that he never received any communication notifying him of the meeting.

Affidavit of Dr. Raid Al-Tahir

- Dr. Raid Al-Tahir, at the time of swearing his first affidavit, was a Senior Lecturer in the Department of Surveying and Land Information, Faculty of Engineering, University of the West Indies.

- He established himself as an expert by reference to his qualifications and publications.

- Dr. Al-Tahir criticised the Air Dispersion Model (ADM) which formed part of the EIA on which the CEC was granted in the following way.

> *"The results … of the air dispersion modelling and predicted air concentrations would be directly dependent on the accuracy, quality and reliability of the data values used in the data sets for the CALPUFF Model …"*

- Dr. Al-Tahir identified three data sets:

  (1) elevation/terrain
  (2) land cover
  (3) meteorological

- Dr. Al-Tahir deposed that the elevation/terrain data was obtained from the Shuttle Radar Topography Mission (SRTM).

- Dr. Al-Tahir criticized the SRTM data on the ground that it had not been validated for Trinidad to ensure reliability and accuracy.

- At paragraph 19 of his affidavit Dr. Al-Tahir concluded:

> *"… I therefore verily believe that the ADM Report contains several fundamental flaws and as such a … proper decision to grant a CEC could not have been reasonably made … based on the information contained therein."*

Affidavit of Dr. Peter Vine

- Dr. Peter Vine, at the time of swearing his affidavit was an Industrial and Agricultural Physicist. He held a BSc, MSc and PhD in Soil Physics and taught at the University of Nigeria, University of the West Indies and University of London.

- Dr. Vine established himself as an expert by reference to his Curriculum Vitae as well as his participation on numerous projects. At paragraph 14 of his affidavit, Dr. Vine stated:

  > *"Having learnt of the proposed project was one which required careful consideration in the public interest. I considered that this project raised many issues which needed careful consideration, including the problems of limited natural gas resources, emissions, displacement of persons, coastal erosion and the challenge of sequestering CO_2 produced by the facility …"*

- At paragraph 18 of his affidavit, Dr. Vine stated that *"the predictions of airborne emission"* concentrations are so uncertain that there is a strong likelihood that actual concentrations would be found to be unmanageably deleterious to human health.

- At paragraph 20, Dr. Vine alluded to the unreliability of models, whose unreliability increased where inaccurate data was fed into them and expressed the following opinion:

  > *"Where models are used without sufficient knowledge about their behaviour and limitations significant errors can be committed. Models that are based on insufficient data can lead to erroneous results. I …consider that the EIA in this case suffers from such inaccuracies …"*

- At paragraph 29, Dr. Vine stated:

> *"A minimum requirement for an EIA model is that it is validated on past situations for which measured values are available …"*

- And at paragraph 30:

> *"It is my opinion that in the case of Union Estate …, the Intended Defendant, failed to take into account not only the most likely or best estimate, but … the range of uncertainty."*

- At paragraphs 38 and 39, Dr. Vine expresses the following opinions:

> *"It is my opinion that the use of the Calpuff Model by Alutrint … must be considered in the context of its failure to indicate a range of predictability."*

- Then at paragraph 39:

> *"… the failure to indicate a range of predictability reduces the effectiveness of the model as a tool to predict air emissions, particularly emissions that are estimated to be around the critical level and potentially deleterious to human health."*

- Dr. Peter Vine expressed his opinion on Air Modelling and the importance of Meteorological data, and stated at paragraph 42:

> *"If the proposed Union Estate Smelter were to be built adjacent to Piarco Meteorological Centre where there are detailed atmospheric measurement and the land is fairly level, there would be less uncertainty … However the Union Estate Smelter has no detailed local meteorological records and is on the sea coast and separated from Piarco Meteorological Station by some 50 km of varied terrain."*

- At paragraph 44, Dr. Vine states:

  "The actual weather at La Brea is markedly different from that at Piarco."

- At paragraph 46, Dr. Vine expresses the following opinion:

  "ALUTRINT has presented at the office of the Union Industrial Estate maps comparing predicted and measured sulphur hex fluoride concentrations from a tracer experiment at low and higher wind speeds. The match is visually impressive …

  However, the match may not be so good if the wind speed were to fluctuate, if the emission were HF instead of SF 6 if the source were a Chinese-Design aluminium smelter and if the emission were to rise naturally from the smelting pots rather than being injected into the factory like the SF6 … if the actual wind speed is not the same as the wind speed predicted by ALUTRINT's modelling."

- At paragraph 48, Dr. Vine states:

  "The major problem with the predicted pollutant dispersion at the proposed Union Estate Smelter is the meteorological uncertainties such as wind speed …"

- At paragraph 49, Dr. Vine alluded to other uncertainties.

- At paragraph 51, Dr. Vine stated that he failed to elicit at Alutrint's public meetings any information about similar smelters in the People's Republic of China.

- Dr. Vine exhibited an ***Alutrint*** position paper and inferred that ***Alutrint*** has indicated its concerns with meeting the standards of the Draft Air Pollution Rules.

- At paragraph 63, Dr. Vine critiques the HHERA stating that another deficiency of the HHERA related to the disposal the Spent Pot Lining. Dr. Vine stated further that accidental gaseous releases and spillages of pollutant-containing liquids and solids are ignored.

- At paragraph 68, Dr. Vine addresses the disposal of Spent Pot Lining:

> *"The NEC did not apply for permission to establish a waste handling facility yet the CEC provides for the crushing of SPL. SPL is extremely toxic particularly when broken up and therefore the potential for the escape of dust in the crushing process must be assessed."*

Affidavit of Michael Lopez

- In his affidavit, Michael Lopez set out the undisputed chronology in this matter. Mr. Lopez also raised concerns as to the omission of critical documents from the National Register, the presence of conditions in the CEC and other matters which are reflected in the Grounds of the Claim.

Affidavit of Dr. Steve Smith

- Dr. Steve Smith is a Medical Practitioner, specializing in internal medicine. At the date of the swearing of his affidavit he held the appointment of Associate Lecturer in Internal Medicine, Faculty of Medical Sciences, UWI.

- Dr. Smith referred to a report which he prepared on behalf of the medical board and identified certain key issues.

- One key issue was that chemical agents or waste products, such as Spent Pot Lining (SPL) and Poly Aromatic Hydrocarbons (PAH) which may arise from an aluminium smelter have proven to have toxic and carcinogenic properties.

Affidavits filed on behalf of the Defendant, EMA

Affidavit of Glen Goddard

- Glen Goddard, at the time of the swearing of his affidavit was a Civil Engineer and held the post of Manager, Technical Services Department in the ***EMA***.

- In his supplemental affidavit filed on 23rd October, 2008, Glen Goddard testified that the National Environment Policy was submitted for public comment from 13th January, 2005 to 18th February, 2005.

Affidavit of Mike Murphy

- Jacques Whitford, Consultants on Environmental Engineering Scientific Planning and Management had been retained by the ***EMA*** to provide Peer Review Reports on the EIA and the ADM and later on the Supplementary Report as well as the HHERA.

- Mike Murphy swore to his affidavit on 4th April, 2008, as the Principal of Jacques Whitford and the Senior Service Director for Atmospheric Science and Engineering Group Services.

- Dr. Murphy is the holder of a Bachelor of Science Degree, first class Standing Degree, University of Prince Edward Island and the holder of a PhD in Chemical Engineering from the University of Waterloo.

- In the course of his affidavit evidence, which was substantially expert evidence designed to contradict the expert witnesses of the Claimant, Dr. Murphy relied on the expertise of other experts such as Jonathan Holder, Roberts E. Rogers, Benjamin Burkholder, Tania Sharpe and Stefanos Kales. Each of these experts swore to affidavits confirming the testimony of Dr. Murphy, relying on their expertise.

- In answer to the affidavit of Dr. Mark Chernaik, whose affidavit was filed on behalf of the Applicant ***Smelta Karavan***, Dr. Murphy testified that it is *"… incorrect to state that the grant of the CEC did not take into account the particulate matter pollution."*

- Dr. Murphy stated further that in the HHERA, both particulate matter PM_{10} and fine particulate matter $PM_{2.5}$ were predicted to be below the accepted standards.

- From paragraph 5 to 17, Dr. Mike Murphy answers allegations concerning the disposal of SPL.

- Dr. Murphy, relying on the EIA, referred to the proposed off-shore disposal option, and stated that the EMA rejected the proposal for on site/on island disposal of SPL. Dr. Murphy referred to the Supplemental EIA, where ***Alutrint*** discussed the off-shore proposal in more detail.

- At paragraph 6, Dr. Murphy concludes:

> *"… it is therefore not correct to state that the risk of improper disposal of SPL has not been addressed so as to mitigate any risk there might be to human health.."*

- Dr. Murphy concedes that the *"… risks associated with transportation of SPL from the site to the ships needed further research …"*, but insisted:

> *"… the processing of SPL has been the subject of a condition in the CEC to address this shortcoming ..."*

- At paragraph 23, Dr. Murphy denied that cyanide and fluoride from the improper disposal of SPL would contaminate the surface and underground water in La Brea.

- Dr. Murphy then provides the following expert view:

"Fluoride contamination of underground water via movement … is highly unlikely as fluoride is strongly absorbed or held by the soil."

Dr. Murphy states:

"Fluoride forms complexes with soil components, this resulting in a slow rate of leaching through the soil profile to ground water."

- At paragraph 9, Dr. Murphy states that the soil has a capacity to bind fluoride.

- In support of his statement that soil has the capacity to bind fluoride, Dr. Murphy states:

  "… 98% of fluoride added to silt loam soil … was retained over a ten year period."

- Dr. Murphy stated that for humans and most other animals ingestion is the main pathway for fluoride uptake.

- Dr. Murphy quotes the World Health Organization in support of his statement:

  "Humans living in the area surrounding industrial emissions do not normally have a significantly higher than normal fluoride intake …"

- Dr. Murphy was not cross-examined. In the absence of cross-examination, the Court will resolve a dispute of fact against the party who alleges. The Court therefore accepts the expert evidence of Dr. Murphy that humans living in the area of industrial emissions do not normally have a significantly higher than normal intake of fluoride.

- At paragraph 15 of his affidavit, Dr. Murphy states of hydrogen cyanide, that exposures less than .003 mg/m^3 can be considered to be protective of human health.

- At paragraph 17, Dr. Murphy addresses the Recommended Exposure Limit for Hydrogen cyanide in the workplace, and at paragraph 18, Dr. Mike Murphy addresses Particulate and Gaseous Pollution. Once again his testimony is based on advice and consultation with Robert E. Rogers.

- Dr. Murphy asserts:

> *"… ambient air quality standards in the range of 0.3 to 1.0 mg/m^3 are set to protect the most sensitive receptors … and are at levels where it is unlikely that even if they should be occasionally exceeded, there would be substantive or even detectable damage …."*

- At paragraph 21, Dr. Murphy refers to the EIA and the Supplemental Report which indicated that predicted concentrations will be below regulatory standards.

- On this basis, Dr. Murphy predicts that it is *"unlikely that there will be a significant and adverse effect on plants and animals of the Morne L'Enfer Forest Reserve."*

- Responding to the allegations of Dr. Steve Smith, deponent for ***PURE***, that the HHERA omitted several stages of the Fluoride cycle, Dr. Murphy stated that the most important pathways of Fluoride entry were considered.

- Dr. Murphy deposes further that to the modeled predictions the facility is unlikely to exceed the regulatory standard for Hydrogen Fluoride of 1 microgram per cubic metre.

Affidavit of Dr. Dave Mc Intosh

- Dr. Mc Intosh provided the Court with a detailed chronology of the events from the initial application by ***NEC*** for a CEC to the highly contentious grant of the CEC in April, 2007.

- As an official of the Defendant, Dr. Mc Intosh also provided evidence of steps taken by the ***EMA*** in the decision-making process.

- Dr. Mc Intosh alleges further:

> *"From these (public meetings) … we were able to obtain a fairly detailed picture of the concerns which members of the adjoining communities and the wider public had and we were able to rely on comments received to ask Alutrint for further information.*
>
> *… All comments received were taken into account …*

- At paragraph 127, Dr. Mc Intosh explained why the CEC was granted subject to conditions:

> *"… out of an abundance of caution and because we appreciated that the studies we were reviewing were estimating and predicting the extent of future hazards we were careful to make the grant subject to conditions…….*

- Dr. Mc Intosh addresses the issue of SPL and confirms that five options had been identified by ***Alutrint***.

- At paragraph 134, Dr. Mc Intosh confirmed that Trinidad and Tobago is a signatory to the Basel Convention. Dr. Mc Intosh stated:

> *"This means that … Trinidad and Tobago has agreed to only allow shipments of waste to and from other parties to convention but Trinidad and Tobago has not implemented domestic law to give effect to … the convention."*

- At paragraph 139, Dr. Mc Intosh stated that the estimated time for the by-production of SPL was eight years after the grant of CEC and stated:

  "It was … unrealistic to expect that the NEC would have concluded contractual arrangements for the shipment of SPL…"

- ***EMA*** asked for an update. The Applicant responded by letter of 23rd March, 2007, providing an update which was subject to a claim for confidentiality.

- At paragraph 140, Dr. Mc Intosh stated that the ***EMA*** decided to grant the CEC subject to a condition that disposal of SPL be subject to international guidelines.

- At paragraph 143, Dr. Mc Intosh answered complaints concerning conditions contained in the CEC by stating:

  "… the various plans which the CEC requires to be reproduced … are intended to provide mechanisms whereby the impact on the environment … can be managed, monitored and measured to ensure that the plant is indeed operating within acceptable standards."

- At paragraph 143, Dr. Mc Intosh stated that the management and monitoring plans were not part of the assessment process.

Affidavits filed on Behalf of the Interested Party, Alutrint

Affidavit of Joseph Scire

- Joseph Scire held a Master of Science degree from MIT, and had been involved in the *"design, development, application and evaluation of several air quality dispersion models of which CALPUFF was one."*

- Mr. Scire deposed that Guideline models undergo *"a rigorous and extensive multi-year assessment and evaluation process that include model evaluation … public review and comment through an open public hearing process formal per review and public disclosure …"*
- At paragraph 12, Mr. Scire answers allegations made by Dr. Vine who alleged that *"predictions of air borne emissions … are so uncertain that actual concentrations would be found to be deleterious to human health …"*

- In answer, Mr. Scire states:

  "… dispersion models are designed to provide conservative estimates."

- This witness stated further that CALPUFF does not show any tendency for under-prediction and is protective of public health and safety. In answer to the allegations of Dr. Vine's affidavit, Mr. Scire deposed that CALPUFF accounts for movement of winds, land topography and land use variability.

- At paragraph 29, Mr. Scire provided the following opinion:

  "The results of the modelling study are reasonable accurate and consistent with good modelling practice."

Second Scire Affidavit – Supplemental Affidavit

- At paragraph 3, Mr. Scire answers Cathal Healey-Singh. Mr. Scire alleges that the ***Alutrint*** EIA included a Cumulative Impact Assessment that evaluates the impact of the proposed Urea Ammonium Nitrate Complex.

- He repeats that modelling techniques are consistent with standard regulatory, the Calpuff Model being classified as a guideline model by USEPA stating:

"It is well understood by experienced modelers that no model is perfect."

But that :

"… models are useful tools …"

The specific models used in the Alutrint dispersion analysis have been extremely reviewed and accepted by regulatory agencies including the USERA.

- Mr. Scire concludes that the results of the modelling study are reasonable, accurate and consistent with current good modelling practice.

Affidavit of Joseph Norton

- Joseph Norton, at the time of swearing his affidavit was an Environmental Scientist, who held a BSc in Biology and a Masters in Zoology.

- He stated that as an Environmental Scientist for Alcoa, he had been engaged in *"numerous environmental studies ranging from treatment of wastewater and development of air permit compliance strategies to leading the Global team for management of Alcoa's SPL."*

- Mr. Norton was also Plant Manager at Alcoa's Gum Springs, where 65, 000 tonnes[3] of SPL had been processed in 2007.

- Mr. Norton referred to a Summer 2006, meeting with Philip Julien of ***Alutrint*** and stated:

  "We … agreed that Gum Springs would be an appropriate destination for SPL generated by the Alutrint Facility."

- He prepared and sent a letter to ***Alutrint*** confirming Alcoa's commitment to receive and treat SPL in compliance with US Regulations …

- Mr. Norton contradicts Mark Chernaik stating that there is no aluminium smelter in Jamaica.

- He also contradicts Mark Chernaik, where he deposed from paragraph 16 of his affidavit that SPL poses a serious environmental risk.

- In answer, Mr. Norton states:

> *"… they are predicated on improper disposal practices and are not reflective of technologies employed in modern pre-bake smelters … where efficient, safe and environmentally sound SPL Management plans are put in place before SPL is generated."*

- Mr. Norton further contradicts Mark Chernaik, while accepting that the acute effects of HF are well known, but states:

> *"… properly managed SPL does not release Hydrogen Cyanide in toxic amounts …."*

- He accepts the allegation of Mark Chernaik that USA prohibits the disposal of untreated SPL, but states of the Gum Springs Plant that it is a facility that exists solely to treat and dispose of SPL.

- Mr. Norton states:

> *"For the past ten years Gum Springs Plant has been processing and placing treated SPL in the on-site landfill with all material meeting the strict analytical requirements for destruction of cyanide, sequestering of fluorides and all other permit requirements."*

- And further:

"… improper management of common materials can have serious consequences."

"The focus of regulatory agencies and smelter operators is the proper management of SPL."

- Mr. Norton stated :

"… it was Alcoa's position that Gum Springs would be the destination for the Alutrint SPL. However, it was premature to finalize a contract at that time."

Affidavit of Ahmad Khan

- Ahmad Khan at the time of swearing his affidavit was the Executive Director of Rapid Environmental Assessments Limited (REAL).

- REAL is a local company providing consultancy services to clients in the oil and gas including analyses of the environmental impacts of proposed industrial projects.

- Dr. Khan deposed that on 6th June, 2005, the ***NEC*** retained REAL to conduct an EIA for the Smelter project.

- Dr. Khan stated that the affected area was a 5 km radius and stated that the internationally accepted definition of *"affected population"* includes those persons who may live or work within an area and in which significant changes in air quality, soil or biota may lead to a change in quality in life standards typically within a 5 km radius.

- REAL contracted experts KOMEX and SENSES. Dr. Khan provides confirmation of consultations which took place on the Draft TOR.

Affidavit of Alan Davidson

- Professor Davidson swore to this affidavit as Emeritus Professor and Specialist on the effects of air pollution on plants and animals.

- Professor Davison deposed that between 1964 and 2003 he built up a research team that specialized in studying the effects of sulphur dioxide, fluorides, ozone and deposited nitrogen compounds.

- At paragraph 9, Professor Davis states:

  > *"Where plants and animals are concerned, the most important of these emissions is gaseous fluoride."*

- Drawing a distinction between pre-bake and Soderberg technologies, at paragraph 10, Professor Davison states that *"… technology used in aluminium smelters has changed radically over fifty years. Initially Soderberg used without any system for capturing emissions."*

- Professor Davison expressed the view that that a major improvement came with the introduction of pre-bake technology.

Affidavit of Harriet Phillips

- Harriet Phillips holds a PhD in Chemical Engineering and is a Senior Specialist in Risk Assessment and Toxicology for SENSES.

- Dr. Phillips identifies the emissions from the smelting process as being primarily gaseous and stated that they comprise hydrogen and particulate fluorides, aluminia, CO, CO_2, SO_2, NO, volatile organics and polycyclic hydrocarbon.

- Dr. Phillips provides a table showing the maximum concentrations of chemicals of concern at the site location.

- Of hydrogen fluoride, Dr. Phillips states that the most important long-term effect is *"skeletal fluorosis …"*

- Dr. Phillips refers to the World Health Organisation standards: 16 micrograms/m^3 per 24 hours for humans and 1 micrograms/m^3 per 24 hours for plants.

- Dr. Phillips identifies the maximum predicted concentration from the Alutrint Smelter as reported in the HHERA as *"… 0.95 micrograms per cubic metres per 24 hours, just out of the buffer zone."*

- At paragraph 13, Dr. Phillips states:

  "This concentration is well below concentrations on a 24 hour basis that are protective of human health."

- At paragraph 14, Dr. Phillips identified chemicals containing carcinogenic effects.

- Of these Dr. Phillips states at paragraph 15:

  "According to HHERA and EIA the maximum predicted concentration of benzo(a) pyrene in emissions from the proposed Alutrint smelter is … 4 x 10^{-9} mg/m^3 … well below regulatory limits …."

- Of sulphur dioxide, Dr. Phillips refers to reports of the World Health Organization (WHO), which suggests that a SO_2 concentration of 50 microgram/m^3 is a reasonable and feasible goal for developing countries.

- At paragraph 20, Dr. Phillips states:

  "The 24-hour predicted SO_2 concentration from the proposed smelter … is 30 micrograms/m^3 as compared to a value of 50 micrograms/m^3 protective of human

health and 100 micrograms/m^3 protective of plants and therefore no adverse effects are expected from $_{SO2}$ from the smelter."

- At paragraph 21, Dr. Phillips refers to the adverse effects of particulate matter. Adverse health effects include asthma, chronic pneumonia and cardiovascular problems.

- At paragraph 22, Dr. Phillips states that WHO indicates that there is little evidence to indicate that there is any threshold below which no adverse health effects would be anticipated.

- At paragraph 25, Dr. Phillips refers to the HHERA and states:

  "The results of the risk assessment indicate that the maximum PM_{10} concentrations are below a concentration of 1 microgram per m^3.

- At paragraph 33, Dr. Phillips answers paragraph 89 of Cathal Healey-Singh's affidavit in respect of the treatment of liquid waste management. Dr. Phillips states that the detention pond is designed to treat 700 m^3 per day and :

  "Thus the predicted concentrations are very low and will not result in any adverse effect in the aquatic environment."

- At paragraph 35, Dr. Harriet Phillip answers paragraph 25 of the affidavit of Dr. Steve Smith, where Dr. Smith alleged that SENSES had left out portion of the fluoride cycle. Dr. Harriet Phillip states that the diagram relied on by Dr. Smith was wrong and states further that:

  "… sediment exposure and the aquatic environment were considered in the risk assessment …"

- At paragraph 37, Dr. Harriet Phillips answers paragraph 28 of the affidavit of Dr. Smith and states that Dr. Smith is misinformed about the information in the USEPA handbook, stating that information was not concession above.

  Then Dr. Harriet Phillips states of the La Brea area:

  > *"While there are uncertainties in extrapolating this information to the La Brea context they were identified in the risk assessment and assumptions were made so as to over-estimate the potential exposures in the La Brea area …"*

- At paragraph 45, Dr. Harriet Phillip, in answer to Dr. Vine states in respect of Hydrogen Fluoride:

  "There are no exceedances of the critical value of one for human health …"

Submissions

- Parties in these matters relied on written submissions, which were supplemented by oral submissions.

- From the inception of the matter, five sets of written submissions were filed on behalf of the Claimant ***PURE***:
  - 30th August, 2007
  - 7th September, 2007
  - 10th September, 2007
  - 20th August, 2008
  - 19th September, 2008

- Of the foregoing written submissions, those filed on 19th September, 2008, are the relevant submissions for the purpose of the substantive claim before this Court.

- In his submissions, Dr. Ramlogan identifies eleven issues, which, he submits can be placed into three categories, namely:

    (i) public consultation,
    (ii) the EIA process and
    (iii) the precautionary principle.

- Learned Counsel, Dr. Ramlogan referred to Rule 10 of the ***CEC Rules***, as providing a list of the critical components of the environment to be considered, prior to the grant of a CEC.

- Learned Counsel, Dr. Ramlogan submitted that the EIA consisted of all seven (7) documents submitted by the Applicant, that is to say:

    - EIS - the Environmental Impact Statement
    - ADM - the Air Dispersion Modelling Report
    - SIA - the Social Impact Assessment
    - The Supplementary Report
    - An Addendum to the Supplemental Report
    - The HHERA
    - Cumulative Impact Assessment

- Learned Counsel cited the authority of ***Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment and Planning Agency (Jamaican Case)***[1] as well as ***Talisman (Trinidad) Petroleum Ltd. v EMA***[2] and ***R (on***

the application of Edwards and another) v. Environmental Agency and others[3], as examples of judicial recognition of the role of public consultation and participation.

- Learned Counsel quoting Sherstobitoff JA, cited ***Saskatchewan Action Foundation for the Environment v. Saskatchewan (Minister of the Environment and Public Safety[4]),*** and contended that there should be a higher standard of vigilance where government is the primary sponsor of the project :

  "Public participation in the process is all the more important because the Government of Saskatchewan may have an interest, direct or indirect."

- Learned Counsel, Dr. Ramlogan referred to Rule 10 of the ***CEC Rules***, as providing a list of the critical components of the environment to be considered, prior to the grant of a CEC.

- Learned Counsel's first main submission related to the failure of the Authority to ensure compliance with Rule 5 (2).

- Rule 5 (3) of the ***CEC Rules***, requires the Authority to consider representations to finalise the TOR.

- Referring to Rule 10, Learned Counsel, Dr. Ramlogan emphasizes that this rule identifies information which should normally be provided in the EIA and submits:

  "It therefore follows that the Defendant has a general duty to provide information concerning:
  - *Effects on human beings*
  - *Mitigation measures*
  - *Monitoring plans"*

- Learned Counsel submits that the Authority breached the Common Law requirement of fairness and cited the authority of ***R v Brent LBC ex p. Gunning***[5]***,*** where Stephen Sedley, Q.C. stated:

> *"… to be proper, consultation must be undertaken at a time when proposals are still at a formative stage."*

- Referring to the Applicant's July, 2005, consultation on the Draft TOR, Learned Counsel pointed out that of the 35 entities, who received copies of the draft TOR, 13 were NGOs and four were concerned members of the public. Many were State agencies.

- On this basis, Learned Counsel submits at p. 25:

> *"… the Draft TOR represents the very formative stage of the project and the failure of the Defendant to ensure compliance with Rule 5 (2) … is ultra vires the EMA Act … is unreasonable or irrational."*

- Learned Counsel contends that by Rule 5 (3), the Defendant has a duty to consider all written representations and that they failed to do so.

- Learned Counsel relied on ***Ex p. Gunning***[6] itself quoted in the ***Jamaican Case***[7]:

> *"… the product of consultation must be conscientiously taken into account when the ultimate decision is taken .."*

- Learned Counsel refers to ***Earthlife Africa v Department of Environmental Affairs and Tourism and others***[8], where Justice Griesel stated:

> *"… the D.G. made his decision without having heard the applicant … driven to the conclusion that the process which underlay the decision of the D.G. was procedurally unfair."*

- Learned Counsel contends that ***PURE*** were denied the opportunity to put forward or influence the TOR, as the framework for the EIA.

- On this point Learned Counsel submits that the public consultation on the draft TOR were *ultra vires* and unlawful and not in compliance with Rules 5 (2) and (3) of the ***CEC Rules***.

- Moving on to his second submission, Learned Counsel, Dr. Ramlogan submitted that the Authority failed to conduct consultations in the Post Final TOR Phase.

- Learned Counsel cited ***R (on the application of Edwards) v. Environment Agency***[9] per Auld, LJ:

> *"… consultation shall be on a reasonably informed basis … and not some courtly charade …"*

- Learned Counsel submits that the Final TOR required the ***NEC*** to hold consultations with stakeholders *"… to assist in the identification and mitigation of impacts …"*

- Learned Counsel contends that the ***NEC*** was required to host two public consultation meetings one at the start of the EIA process and the second at the end of the data collection phase.

- The final TOR provided that the public consultation should allow stakeholders time for assessment.

- Learned Counsel contends that the ***NEC*** did not hold the meeting at the designated time and that neither consultation was held at the beginning of the EIA process.

- Learned Counsel submits that the holding of two meetings, held respectively on the 9th November, 2005, and 11th November, 2005, were held in quick succession to provide a pretense of compliance.

- Learned Counsel submits that the Authority carries a duty to manage public consultations by virtue of the preamble to the ***EM Act*** and that the Authority failed to manage the consultations, which were conducted by the Applicant.

- Learned Counsel cited ***Padfield v. Ministry of Agriculture, Fisheries and Food***[10] as authority for his submission that the Authority, as a governmental entity ought not to act so as to frustrate the policies of the Act.

- Learned Counsel contends that the right to public participation springs from s. 35 (5) of the ***EM Act*** and that the Defendant failed to manage public consultations on the:
    - Draft TOR - 19th to 20th July, 2005
    - Public Consultation - 9th November, 2005
    - Public Consultation - 14th November, 2005

- Learned Counsel complains that the Respondent did not supervise or monitor the public consultation on the baseline findings and did not seek to supervise the public consultation process until complaints were made.

- Learned Counsel then made submissions on the administrative record contending that the Defendant failed to include key documents in the administrative record.

- Learned Counsel relies as well on ***Shiu Wing Steel Limited v. Director of Environmental Protection and Airports Authority of Hong Kong***[11]**.**

- Learned Counsel cites Rule 10 (h) and (j) that an EIA should include:

> *"… an account of the measures proposed to avoid, reduce, mitigate or remedy adverse effects."*

- Learned Counsel submits that the EIA on which the CEC was granted failed to take account of mitigatory measures. This failure is evidenced by the conditions appearing in the CEC.

- At p. 76, Learned Counsel contends that further evidence of the Defendant's failure to take account of mitigation measures is seen in the Review and Assessment Report, which required the Applicant to provide details of:

    - measures to protect ground water supply
    - disposal of SPL

- Learned Counsel refers as well to measures required in the Comments on the Supplementary Report.

- Learned Counsel contended that the EIA failed to take into account mitigation measures and monitoring plans and the decision to grant the CEC was contrary to Rule 10 (e) of ***CEC Rules***.

The Precautionary Principle

- At p. 97, Learned Counsel makes submissions on the precautionary principle, as contained in the ***NEP***, which he contends is one aspect of sustainable development.

- Learned Counsel contends that in granting the CEC, the Defendant failed to apply the precautionary principle.

- Learned Counsel submitted that the pre-cautionary principle is defined at chapter 2.3 of the ***NEP*** as follows:

"… government policy will adhere to the principle that if there are threats of serious irreversible damage, lack of full scientific certainty will not be used as a reason for postponing measures to prevent environmental degradation."

- Learned Counsel referred to ***Bentley v. BGP Properties Pty Ltd***[12]**,** referring to the important role of the EIA in achieving sustainable development, and quoted from the case as follows:-

"Prior environmental impact assessment and approval are important components in a precautionary approach."

- Learned Counsel put forward a number of points to suggest that there was scientific uncertainty about air emissions.

- Learned Counsel argued:

"As part of its process the Aluminium Complex would be producing a number of chemicals of concerns, organic compounds leading to cancer …"

- Counsel contends that predictions airborne emissions are so uncertain.

- In relation to the precautionary principle, Learned Counsel observed that at the time of the CEC, mitigation and monitoring plans were yet to be developed especially the disposal of SPL.

Oral Submissions of Dr. Ramlogan

- Dr. Ramlogan supplemented his written submissions by oral submissions on the 7th October, 2008 and on 10th October, 2008.

- Dr. Ramlogan submitted that the ***EM Act*** built a fairly comprehensive system for public consultation, which system was required to be implemented in a rigorous manner because the applicant had significant State involvement.

- Dr. Ramlogan asked rhetorically :

  "What is an EIA …?"

  Learned Counsel submitted that an EIA is not simply a document but a process of information gathering.

- Learned Counsel submitted that what should come before the decision-maker was environmental information.

- Learned Counsel conceded that the consultation was required to be conducted by the developer and not the ***EMA***.

- Learned Counsel submitted that the section does not define what appropriate consultation is, but submitted that in this case, every step of the process was diminished.

- In his oral submission, Learned Counsel canvassed once again the requirement of consultation on the Draft TOR.

- Learned Counsel reminded the Court that on the 11th July, 2007, the draft TOR was ready for collection.

- Thirty-five entities were selected to receive the draft TOR. Of the thirty-five entities twenty-three were state enterprises; thirteen were NGOs and four were concerned members of the public

- Additionally, on the 27th July, 2007, ***Alutrint*** established a communication centre, with a full page advertisement on the 31st July, 2007 stating that the Draft TOR could be viewed at the Communication centre.

- Dr. Ramlogan refers to Dr. Khan's affidavit (paragraph 22) where Dr. Khan alleged that there were meetings at the village council.

- Dr. Ramlogan refers to attachment 12 of the affidavit of Michael Lopez and suggests that there never was a meeting. The allegation that there were village council meetings was not refuted on the evidence. The doubt cast by learned Counsel in his submissions is in my view inadequate to counter the sworn evidence on Dr. Khan and I am therefore constrained to accept that there were in fact village council meetings.

Written Submissions on behalf of the defendant, EMA

- Learned Attorneys-at-law for ***EMA*** filed Written Submissions on 29th September, 2008.

- By reference to Rule 5 (2) of the ***CEC Rules*** Learned Counsel, Mr. Mendes, S.C., submitted:

> *"Given the statutory time frame in which Alutrint was required to conduct consultations and report back to the Authority,…. no reasonable complaint can be made about the shortness of the consultation period."*

- Learned Counsel submits:

> *"The real issue … is whether the consultation process on the draft TOR … was flawed because there was a failure to have a wider consultation with members of the public."*

In response, Learned Counsel submitted that the consultation was adequate and that some discretion should be left to Alutrint and that there is no requirement at this stage for widespread consultation.

Timing of Consultations

- Learned Counsel identified the timing of consultations, as a complaint of all three Claimants:

  "… contrary to the provisions of the TOR consultation held by Alutrint were both held near the end of the preparation of the EIA …"

- Referring to paragraph 2.10 of the TOR, which addressed Stakeholder Consultation and Participation, learned Counsel cites the TOR as requiring inter alia:

  "A minimum of two public meetings should be held with the identified stakeholder groups."

- TOR requires:

  "At least one meeting should be conducted at the start of the EIA study to sensitise stakeholders to the project and gather stakeholder concerns ideas and perceptions.

- TOR further requires:

  " ..at least one other public meeting should be held to inform stakeholders of findings and proposed management plans…"

- Learned Counsel for EMA concedes at paragraph 20:

  "While it is the case that a mass public consultation was not held at the beginning of the EIA process as envisaged by the TOR …"

- By reference to paragraph 49 of Dr. Mc Intosh's affidavit, learned Counsel itemized the consultation measures undertaken by the Applicant including closed door meetings with community leaders as well as interviews of residents of neighbouring villages by questionnaires.

- On this basis, Learned Counsel submits:

  "… it would not be inaccurate to say that consultations were in fact held at the commencement of the EIA process, albeit fragmented."

- Learned Counsel submits that any error made in holding mass consultations later on was *"de minimis"* and that failure to hold the consultation before the EIA process started was *"… cured by numerous consultations held thereafter."*

- Answering submissions on the contention on behalf of the Claimant, ***Smelta Karavan***, that the information was not presented to the public in a fair objective and accurate manner and that such was the result of ***EMA*** delegating its responsibility to ***Alutrint***, Learned Counsel contended that there is no general statutory obligation on the ***EMA*** to hold consultations with the public.

- At paragraph 24, Learned Counsel answers the contention of ***PURE*** and ***RAG*** that the ***EMA*** failed to manage/supervise consultations by ***NEC***, as developer and contends that the sources identified do not impose any supervisory duty on the ***EMA***

- Learned Senior Counsel identified the three sources of the Law on consultation, according to Counsel for ***PURE*** and ***RAG***, namely - common law principle that consultation should be fair, preamble to the ***EM Act*** and s. 31 of the ***EM Act***, which incorporates the ***NEP***.

- At paragraph 26, Learned Counsel contends that the complaint is not made in respect of statutorily required consultations and *"… there is nothing in the preamble which imposes a duty on the Authority, having decided to require an Applicant to conduct a consultation …"*

- Learned Counsel submits further that there is no requirement in the ***NEP*** requiring supervision.

- Learned Counsel addressed the complaints concerning the public comment period, firstly that the HHERA was not submitted for public comment at all.

- In answer, Learned Counsel for ***EMA*** contends that the public is not entitled as of right to see and comment on all documents.

- Learned Counsel refers to section 28 (2), that the Authority is only required to place on the administrative record:

  "… copies of documents or other supporting materials, which the authority believes would assist the public in developing a reasonable understanding of major environmental issues …"

- In respect of the HHERA, Learned Counsel contends:

  "… a comparison of the documents … will reveal that no major environmental issue addressed in the HHERA and the addendum were not already dealt with in the earlier documents.

- Learned Counsel contended further that in any event all documents were on the national register and were available to the public, except the Report on the Cumulative Impact Assessment, which being dated 28th March, 2007 was too late to be submitted for public comment.

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- At paragraph 38, Learned Counsel answers the contention that the times allotted for the public comment period were inadequate. Learned Counsel submits that the times allotted were adequate. Essentially, EMA's contention is that the public comment exceeded the requirement of statute, the minimum period provided for by the ***Act*** being thirty days.

- Learned Counsel refers as well to Regulation 6 (1), by which the Authority had a period of eighty days to make a decision in relation to the Application for CEC.

- From paragraph 39, Learned Counsel answers submissions on the *"public hearing"* and that it had been confined to La Brea and its environs.

- In addressing the submission of a lack of public comment on the conditions in the CEC, learned Counsel contended :

  > *"The Claimants all complain … that by making the CEC subject to certain conditions to be satisfied at a date subsequent to the issuance of the CEC, the Authority deprived the public of the right to consultation."*

- EMA contends that the public were already given an opportunity to comment on issues which were conditions.

- Learned Counsel submits that the broader issue raised is the extent to which the public is entitled to participate in the process leading to the grant or refusal of the CEC.

- Learned Counsel submits that the extent of the right of participation is to be gleaned from Sections 35 (5) and 28 of the ***EM Act.***

- Learned Counsel contends:

"… so long as in substance the public is alerted to the major environmental issues and given access to documents which the Authority believes would assist the public … nothing more is required."

- The ***EMA*** answers the contention that in granting the CEC subject to conditions the Authority failed to take into account relevant matters before making its decision to grant the CEC.

- Learned Senior Counsel contended that the argument was misconceived because section 36 (1) empowers the ***EMA*** to grant the CEC *"… subject to such terms and conditions as it thinks fit …"*

- Learned Counsel contends as well that by section 37, the ***EMA*** is required to monitor the performance of the activity.

- Learned Counsel submits:

"… the mere inclusion of conditions in a CEC cannot be the basis of a challenge to the vires of the decision making process …"

- Additionally, Learned Counsel argues that the conditions were imposed to ensure that Alutrint developed mechanisms to manage impact to the environment.

- Learned Counsel distinguished the following cases cited on behalf of the Claimant ***Smelta Karavan***:

  - ***R v Rochdale Metropolitan Council, ex p. Tew***[13]
  - ***Rv. Cornwall County Council, ex p. Hardy***[14]
  - ***Hereford Wastewatchers Ltd. V Hereford Council***[15]***,***

on two grounds: (i) that the deferred matters were required to be resolved prior to the grant of permission and (ii) that outline permission in those cases could not be reversed.

- Relying on ***Belize Alliance of Conservation Non-Governmental Organisation v the Department of Environment and Belize Electric Company Ltd. (BACONGO #2)***[16] Learned Counsel submits that in this case the Authority is empowered to oversee compliance:

  "… it is therefore wrong to approach an EIA as if it represented the last opportunity to exercise control …"

- At paragraph 52, Learned Counsel for the ***EMA*** answers the submission of ***Maxime*** that the EIA did not comply with the TOR contending that the Mitigation and Monitoring and SPL plans are to be found in the EIA.
- From paragraph 56, Learned Counsel answers submissions concerning the absence of rules. The submission for the Claimants was that *"… in assessing Alutrint's application the Authority acted ultra vires the Act by using standards, guidelines or criteria not established in accordance with sections 26 and 27 of the Act."*

- Learned Counsel submits:

  "In the absence of rules governing areas affecting the environment, it is respectfully submitted that it would be incumbent of the Authority to rely on local and international standards."

Submissions on SPL

- Learned Counsel identifies four submissions made by the Claimants on the disposal of SPL:

  "(i) The Authority did not properly consider and evaluate the disposal of the SPL before granting the CEC …

(ii) The Authority should have been satisfied that there was a contract in place for the shipment of SPL …

(iii) Members of the public were denied their right

(iv) At the time the Authority granted the CEC there was no evidence before it of the method of disposal."

- In answer, Learned Counsel contends:

"… the question of the method of disposal of SPL was addressed in the EIA … dealt with in greater detail in the Supplemental EIA and was subject to site visits."

Learned Counsel contends that the ***EMA*** spelt out in detail the method of storage and disposal and that it was unreasonable to expect any contract to come into existence when there would be no disposal of SPL for another eight years.

Oral Submissions of Mr. Mendes, S.C. on behalf of the EMA

- On Monday 13th October, 2008, Learned Senior Counsel Mr. Mendes supplemented the Written Submissions with oral submissions and submitted :
"If the EMA has made errors there has been substantial compliance. The errors are not sufficiently grave to warrant relief".

- In the course of his oral submission Mr. Mendes, S.C. addressed the Court on the scheme of the ***EM Act***.

- Learned Senior Counsel submitted that all information required by Rule 3 of the ***CEC Rules*** are geared to facilitate understanding by the ***EMA*** of the impact on the environment by the proposed activity.

- Learned Senior Counsel emphasized that in determining whether consultation has taken place, the principles developed in ***R v North and East Devon Health Authority Ex p. Coughlan***[17] are to be applied.

- In respect of Rule 10 of the ***CEC Rules***, Learned Senior Counsel contends that the rule is only permissive and contrasts it with the use of *"shall"* in English provisions.

- On this basis, Mr. Mendes S.C. submits that it is fairly obvious that the information is geared towards assisting the ***EMA*** in determining the environmental impact on activities.

- Learned Senior Counsel submits that there are two things that the ***EMA*** is required to do namely:
  - Maintain the Administrative Record.
  - Issue a Notice advising of the matter being submitted for public comment.

- Learned Senior Counsel submits further that the public's right to participation in the process leading to the grant or refusal of the CEC is contained in s. 28 of the ***EM Act*** and nowhere else.

- Learned Senior Counsel submits that as long as Parliament establishes a code for public consultation there is no room for the application of common-law principles.

- In support, Learned Senior Counsel cites and relies on ***Ex p. Edwards***[18]***,*** per Lord Hoffman.

- Learned Senior Counsel contends that what the public is entitled to is:

  i. Establishment and maintenance of the Public Record.
  ii. Period of public comment of not less than thirty days.

- As to the documents which ought to be placed in the administrative record, learned Senior Counsel submitted further that the public is entitled to such documents as the ***EMA*** believes will assist the public in understanding environmental issues.

- Learned Senior Counsel contends that there is no absolute right in the public to comment on all the documents that the ***EMA*** might have under consideration.

- The Public's right to comment is satisfied as long as there is compliance with section 28 (2) ***EM Act.***

- Learned Senior Counsel submits that it is for the ***EMA*** to decide whether the documents or other materials would assist the public and further that it is fairly obvious that the purpose of the EIA exercise is to predict what the impact will be. The purpose of the EIA is to assist in making that prediction.
- As to monitoring conditions, Learned Senior Counsel stated that a distinction is to be made between conditions requiring an applicant to carry out further testing in order that the ***EMA*** may appreciate the impact on the Environment.

- Learned Senior Counsel referred to later sections of the statute as providing assistance in determining what kinds of conditions are permissible.

- In answering submissions on consultation on the draft TOR, learned Senior Counsel repeated his submission that consultation on the draft TOR were adequate.

- In respect of late consultation following the preparation of the final TOR, learned Senior Counsel accepted that the TOR required early consultations and that the two consultations were held close to each other but that early consultations were held by use of questionnaires and closed community meetings.

Submissions on behalf of Alutrint

- Learned Senior Counsel, Mrs. Peake, relied on written submissions filed on behalf of ***Alutrint***, the Interested Party, on 30th September, 2008.

- At page 2, of her written submissions learned Senior Counsel reminded the Court that the Claims were not consolidated, but were being heard together by Order of Jamadar, J.

- In respect of the issue of public consultation learned Senior Counsel drew the Court's attention to section 35 (5) of the ***EM Act*** [(a)] as prescribing a process of public comment and to rule 5(1) of ***CEC Rules***[(b)], which required the ***EMA*** to prepare a draft TOR.

- Learned Senior Counsel observed that the final TOR required the Applicant to carry out two public consultations.

- Learned Senior Counsel lists several items of complaint by the Claimant, ***PURE***:

    - The EMA failed to carry out consultation on the draft TOR
    - The EMA failed to supervise consultations
    - The Applicant failed to hold public meetings
    - The Applicant failed to carry out public consultations in any meaningful sense
    - The EMA failed to provide sufficient information in the administrative record
    - The times set for public comment were unreasonable
    - Consultations on the first Deficiency Report, the second Deficiency Report and the HHERA were undertaken without supervision
    - The last ground related to the conditions as contained in the impugned certificate of environmental clearance and that the public was prevented from being able to hold public consultations on them.

- Learned Senior Counsel contends that Rule 5 (1) of the ***CEC Rules***[(b)] does not require consultation on the draft TOR and that Rule 5 (2) of the ***CEC Rules***[(b)] requires the Applicant and not ***EMA*** to conduct consultations.

- Learned Senior Counsel submits that the plain terms of Rule 5 (2) of the ***CEC Rules*** do not require the Applicant to hold public meetings at the stage of the draft TOR and that the Applicant in fact complied with Regulation 5 (2).

- Learned Senior Counsel referred to the evidence which itemises steps taken by the Applicant pre-TOR: the advertisement, the packages to thirty-five entities, the cottage meetings specified in the letter dated 5th August, 2005 and exhibited in these proceedings as *"ML 12"*.

- Addressing the submission that the ***NEC*** failed to carry out public consultations in accordance with the final TOR, learned Senior Counsel conceded that the final TOR, at section 2, required the ***NEC*** to carry out one public consultation at the start of the EIA but drew the Court's attention to the test of *"substantial compliance"* in ***BACONGO***[19] and submitted that the Applicant is not required to meet the standard of absolute perfection.

- Learned Senior Counsel cited ***Ex p. Coughlan***[20], and submitted:

> *"The evidence establishes that no prejudice accrued to the Claimant by NEC's failure to carry out consultation at the start of the EIA."*

- Learned Senior Counsel underscored the action in fact taken by the ***NEC*** and contended that they were meaningful consultations.

- Learned Senior Counsel referred to consultations with:

  (i) Sobo Village Council
  (ii) Rousillac Sports and Cultural Groups
  (iii) Rousillac United
  (iv) La Brea Welfare Community

(v) Sweet Development Agency

(vi) Union Village Council

(vii) Vessigny Village Council

- Learned Senior Counsel referred to meetings with Ministries; with focus-group; one-on-one meetings with 227 residents and to the completion of 120 feedback forms, which were left at the communication centre. Learned Counsel observed that consultations took the form of presentations by the consultant, REAL using maps, handouts and questions and answers.

- Learned Senior Counsel contended that no prejudice accrued as a result of Alutrint's failure to conduct a public consultation at the start of the EIA process.

- Learned Senior Counsel argued that no mere procedural irregularity will do. Citing ***Fishermen and Friends of the Sea v. EMA (P.C.)***[21] at paragraph 30 learned Senior Counsel contended that it must be an irregularity that *"significantly"* affects the consultation process.

- Learned Senior Counsel cited ***R (on the application of Greenpeace Limited) v. Secretary of State for Trade and Industry***[22] and argued :

> "*whether a consultation exercise was unlawful on the ground of unfairness … depends on whether something went 'clearly and radically wrong' …*"

- Learned Senior Counsel submitted that there has been substantial compliance with requirements of public consultation under the TOR.

- Addressing the issue of whether there was a failure by the ***EMA*** to provide sufficient material in the record, Learned Senior Counsel cited ***Earthlife Africa v. Director General of Environmental Affairs and Tourism***[23] and submitted that the principle of fairness requires that an interested party be given access to relevant material in order to make meaningful representations.

- Learned Senior Counsel drew a distinction, however, between the right to access of relevant material and the right to complete discovery and contended that there was enough material on the administrative record.

- Learned Senior Counsel refers to section 28 (3) ***EM Act***[(a)] :

  "… the Authority shall receive written comments for not less than 30 days … and if the Authority determines that there is sufficient public interest, it may hold a public hearing for discussing the proposed action …"

- Learned Senior Counsel set out the evidence, which suggested that the May, 2006 public hearing was not confined to La Brea:

  - EMA held the public hearing on 27th May, 2006.

  - On the 24th May, 2006, daily notices in the newspaper until 26th May, 2006 *"inviting all members of the public to attend …"*

- In response to submissions by the Claimants as to conditions in the CEC, Learned Senior Counsel referred to section 36 of the ***EM Act***[(a)] which empowers the ***EMA*** to issue a Certificate *"… subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures …"*

- Relying on section 37, of the ***EM Act***[(a)], which requires the Authority to monitor performance, Learned Senior Counsel, likens the Trinidad and Tobago situation to that of Belize. Learned Senior Counsel submits that the environmental management in both jurisdictions is an iterative process which does not stop at the grant of approval.

- Learned Senior Counsel contends that the items listed as conditions were dealt with in the EIA Report and the two supplementary reports.

- At page 33, paragraph C, Learned Senior Counsel submits:

> *"… the conditions imposed in the CEC provided mechanisms whereby the impact on the environment, already determined acceptable, could be monitored measured and managed (paragraph 143, Dr. Mc Intosh)."*

- Citing ***Northern Jamaica Conservation Association and others v. the Natural Resources Conservation Authority and The National Environment and Planning Agency***[24]**,** as well as ***Ex. P. Coughlan***[14]**,** learned Senior Counsel submitted that each case turned on its own facts.
- Learned Senior Counsel quoted Sykes J in ***Northern Jamaica Case***[25]:

> *"It does not follow … that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem that it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision- maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision … the Court's will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy …"*

- Learned Senior Counsel outlines the Claimant's complaint as to defects in the EIA :

> *"(i) The EMA accepted from the Applicant and acted upon <u>a defective EIA</u> … in relation to SPL/ADM/ HHERA.*
>
> *(ii) The EMA accepted from the Applicant an EIA which did not conform with the TOR, in that it did not answer TOR requirements on*

Decommissioning/Emergency Response Plan and Social Impact or Community Management."

- In answer, Learned Senior Counsel contends that it is for the ***EMA*** to approve the TOR and to decide on its compliance.

- Citing ***BACONGO #2***[26], and ***Prineas v Forestry Commission of New South Wales***[27] learned Senior Counsel contends that EMA's decision to accept the EIA can only be set aside if ***EMA*** can be shown to have acted irrationally or in such a way as to frustrate the purpose of the ***EM Act***[(a).]

- At page 38, Learned Senior Counsel contends that the evidence in support of the deficiency of the EIA is the *"subject of major dispute and substantial conflict …",* but argued, by reference to the ***CEC Rules*** that the EIA did not fail to conform with the TOR.

- Answering submissions on the EMA's failure to obtain maximum fees learned Senior Counsel relied on Rule 4 (1) (d) ***Fees and Charges Regulation***[(c)].

Submissions on the precautionary principle

- Learned Senior Counsel countered submissions on the precautionary principle, by drawing the Court's attention to s. 31, ***EM Act***[(a).]: *"the Authority… shall conduct their operations … in accordance with the NEP …"*

- Chapter 2.3 of the NEP provides that Government's policy will be guided by "*Precautionary Principle"*.

- Relying on ***Telstra Corporation Ltd. v. Hornsby Shire Council***[28] and ***Greenpeace Australia v. Redbank Power Co***[29]**.** Learned Senior Counsel contends that the precautionary principle may be invoked only where two elements are present:

(i) there must be a threat of serious irreversible environmental damage.

(ii) there must be scientific uncertainty as to damage.

- Learned Senior Counsel contends:

> *"… there is before the Court a substantial body of credible scientific evidence from world renowned experts … to the effect that there is no threat of serious irreversible environmental damage."*

- And that :

> *"In the face of such evidence… it cannot be said that the failure of EMA to apply the pre-cautionary principle was perverse …*

- Learned Senior Counsel referred to the affidavit of Dave Mc Intosh, to the effect that the Conditions in the CEC are designed to provide preventative and mitigation measures.

- Learned Senior Counsel submit further that the Claimant had at its disposal an alternative remedy under s. 81(5) and s. 30 of the ***EM Act***[(a)]**,** by which sections the Claimants could have appealed to the Environmental Commission.

Answering submissions made on behalf of Smelta Karavan only

- According to learned Senior Counsel, submissions which were made on behalf of the Claimant ***Smelta Karavan*** were as follows:

(i) that the decision to grant the CEC was ultra vires because the EMA was not fully satisfied of deferred matters;

(ii) the EMA's decision was procedurally improper in that *"core matters of substance were not raised adequately or at all."*

(iii) *"The EMA's imposition of conditions … was unlawful … because the conditions did not relate to the performance of the activity …"*

- Summarising ***Smelta Karavan's*** submissions, Learned Senior Counsel argued that the essence of the Claimant's challenge is that in issuing the CEC, the ***EMA*** unlawfully deferred the investigation of relevant matters relating to significant impacts arising from the project.
- In distinguishing the English Authorities of ***ex p. Hardy***[30] *and* ***ex p. Tew***[31], relied on by Mr. Hosein S.C. for ***Smelta Karavan,*** learned Senior Counsel referred to ***BACONGO #2***[32]where Lord Hoffman distinguished ***ex p. Hardy*** by observing that the statutory regime in ***Hardy***[33] was *"altogether different from what exists in Belize …"*.

- Learned Senior Counsel also contends that in England the statutory background renders the regulatory authorities powerless as long as approval is given, but that in Trinidad and Tobago, the EMA is empowered by s. 37 of the ***EM Act***[(a)] both to monitor the performance of the developer and to ensure compliance.

- Learned Senior contends further that the nature of information deferred in cases cited on behalf of ***Smelta Karavan*** concerned:

> *"… substantial environmental impacts and were not matters of mitigation planning and management …"*

Oral Submissions of Ms. Peake

- Learned Senior, Mrs. Peake opened her submissions by identifying 14 points all touching on the well-known, well-established principle essentially that in judicial review proceedings, the Court exercises a supervisory and not an appellate jurisdiction; that the decision-making power is invested by statute in the ***EMA*** and that there being no bad faith, the Court is not concerned with merits of the Authority's decision.

- Learned Senior emphasised that wherever the ***EMA*** received the EIA or any subsequent documents, the EMA never accepted them without scrutiny or analysis.

- Learned Counsel relied on to ***Re W (No. 12)***[34] per Lord Hailsham, in support of her proposition that a decision could be declared irrational only where it is outside the band of reasonable decisions.
- Learned Senior Counsel argued that all three Claims constituted a challenge to the lawfulness of conditions in the EIA, which was essentially a challenge to the adequacy of the EIA. Learned Senior Counsel cites and relies on ***BACONGO # 2***[35] at paragraph 32:

> *"It seems to their Lordships that however the argument is put it is still a challenge to the adequacy of the EIA as a basis for decision-making. If the law required the matters in question to be cleared up as part of the EIA, then the EIA was inadequate … If they did not have to be included in the EIA, it does not become retrospectively inadequate …*

- Learned Senior Counsel contended that the EIA does not have to investigate every issue, but citing ***BACONGO # 2***[36] contended that the EIA should:

> *"… alert the decision-maker of the effect of the activity on the environment …"*

- Learned Senior Counsel, citing ***Ex p Edwards***[37] submitted :

"It is only when the EIA is so deficient that it cannot reasonably be described as an EIA that it will not be a proper basis for decision-making."

- In the instant case, argued learned Senior Counsel, the EIA did alert the decision-maker to the effect of the activity on the environment.

- Learned Senior Counsel's fourteenth point was that environmental control was iterative and that the purpose of the conditions was the continued management of project.

- Learned Senior Counsel contended that section 28 of the ***EM Act***[(a)] was not mandatory and that there was nothing in the ***EM Act***[(a)] to suggest that the public was involved in decision-making.

- Learned Senior Counsel recognised that Parliament gave the public a limited role in having an opportunity to comment on the application for the CEC.

- Learned Senior Counsel submits that section 28[(a)] is a generic type of section.

- Learned Senior Counsel contrasted the Trinidad and Tobago situation with the European and submitted that European Union gave public greater right to consultation.

- Learned Senior Counsel submitted that the ***EMA*** stuck to the Act[(a)] .

- Under section 28 of the ***EM Act***[(a)]***,*** the ***EMA*** has a discretion whether to hold a public hearing and that at all stages, the EMA allowed the public a greater input than what was required by the ***EM Act***[(a)].

- Learned Senior Counsel points to the word *"may"* in Rule 10 of the ***CEC Rules***[(b)] :

"An EIA … may, where appropriate include the following …"

- Comparing the European with the Trinidad and Tobago situation Learned Senior Counsel observed that under the Euro-model both the Application and the EIA are required to be made available to the public and sought to suggest that the words of Lord Hoffman in ***Berkley v Secretary of State for the Environment***[38] (as to the directly enforceable right of the public) was made in the context of Euro-law. This submission was made in the face of the very clear adoption of Lord Hoffman's words in ***FFOS v EMA***[39] by Lord Walker of Gestingthorpe.

- Learned Senior Counsel submitted that full information in Trinidad and Tobago's context is information according to the provisions of section 28 (2) of the ***EM Act***[(a)]***,*** which section constitutes the limit of the high democratic principle is section 28 (2)[(a)].

- Citing the case of ***Tew***[40]***,*** Learned Senior Counsel argued that the EIA is not required to contain every scrap of information.

- Learned Senior Counsel repeated:

> *"The local legislation represents the way Parliament chose to give expression to the role of the public …"*

- Learned Senior Counsel contrasts Article 5 of the ***European Council Directive*** and Rule 10 ***CEC Rules***[(b)].

- Article 5.1 of the Directive provides (see page 14 of ***Tew***[41]*):*

> *"In the case of projects which … must be subjected to an EIA … member states shall adopt the necessary measures to ensure that the developer supplies … the information specified in Annex III …"*

- Article 5.2:

"The information to be provided by the developer … shall include at least a description of the project …"

- Article 9 of the Directive requires Member States to inform the public.

- Learned Senior Counsel sought to contrast the Council Directive with Rule 10 ***CEC Rules***[(b):]

  "10. An EIA … shall be carried out by persons with expertise and experience ... and may where appropriate include the following information."

- Relying on ***FFOS v EMA***[42]**,** Learned Senior Counsel submitted that even in the face of procedural irregularity, the process would not be flawed as long as there is substantial compliance.

- Learned Senior Counsel refers to the ***Town and Country Planning Regulations 1999 (U.K.)*** for definitions for environmental information and environmental statement and compares them to the ***CEC Rules***[(b)] with no definition of environmental information.

- Learned Senior Counsel refers to page 5 of Regulation 3 the ***Town and Country Planning Regulations 1999 (U.K.),*** which contains a prohibition on the grant of planning permission

  "… unless they have first taken environmental information into consideration."

- Learned Senior Counsel suggested that the 2006 U.K. Regulations conferred on the public an even greater right to consultation and urged that there was an expanding right of the public to consultation

- Learned Senior Counsel sought to contrast the Trinidad and Tobago regime with that of Belize. Learned Senior Counsel produced copies of the Belize Regulations 1995 ,which provide at Regulation 5:

"An EIA <u>SHALL</u> include:…"

- Learned Senior Counsel addresses the Post-TOR consultations referring to the Final TOR and to the Briefing Note of public meetings, held respectively on 9th November, 2005 and 14th November, 2005, at the La Brea Community Centre. Learned Senior Counsel contends that the Briefing Notes were part of the EIA process and demonstrate that the public hearing was not a charade but were meaningful consultations.

- Learned Senior Counsel emphasised that all environmental issues were discussed. For example, in the record of the public meeting, Dr. Vine is seen to raise concerns as to:

    - greenhouse gases;
    - pre-baked process;
    - the Decommissioning process.

- At page A111-59, Dr. Ahmad Khan answers Dr. Vine's questions.

- Learned Senior Counsel underscored that it was after three meetings:

    - 1st July, 2005;
    - 9th November, 2005;
    - 14th November, 2005

  that the EIA was submitted on 18th January, 2006. The Administrative Record was then made available for public comment on 13th March, 2006.

- Learned Senior Counsel refers to the submissions of Mr. Hosein, Learned Senior Counsel for ***Smelta Karavan***, in respect of section 28(a) and submitted that other sections attract public comment.

- Learned Senior Counsel refers to:

    - Section 18[(a)], which empowers the Board to develop a National Environmental Policy.
    - Section 18 (3)[(a)] requires the Minister to have the draft policy submitted for public comment in accordance with section 28[(a)].
    - Section 27 (1) (b)[(a)], which requires the Minister to submit draft rules for public comment in accordance with section 28[(a)].
    - Section 61 (1)[(a)] empowers the Authority to designate categories of accidental spills. By section 61 (2)[(a)], the designation of categories *"… shall be submitted for public comment in accordance with section 28[(a)]."*

- In summarising her submissions on 17th November, 2008, Learned Senior Counsel, Mrs. Peake referred to ***Inco Europe Limited v. First Choice Distribution (A Firm) and others[43],*** and submitted that section 28 is *"multipurpose"*, governing four different kinds of situations, that is to say:

    (1) National Environmental Policy
    (2) Creation of Draft Rules
    (3) Categories of accidental spills

- Learned Senior Counsel argued that the ***Inco Europe[44]*** provides authority for her submission that the Court has the power to read words into the statute.

- Learned Senior Counsel contends that it is absurd to ask the Authority to give reasons under s. 28[(a).]

- Learned Senior Counsel relies also on the decision of the Privy Council in ***Herbert Charles v. Judicial and Legal Service Commission[45],*** in support of her submission that "shall" in the context of s. 28 is not imperative.

- Learned Senior Counsel urged the Court to follow three steps: (i) discern the intention of the legislature; (ii) what is the effect of failure to observe and (iii) would failure to observe result in total failure.

- Learned Senior Counsel repeated her submission that it was for the EMA to decide whether or not there was compliance with the TOR.

- Learned Senior Counsel answered the submission that the public had conceived a legitimate expectation on the basis of the contents of the TOR.

- Learned Senior Counsel refers to ***Gillette Marina Ltd. V Port Authority of Trinidad and Tobago***[46] and contends that there is no representation that is clear and unambiguous, upon which the Claimant could have conceived a legitimate expectation.

- Learned Senior Counsel states that this is different from the Jamaican case, where there was a legitimate expectation that the public would be consulted.

- Learned Senior Counsel then turned to the issue of conditions in the CEC, relying once again to section 36(1)[(a)], which specifically empowers the ***EMA*** to issue a CEC with conditions.

- Learned Senior Counsel refers to paragraph 143 of the affidavit of Dr. Mac Intosh, as evidence that the standards were met.

- Learned Senior Counsel argued that the *"conditions argument …"* is inextricably linked to public participation argument and that if the public participation argument is flawed, the conditions argument is also flawed.

- Learned Senior Counsel referred to the judgment of the Privy Council in ***BACONGO #2***[47] at paragraph 10, where Lord Hoffman identified the issue as being that the procedure had not been followed.

- Learned Senior Counsel refers as well to paragraph 12 of ***BACONGO #2***[48] per Lord Hoffman, who stated that:

> *"…the Belize legislation has much in common with a number of other countries …"*
>
> *"But as their lordships will have occasion to notice when they come to examine the Belize statute in more detail, there are also significant differences (with other legislation …)."*
>
> *"What each system attempts in its own way to secure is that a decision to authorise a project likely to have significant environmental effects is preceded by public disclosure of as much relevant information about such effects as can reasonably be obtained and the opportunity for public discussion of the issues which are raised."* (emphasis mine).

- At paragraph 13, Lord Hoffman identifies what the systems have in common:

> *"… they distinguish between the procedure to be followed in arriving at the decision and the merits of the decision itself. The former is laid down by statute and is binding on the decision-making authority."*
>
> *"The latter is entirely within the competence of the authority …"*

Lord Hoffman then quoted Linden JA in ***Bow Valley Naturalist Society v. Minister of Canadian Heritage***[49]*:*

> *"The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judge to decide what projects are to be authorised, but, as long as they*

*follow the statutory process, it is for the responsible authorities…"(*emphasis mine*).*

- On the authority of ***BACONGO #2***[50], Learned Senior Counsel submitted:

  "When Parliament of Trinidad and Tobago came to discuss the role our system would have in public participation they came up with section 28 … their way of securing public participation …"

- Learned Senior Counsel quoted Lord Hoffman, ***BACONGO #2***[51]***:***

  "It is still a challenge to the adequacy of the EIA …"

- Learned Senior Counsel submitted:

  "that the Court should ask itself whether the EM Act and the CEC Rules … require matters in the conditions to be cleared up as part of the EIA …"

- Learned Senior Counsel submitted that the Court should ask itself whether the ***EMA*** would have acted unlawfully if it did not have before it items in the conditions and that it only becomes unlawful if irrational.

- Learned Senior Counsel refers to ***Chandresh Sharma v Dr. Lenny Saith and Minister of Public Administration and Information***[52], as to the meaning of the word *"may."*

- At page 130, Learned Senior Counsel, Mrs. Peake addressed the submission of ***Smelta Karavan*** as to reasons.

- At page 131, Learned Senior Counsel addresses the Precautionary Principle.

- Learned Senior Counsel contends that certain hurdles must be passed, before the Court can find the existence of a threat of serious and irreversible damage:

    (i) there must be a threat of serious irreversible environmental damage.
    (ii) there must be scientific uncertainty as to damage.

Submissions of Dr. Ramlogan in Reply

- Dr. Ramlogan argued that it is absurd to suggest that the TOR is merely a guide, arguing that the EIA must substantially comply with the TOR, and that the simple task of this Court is to decide whether the TOR has been complied with fully or substantially.

- Dr. Ramlogan submitted:

    "If the Court finds substantial compliance with the TOR, then the Court is entitled to withhold relief, but not on the basis that the TOR is merely a guide."

- Dr. Ramlogan addressed the question of whether Regulation 10 is mandatory. He relied on ***Dougnath Rajkumar v Kenneth Lalla and others***[53] and ***Charles Matthew v The State***[54]**.**

- Dr. Ramlogan urged the Court to ignore the chantings of *"permissive and directory and look at whether there was substantial compliance with Rule 10."*

- Dr. Ramlogan considered the submission that consultation should be according to section 28.

- Dr. Ramlogan contended that the source of the directive for consultation was irrelevant and that as long as the ***EMA*** used its power under Rule 5 (3) to include public consultation in the TOR, it must ensure that consultation was carried out properly.

55

- In respect of the exclusion of the common law duty of fairness, Dr. Ramlogan relied on ***Director: Mineral Development, Gauteng Region and another v. Save the Vaal Environment and others***, as authority for saying that statutory exclusion of the common law rule of fairness should be done expressly.

- At page 217, Dr. Ramlogan repeats that the Cumulative Impact Assessment was never placed before public.

Written Submissions of the Attorney General

- Mr. Martineau S.C. commenced his submissions by outlining the role of the ***Attorney General*** as it regards Judicial Review applications. He cited the House of Lords decision of ***Gouriet & Ors. v H.M. Attorney General and Post Office Engineering Union & Ors***[56] as well as the Canadian authority of ***Sutcliffe et al v Minister of the Environment (Ontario) et al***[57] in support of the proposition that the ***Attorney General*** is the guardian of the public's interest having a common-law right to intervene in judicial review proceedings.

- Learned Senior Counsel then proceeded to give an overview of the nature of judicial review proceedings. He adopted the submissions made on behalf of ***Alutrint***, at paragraph 2 of its written submissions filed on 30th September, 2008. He cited the Court of Appeal decision of ***Sherman McNicolls v The Judicial and Legal Service Commission***[58]***:*** *"that the Court is not called upon to decide on the merits of the CEC but rather it may examine the process leading to its grant".*

- Mr. Martineau submitted that the EMA's decision was neither irrational nor illegal and that the Court's duty is to examine the statutory procedure established by Parliament to ascertain whether same was followed. He cited the Canadian authority of ***Bow Valley Naturalists Society v Minister of Canadian Heritage***[59] as approved by Lord Hoffman in the majority decision of the Privy Council that he delivered in the ***BACONGO CASE***[60]**.**

- Mr. Martineau submitted that these proceedings should be dismissed on the ground that there exists an appropriate alternative remedy. Mr. Martineau endorsed Alutrint's submission that Sections 30 and 81 of the ***EM Act***[(a)] provide an alternative and more suitable forum for the Claimants' complaints and therefore, that the remedies being sought by the Claimants could have and properly should have been entertained by the Environmental Commission. As a result of the Claimants' failure to raise their complaints with the Environmental Commission, the Court should refuse to grant the remedies being sought by the Claimants. He cited the following cases:

    - ***R v Epping and Harlow General Commissioners ex p Goldstraw***[61]
    - ***R v Chief Constable of Merseyside Police ex p Calveley***[62]
    - ***R v Inland Revenue Commissioners ex p Preston***[63]
    - ***Sharma v Brown Antoine and ors***[64]
    - ***R v Lambeth London Borough Council ex p Crookes***[65]
    - ***Harricrete Limited v Anti Dumping Authority***[66]

- Mr. Martineau provided submissions on the common-law requirements of public consultation and the test to be applied by the Court:

- The general principles governing consultation is that outlined by Lord Woolf MR in ***R v North & East Devon health Authority ex p Coughlan***[67]

- ***R v Secretary of State for Trade and Industry (on the Application of Greenpeace Limited)***[68]

- ***FFOS v EMA***[69]

❖ Mr. Martineau submitted that the Court should adopt the approach taken by the Court in ***FFOS***[70] that is, that the irregularity must have "significantly" affected the process of public consultation.

❖ Regarding the EIA, Mr. Martineau submitted that the standard to be applied by the Court in assessing the EIA process employed is that, it is not expected to be absolutely perfect and to have resolved every issue, but rather it is expected to have been reasonable: ***BACONGO CASE***[71] per Lord Hoffman at paragraph 68 – 73.

❖ In response to ***Maxime's*** submission that Section 26-29 of the ***Act***[(a)] is mandatory, learned Senior submitted:

> *"The use of the word 'may' in Section 26 of the Act means that it is not mandatory for the Minister to make rules"*.

The Learned Senior cited ***Sharma v Registrar of the Integrity Commission and another***[72]

> *"The question to be asked is whether it was a purpose of the legislature that an act done in breach of that provision should be invalid":* ***Herbert Charles v Judicial and Legal Services Commission*** *[2002] UKPC 34****; The Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. v The Honourable Minister of Finance,*** *Civil Appeal No. 123 of 2004****; R v Soneji and another*** *[2006] 1 AC 340****.***

- Mr. Martineau further submitted that the acts of the ***EMA*** and the standards and criteria implemented by the ***EMA*** in the absence of Rules are not invalid.

- The Learned Senior Counsel also submitted that the Claimants should be denied the relief being sought because they should have challenged the EMA's decision(s) earlier.

- Mr. Martineau adopted the submissions of the ***EMA*** and ***Alutrint***, with respect to the Claimants' compliant that the EMA failed to provide reasons and/or failed to comply with section 29 of the ***EM Act***.

Oral Submissions of Mr Martineau S.C.

- Mr. Martineau commenced his oral submissions by referring to the Preamble to the EM Act, which he referred to as a *"manifesto to the act"*. He submitted that it was clear from the preamble that the duties we see embodied in the function of the EMA are not duties of an absolute nature, but are general and are what are called target duties, in the public law sense.

- He further submitted that the EMA and the Commission were specialist bodies created by Parliament and that Court ought to exercise extreme care. There should be an enhanced margin of appreciation when dealing with the EMA decisions.

Law

1. ***The Environmental Management Act***[(a)] Chapter 35:05

- In the preamble to the ***Environmental Management Act*** (***the EM Act),*** Parliament set out the philosophy which informed the legislation:

> *"Whereas the Government of the Republic of Trinidad and Tobago … is committed to developing a national strategy for sustainable development being the balance of economic growth with environmentally sound practices in order to enhance the quality of life and meet the needs of present and future generations …"*

- Part IV, that is to say, sections 26 to 31 of the ***EM Act*** provides for *"Rules and Public Participation."*

- Section 26 empowers the line Minister to make Rules, subject to the negative resolution of Parliament for inter alia:

> *"… (b) the quality, condition or concentration of pollutants … that may be released into the environment generally …"*

- Section 27 requires the Minister, in the course of developing rules to:

> *"(a) submit draft Rules for public comment in accordance with section 28.*
>
> *(b) consider the public comments received and revise the Rules as he thinks fit.*
>
> *(c) cause the Rules to be published in the Gazette and laid thereafter in Parliament …"*

- Section 28 is critical for the determination of the instant Claims and is accordingly set out in full:

"(1) Where a provision of this Act specifically requires compliance with this section, the Authority shall –

(a) publish a notice of the proposed action in the Gazette and at least one daily newspaper of general circulation

(i) advising of the matter being submitted for public comment
(ii) identifying the location or locations where the administrative record is being maintained

(iii) stating the length of the public comment period; and

(iv) advising where the comments are to be sent …

(b) establish and maintain an administrative record regarding the proposed action and make such administrative record available to the public at one or more locations …"

- Section 28 (2) directs what the administrative record ought to contain:

"The administrative record … shall include a written description of the proposed action, the major environmental issues involved in the matter under consideration, copies of documents or other supporting materials which the Authority believes would assist the public in developing a reasonable understanding of those issues and a statement of the Authority's reasons for the … proposed action …"

- Section 28 (3) prescribes the minimum duration of the public comment period:

"(3) The Authority shall receive written comments for not less than 30 days from the date of the notice in the Gazette and, if the Authority determines that

there is sufficient public interest it may hold a public hearing for discussing the proposed action and receiving verbal comments …"

- In addition to s.35 (5), two other sections require compliance with section 28, that is to say:

  - Section 27, which invests the Minister with rule-making power;
  - Section 35 (5), which is relevant to the instant Claim; and
  - Section 61 (1), which empowers the Authority to designate categories of accidental spills. By section 61 (2), the designation of categories *"… shall be submitted for public comment in accordance with section 28.*

- Section 29 prescribes the period of time for which the administrative record should be kept available at public locations:

  "The Authority shall keep available at the public locations for not less than 45 days after the publication of notice of the final action in the Gazette, the administrative record, together with copies of documents constituting the final action, a response to the public comments and an identification of the basis for the final action …"

- Part V which includes sections 31 to 61 addresses Environmental Management.

- The sections which are relevant for the purpose of this Claim are: sections 35, 36 and 37.

- Section 35(4) empowers the EMA to require the preparation of an environmental impact assessment. This section is also critical for the determination of the instant Claim and is therefore set out fully:

  "s. 35 (1) For the purpose of determining the environmental impact which might arise out of new or significantly modified construction,

process, works or other activity, the Minister may … designate a list of activities requiring a certificate of environmental clearance.

s. 35 (2) *No person shall proceed with any activity which the Minister has designated as requiring a Certificate unless such person applies for and receives a Certificate from the Authority …"*

s. 35 (4) *The Authority in considering the application may ask for further information including, if required, an environmental impact assessment, in accordance with the procedure prescribed.*

s. 35 (5) *Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority."*

- Section 36 provides for the grant of the Certificate of Environmental Clearance:

"After considering all relevant matters, including comments or representations made during the public comment period, the Authority may issue a certificate subject to such terms and conditions as it thinks fit including the requirement to undertake appropriate mitigation measures …"

- Section 36 (2)

"Where the Authority refuses to issue a certificate, it shall provide to the Applicant in writing its reasons for such action …"

- Section 36 requires the Authority to monitor the Applicant's performance in the following terms and ensure that the Applicant complies with conditions in the Certificate.

- By section 37 the Authority is required to confirm that *"the performance of the activity is consistent with –*

  (a) the description provided in the application for a certificate; and

  (b) the information provided in any environmental impact assessment …"

- Part V comprises sections 62 to 71 and contains provisions which empower the Authority to ensure compliance with environmental requirements.

- By section 62 (g), the term environmental requirements includes the requirement upon a person to *"… comply with the conditions and mitigation measures …"* which appear in a Certificate of Environmental Clearance.

2. ***Certificate of Environmental Clearance Rules***

- These Rules, made by the line Minister pursuant to section 26 (h) of the ***EM Act***[(a)] prescribe the method by which a developer should apply for a Certificate of Environmental Clearance.

- After having received an application in prescribed form, the Authority is required to acknowledge receipt of the application within 10 working days. (See Rule 4[(b)]).

- Within the specified 10 working days the Authority is also required to notify the applicant that an EIA is required. (Rule 4 (1) (d)[(b)]).

- Within 21 days after notifying the applicant of the requirement of the EIA, the Authority is required to consult the applicant on the preparation of a proposed Terms of Reference (TOR), to prepare a draft TOR and to notify the applicant that the TOR is ready for collection (rule 5(1)).

- Rule 5 (2) of the ***CEC Rules***[(b)] requires the Applicant to conduct consultations on the Draft TOR *"… with relevant agencies, non-governmental organizations and other members of the public."*

- By Rule 5 (2), the applicant is given the option of making representations for the modification of the draft TOR, following which the Authority is required to consider written representations and issue the final TOR, within 10 days.

- Rule 6 requires the Authority to notify the applicant of its determination within 80 working days after the submission of the EIA report. Where no EIA is required, the stipulated time is 30 days.

- Where the Authority is unable to make the determination within the stipulated time, the Authority is required to notify the Applicant in writing of the extended date by which the determination will be made. The required notification must be given before the expiration of the time fixed by rule 6 (1).

- Rule 7 specifies in detail what the issue of a Certificate entails. For the purpose of this Claim, the Court observes that the Certificate is required to include:

> *"(iv) the mitigation measures that the applicant is required to undertake …"*

- Rule 8 provides for the National Register. Rule 8 (1) requires the Authority to establish a National Register of Certificates.

- Rule 8 (2) specifies what should be entered on the Register:

> *"… the details and status of every*
>
> *(a) application …*

(c) certificate, including the appropriate mitigation measures."

- Rule 9 provides for affording public access to the National Register. The Register is required to be open to the public during times specified in the Gazette.

- Rule 10 provides for the standards for the preparation of the EIA:

> *"The EIA … shall be carried out by persons with expertise and experience in the specific areas for which information is required and may, where appropriate include the following information …*
>
> *(c) an identification and assessment of the main effects that the activity is likely to have on the components of the environment, including:*
>
> *i. human beings*
> *ii. fauna*
> *iii. flora*
> *iv. soil*
> *v. water-surface and ground*
> *vi. air*
> *vii. the coast and the sea*
> *viii. weather and climate*
> *ix. the landscape*
> *x. the interaction between any of the foregoing*
> *xi. material assets*
> *xii. cultural heritage*

Statutory interpretation

In analyzing whether failure to comply with procedural requirements in a statute necessarily invalidates the thing done, it has become useless to adhere blindly to the strict divide between mandatory and directory requirements. Rather, the Court's task is to scrutinize the Act as a whole and determine the legal consequences that may have been intended by the legislator where there is a breach of the duty. See: ***Herbert Charles v JLSC*** *(2002) UKPC 34*[24]

- In ***Herbert Charles v JLSC***[73]***,*** the Privy Council considered an Appeal by the Applicant, the Deputy Chief Magistrate, from the Court of Appeal's dismissal of his application for Judicial Review.

- A complaint had been made against the Appellant's conduct to the Judicial Legal Service Commission (JLSC) and an investigating officer was appointed to investigate the complaint.

- The investigating officer failed to comply with the statutory time limits provided for the investigations. Notwithstanding the lateness of the investigating officer's report, the JLSC decided to charge the Appellant.

- The Appellant instituted proceedings for Judicial Review of the decision of the JLSC on the grounds that the JLSC had no power to make the decision because of the lateness of the investigating officer's report.

- Dr. Ramsahoye, Q.C., for the Appellant, argued on the basis of a strict dichotomy between "*mandatory"* and *"directory*" provisions. Dr. Ramsahoye argued that the time provision was mandatory and their breach rendered all that followed null and void.

- Justice Tipping who delivered the opinion after the Board described the approach of Queens Counsel for the Appellant as not being in accordance with the relevant principles.

- Justice Tipping referred to ***Wang v Commissioner of Inland Revenue,*** in which Lord Slynn of Hadley stated:

"*…their Lordships considered that when a question like the present one arises... it is simpler and better to avoid these two words 'mandatory' and 'directory" and to ask two questions. The first is whether the Legislation intended the person making the determination to comply with the time provision, …. Secondly, if so, did the Legislation intend that a failure to comply…..would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void…."* (emphasis mine).

- Tipping J referred extensively to the judgment of Lord Penzance in ***Howard v Bodington*** :

> *"...in each case you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act and ... decide whether the matter is what is called imperative or directory..."*

- In dismissing the Appellant's appeal**,** Tipping J, on behalf of the Board referred to ***London And Clydesdale Estate***, in which Lord Hailsham spoke of a spectrum of possibilities:

> "*…at one end of this spectrum there may be cases in which a fundamental obligation may have been ... ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequence upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield of defence….. At the other end of the spectrum, the defect in procedure may be so nugatory that the authority can safely proceed without remedial action".*

At Paragraph 17 of the Judgment Justice Tipping said:

> "*Their lordship added that most cases will fall somewhere in the middle and will be for the Courts to assess…."*

- In dismissing the appeal of Herbert Charles, their lordships noted that the:

"*…delays were in good faith ... were not lengthy and were entirely understandable. The appellant suffered no material prejudice, no fair trial considerations were or could have been raised and no fundamental human rights act in issue...*"

Chandresh Sharma v Dr. Lenny Saith and Minister of Public Administration and Information[74], was a decision of Justice Kokaram and was cited and relied upon by learned Senior Counsel, Mrs. Peake. Justice Kokaram considered the obligations created by section 40 of the ***Freedom of Information Act (FOIA)*** and the legal consequences of a failure to comply with the procedural requirements of that section.

- By virtue of the said section 40(1), the respondent was invested with the responsibility of laying before both Houses of Parliament a report on the activities of public authorities under the FOIA *"as soon as practicable after the end of each year"*.

- Mr. Sharma sought leave to apply for judicial review, challenging the delay and/or omission of the respondent to lay before Parliament any reports on the operations of the FOIA pursuant to the section, for the years 2001, 2002, 2003 and 2004. The applicant proceeded with the application although prior to the hearing of the application for judicial review the reports were completed and laid before both Houses of the Parliament.

- Mr. Justice Kokaram, in dismissing the application ruled that *"in the absence of prejudice this Court is entitled to treat Section 40(1) obligation as merely directory or that failure or delayed compliance with the obligation does not adversely affect the Applicant or that there has been substantial compliance with this procedural requirement"*.

- Kokaram J. referred to the judgment of Lord Hailsham in ***London and Clydesdale Estates Limited v Aberdeen District Council*** *[1980] 1 WLR 182,* where Lord Hailsham observed that:

"... language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument it may be misleading in effect if relied on to show that

the Courts in deciding the consequences of a defect in the exercise of power are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition."

- Kokaram J. also referred to words of Lord Slynn's judgment in ***Wang v the Commissioner of Inland Revenue*** *[1994] 1 WLR 1286* as quoted ***in Herbert Charles***[75]**.**

- Kokaram J. also relied on the case of ***Herbert Charles***[76] as well as the case of ***ex p Jeyeanthan*** *[1999] 3 All ER 231,* where Lord Wolf MR indicated that the critical factor is to determine what the legislator should be judged to have intended should be the consequence of non-compliance.

Dougnath Rajkumar v Kenneth Lalla and Ors[77] was a decision of the Judicial Committee of the Privy Council. The decision of their Lordships had not been cited in the Claims before this Court. However, Dr. Ramlogan, learned Counsel for ***PURE***, relied on the decision of the Court of Appeal.

- In this case, the appellant Dougnath Rajkumar was appointed to the post of Prison Officer I in 1968. He acted as Prison Officer II for 14 years – from 1980 to 1990 and from 1997 until the determination of the case. Rajkumar's complaints in 1990 were met by assurances from the Director of Personnel Administration that his name appeared on the merit list and that he would be promoted when there was another set of promotions. During 1998 while the appellant was acting as Prison Officer II three sets of promotions to Prison Officer II were made, and the appellant was never promoted.

- The Privy Council found that *"in so far as the decisions impugned did not promote him they are flawed",* but their Lordships refrained from setting aside *"these decisions in so far as they appoint others whose promotion their Lordships are not empowered to question",* and accordingly remitted the case to the Public Service Commission for them to review the appellant's application for promotion.

Inco Europe Ltd. and others v First Choice Distribution[78] was a decision of the House of Lords and was relied on by learned Senior Counsel, Mrs. Peake. In the course of delivering the majority judgment, Lord Nicholls of Birkenhead expressed the view that:

> *"It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors.* (emphasis mine). *In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, Statutory Interpretation, 3rd ed., pp. 93-105. He comments, at page 103:*
>
> > *'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'"*

- Lord Nicholls of Birkenhead continued:

> *"…This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."*

Charles Matthew v The State[79] was cited and relied on by learned Counsel, Dr. Ramlogan. This case concerned the constitutionality of the mandatory death penalty, contained in Section 4 of the ***Offences Against the Persons Act,*** Chapter 11:08.

- Section 5(2) (b) of the ***Constitution*** provides that Parliament *"may not impose or authorize the imposition of cruel and unusual treatment or punishment"*. But section 6 (1) provides that *"nothing in sections 4 and 5 shall invalidate…an existing law"*. The law decreeing the mandatory death penalty was an existing law at the time when the constitution came into force.

- The submission of counsel for the appellant was that a power (or duty) to modify section 4 of the ***Offences Against the Persons Act*** can be derived from section 5(1) of the ***Constitution***, which provides that*"…the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."* Lord Hoffman, in his judgment for the majority adopted the traditional approach to statutory interpretation and declined to apply Section 5(1). It was held that no such interpretation could have been intended. The majority rejected the notion that the framers of the constitution could have wished to install such an "arbitrarily incomplete mechanism" for securing conformity between existing laws and the constitution.

- The minority viewed the majority decision as legalistic and over literal and evidencing the "austerity of tabulated legalism". They were of the view that an approach that would give full recognition of the guarantee of human rights was intended to be embedded in the constitution.

Authorities on the Importance of Public Consultation

R v North and East Devon Health Authority, Ex Parte Coughlan[80] ***(Coughlan)***

- The well-known facts of ***Coughlan*** are that the Applicant, who was severely disabled, was moved from a hospital which the health authority wished to close, to Mardon House, a National Health Service Facility for the long-term disabled.

- The health authority assured the applicant that Mardon House would be her home for life. Subsequently, following public consultation, the Authority decided to close Mardon House and to transfer care of the Applicant to the local authority but no alternative placement for her was identified.

- On an application for Judicial Review of the decision to close the facility, the judge quashed the decision to close and held that the applicant's decision was flawed. On appeal by the Health Authority, the Court of Appeal, although it disagreed with some of the reasoning of the Judge below, held that the closure decision was an unjustified breach of the promise that the facility would be her home for life.

- In the Court below, one of the points raised by the Applicant in her grounds of challenge related to the consultation process. Central to this critique of the consultation process was non-disclosure of the report of one Dr. Clark. At page 258, Lord Woolf M.R. had this to say:

> *"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken :* ***R v Brent London Borough Council Ex p. Gunning*** *(1985) 84 LGR 168"*

- The Judge in the Court below concluded that the consultation process had been too hurried and that none of the four Gunning criteria was met. The Court of Appeal agreed with the Appellant's submission that there was no need to consult on Dr. Clark's report, *"which was external advice on the opinions of local clinicians and was therefore itself a response to the consultation…"* At page 259 Lord Woolf M.R. said:

  > *"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent from statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, though it may be quite onerous, goes no further than this."*

- In the final analysis, the Court of Appeal concluded that *"although there are criticisms to be levelled at the consultation process, and although it ran certain risks, it was not flawed by any significant non-compliance with the* ***Gunning*** *criteria.*

R v Secretary Of State for Social Services, Ex Parte Association of Metropolitan Authorities[81]

- In this Application for Judicial Review, the Association of Metropolitan Authorities sought to quash the Housing Benefits Amendment (No.4) regulations 1984, made by the Secretary of State for Social Services under the Social Security and Housing Benefits act 1982, on the ground that the Secretary of State failed to consult the applicant properly or at all with regard to the making of the regulations, prior to making the regulations. s. 28(1) of the Social Security and Housing Benefits act 1982 gives the secretary of State the power to make regulations but s. 36(1) provides that before making regulations "*the Secretary of*

State shall consult with organizations appearing to be representative of the authorities concerned".

- The Secretary of State in fact communicated with the applicants before making the regulations, giving some information about the proposed amendments and asking for their comments. However, the issue was whether the Secretary of State consulted the applicants within the meaning of that word in section 36(1). The applicant contended that the secretary of state failed to comply with his obligation to consult within the meaning of that subsection because the *time allowed to them within which to comment on the proposals was insufficient* (emphasis mine) and because the information provided was insufficient or misleading with the effect that they were unable to sufficiently or properly comment on the proposals.

- The Respondent argued that in light of the need to amend the regulations urgently, the time allowed and the information provided were each sufficient to enable the applicants to make sufficiently considered comments.

- The nature of the obligation to consult may be summarized in the following quote from Webster J at page 167 G - H.:

> *"…the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party."*

Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism[82]

- The Court in this case confirmed the importance of public participation in the EIA process.

- This application concerned the very sensitive and controversial issue of nuclear power. The second respondent, Eskom, was granted authorization by the Director-General to construct a demonstration model 110 Megawatt class pebble bed modular reactor (PBMR) at the site of its Koeberg Nuclear Power Station near Cape Town. The authorization was granted in terms of s 22(3) of the Environment Conservation Act 73 of 1989. The applicant, a non-governmental, non-profit, voluntary association of environmental and social activists in Cape Town, brought this application to review and set aside the decision by the Director General. The requirements of procedural fairness were by and large recognized and observed on behalf of the department up to and including the submission by Eskom's consultants of their final EIR. Subsequent to that, however, no further submissions from interested parties were entertained or even invited by the Director General, notwithstanding the fact that the final EIR differed materially from the earlier report on which the applicant did comment. Furthermore, the Director General made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. The decision was found to be flawed and was set aside

- In response to the applicant's submission that it was confined to submissions on an earlier draft version of the EIR, notwithstanding its requests to the Director General to be afforded a further 'hearing' on the final EIR, the respondents argued that the applicant did not enjoy a right of reply on the contents of the final EIR. The Court strongly disagreed with the respondents approach and emphasized at paragraph 89 that:

> *"The regulations provide for full public participation in 'all the relevant procedures contemplated in these regulations'. The respondents seek to limit such participation to the 'investigation stage' of the process.... After submission of the EIR, however, the 'adjudicative phase' of the process commences, involving the Director General's consideration and evaluation, not only of the EIR, but also…of all other facts and circumstances that may be relevant to his decision."*

R v Shropshire Health Authority and Others, ex p Duffus[83]

- The Shropshrie Health Authority proposed to close the Oswestry and District Hospital. The League of Friends of the hospital sought Judicial Review on the basis that they had not been adequately consulted.

- There had been initial consultations, following which the health authority had produced a second proposal on which there was no consultation.

- The Applicant contended that they held a legitimate expectation, which arose from the Health Service Circular, as well as from a statement, which had been made by the Secretary of State.

- The Respondent conceded that the Applicant held a legitimate expectation, but contended that the consultation which had taken place had been adequate to fulfil their legal obligation. It was common ground that the second proposal was identical to the first. It had also been common ground on the basis of the authority ***Ex p Gunning (1986),*** that the applicant would have had a legitimate expectation of being consulted again, had the second proposal been entirely different from the first.

- The Divisional Court, in dismissing the application, held that there was nothing in the circular to require repeated consultations and went on to hold :

  > "*To require such further consultation might endanger the whole process by rendering it unworkable….*"

- The Court held that the question whether the proposals were so hanged as to require fresh consultations was essentially a question of degree and largely a matter of first impressions.

- The Court in ***Shropshire*** also cautioned against straining the doctrine of legitimate expectation to embrace informal situations of this kind.

R (on the application of Greenpeace Ltd.) v Secretary of State for Trade and Industry[84]

- ***Greenpeace*** had been cited and relied upon by Mrs. Peake, learned Senior Counsel for the Interested Party.

- In a 2003 *Energy White Paper: Our Energy Future – Creating a Low Carbon Economy*, the defendant addressed the possible use of new nuclear power stations. The paper indicated that it was not minded to support the building of new nuclear power stations and that *"Before any decision to proceed with the building of new nuclear power stations, there would need to be the fullest public consultation and the publication of a further white paper setting out the Government's proposals"*.

- In 2006, the defendant issued a consultation paper seeking views on medium and long term energy policy in the U.K. including the use of nuclear power.

- The 2006 paper was subject to consultation for 12 weeks, following which the defendant published a review report, which supported the building of new nuclear power stations.

- Greenpeace challenged the decision on the ground that it had a legitimate expectation that there would be *"the fullest public consultation"* before such a final decision on the future role of nuclear energy was decided. The applicant contended further that the legitimate expectation had not been met because the 2006 paper was intended to seek consultees' views on the issues to be addressed as opposed to arriving at conclusions about the main substantive issue, namely the desirability of new nuclear power stations.

- The defendant submitted that the promise of "*the fullest consultation*", had been met bearing in mind the purpose of the exercise which was a review carried out against a

background of substantial amount of information which had been gathered in preparing the 2003 White paper.

- Sullivan J., in allowing the application, held that "*the consultation exercise was very seriously flawed…. Whilst it was perfectly adequate as an issues paper it was manifestly inadequate as a consultation paper on an issue of such importance and complexity. It contained no proposals as such and the information given to consultees was wholly insufficient to enable them to make an intelligent response."*

Talisman (Trinidad) Petroleum Limited v. EMA[85] was relied on by Dr. Ramlogan and was a decision of Justice Hosein, sitting as Chairman of the Environmental Commission.

- The Appellant, Talisman, challenged the decision of the EMA to refuse their application to conduct a seismic survey.

- At page 11, Justice Hosein identified two components of the Appellant's argument, the first of which was the failure of the Respondent to give the Appellant an opportunity to be heard in order to show why the Respondent should not refuse to grant it a CEC, contending that there has been a breach by the Respondent of the Appellant's right to a fair hearing in accordance with the *"… rules of natural justice."*

- At page 16 of his judgment, Justice Hosein wrote:

> *"… the real question is whether in its discharge it [the EMA] has acted unfairly by failing to give the Appellant an opportunity to show how its scientific and technical methodology … can be carried out without unacceptable environmental harm …"*

- In the course of considering the issue, Justice Hosein referred to Rule 4 of the ***CEC Rules*** to section 16 (2) of the ***EM Act*** and to the public comment procedure at section 28.

- Justice Hosein itemised the general advantages of public participation holding that such participation :

> *"… 1. improves the understanding of issues among all parties*
>
> *2. finds common ground and determines whether agreement can be reached on some issues*
>
> *3. highlights tradeoffs that must be addressed in reaching decisions."*

- At page 20, Justice Hosein considered the right to a fair hearing, describing it as *"… a principle of natural justice and has been applied as a base on which to build a kind of code of fair administrative procedure …"*

- At page 22, Justice Hosein decided that the EMA's decision to refuse the CEC was fundamentally flawed because the Appellant was denied the opportunity to persuade the EMA that its activity would not damage the environment.

- Justice Hosein observed that Rule 4 of the CEC Rules did not specifically provide for an oral hearing by the Respondent, but expressed the view that the EMA was required by section 16 of the ***EM Act*** in the discharge of its obligations to facilitate cooperation among persons and to manage the environment in a manner which fosters participation and promotes consensus

- However, after reference to rule 5 of the ***CEC Rules***, Justice Hosein concluded :

> *"So Rules 4 and 5 do involve in accordance with section 16 (2) the application of rules of fairness before the decision to issue or refuse the CEC … is ultimately made …"*

- Justice Hosein concluded that there was a breach of the Appellant's right to a fair hearing and/or a procedural irregularity under Rule 4.

Saskatchewan Action Foundation for the Environment v. Saskatchewan Minister of Environment and Public Safety *(1992) 97 Sask. R. 135*[4] was cited by Dr. Ramlogan in support of his submission that greater public participation was required where the developer was partly owned by Government.

- Dr. Ramlogan relied, in particular, on paragraph 37 of ***Saskatchewan***:

  "Public participation in the process is all the more important because the government of Saskatchewan may have an interest direct or indirect in the advancement of a development …

  Accordingly, the minister being the person charged under the Act with granting approval and at the same time being a member of the government is placed in a position of potential conflict. Public participation … is important to avoid the appearance of partiality."

- ***Saskatchewan*** is distinguishable from the Trinidad and Tobago situation, since the ***EM Act*** creates an independent body for the purpose of deciding whether a certificate of environmental clearance ought to be granted. Even if members of the Authority are appointed by government, the Authority is in no way comparable to a Minister, who is a member of government.

- Accordingly, the government involvement in the project is not a ground, under the ***EM Act***, for demanding more intense public participation.

Robertson v Methow Valley Citizens Council[86]

- This was a decision of the Supreme Court of the United States of America, delivered by Justice Stevens, in which the Court heard an application for an order of certiorari to quash a decision of the Forest Service to issue a special permit authorizing the displacement of a major destination, Alpine Ski Resort, at Sandy Butte, in the North Cascade Mountain.

- This authority is useful in identifying the value of the Environmental Impact Statement (EIS). At pg. 349, Justice Stevens states:

> "*The statutory requirement that a Federal Agency contemplating a major action prepare such an Environmental Impact Statement, serves the NEPA's" action - forcing" purpose in two important respects… It ensures that the agency, in reaching its decision will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to a larger audience that may also play a role in both the decision making process and the implementation of that decision…*
>
> *"…..Publication of an Environmental Impact Statement (EIS) both in draft and final form also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decision making process…. and perhaps more significantly provides a springboard for public comment…"*

Northern Jamaica Conservation Association and Others v. Natural Resources Conservation Authority and national Environment Planning Agency (Northern Jamaica Case)[87]

- This authority was relied on by all six parties to the Claims which were argued before this court. It concerned an application for judicial review of the defendant's decision to grant a permit to Hotels Jamaica Pinero Ltd. (HOJAPI) for the construction of a 1918 Room Hotel in the parish of St. Ann's along the North coastline of Jamaica.

- In the course of his decision Justice Sykes drew a distinction between the broad and the narrow ***Wednesbury*** test, stating :

> *"… the strictness of the Wednesbury test has been relaxed in recent years even in areas which have nothing to do with fundamental rights. The Wednesbury test is moving closer to proportionality … But we consider it is … not for this Court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords … the obvious starting point is Exp. Brind [1991] 1 AC 696 … all of their Lordships rejected the proportionality test and applied the traditional Wednesbury test …"*

- At paragraph 26, Justice Sykes referred extensively to ***Coughlan*** and at paragraph 35 described the concept of fairness as not being *"a predetermined unalterable standard."* The learned Judge cited and relied on ***R v. Secretary of State Exp. Doody*** *[1994] 1 A.C. 531*,where Lord Mustill expounded on fairness in the following way:

> *"From them (oft-cited authorities), I derive that:*
>
> 1. *Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair.*
> 2. *The standards of fairness are not immutable.*
> 3. *The principles of fairness are not to be applied by rote. What fairness demands is dependent on the context of the decision.*
> 4. *An essential feature of the context is the statute.*
> 5. *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification; or, both*
> 6. *fairness will very often require that he is informed of the gist of the case he has to answer.*

- Sykes J concluded:

> *"… it would seem to me that it is difficult to resist the conclusion that under English and Jamaican Law the decision maker may well survive the Wednesbury test … but is still found to have acted unfairly …. Unfairness is an abuse of power. Irrationality is simply an extreme form of abuse of power."(*see paragraph 6)

Sykes, J goes on:

> *"The role of the court then is not to stymie the executive or decision maker but to determine whether the executive or decision maker has acted unlawfully. It is not for the executive or decision-maker to determine whether it has acted fairly. That is a judicial function."*

- At paragraph 38, Justice Sykes addresses the issue of consultation, and asks the question, *"What then is proper consultation?"* In harmony with the other cases on this point, the learned Judge referred to ***R v. Brent London B.C. Exp. Gunning*** and to the *"Sedley definition …",* which received the imprimatur of Lord Woolf in ***Coughlan***:

> *"…it is common ground that whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon, it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken …"*

- At paragraph 39, Justice Sykes quotes Lord Woolfe as pointing out that consultation is not litigation:

"The duty entails letting those who have a potential interest in the subject matter know in clear terms what the proposal is … telling them enough to enable them to make an intelligent response …"

- Paragraph 40 of the judgment of Justice Sykes was relied on by Mrs. Peake for Alutrint:

"It does not follow from this that flaws in the consultation process will necessarily mean that the decision should be quashed … it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process.

Consultation is the means by which the decision-maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision. It must be recognized that the consultation process may not …go as well as everyone would like so at the end of the day the question may well be a qualitative one, that is to say, the Courts will examine what took place and make a judgment on whether the flaws were serious enough to deprive the process of efficacy.

- At paragraph 43 of his judgment, the learned Judge observed that two of the applicants the Northern Jamaica Construction Association and Jamaica Environmental Trust had only eight (8) days in which to review the EIA and thus suffered a reduced ability to secure technical advice if needed.

- Further at paragraph 44, Justice Sykes expressed the view that a marine ecology report should have formed part of the EIA and was not submitted at the time that the latter was sent to the applicant, Northern Jamaica Construction Association. Justice Sykes said :

"The marine ecology report was also missing at the time of the public meeting… in fact the public other than perhaps the applicants, still do not know of the marine ecology report…. no one knows what effect it might have had on public discussions".

- At paragraph 51, Justice Sykes made the further finding that "*the Environmental Impact Assessment has significant empirical shortcomings that might not have mattered but in the context of an ecologically an important area, these shortcomings loom unimpressively large…".*

- In respect of a complaint as to the length of public consultations, Justice Sykes was of the view that the public meetings exceeded the recommended period for presentation and questions and that the meetings met the standards.

- Finally, Justice Sykes held that the meeting discussed what was known to the public and on that basis the meeting was fairly conducted. However, in my view the process was depreciated considerably because the marine ecology report was not disclosed. (See paragraph 84)

- Having considered all the alleged deficiencies in the EIA, Justice Sykes said at paragraph 99:

> "*There are more than enough deficiencies highlighted that ought to have raised serious doubts about the quality of the empirical work of the EIA…"*

- At page 36 Justice Sykes granted certiorari. The learned Judge listed six (6) reasons for his decision. The following are in my view relevant to the instant Claims:

  - "…The NRCA failed in its statutory duty to consult by failing to circulate the marine ecology report.
  - ……
  - The NRCA failed to meet the legal standards of consultation by not circulating the marine ecology report to members of the public and the applicants and also by failing to inform members of the public and the applicants that the document circulated was incomplete thereby increasing

the real possibility that the public and the applicants might make incorrect conclusions about the impact of the development …"

- In conclusion , Justice Sykes stated:

> "*the consultation process was flawed because an important part of the Environmental Impact Assessment was not placed in the public domain…the public was not told about the omission. The public were led to believe that the Environmental Impact Assessment was all that there was when this was not the case… The Public was therefore deprived of participating in the consultation process that was based on full and complete information.…"*

- In his closing paragraph, **Sykes J**. criticized the traditional ***Wednesbury*** doctrine in the following terms:

> "*Narrow Wednesbury while not dead has been mortally wounded."*

In this jurisdiction, however, it would appear that the narrow ***Wednesbury*** has not as yet received the mortal blow. As recently as March 2006, Justice of Appeal Kangaloo in ***NH International v. UDC and Other*** CV. 95 of 2005 regarded as correct the application of the test of irrationality as expounded by **Lord Diplock** in ***CCSU***. I am bound by this very clear statement of the law by the Court of Appeal. The test of irrationality continues to be that a decision is reviewable on the ground it is *"…so outrageous in its defence of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…"*

The Grand Council of the Crees of Quebec v. Attorney General, Hydro-Quebec Energy Board[88]

- This authority did not concern challenges to an EIA process. It was cited by Dr. Ramlogan in support of his submission that there should be adequate disclosure by the decision-maker in order to permit meaningful participation in the process.

Justice Iocobucci sitting in the Supreme Court stated:

> *"In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process."*

Justice Iocobucci continuing his exposition on the principle, stated at paragraph 25:

> *"The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular the type of decision to be made and the nature of the hearing to which the affected parties are entitled …"*

Justice Iocobucci identified the issue of procedural fairness thus:

> *"… the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation."*

Justice Iocobucci emphasised that the Board held a discretion:

> *"In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision …"*

The learned Judge decided that in ***Quebec*** the discretion had not been improperly exercised.

The principles to be extracted from this case are:

(1) Procedural fairness demands that sufficient information should be provided to enable those with a right to be heard to engage in meaningful participation in the hearing process.

(2) The decision-maker is invested with the discretion to determine what evidence is relevant.

(3). What is sufficient will vary with the type of decision to be made and the nature of the hearing to which parties are entitled …

Authorities Relating to Defects in the EIA

- The legislative guidelines for the contents of the EIA are to be found at rule 10 of the ***CEC Rules*** set out fully above.

Fishermen and Friends of the Sea v. EMA (Privy Council) (FFOS) (P.C.)[89]

- On the question of defects in the EIA, several authorities were relied on by all six parties. ***FFOS (P.C.)*** was the case of highest authority, which emanated from the jurisdiction of Trinidad and Tobago and by which this Court is bound. ***FFOS (P.C.)*** is concerned with an application for leave to apply for judicial review, in respect of the grant of a CEC for the commissioning of two projects designated the *Kapok and Bombax projects*.

- The projects were two linked projects to recover offshore oil and gas and involved a substantial increase in the volume of natural gas to be transmitted through an existing underground pipeline passing near heavily populated areas in the island.

- The application for leave to apply for judicial review was made under the ***Judicial Review Act 2000***[(d)]**.** The Respondent argued against the grant of leave on the ground that there had been undue delay in applying for leave to apply for judicial review.

- Control of the projects fell to the EMA under the ***EM Act,*** *2000,* although the EIAs had been prepared before the ***EM Act,*** *2000* took effect and were submitted to the predecessors of the EMA.

- In October, 2001, the Authority authorized the publication of a notice to proceed in the official Gazette. At the end of November, the EMA granted the CEC, "…*subject to numerous terms and conditions (concerned with mitigation measures, inspection of installation …"* See page 368a of the Report. The CEC was granted in respect of both projects. On 20th May, 2009 the applicant, Fisherman and Friends of the Sea applied for leave to apply for judicial review.

- The application was refused at first instance and the ensuing appeal was dismissed by the Court of Appeal. Lord Walker of Gestingthorpe delivered the decision of the Judicial Committee.

- The EIA, which had been approved, stated that a consultation meeting was held regarding the applicability of the CEC Rules to the project. The EIA recorded that the EMA indicated that due to the advanced state of the project the ***CEC Rules***, which at the material time were at the drafting stage, would not apply. See p.366a of the report.

- Lord Walker referred to *"the changing legislative scene …."* When the projects started the relevant statute was *"the EMA 1995"* which had not been implemented by secondary legislation. The relevant portion of the ***EM Act,*** 2000 is section 35, in particular:

> *"(4) The Authority in considering the application may ask for further information including … an environmental impact assessment …*
>
> *(5) An application which requires the preparation of an environmental impact assessment … shall be submitted for public comment in accordance with section 28 before any certificate is issued."*

- Lord Walker considered section 28 of the ***EM Act***:

> *"Section 28 contains detailed provisions for the publication of notices giving information as to the relevant proposal, identifying where the administrative record is being maintained, stating the length of the public comment period and advising where comments are to be sent."*

- In dismissing the appeal, Lord Walker identified the only significant criticism of the judgment of Bereaux J, as the insufficiency of "…. *attention to the need for public consultation …"* and ruled:

> *"Public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy."* See paragraph 28, page 372 of the report.

- Lord Walker referred to ***Berkley v. Secretary of State for the Environment****, [2001] 2 A.C. 603* where Lord Hoffman said:

> *"The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the directive in which the public, however misguided or wrong-headed its views may be is given an opportunity to express its opinion on environmental issues …*
>
> *A Court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority … had all information necessary to enable them to reach a proper decision …*

- At paragraph [29] Lord Walker states:

"These passages refer to the requirements of legislation of the European Union. But similar principles underlie the EMA 2000 as appears from the detailed requirements of section 28." (emphasis mine)

Lord Walker goes on:

"The doctrine of substantial compliance must therefore be treated with considerable caution in environmental cases of this sort …"

At page 372 Lord Walker said:

"Had the irregularity significantly affected the process of public consultation it is very doubtful whether it would be right in a case of so much public interest to treat the authority as having substantially complied. (emphasis mine)

Belize Alliance of Conservation v. Department of the Environment BACONGO 2[90]

- This was a decision, which was handed down by the Privy Council and in respect of which the Court heard submissions on behalf of all six parties to the Claims before this court.

- For the purpose of these proceedings, the relevant facts are that the Government of Belize had granted its approval for the construction of the Challilo Dam. The proposed Challilo Dam was a hydro-electric scheme for the construction of a 49.5 metre dam on the Macal River at Challilo. It was proposed that the dam would hold back the waters of Macal and its tributary the Raspaculo to create a lake which will extend several metres up the Macal and the Raspaculo. (See Para 5 of the report).The proposal for development had aroused strong opposition from environmentalists (paragraph 6).

- Claimants for Judicial Review proceedings contended that the Department of the Environment which approved the construction of the dam did not comply with the procedures required by law to be observed (paragraph 10 of the report).

- The procedures were contained in the ***Environmental Protection Act*** of Belize. The ***Environmental Protection Act*** and the ***Environmental Impact Assessment Regulations*** 1995 together require the preparation of an EIA for any project which significantly affects the environment.

- The ***Act*** and ***Regulations*** prescribe the form and content of the EIA and establishes an expert advisory body, the National Environmental Appraisal Committee, to advise the Department of Environment on the adequacy of the EIA.

- At paragraph 12 of the decision, Lord Hoffman explained that the Belize Legislation has much in common with legislation in other parts of the world. At paragraph 12, Lord Hoffman held:

  "*What each system attempts in its own way to secure is that a decision to authorize a project likely to have significant environmental affects is proceeded by public disclosure of as much relevant information…. as can reasonably be obtained and the opportunity for public discussion on the issues which are raised…"*

- At paragraph 13, Lord Hoffman continued:

  "*What these systems have in common is that they distinguish between the procedure to be followed in arriving at the decision and the merits of the decision itself…The former is laid down by statute and is binding on the decision-making authority. The latter is entirely within the competence of the authority."*

- Lord Hoffman quoted Linden JA, in ***Bow Valley Naturalists Society v Ministry Of Canadian Heritage (2001) 2 FC 461:***

"*The court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities…."*

- The project was approved on the 31st October 2001, subject to conditions. Lord Hoffman summarized the grounds of appeal and made the following observation :

"*It seems to their Lordships that, however the argument is put, it is still a challenge to the adequacy of the EIA as a basis for decision-making…."*

- The alleged deficiency which had been given the greatest prominence in the appeal before the Board concerned the geology of the bed of the Macal at the site of the dam. This deficiency involved not an omission but a mistake. The EIA contained a geological error that the Macal bed was made of Sandstone and not of granite. (See paragraph 38 of the report)

- At paragraph 48, Lord Hoffman states, after recounting the history of the case, that their Lordships did not consider that the geological error in the EIA was of such significance as to prevent it from satisfying the requirements of the Act.

- The Appellants raised additional problems with the EIA, that is, they claimed that the EIA was inadequate in failing to identity mitigatory measures in respect of plant life, wild life, and archeology.

- Lord Hoffman referred to Regulation 7 and ruled:

"It is for the DOE to approve the terms of reference … and decide whether the EIA complies with those terms … It is for the DOE to decide whether it is necessary to

require further work or studies or supply further information. It appears to their Lordships to follow that the question of whether the EIA complies with Act and regulations both in respect of providing the material for public discussion and of providing a proper basis for decision-making is primarily entrusted to the DOE. The decision to accept the EIA should therefore not be set aside except on established principles of administrative law."

- At paragraph 68, Lord Hoffman goes on:

"For that purpose, it is necessary for the appellants to show that the DOE acted irrationally or in such a way as to frustrate the purpose which an EIA is intended to serve."

- At paragraph 69, Lord Hoffman refers to the ground of irrationality as *"… this demanding requirement …"*and indicated that their Lordships adopted the observations of Cripps J, sitting in the Land and Environment Court of New South Wales in ***Prineas v Forestry Commission Of New South Wales[91]:***

"*I do not think the statute……imposes on a determining authority when preparing an environmental impact statement, a standard of absolute perfection… in my opinion there must be imported into the statutory obligation a concept of reasonableness… Provided an environmental impact statement is comprehensive in it treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public to the affect of the activity on the environment and the consequences to the community inherent in carrying out or not carrying out the activity it meets the standard imposed by the Regulations…."*

" *The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by the experts does not necessarily invalidate it or*

require a finding that it does not substantially comply with the statute and the Regulations."

- At page 71, Lord Hoffman states:

  "Environmental Control is an iterative process which does not stop with the approval of the EIA….It is therefore in their Lordships opinion wrong to approach an EIA as if it represented the last opportunity to exercise any control over a project which might damage the environment …"

- At paragraph 73, Lord Hoffman states the majority decision:

  "In the present case, they (their Lordships) consider it to be impossible to say that the EIA was inadequate to meet the requirements of the relevant legislation …"

Prineas v Forestry Commission *(NSW) 49 LGRA 402*

- This case involved a challenge to a decision to approve logging operations, a decision which required assessment of Environmental Impact under Part 5 of the Environmental Planning and Assessment Act of New South Wales.

- The environmental assessment was held to be adequate even though it failed to assess a number of important issues including the cumulative impact of future hardwood logging in the vicinity, feasible alternatives to rainforest logging, aboriginal cultural heritage and endangered species.

- In describing the basic requirements of an adequate EIS, Cripps J. said that substantial compliance must be determined in light of the purpose of environmental assessment, which is to alert the decision-maker and the public to the inherent problems of the proposal, to encourage public participation and to ensure that the decision-maker takes a

hard look at what is proposed. In particular the statement must not be superficial, subjective or non informative. It must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of the proposed development.

At page 15 of the judgment, Cripps J expressed the following view:

> *"I do not think the obligation in S.111, that is to take into account 'to the fullest extent possible' imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. … In my opinion, there must be imported into the statutory obligation a concept of reasonableness…. But in my opinion, provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment…it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and regulations…An environmental impact statement is not a decision making end in itself – it is a means to a decision making end.*

Fisherman and Friends of the Sea v. EMA and ALNG[92]

- This was a first instance decision delivered by Justice Stollmeyer. It was not appealed and was relied on by all six parties to these proceedings. This Court found this judgment to have been extremely useful, particularly in respect of the precautionary principle, which is considered below.

- In ***Fisherman and Friends of the Sea v. EMA and ALNG,*** the Respondent ALNG was at the material time, the owner and operator of a facility at Point Fortin for the production of liquefied natural gas. The Respondent operated three liquefaction trains supported by three storage tanks and a marine loading facility.

- On 6th June, 2003, the EMA issued a CEC relative to the establishment of an expansion to ALNG's existing facility. The expansion is referred to as Train IV.

- The CEC was issued subject to a range of terms and conditions to take effect prior to and during construction as well as thereafter during operation of the facility.

- Justice Stollmeyer considered whether the EMA was wrong in failing to hold a public hearing pursuant to section 28 (3)[a] and ruled: (Page 54)

> *"EMA had a broad discretion in determining whether and when to hold public hearings. There is no express provisions requiring follow up public hearings before granting the CEC. That is left up to its discretion….. Community involvement is one manifestation of the holistic approach adopted by the Act. Environmental degradation has a human face as well; it is not limited to merely land water and air. Communities frequently face the most severe impacts but are often the least involved in making environmental decisions that affect their well-being"*
>
> *"… section 28 attempts to remedy this by allowing affected communities more meaningful participation in decisions that affect them. It also provides communities with valuable information about the potential health and environmental effects of the project. <u>It affords persons who may be affected the opportunity to voice their concerns … and correspondingly places EMA under a duty to consider what they say. These persons are given a fair hearing</u>."* See page 54 of 88.

- The learned Judge continued :

"In essence, it (section 28) aims to achieve environmental justice which is the fair treatment and meaningful involvement of all peoples …" (See page 54 of 88)

- Justice Stollmeyer concluded that the EMA had not exercised its discretion unreasonably and held there was no illegality, procedural impropriety or irrationality in not holding a second public meeting. (See page 55). Justice Stollmeyer emphasized that the EMA considered that the consultation process had been accomplished in three stages*: "First the ALNG public meeting, second the Administrative Record... and third EMA public meeting…."*.

- Having considered whether EMA was irrational in its failure to deal with cumulative impact, Justice Stollmeyer held that the EIA and subsequent correspondence dealt with the issue of cumulative impact:

> *"… Rule 10 (e) of the CEC Rules requires the EMA to consider the cumulative effects but does not provide any specific guidelines or parameters for cumulative impact assessment.(*paragraph 77 of 88).*The EMA is given a broad discretion to determine the scope and sufficiency of the assessment but is not provided with any guidance on how this discretion is exercised."*
>
> *"… The term "cumulative effect" is not specifically defined, but its importance is well recognized as being one of the more important considerations in carrying out an environmental assessment."*

Justice Stollmeyer observed:

> *"The scope of judicial review of the agency's discretion is narrow because of the policy concerns …"*(See page 78 of 88).

The learned Judge quoted from ***Iverhuron & District Ratepayers Association v. Canada (Minister of the Environment)*** *(2001) 272 N.R. 62 paragraph 53:*

"The extent to which certain factors are considered and the weight given to various factors on the overall assessment of environmental effects … are matters for those who have expertise to make such judgments ,and not for the court."

Then at page 78, Justice Stollmeyer stated:

"The Court limits itself to mainly procedural review seeking to ensure that the statutory requirements have been complied with and the legislative purpose is achieved. Courts only intervene to overturn the agency's findings if they are arbitrary and capricious …"

- Again at page 78, Justice Stollmeyer ruled:

"As long as the agency complies with statutory process, the Court must defer to their determination … but the deference is not absolute.

The Courts approach should not be so deferential as to exclude *"… all inquiry into the substantive adequacy of the environmental assessment …"*

- By reference to ***Neighbours of Cuddy Mountain, Blue Mountains Biodiversity Project v. Blackwood*** *161 F. 3d 1208* and ***Muckleshoot Indian Tribe v. Forest Service*** *177 F. 3d. 800* Justice Stollmeyer endorsed the view that the court's mandate was to verify two things: procedural compliance and substantive compliance. See page 79 of 88.

- At page 79, Justice Stollmeyer considered the effect of the "*hard look doctrine"*:

"The approach to judicial review of cumulative impact assessment … referred to as the 'hard look' doctrine and originated in the context of court review of administrative decisions…"

"The hard look doctrine requires the agency to take its statutory responsibilities seriously and take a "hard look" at all relevant circumstances. It calls for the court to ensure that the agency took a hard look at the cumulative environmental consequences….[Once] the agency has taken a hard look by complying procedurally and substantively with the legislative intent, the court cannot impose its views or interject onto the agency's discretion as to the action to be taken.

"…The Court applies this doctrine by scrutinizing the record … The agency's hard look must be supported by substantial evidence and the court should only set aside the agency's decision if … not supported by substantial evidence."

- Justice Stollmeyer indicated how the court applied the doctrine :

  "*…by scrutinizing the record to satisfy itself that the agency has exercised its discretion with reasons that do not deviate from or ignore the ascertainable legislative intent…[The] agency's hard look must be supported by substantial evidence and the court should only set aside the agency's decision if it is not supported by substantial evidence…"* See page 79.

- At page 80 Justice Stollmeyer observed of the ***EM Act***[(a)], that compliance with the Act is judged by the level of detail the data provides and ruled:

  *"The EMA's decision-making process must exhibit a transparency so that the decision is seen to depend on specific detailed information collected in compliance with the Rule.. There must be evidence that quantified and detailed information was considered …." (*See Page 80)

Relying on *Neighbors of Cuddy Mountain* and *Blue Mountains Biodiversity Project* Justice Stollmeyer ruled:

"For the EMA to satisfy this requirement there must be evidence that "quantified and detailed information was considered."

- Justice Stollmeyer also referred to *Muckleshoot Indian Tribe,* where the Court laid out the test as to whether an environmental impact survey is adequate as being: "*whether there is a reasonably thorough discussion of the significant aspects of the probable environment consequences".*

> "*As in Neighbors of Cuddy Mountain and Blue Mountain Biodiversity Project, the Court focused on the need for details: an environmental impact statement must "catalog relevant past projects", "it must include a useful analysis of the cumulative impacts of past, present and future projects", it must discuss future projects, and it must analyse the total effects in sufficient detail to inform the decision maker in deciding whether to alter the project to avoid or lessen these impacts."*

- Ultimately Justice Stollmeyer expressed the view that the EMA complied with the assessment procedures set out in the CEC rules.

R v. Environmental Agency ex p. Edwards[93]

- ***Ex p. Edwards*** was relevant in this case both to issues as to public consultation and as to defects in the EIA. It concerned an appeal arising out of an application to quash a permit issued on 12th August, 2003 by the Environmental Agency ("*the Agency").* The permit had been issued to Rugby Limited on 21st August, 2001.for the operation of a cement works in Lawford Road, Rugby. An intense controversy arose following a proposal to replace fuel with *"shredded tyres".*

- The ground upon which the application was made was that the agency failed to disclose enough information about the environmental impact of the plant to satisfy its statutory and common law duties of consultation.

- At the time of the judgment of their Lordships, Rugby Limited had been taken over by Cemex UK Limited.

- Statutes relevant to these proceedings were the ***Pollution Prevention and Control Act*** 1999 and the ***Pollution Prevention and Control Regulations***.

- By the ***Regulations***, anyone operating a cement plant was required to obtain a permit from the Agency. Regulation 11(2) states that the object of regulation is to ensure:

> *"(a) all the appropriate preventative measures are taken against pollution … through application of the best available techniques …*
> *(b) no significant pollution is caused …"*

- It was the contention of the company explained that burning tyres at high temperatures would not produce unpleasant smoke. The local people were sceptical (See paragraph 10).

- The Agency stated:

> *"… few determinations have been subjected to such intense scrutiny and debate as this one …"*

- The application for judicial review was launched by a resident of Rugby. The first ground concerned a point on the ***European Council Directive***. The second ground related to the company's use of fabric filters and its failure to ensure that it used the Best Available Techniques.

- The Appellants introduced a new ground, that is to say:

> *"… the appellant's complaint is that the Agency did not properly discharge its statutory obligation of public consultation …before reaching a decision on the other limb of pollution control … namely whether the plant … would cause significant pollution …"*

- The company's position, in its application for approval :

> *"The maximum predicted contribution to ambient concentrations of fine particulate matter is insignificant …"*

- However, the application omitted reference to contributions of emission of PM 10 (fine particulate matter) from Lower Level Point sources. The Appellants complained as follows:

> *"…the Agency failed in its duty of consultation and the grant of the permit is vitiated by a procedural irregularity …"*

- The breach of the duty was the failure to publish both Air Quality Reports. The effect of the AQMAU report was that the relevant Environmental Quality Standards (EQS) would be breached locally if all the sources were emitting at the same time.

- In the words of Lord Hoffman as to the effect of the undisclosed Air Modelling Report:

> *"In other words, there was already so much dust in the air of Rugby that … the addition of PM 10 from the plant appeared likely to breach EQS …"*

- The sources of the duty of public consultation were :

- IPPC directive
- the Regulations
- the Common Law duty of the Agency as a body exercising public functions. Of these only the last is relevant to the instant case.

❖ Lord Hoffman identified the following as an *"unchallenged finding of fact"*:

> *"… the only change in operation proposed by the application, namely the use of tyres would not have significant negative effects on human beings or the environment …"*

That finding satisfied the claim based on the directive. The majority of their Lordships held that the claim must fail.

❖ Lord Hoffman endorsed the remarks of Sullivan J in ***R. v (Blewett) v. Derbyshire CC***[94]*:*

> *"In an imperfect world, it is an unrealistic counsel of perfection … to expect that the applicants environmental statement will always contain the full information about the environmental impact of a project …*
>
> *The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting environmental information provides the local planning authority with as full a picture as possible.(* Emphasis mine)
>
> *There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be*

described as an environmental statement … but they are likely to be few and far between …"

- Lord Hoffman addressed the Common Law duty of fairness, as expounded in ***Exp. Coughlan***. The IPPC directive specifies with precision what information should be made *"… available to the public."* Lord Hoffman held :

> *"when the whole question of public involvement has been considered and dealt with in detail by the legislature, I do not think it is for the courts to impose a broader duty.*
>
> *Secondly, the AQMAU documents were part of the Agency's decision-making process … If the Agency has to disclose its internal working documents for further public consultation, there is no reason why the process should ever come to an end.*

At paragraph 61, Lord Hoffman distinguishes Berkley *"… in which the alleged Environmental Statement had to be pieced together."*

Berkeley v. Secretary of State *[2001] 2 A.C. 603 (House of Lords)*

- In ***Berkeley,*** the local planning authority received an application by a football club for planning permission to rebuild part of its stadium on the bank of the River Thames.

- The proposal involved the creation of a riverside walkway which would encroach slightly into the river and involve the remodeling of a retaining wall with effect on the river's habitat.

- The application was advertised and representations received.

- The local authority's officer's report recommended that the application be granted subject to conditions.

- The Secretary of State accepted the recommendation and granted permission for the project to proceed subject to a number of conditions, including the construction of a wetland shelf.

- The applicant, Lady Berkley applied under section 288 (5) (b) of the ***Town and Country Planning (Assessment of Environmental Effects) Regulations*** for an order quashing the permission granted by the Secretary of State on the ground that the Secretary of State failed to act in accordance with Regulation 4 (2) of the ***Regulations***.

- The issue raised in the appeal before their Lordships was whether a grant of planning permission by the Secretary of State for a redevelopment of the site should be quashed because of the Secretary of State failed to consider whether there should have been an EIA . See p.608 .

- At first instance, the Judge refused to quash the decision of the Secretary of State. The decision was upheld on appeal. Their Lordships allowed the appeal.

- At page 609, Lord Hoffman outlines the law relating to EIA in this way :

  "The EIA is a procedure … introduced to implement Council Directive …"

- Article 2(1), which contains the primary obligation imposed on member states requires member states :

  - *"… to adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment … are made subject to an assessment with regard to their effects …"(See page 609*

- Article 4 distinguishes between Annex I projects, *"conclusively presumed to require an EIA."(*including for example oil refineries) and Annex II projects which *"… may or may not require an EIA depending on whether the member state considers that they are likely to have significant effects on the environment."(See page 609).*

- Article 5, which addresses the contents of the EIA requiring the developer to specify information required by Annex III, requiring a description of the project and the aspects of the environment likely to be significantly affected, including fauna, flora, water, landscape. See p.610

- Article 6 (1) requires member states to ensure that *"authorities likely to be concerned by the project … are given an opportunity to express an opinion …"* and Article 6 (2) requires member states to ensure that the application for development consent and information gathered pursuant to article 5 is made available to the public and the public must be given an opportunity to express an opinion before the project is initiated. See p.610.

- The United Kingdom implemented the Council Directive by Regulation 4 of the 1988 ***Regulations,*** which reproduced the Directive Annex 1 and II as Schedule 1 and 2**.** Schedule 2 related to developments which would be likely to have significant effects on the environment. The Schedule 2 application must be accompanied by an EIA. The question whether or not an application is a schedule 2 application may be determined by a direction of the Secretary of State. Otherwise it is left to the determination of local planning authority. See p.610.

- Regulation 4 prohibited the Secretary of State from granting permission *"… unless the information obtained by an EIA … taken into consideration …"*and by Regulation 25 the grant of planning permission in contravention of Regulation 4 would be outside of powers of the Act.

- In the appeal before their Lordships, Mr. Elvin, Queens Counsel for the Secretary of State conceded that the failure of both the planning authority and the Secretary of State to

consider whether an EIA should be required made the grant of planning permission unlawful. See p.614. Queens Counsel for the Secretary of State did not seek to defend the reasoning of the Court of Appeal that is to say that an EIA would have made no difference. Instead, learned Q.C. argued that there had been substantial compliance with the requirements of the Directive.

- Having regard to the concession of learned Q.C., Lord Hoffman held that the issues had been narrowed as follows :

> "*So the narrow issue argued before your Lordships was a different one namely that there had been on the facts been substantial compliance with the requirements of the Directive…..*"

- At p.614 of the report, Lord Hoffman indicated why the concession of learned Q.C. was correct. His Lordship noted that the primary obligation under Article 2 (1) of the Directive is for a member state to require an EIA before consent is given in every case in which the project is likely to have significant effects on the environment. See p.614. However, the decision whether an Annex II project will have such effect is left to the individual member state, which , as Lord Hoffman observed:

> *"….must mean that in Annex II cases the Member States are under an obligation to consider whether or not an EIA is required."*

- The Regulations do not impose an express obligation to consider whether an application is a schedule 2 application or not. By reference to regulations 5 and 10, Lord Hoffman concluded :

> "*... it is not difficult , in order to make regulation 4(2) effective to imply into that regulation an obligation upon the Secretary of State to consider the matter …"* .See p.614.

- In respect of the appeal before their Lordships, Lord Hoffman remarked that, *"… the conflicting evidence on the potential effect on the river is enough in itself to show that it was arguably likely to have significant effects on the environment …"* (p.615) .

- On this basis Lord Hoffman held :

> "*In those circumstances, individuals affected by the development had a directly enforceable right to have the need for an EIA considered before the grant of planning permission by the Secretary of State and not afterwards by a Judge."*

- In considering whether it mattered whether an EIA would have affected the decision, Lord Hoffman quoted ***Rv. North Yorkshire CC. Exp. Brown*** *[2000] 1 AC*: where it was stated that the purpose of the Directive was to *"… ensure that planning decisions which may affect the environment are made on the basis of full information."*

- Lord Hoffman describes this as *"…a concise statement adequate in its context but which needs for present purposes to be filled out …".* See p.615, paragraph 8.

- Lord Hoffman says:

> *'The Directive requires not merely that the planning authority should have the necessary information but that it should have been obtained by means of a particular procedure, namely that on an EIA."*

- At paragraph 8, Lord Hoffman identifies an essential element of the procedure that the environmental statement should be made available to the public and that the public should have been given the opportunity to express an opinion in accordance with Article 6 (2) of the Directive.

- Lord Hoffman quoted ***Euro Communities v. Federal Republic of Germany:***

"It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment … it is ensured that the environmental impact of the project shall be included in the public debate'"(emphasis mine).

- By reference to ***Euro Communities v. Federal Republic of Germany*** , Lord Hoffman held:

  "The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and requires the inclusive and democratic procedure prescribed by the Directive … in which the public however misguided or wrong headed … is given an opportunity to express its opinion …"

- Lord Hoffman quoted from the UK Government publication *"Environmental Assessment: A Guide to the Procedures …"* and held: (Lord Hoffman):

  "A Court is … not entitled retrospectively to dispense with the requirement of an EIA."

- At p. 616, Lord Hoffman addresses the doctrine of substantial compliance and recounted the facts of ***European Communities v. Federal Republic of Germany:***

  "... the Federal Republic of Germany had failed to transpose the Directive into domestic law by the stipulated date and had given consent to construction of a power station without an EIA. It had followed procedures required by its Pollution Protection Law. In enforcement proceedings, the Commission conceded that the developer had supplied all information … It conceded that the information had been made available to the public and that the public was given an opportunity to comment …"

- Lord Hoffman stated that ***Commission v. Germany*** establishes:

> *"…an EIA by any other name will do as well. But it must in substance be an EIA."*

- Lord Hoffman considered the submission for Secretary of State that the equivalent of applicant's environmental statement appeared in the public authority's statement of case which in turn incorporated other documents and that members of public had access to all documents and held (see page 617) :

> *"My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement."*

- Of the EIS contemplated by the Directive, Lord Hoffman states:

> *"The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation produced by the applicant at the very start of the application process of the relevant environmental information and the summary in non-technical language …"*

- Lord Hoffman held that the Directive does not allow Member States to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement and stated:

> *"I would accept that if there was a failure to observe some procedural step which was clearly superfluous … it would be possible to exercise the discretion not to quash."*

- ***Berkeley*** was considered by their Lordships in ***Fishermen and Friends of the Sea v. EMA (P.C.)*** and in spite of the differences in the legislative regime, the exposition of Lord Hoffman in ***Berkeley*** was authoritatively held to be relevant to this jurisdiction.

R v Rochdale Metropolitan Borough Council exp. Tew[95]

- This was an application for judicial review in respect of the Respondent's grant of outline planning permission for a proposed business park and full planning permission for the construction of a spine road.

- In the application for outline permission, it was stated, in answer to questions relating to *"diversion of public rights of way, felling of trees demolition of existing buildings, type and colour of materials to be used,"* that the application was in outline and that details were not available or were to be subsequently provided and agreed.

- Sullivan J, considered the effect of Regulation 4 (2) of the ***Town and Country Planning (Assessment of Environmental Effects) Regulations of 1988***, which provides:

> *"The local planning authority shall not grant planning permission … unless they have first taken environmental information into consideration …"*

- The terms *"environmental information"* and environmental statement are defined. Information required to be placed in the environmental statement is similar to what is required by Rule 10 of the ***CEC Rules***.

R v. Rochdale Metropolitan Borough Council, ex p Milne[96]

- The developer in ***Tew*** returned for planning permission after having made the necessary adjustments. Planning permission was granted and there was a second application to have it quashed in ***R v. Rochdale Metropolitan Borough Council, ex p. Milne.*** In ***Milne,*** the court refused to quash the grant of planning permission**.** The decision of Justice Sullivan in ***Milne*** was upheld, on appeal, by Lord Justice Pill.

- At paragraph 33 of his decision, Lord Justice Pill addressed the role of the Court stating that it should only intervene if it was satisfied that no reasonable authority could have been satisfied with the amount of information with which it was supplied.

- At paragraph 37, Lord Justice Pill formulated the appropriate test, that is to say, whether the authority deferred a decision on any matter which is likely to have a significant effect or on any mitigation measures in respect of such effect.

R v Cornwall County Council ex parte Hardy[97]

- In this case the applicant carried out EIA and provided an Environmental Statement. Although it was known that the conditions at the site were those favoured by a protected species - bats, the applicant did not investigate for their presence. The planning authority, advised by English Nature, granted planning permission but imposed a condition requiring the applicant to carry out a survey to establish whether bats were present prior to commencing the development.

- In quashing the decision to grant planning permission Harrison J held that the grant of planning permission was not lawful because the respondent could not rationally conclude that there were no significant nature conservation effects until they had the data from the surveys. In his view, the authority was not in a position to know whether they had the full environmental information required by Regulation 3 (2) before granting planning permission.

- Harrison J agreed that it was for the planning authority to determine the adequacy of the environmental information referred to in Part II Schedule 4 of the Regulations, subject to review by the courts on the normal ***Wednesbury*** principles. At paragraph 71, he said:

"Having decided that those surveys should be carried out, the Planning Committee simply were not in a position to conclude that there were no significant conservation issues until they had the results of the surveys. The surveys may have revealed significant adverse effects on the bats or their resting places in which case measures to deal with those effects would have to be included in the environmental statement. They could not be left to the reserved matters stage when the same requirements for publicity and consultation do not apply."

Hereford Waste Watchers Ltd. v Hereford Council[98]

- The primary issue in this case concerned the duty on the decision maker to obtain further information on the significant environmental effects of a waste treatment and recycling facility before granting planning permission. Here, the planning officer had expressed concerns over the efficacy of a proposed system for controlling emissions, based on advice from the council's own environmental health officer. The recommendation of the planning officer was that permission should be granted subject to a number of conditions which said decision was taken by the planning authority. Mr. Justice Elias found that the council should have insisted upon the provision of the additional information before granting planning permission. He held that by taking the latter course the authority was effectively depriving consultees the opportunity to be consulted on the likely environmental impact. The planning permission was accordingly quashed on this ground.

- Justice Elias cited with approval the court of appeal decisions of ***Bellway Urban Renewal Southern v John Gillespie and Smith v Secretary of State for the Environment.*** At page 10, paragraph 334 of his judgment he summarises the material principles, as derived from ***Smith*** and ***Gillespie*** and the decisions to which they refer, as follows:

"1. The decision whether a process or activity has significant environmental effects is a matter for the judgment of the planning

authority. In making that judgment it must have sufficient details of the nature of the development, of its impact on the environment and of any mitigating measures.

2. *Equally, it is for the planning authority to decide whether it has sufficient information to enable it to make the relevant judgment. It need not have all available material provided it is satisfied that it has sufficient to enable a clear decision to be reached.*

3. *In making that determination, the planning authority can have regard to the mitigating measures provided that they are sufficiently specific, they are available and there is a real doubt about their effectiveness. However, the more sophisticated the mitigating measures and the more controversy there is about their efficacy, the more difficult it will be for the authority to reach a decision that the effects are not likely to be significant.*

4. *If the authority is left uncertain as to the effects, so that it is not sure whether they may be significant or not, it should either seek further information from the developer before reaching a conclusion, or if an ES has already been provided it should require a supplement to the ES which provides the necessary data and information. It cannot seek to regulate any future potential difficulties merely by the imposition of conditions.*

5. *The authority cannot dispense with the need for further information on the basis that it is not sure whether or not there are significant environmental effects, but that even if there are, other enforcement agencies will ensure that steps are taken to prevent improper pollution. However, it should assume that other agencies will act*

competently and it should not therefore anticipate problems or difficulties on the basis that those agencies may not do so."

R (Blewett) v Derbyshire CC[99]

- In ***Blewett,*** Justice Sullivan considered an application for judicial review seeking a quashing order in respect of a grant of planning permission dated 23rd December, 2002.

- Planning permission was granted in respect of *"land reclamation by waste disposal with restoration to agricultural woodland … at Glapwell Colliery …"*

- Justice Sullivan explored the factual background, recounting that the Glapwell Colliery had been closed in the mid 70s.

- Planning permission was granted for reclamation involving tip washing. Voids had been created.
- Glapwell I was the first void to be filled. Glapwell 2 and 3 were eventually filled. The proposal which was being considered involved tipping 850, 000 m^3 of domestic, industrial commercial and inert waste over a period of four years.

- The application site covers 9 hectares and is located within 1 km of 4 villages, one of which is Bramley Village, where the Claimant lives.

- Claimant suffered from chronic bronchitis and contended that his health conditions were exacerbated by dust and smells.

- Under the ***Regulations*** an environmental statement was required if the development was likely to have significant effects on the environment.

- The Regulatory Planning and Control Committee of the Defendant first considered the application. The Defendant's Director of Environmental Services advised members of the merits of the application. The recommendation was subject to 53 conditions.

- Dr. Wolfe, for the Applicant, identified three grounds of challenge. The first is relevant to the instant case:

> *"The environmental statement did not include an assessment of the potential impact of the use of Glapwell 3 … and instead unlawfully left those matters to be assessed after planning permission had been granted."*

- Justice Sullivan considered the Environmental Statement, which he described as *"… a lengthy document comprising 15 chapters and 7 technical appendices."***.** (See paragraph 31). The complaint was stated as follows :

> *"It is not suggested that the Environmental Statement failed to mention the potential impact … rather it is submitted that the manner in which issues were dealt with was inadequate. In summary, the assessment of likely impact and the description of necessary mitigation measures were left over for subsequent determination."*

- At paragraph 32, Sullivan J states:

> *"Where there is a document purporting to be an Environmental Statement the starting point must be that it is for the local planning authority to decide whether the information in the document is sufficient to meet the definition of an environmental statement at Regulation 2."*

- Regulation 2 of the Regulations provides :

"environmental statement means a statement … that includes such of the information referred to … as is reasonably required to assess the environmental effects of development …"

- At paragraph 33, Justice Sullivan states:

  "The local planning authority's decision is … subject to review on normal Wednesbury principles …"

- Then the learned Judge distinguished Berkley and stated:

  "In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded as an EIA …"

- At paragraph 38, Justice Sullivan states:

  "The Regulations envisage that the applicant for planning permission will produce the environmental statement…. It follows that the document will contain the applicant's own assessment…the applicant's assessment may well be inaccurate, inadequate or incomplete…. Hence the requirement to submit thirteen copies to the Secretary of State …"

- Then at paragraph 39 Justice Sullivan explains the rationale for publicity:

  "This process of publicity gives those persons who consider that the environmental statement is inaccurate an opportunity to point out its deficiencies."

- By regulation 3 (2), the local authority must consider not only the environmental statement, but also information.

- At paragraph 40, Sullivan J:

> *"… the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact or has wrongly dismissed it as unlikely or not significant …*
>
> *… That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement … so as to deprive the authority of jurisdiction to grant planning permission."*
>
> *"Once the requirements of Schedule 4 are read in the context of the Regulations … it is plain that a local planning authority is not deprived of jurisdiction … merely because it concludes that an environmental statement is deficient in a number of respects."*

- At paragraph 41, Justice Sullivan opined that Ground 1 is an example of the *"unduly legalistic approach."*

> *"The Regulations should be interpreted as a whole and in a common sense way. The requirement than an EIA application … must be accompanied by an Environmental Statement is not intended to obstruct such development."*

Justice Sullivan refers to Lord Hoffman in ***R v. North Yorkshire exp. Brown*** [2000] 1 AC 397 and concluded:

> *"…the purpose is to ensure that planning decisions which may affect the environment are made on the basis of full information …*
>
> *In an imperfect world, it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations*

are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information provides the local planning authority with as full a picture as possible …"

"There will be cases where the document purporting to be an environmental statement will be so deficient that it could not be described as an environmental statement … but they are likely to be few and far between."

At paragraph 42, Justice Sullivan, regards *"defensive documents as unhelpful":*

"It would be of no advantage to anyone concerned with the development process … if environmental statements were drafted on a purely defensive basis … such documents would be a hindrance, not an aid to sound decision-making …"

At paragraph 58, Sullivan J records the claimant's submission:

"… that the assessment of the impact of the proposed development on groundwater was impermissibly left over to another decision-maker."

Sullivan J at paragraph 60 distinguished ***Gillespie***, saying that the facts before him were very different and rejected Ground 1 as a ground of challenge. The application succeeded however on the third ground .

R (on the application of PPG11 limited) v. Dorset County Council and Viridor Waste Management Limited[100]

- This authority was cited and relied upon by learned Senior, Mr. Mendes, S.C. It was an application for a quashing order, heard and determined by Mr. Justice Mackay. The applicant, PPG11 sought an order quashing the grant of planning permission to the interested party ***Viridor.***

- Planning permission had been granted for the deposit of waste at Trigon Hill Quarry, which was open cast clay quarry in operation since 1960.

- At the time of the decision, permission existed, under which clay could be extracted until 2015. The site continues to be operated as a Quarry.

- Viridor, the Interested Party had applied to the Dorset County Council for the planning permission to use the quarry as a landfill site for controlled waste. The scheme sought permission to deposit waste for some 20 years, after which the site would be restored.

- On the 18th January 2002, the Dorset Planning Committee decided to grant permission on conditions.

- The Claimant was an action group seeking to quash the decision on the ground that it was unlawful.

- Justice Mac Kay considered the statutory framework, which had been considered in the foregoing English authorities such as ***Berkley*** and ***R v. Edwards*** (supra)***,*** and observed that the ***Town and Country Planning Regulations*** 1999 transposed into English domestic law, the Council of the European Communities Directive.

- According to the Directive, consent should be given in respect of projects, which are likely to have <u>significant effects on the environment</u> only after prior assessment of the likely significant effects of the project and that such assessment should be carried out on the basis of appropriate information.

- Justice Mac Kay referred to the definition of the EIA under ***Regulation*** 2 (1) as well to the definition of "*environmental information"* The environmental statement by regulation 2(1) is required to contain information referred to in Part 1, but at least should include information referred to at Part ll of Schedule 4.

- Justice Mac Kay concluded that the would-be developer has to include in his environmental statement as a minimum requirement the information set out at Part ll of Schedule 4. (See paragraph 7).

- The items of information set out at Part ll included a description of the development; description of measures to avoid, reduce and remedy <u>significant</u> adverse affects.

- In respect of the application before him, Justice Mac Kay observed that the environmental impact of the project was obvious in terms of traffic noise, pollution and visual amenity. Justice Mac Kay (paragraph 10) mentioned, one example, that is to say where it was envisaged that at its peak, there would be 46 deliveries of waste each day.

- Justice Mac Kay considered the history of the application, noting that the application for planning permission had been made on the 22nd December 1999. The application incorporated the Environmental Statement. The EIS has been circulated in draft and there had been substantial consultation, including two public meetings and the submission of a mass written material. (See paragraph 18).

- The Dorset County Council also considered a report from the Director of Environmental Services. Justice Mac Kay referred extensively to this report of the Director of Environmental Services. The Committee eventually resolved to grant planning permission subject to a number of conditions, including the Condition 4 relating to "*Habitat maintenance/enhancement*".

- The argument of PPG 11 resembled the argument of the Claimant before this Court. PPG 11 argued :

"… these exercises were an essential part of the EIA itself and needed to be done prior to the grant of permission….."

- Considering the cases, Justice Mackay stated :

" When this case was argued before me there was no binding authority directly in point on the issues with which I have to deal, but there were no fewer than seven recent first instance decisions of this Court by judges of great experience in this field….."

- The decisions which Mac Kay J referred to were:
  - ***R v Rochdale Ex p. TEW***[101]
  - ***R v Rochdale Ex p. Milne***[102]

- ***Tew*** and ***Milne*** related to the same set of facts. The latter having been a sequel to the former.
- The remaining three were considered together , that is to say:
  - ***Telecommunication P/c v Gloucester City Council*** *(2001) EWHC 1001 (Admin)*
  - ***R v (on the application of Lebus) v South Cambridgeshire District Council*** *(2002) EWHC 200*
  - ***Gillespie v The First Secretary of State and Bellway Urban renewal*** *(2003) EWHC 8*

- In each of the foregoing trilogy of cases there had been no EIA, because the authorities had decided that none was needed. Justice Mac Kay says of ***Gillespie:***

"This… was a case in which the public had no opportunity at all event to inform itself of what persons or contamination associated with this development might be…" (paragraph 34)

- At paragraph 36, Justice Mac Kay referred to ***R (Jones) and Mansfield District Council,*** a decision handed down on the same day as ***Gillespie.*** In ***Jones,*** there had been an application for outline planning permission and the Authority had not required an EIA. Richard J pointed out:

  "*…. there was a difference between a development having some effect on a species and it having a likely significant impact."*

- At paragraph 37, Justice Mac Kay states:

  *"the difference between **Jones** and **Hardy** is interesting. In **Hardy** the local authority had decided in accordance with the strong expert advice to carry out surveys to ensure that bats would not be affected. In **Jones** there had been surveys, no bats had been discovered and therefore there was information on which the Council would reasonably form a decision that there was no need for an EIA."*

- At paragraph 39, Justice Mac Kay refers to ***R v Cornwall County Council Ex p. Hardy***[103]. The facts were that Hardy sought to set aside a grant of planning permission to fill a former quarry site on the ground that the authority did not have the information required by Regulation 1999. The Council (in Hardy) had received advice that further surveys should be carried out on bats, badges, liverworts. In ***Hardy,*** the Judge formulated the question:

  "… whether the respondent could rationally conclude that those nature conservation aspects…did not amount to significant adverse affects…."

- At paragraph 47, Mac Kay J considers the principles of relevance:

  (i) The EIA scheme exists to ensure that planning decisions are taken with full information.

(ii) *A further purpose of the EIA scheme is to enable democratic participation.*

(iii) *The adequacy of environmental information… is a matter for the judgment of the planning authority with which the Court will only interfere if it is proved to have been exercised irrationally.*

(iv) *The imposition of a condition…requiring further investigation of a potential adverse effect is neither necessarily nor invariably an erroneous approach in law (**Jones** 57, 59) **Hardy** 65, M…132) or evidence of irrationality.*

(v) *Not all adverse effects are significant adverse effects.*

(vi) *Not every scrap of information has to be included."*

- At paragraph 49, J Mac Kay refers to each of the cases where the Court struck down planning permission and said:

> *" … one can see clear deficiencies in the evidence which they had before them. In Tew … no description at all as to what the development comprised In BT … what was proposed ... would have highly significant effects on archaeological remains…In Lebus the officers recognised that there was a potential for significant adverse impact on the environment. In Gillespie, there was a complete absence of information as to the nature, degree and extent of contamination of the soil. In Hardy the mineshafts were plainly potential sites where bats might be found…In each of these cases, the Court ruled that it was not permissible for the authority to fall back on post-grant survey conditions to make up for this lack of evidence on which to base a finding as to an essential feature of Part II"*

- Then at paragraph 50, Justice Mac Kay considers cases where the decision withstood the attack:

> *"… it is possible to see that there was <u>some</u> material on which they could have reasonably relied to reach a decision as to all relevant Part II matters…'*

- Justice Mac Kay refers to ***Milne*** (paragraph 50)

> *"In **Milne**, the Master plan incorporated in the outline application served to win the day. In **Hardy**, had the decision rested on the badgers and liverwort alone, it is tolerably clear the Council would have succeeded on the basis that there was no evidence of adverse effects. In **Jones** the committee felt able to form the view that there was some adverse effect… but that it was not likely to be significant. In none of these cases did the imposition of a condition as to further investigation vitiate the prior decision to grant.... rather it appears to have been treated as no more than a legitimate… sensible further step to minimize… non-significant adverse effects."*

- At paragraph 51, Justice Mac Kay referred to the Court of Appeal's decision in ***Gillespie***, in which the Court of Appeal upheld the decision of Richards J.

- At paragraph 52, Justice Mac Kay identified the principles of relevance. Of the six, those relevant to this case are:

  i. Each case will turn on its own facts

  ii. The decision as to whether an EIA is required (as in Gillespie) is a judgment different from and to be made before an assessment of the procedures appropriate if an EIA is held to be required…

  iii The extent to which remedial measures can be taken into account when making a screening decision will depend on their nature.

  iv. The decision maker can properly take them into account in forming the decision that the project would not be likely to have significant adverse effects on the environment if they are:

".. modest in scope

… plainly and easily achievable (Gillespie) (Pill LJ 37)

… plainly established and plainly uncontroversial (Laws LJ46) or of limited impact or well-established to be easily achievable … (Arden LJ 49)."

- In the matter before him, Justice Mac Kay held that the developer and the County Council were supported by the Court of Appeal when they urged the Court "*… not to lose sight of the overall position..."*

- Ultimately deciding that the claim should fail, Justice Mac Kay pointed out that both the Director and the ecologist believed there was likely to be a significant adverse effect on the relevant ecology resulting from this project.

".. There was material on which each was entitled to form this belief independently of the putative effects of mitigation".

The Precautionary Principle

Section 31 of the EM Act

- Section 31 of the ***EM Act*** , provides :

"The Authority and all other governmental entities shall conduct their operations and programs in accordance with the NEP established under section 18 …"

- The ***NEP*** , at Chapter 2 identifies its *"Goals, Objectives and Basic Principles …"*, one of which is the Precautionary Principle:

"Government policy will adhere to the principle that if there are threats of serious irreversible environmental damage, lack of full scientific certainty will not be used as a reason for postponing measures to prevent environmental degradation."

Fishermen And Friends Of The Sea v Environmental Management Authority And Atlantic LNG[104]

- The meaning and import of the precautionary principle was addressed in Trinidad and Tobago in ***Fishermen And Friends Of The Sea v Environmental Management Authority And Atlantic LNG***, a decision of the Honourable Justice Stollmeyer. The decision in ***Fishermen And Friends of The Sea V Environmental Management Authority And Atlantic LNG*** was never appealed and has the distinction of having been cited and relied upon by all six (6) parties to the present Claims.

- At pg. 42 of 88, Justice Stollmeyer wrote:

"*The precautionary principle is included in the National Environmental Policy but only as a general statement of the principle. It is difficult to translate it into specific commitments or requirements because it contemplates enormous financial burdens and foregone opportunities with no clear scientific justification. It must be directed to…… achieving sustainable development."*

- At pg. 44 of 88, the Learned Judge wrote:

"*The principle is regarded as a new legal response to scientific uncertainties surrounding the capacity of the environment, to cope with the increasing demands placed upon it to protect the environment as well as human, animal and plant life, when no concrete threat to those resources*

have yet been demonstrated, but initial scientific findings indicate a possible risk. The principle therefore sets out a rule for action in situations of uncertain risk where there in an inseparable connection between the principle and potential risk to objects of legal protection…"

- At pg. 45 of 88, the Learned Justice Stollmeyer identifies three stages of application of the principle. The first stage was the finding of potential risk :

  (i) "*before the precautionary principle is invoked there must be comprehensive scientific evaluation of any potential risk…"*

- In respect of the first stage, the Learned Judge wrote:

  "*the precautionary principle is usually invoked if, following this risk assessment, serious or irreversible threats of environmental damage are discovered…"*

- Justice Stollmeyer observed further:

  "*The National Environmental Policy of Trinidad and Tobago specifies that the risk or threats must be serious irreversible environmental damage".*

- The Learned Judge observed that :

  "*the threshold and burden of risk demonstration" is significantly higher in other jurisdictions.*

- The second stage identified by the Learned Judge:

  "*…… the precautionary principle is only invoked where scientific opinion conflicts on the potential threats…"*

- Justice Stollmeyer specified that the burden of proof rested on the developer to prove:

> "*…. that their actions will not cause serious irreversible harm to the environment…"*

- The third stage, according to Justice Stollmeyer at pg. 45 of 88 is:

> "*…..the authority or agency….. may by reason of the precautionary principle take protective measures without having to wait until the reality and the seriousness of those threats become fully apparent….."*

- Justice Stollmeyer expresses the view that there were no hard and fast rules and that each case had to be considered on its own facts. Referring to the case of ***Monsanto Agricoltura Italia Spa V Presidenza Del Consiglio Del Ministri (2003) ECR,*** the Learned Justice Stollmeyer stated:

> "*The generally accepted interpretation of the principle is to act prudently when there is sufficient scientific evidence and where inaction could lead to potential irreversibility or demonstrate harm to future generations….."*

And quoted from ***Monsanto***:

> *"According to the precautionary principle there is no need to provide complete proof of a risk to the environment or to human health, rather protective measures are already justified wherein preliminary and objective scientific risk evaluation gives reasonable grounds for concern…."*

- The Learned Judge emphasised that the risk must be adequately substantiated by scientific evidence.

- It is significant that in the application before him, Justice Stollmeyer decided that there was insufficient evidence to suggest that the Environmental Management Authority did not apply the precautionary principle.
  "*It appears to me that they did so in any event…"*

Telstra Corporation Ltd v Hornsby Shire Council (Telstra)[105]

- Learned Senior Counsel, Mrs. Peake cited and relied on the authority of ***Telstra***, which was a decision of the Land and Environment Court of New South Wales. Two Judges are identified as comprising the court, that is to say: Preston, C.J. and Brown C. It is, however, unclear, at least from the report supplied by learned Senior Mrs. Peake, which of the two Judges delivered the Court's judgment. I am therefore constrained to make tedious reference, in the paragraphs which follow, to - "*the Court in Telstra"*. Nevertheless, this Court found ***Telstra*** to be an extremely useful authority in its exposition of the precautionary principle.

- In ***Telstra***, the Respondent Council refused an application for development consent relating to the installation of telecommunications equipment and a base station. The application was opposed by members of the local community fearing that the facility would emit electronic energy that would harm the health and safety of residents.

- The Court held that there was no basis on which it could apply the precautionary principle and at page 38, explored the precautionary principle, describing it as:

> *"…triggered by the satisfaction of two conditions precedent; a threat of serious and irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental*

damage, but it should be proportionate. N de Sadeleer, Environmental Principles: From Political Slogans And Legal Rules.

- At page 38, the Court in ***Telstra*** noted that all that was required was a *threat* and that serious or irreversible environmental damage need not have actually occurred.

- At page 39, the Court in ***Telstra*** wrote :

  "*...threats to the environment that should be addressed include direct and indirect threats, secondary and long term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions. Where threats may interact or be inter-related... they should not be addressed in isolation…"*

- At page 39, paragraph 134, the Court warned that the threat should be adequately sustained by scientific evidence and at paragraph 138 the Court explained:

  "*….If there is no threat of serious irreversible environmental damage, there is no basis upon which the precautionary principle can operate. The precautionary principle does not apply and precautionary measures cannot be taken to regulate a threat of negligible environmental damage…"*

- At paragraph 140, the Court in ***Telstra*** considered the requirement of scientific uncertainty and relying on ***Leatch v National Park And Wildlife Service (1993)*** stated:

  "*…The uncertainty is as to the nature and scope of the threat of environmental damage….."*

- At paragraph 149, the Court writes:

  "*…..If there is no, or not considerable, scientific uncertainty…….but there is a threat of serious or irreversible environmental damage the precautionary*

principle will not apply….The threat of serious irreversible environmental damage can be classified as relatively certain because it is possible to establish a causal link between action or event and environmental damage, to calculate the probability of their occurrence and to insure against them…."

- The Court in **Telstra** continued:

"measures will still need to be taken but these will be preventative rather than precautionary".

- At paragraph 150, the learned Judges in ***Telstra*** identified the third stage, stating that when the precautionary principle is activated there is a shifting of the evidentiary burden of proof:

"*…A decision-maker must assume that the threat… is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist reverts to the proponent of the development plan, programme of project…"*

- At page 44 (paragraph 154), learned Judges in ***Telstra*** indicated that the evidentiary burden related only to one impact of the decision making process, that is to say the question of environmental damage.

- The Court continued:

"….If a proponent of a plan, program of project fails to discharge the burden of proof that there is no threat of serious or irreversible environmental damage, this does not necessarily mean that the plan, program or project must be refused. It simply means that in making the final decision, the decision maker must assume that there will be serious or irreversible environmental damage. This assumed factor must be taken into account in the calculus which decision makers are instructed to apply into environmental legislation. (emphasis mine).

- At paragraph 154, the Court continues:

> "*….there is nothing in the formulation of the precautionary principle which requires decision-makers to give the assumed factor…. overriding weight compared to the other factors required to be considered such as social and economic factors, when deciding how to proceed…..*"

- The "*assumed factor*" is clearly reference to the factor of the threat of "*serious or irreversible environmental damage"* which the decision-maker assumes to be a reality if the developer fails to discharge the burden that the threat does not exist.

- In my view, the insight provided in the quoted paragraph is critical in so far as it suggests:

  i. That the shifting of the burden of proof, at the third stage of applying the precautionary principle is a burden to be discharged before the decision–maker that is to say, the Environmental Management Authority (EMA), It is not a burden to be discharged in proceedings before the reviewing court. The burden before the reviewing court continues to rest on the Claimant, who makes the allegation.

  ii. Assuming that this Court finds the first two elements present, it does not necessarily imply that the Environmental Management Authority (EMA) as decision-maker must refuse the application. Rather, the decision-maker is required to assume that there is a threat of environmental damage and to take the threat into account when making the decision.

- At paragraph 166, the Court in ***Telstra*** decreed that there should be proportionality in the response and stated:

> *"… in applying the precautionary principle measures should be adopted and that are proportional to the potential threat. A reasonable balance must be struck*

between the stringency of precautionary measures which may have associated costs such as financial livelihood and cost opportunities and seriousness and irreversibility of the potential threat."

- In this statement, one can discern the very structure envisaged and provided for in the Trinidad and Tobago legislation, that is to say, the requirement for balance between the economic and environmental factors in achieving the goal of sustainable development.

- The watch word is balance. The precautionary principle ought not to be to interpreted so as to create "*a paralyzing bias in favour of the status quo and against the taking pre cautions against risk…."* (See paragraph 180, pg 45 of ***Telstra)***

- At page 182, the Court in ***Telstra*** explained:

> "*….The precautionary principle is but one of the set of principles of ecologically sustainable development"*

- At paragraph 184, the Court in ***Telstra*** concluded, that the first element of the principle was not present and, therefore, there was no basis on which the precautionary principle could be applied to the development in question.

Greenpeace Australia Limited v Redbank Power Company[106]

- In this case, Greenpeace Australia Limited objected to the grant of consent by the Singleton Council to Redbank Power Company, for the construction of a power station and ancillary facilities at Warkworth in the Hunter Valley.

- Greenpeace argued that air emissions from the project would unacceptably exacerbate the "*greenhouse effect"*. Pearlman CJ, sitting in the Land and Environment Court of New South Wales dismissed the application of Greenpeace and held:

> "…..*The application of the precautionary principle dictated that a cautious approach should be adopted in evaluating the various relevant factors, in determining whether or not development consent should be granted, but it did not require that the greenhouse issue should outweigh all other issues".*

Murrumbidgee Groundwater Preservation Association v. Minister of Natural Resources[107]

- This case was cited and relied upon by Dr. Ramlogan, learned Counsel for PURE. It was a decision of the Land and Environmental Court of New South Wales in which the Applicants sought a declaration that the water sharing plan for the lower Murrumbidgee Groundwater sources was invalid.

- At paragraph 174 of his judgment, McClellan J observed that the Minister is required to act in a manner consistent with and so as to further the objects of the Act, which identified observance of the principles of ecologically sustainable development as one of its objects.

- McClellan, J described the precautionary principle as "…*a central element in the decision-making process…"*, stating that it was not "*merely a political aspiration*…" but must be applied when decisions are made under a statute which adopts its principles.

- Dismissing the complaint, McClellan J referred to the decision of Mason, J in ***Peko*** and issued the following warning :

> *"…when making a decision a court should be cautious when asked to intervene for otherwise it may inadvertently be engaging in a merit review…".*

J.R.Bentley v. BGP Properties Pty Ltd.[108]

- ***J.R.Bentley v. BGP Properties Pty Ltd.*** was a case relied on by learned Counsel Dr. Ramlogan. It was essentially a criminal matter, in which the Land and Environmental Court of New South Wales considered whether the defendant BGP Properties Pty Ltd was liable for the offence of "*picking a threatened species …"* contrary to s. 118(2) of the ***National Parks and Wildlife Act*** 1974. At paragraph 6, Preston CJ linked the requirement of a environmental impact assessment (EIA) to the goal of achieving ecologically sustainable development. Preston CJ stated further that the preparation of an EIA could advance the cause of the implementing the precautionary principle.

Reasoning and Decision

1. The Claims before me have raised issues which are duo-dimensional. The first dimension is comprised of the principles of administrative law. In this regard, the Court is reminded that its function is not appellate and that it is not concerned with the merits of the decision, but is urged to focus on the decision-making process, and to strike down the decision only if the Claimant has established the presence of one of the grounds listed at s. 5 of the ***Judicial Review Act***[(d)]. Accordingly, it does not fall on this Court to decide whether there should be a Smelter in Trinidad and Tobago. The Court is concerned only with examining the decision of the EMA to grant Environmental Clearance and with considering whether the decision is flawed according to any grounds specified in the ***Judicial Review Act***[(d)]

2. The second dimension consists of the rules that have been developed globally as to sustainable development and which find expression firstly in domestic legislation and secondly in judicial pronouncement on such legislation.

3. Sustainable development is defined in the preamble to the ***EM Act*** and in my view can be described as the principle which calls for a balance between economic development and the preservation of the environment.

4. The two dimensions are discernible in the issues identified by Dr. Ramlogan, Learned Counsel for ***PURE,*** in his Statement of Issues, filed on the 27th day of September 2007, pursuant to the Order of the Honourable Justice Jamadar.

5. In his written submission, Learned Counsel reduced the issues to eleven items, which he placed in the following three (3) categories:

    (i) Public Consultation
    (ii) The EIA Process
    (iii) The Precautionary Principle

Precautionary Principle

6. I will consider the Precautionary principle first. This ground of challenge was made only on behalf of the Claimants, ***PURE***. Learned Counsel, Dr. Ramlogan crafted the ground in this way:

> "*Whether the decision to grant the CEC in the presence of scientific uncertainty with respect to air pollution and hazardous waste disposal violates the precautionary principle…..and was illegal and/ or irrational …"*

7. The precautionary principle is an emerging rule of customary international law which was incorporated into domestic law in this jurisdiction by the conjoint effect of s.31 of the ***EM Act*** and the ***National Environmental Policy***. This principle, which was described by Stein J

in ***Leatch v. National Parks and Wildlife Service***[109] as "…..*a statement of common sense* …." is no longer merely a matter of political aspiration but must be applied in the decision making process which is the concern of the court in judicial review. See ***Murrumbidgee Ground water Preservation Association v Minister for National Resources***[110]

8. There are three hurdles to be crossed before the precautionary principle can be invoked:
    - There must be a threat of serious and irreversible damage to the environment. The threats must be adequately sustained by scientific evidence (see paragraph 134 of the judgment in ***Telstra)***
    - There must be a lack of full scientific certainty.
    - Where these two elements are present, the burden of proving that no threat exists is carried by the applicant/developer.

9. In my view the first two elements are present in the instant Claim. In respect of the first element, the prevailing jurisprudence requires the existence of "*scientific evidence* …" The law will reject mere "….*claims or scientifically unfounded presumptions*…" The risk of serious and irreversible damage must be "…..*adequately substantiated by scientific evidence*… " See reference to ***Monsanto v. Presidenza del Consiglio dei Ministri cited*** at paragraph 134 of ***Telstra***[111]**.**

10. In the light of this learning, this Court considered whether there was scientific evidence or whether there were mere unsubstantiated claims. There could be no doubt that there was considerable scientific evidence before this Court of threats of both serious and irreversible damage to both the environment and human health. Experts of the highest calibre swore lengthy affidavits as testimony of the threat. Even if on a balance of probabilities and on account of the lack of cross-examination, the Court chose to accept the expert evidence on behalf of the Defendant; such a finding does not detract from the fact that the Claimant supplied scientific evidence. Such evidence would most certainly have come to the attention of the EMA, as decision–maker through the public hearings and during the written comment period. Accordingly, it is my view that in the instant Claim, the evidence suggests that the first stage has been passed for the precautionary principle to be triggered.

11. The second stage is the presence of scientific uncertainty. According to the learning in ***Telstra,*** the factor of uncertainty is a necessary precondition to the application of the precautionary principle. Certainty as to "*serious and irreversible environmental damage"* would require the application of preventative *rather* than precautionary measures. See Telstra paragraph 149.

12. In my view, the second stage has also been passed in this case. The fact of conflicting scientific opinions as to the effect of the project in itself implies uncertainty. Uncertainty also surrounds the accuracy of the air dispersion predictions. Dr. Vine, who testified on behalf of the Claimant, ***PURE*** stated that *"the predictions of airborne emission"* concentrations are so uncertain that there is a strong likelihood that actual concentrations would be found to be unmanageably deleterious to human health.

13. The project also envisages the production of the spent pot liner some eight (8) years from the start of the project. Dr. Murphy, who testified on behalf of the EMA conceded in his affidavit that the I" … *risks associated with transportation of SPL from the site to the ships needed further research …."*

14. There is no finalised contract for the final disposal of SPL and no finalised method of over-land transportation of the spent pot liner. Moreover the project envisages decommissioning a half century, hence, with no real predictions as to the effect of decommissioning on the environment. The fact that decommissioning may require a separate CEC does not resolve the uncertainty as to the scientific effects of the decommissioning when it takes place. These factors themselves import uncertainty, with those in favour of the project urging that it will be innocuous and those in the opposing camp insisting that the concomitant result would be both serious and irreversible environmental damage.

15. The burden therefore shifts and the developer, ***Alutrint***, is required to prove that there is no threat. The learning suggests, however, that this is a burden to be discharged not before the reviewing Court but before the decision – maker. See paragraph 154 of ***Telstra***[112]**.**

Moreover a failure on behalf of the developer to discharge the burden does not lead inexorably to a refusal of the CEC. The decision-maker must now assume that the threat is a reality and take it into account together with other factors such as social and economic factors. See paragraph 154 of ***Telstra***[113]**.**

16. This Court considered whether the decision-making process of the Defendant **/*EMA*** could be faulted. The decision-making process of the Defendant could be faulted if either or both of two situations are present. If the Claimant has proved on a balance of probabilities that the Defendant failed to apply the precautionary principle the Court would conclude that the ensuing decision was illegal.

17. Secondly, the decision-making process would fail for irrationality if the Defendant, notwithstanding an absence of evidence as to what in fact transpired before the ***EMA***, succeeds in proving that the result was so outrageous in its defiance of logic and accepted moral standards that no reasonable authority could have arrived at it. (per Lord Diplock in ***CCSU***[114]

18. There is no evidence before this Court to suggest that the ***EMA*** omitted to apply the precautionary principle in the process of deciding whether to grant a CEC. In order to prove that the decision was illegal on account of an omission to apply the precautionary principle, the Claimant ought to have produced or have sought the production of such records of the decision-maker which tended to prove that it failed to apply the precautionary principle.

19. Irrationality is more elusive. The Court may look at the final decision and find it so unreasonable that no reasonable decision-maker could have arrived at that decision. This finding however is by no means an exercise of the Court imposing its subjective view. The threshold is notoriously high. The decision must be "… *outrageous in its defiance of logic or acceptable moral standards ….*" See ***CCSU***[115]**.** In my view, in respect of the precautionary principle at least, the decision falls within the band of decisions that could be made by the reasonable decision-maker who employed the "*calculus which decision-makers are instructed to apply….*" and took into account all factors which were required to be considered, without giving overriding weight to the need for precaution. See ***Telstra***[116].

20. Accordingly this ground is resolved in favour of the Defendant.

Public Consultation and Defects in the EIA

21. In respect of the remaining two categories, I agree with Learned Senior Counsel, Mrs.Peake that the first two categories merge into each other and I venture to suggest that the reason for the merger is that one of the principal reasons for the preparation of the EIA is to alert the public to the effects of the activity on the environment. ***(See Prineas[117])***.

22. The requirement of public consultation in Trinidad and Tobago springs from s. 35 and s. 35(5) of the ***EM Act [(a)]*.**

23. By s.35 (4)[(a)], the ***EMA*** in considering the application of a developer for a CEC is empowered to request further information, including the preparation of an EIA.

24. As long as the EMA has commissioned the preparation of an EIA s.35 (5) is activated thus requiring the application for development to be submitted for public comment in accordance with s. 28 of the Act.

25. I agree with Learned Senior Counsel Mrs. Peake that s. 28[(a)] is a generic section. This section governs other activities for which the ***EM Act*** prescribes a process of exposing the activity to public scrutiny. I have diligently avoided the term public consultation because its exact meaning arises for my consideration in this matter.

26. Thus, s. 28[(a)] requires as the first wave of public exposure, that the Authority publishes a notice of the proposed action in the Gazette and in one daily newspaper of general circulation. No issue arises as to the first wave.

27. The Second wave of public exposure is prescribed by s. 28(b), which required the establishment and maintenance of the Administrative Record by the Authority. The administrative record is required to be made available to the public at more than one location.

28. In the Claims before me the EMA diligently complied with s. 28 (2) (b) on two occasions. The administrative record was made available to the public and the public was so notified by Legal Notices published in the Gazette on the 8th March 2006 and the 6th September, 2006. The first publication related to the EIA which comprised the EIS, the SIA and the ADM. The Second publication related to the Supplementary Report (See para 15 & 32 of the facts supra).

29. The Claimant complains, however, that further documents ought to have been placed on the administrative record, that is to say:
    - Review comments on the Supplementary Report;
    - The Addendum to the Supplementary Report;
    - The Human Health and Ecological Risk Assessment;
    - The Report on the Cumulative Impact Assessment.

    (See issue 4 of the Statement of Issues, *supra*)

30. Section 28(2) which addresses the content of the Administrative Record is set out in full above. The portion in respect of which issues arise in these claims is:

> *"The administrative record… shall include… copies of documents or other supporting materials which the Authority believes would assist the public in developing a reasonable understanding of those issues (major environmental issues…) … and a statement of the Authority's reasons for the proposed action…"*

31. The operative words in this section are "*which the authority believes…."* The legislation, therefore, confers discretionary power on the EMA. The very clear consequence of this is that the Authority's selection of documents to be placed on the Administrative Record,

cannot be reviewed on the ground of illegality and is reviewable only in so far as the Claimant can show that the Authority's decision would be flawed on ***Wednesbury*** grounds.

32. The third wave of public exposure as prescribed by s. 28(3) requires the EMA to receive written comments for at least thirty (30) days. In respect of this requirement, the Claimant complains about the brevity of the public comment period. Once again the decision of the ***EMA*** to receive written comments for any given number of days is reviewable on ***Wednesbury*** grounds as long as it is equal to or more than thirty (30) days.

33. The fourth wave empowers the ***EMA*** to hold a public hearing to receive verbal comments. This falls with the discretion of the ***EMA*** and is reviewable only on ***Wednesbury*** grounds. The ***EMA*** in fact held its own public meeting on the 27th May 2006.

34. The requirement of public exposure of the proposed development is entrenched by the requirement of s. 36, which empowers the ***EMA*** to issue the CEC. The decision to issue the CEC ought only to be made after the EMA has considered all relevant matters, including comments or representations made during the public comment period.

35. Public consultation is also prescribed by the CEC Rules which provides a timetable for the preparation of EIA. Within ten days of having received the application of the applicant/developer, the EMA is obliged to indicate whether an EIA is required.

36. Within 21 days thereafter, the EMA furnishes the applicant/developer with a draft Terms of Reference, which ushers in the first round of consultation which precedes the prescriptions of s. 28(2). This round must be conducted by the applicant/developer, itself.

37. Rule 5(2) of the ***CEC Rules*** directs the applicant to conduct consultations "*with relevant agencies, non-governmental organizations and other members of the public…"*. The form as well as the objects of these consultations have been left by the ***CEC Rules***[(b)] to the discretion of the applicant/developer. Learned Counsel, Dr. Ramlogan contends however that the Authority was obligated to supervise the consultation of the developer, an obligation which,

according to the submissions of Dr. Ramlogan, springs not from the express terms of the statute, but from its inherent, unspoken policy. (***See Padfield).***

38. The applicant /developer then returns to the ***EMA*** pursuant to Rule 5(2) of the ***CEC Rules***[(b)] with representations for modification to this draft TOR.

39. In the claims before me, the TOR was issued on 19th August, 2005. The TOR described itself as serving "……*as a guide for the conduct of the EIA* and *the preparation of the EIA Report..."* Over and above the stipulations of the ***EM Act*** [(a),] the TOR itself prescribed further public exposure of the proposed development. The TOR is itself a carefully prepared document impressive in the detailed guidance which it provides. In particular, the TOR provided meticulous guidelines for the conduct of public consultation meetings including provisions as to "location", advertising and a meeting format.

40. At page 15, of the TOR, the EMA provided guidelines as to *Stakeholder consultation and Participation.* At page 16, the Authority directed that there should be a minimum of two public meetings with stakeholder groups. The Authority specified:

> "*At least one meeting should be conducted at the start of the EIA study to sensitize stakeholders to the projects and gather stakeholder concerns, ideas and perceptions".*

41. According to the TOR, the second meeting should be held at the end of "*the data collection phase… to inform stakeholders of findings and proposed management plans…"*

42. The Authority prescribed additional methods by which the process could be facilitated including, for example, the use of "*questionnaires and surveys…"* These were however expressed to be "….*in addition to public meetings…."*

43. In the claims before me, it is undisputed that two public meetings were held. They were held respectively on the 9th November, 2005 and 14th November, 2005. Learned Senior Counsel

for both the Defendant and for the Interested Party have conceded that there had been no public consultation at the start of the EIA study.

44. Learned Senior Counsel, Mr. Mendes, while conceding that there had been no public meetings at the start of the EIA process, argued that there had been substantial compliance. Relying on closed door meetings as well as interviews with residents of neighbouring villages. Learned Senior argued that it would not be inaccurate to say that there was a meeting although fragmented.

45. Learned Senior Counsel, Mrs. Peake relied as well on the doctrine of substantial compliance as expounded in ***BACONGO # 2***[118]**.**

46. Learned Senior, Mrs. Peake painstakingly took the Court through the evidence of consultations in fact held by the developer, including meetings with Ministries, Focus Groups and 227 residents. Mrs. Peake argued that consultations were meaningful.

47. There is no definition of consultation in the ***EM Act*** [(a).] The exact and complete understanding of public consultation is achieved after study of the judicial pronouncement on the consultation process.

48. The leading authority on the elements of fair consultation in administrative law is ***R v North and East Devon Health Authority Coughlan***[119]***,*** where Lord Woolf cited ***R v Brent LBC Ex p Gunning***[120]**.** The very clear principles, known as the ***Gunning*** Principles, are in other words:

- as long as consultations are embarked upon, they must be carried out properly;
- this is unaffected by whether or not the requirement for consultation is statutory;
- proper consultations must be undertaken when proposals are at a formative stage;
- the persons who are being consulted must be provided with adequate reasons so as to facilitate intelligent consideration on their part and an intelligent response;
- The persons who are being consulted must be given adequate time.

49. Lord Woolf in ***Couglan*** defined as well the boundaries of proper consultation, noting that consultation is not litigation. Lord Woolf emphasised that those who are being consulted are entitled, in essence, to know enough to enable them to make an intelligent response.

50. Subsequent authorities, all set out above have implemented the ***Coughan/Sedley*** principles. Of acute importance are the judicial pronouncements which had been in applications for judicial review of decisions granting environmental clearance. Therefore ***Justice Sykes*** in the ***Jamaican case***[121] defined further boundaries to the right to consultation, noting that flaws in the consultation process do not necessarily imply that the decision would be quashed; that the decision is a qualitative one and that the Court ought to examine whether the flaws are serious enough to deprive the process of efficacy.

51. This Court is however not only to be guided, but is indeed bound by the pronouncement of their Lordships in ***FFOS v EMA (P.C)***[122] **.** Pace Learned Senior Mrs. Peake, the words of ***Lord Walker*** in ***FFOS v EMA (P.C.)***[123]**,** have had the effect of importing the ***Berkley Principle*** directly into our local jurisprudence. Notwithstanding the differences in the respective Legislative regimes, following ***FFOS v EMA (P.C.)***[124]**,** this Court is bound to regard an inclusive democratic procedure, conferring on the public an opportunity to express its opinion on environmental issues as a *"directly enforceable right"*.

52. Lord ***Walker FFOS v EMA (P.C.)***[125] continued that the doctrine of substantial compliance should be treated with "*considerable caution in environmental cases of this sort"*.

<u>Applying the law on Public Consultation</u>

53. In so far as the grounds have been reduced to issues, I will consider the issues though not necessarily in the order in which they appear in the Claimant's written statement.

Issue No. 1

54. The Court considered whether the Authority breached its duty of consultation pursuant to Rules 5(2) and 5(3) of the **CEC Rules**[(b)] . A very plain reading of rules 5(2) and (3) suggest that rules 5(2) and 5(3) impose no obligation on the ***EMA*** to conduct consultations. The Rules impose an obligation on the developer, whose actions are not reviewable before me.

Issue No. 2

55. The second issue focuses the search lights on the ***EMA***. The Court considered whether, in the preparation of the final TOR there had been proper input from stakeholders, and if not, whether this constituted a contravention of Rule 5(3).

56. The consultation undertaken by the developer towards the preparation of the final TOR consisted of the full page advertisement, the provision of packages to thirty-five (35) stakeholders and forwarding flyers to residents of the surrounding communities. The rule places the method and the extent of pre-TOR consultation within the discretion of the developer. The EMA's actions become relevant in so far as it could be established that the decision of the EMA to accept the consultations was so unreasonable that no reasonable Authority would have accepted them. Recalling that the threshold for establishing irrationality is notoriously high, in my view the Authority could not be so faulted. The pre-TOR consultation was extensive targeting government ministries, non-governmental organizations and individuals (through flyers). These consultations may not have been perfect. According to judicial precedent, they were not required to be perfect; however, they are not so defective so as to tarnish the Authority with irrationality for having accepted them.

57. Another aspect of developer consultation has been queried by the Claimant that is to say, the admitted failure of the developer to conduct consultations at the formative stage of the EIA.

While conceding that in fact there had been a failure on the part of the developer to comply with this very clear guideline, learned Senior Counsel for both the ***EMA*** and the Interested Party have sought to minimise the admitted flaw.

58. In my view, the stipulation in the TOR for public consultation prior to the preparation of the EIA is reminiscent of the ***Sedly*** principle that consultations must be taken when the project is at a formative stage. Moreover, it is no answer to contend that this was not a requirement of statute but of the TOR which is merely a guide. According to the ***Sedly*** principles consultation, as long as it is undertaken, must be carried out properly.

59. On the face of the facts therefore this aspect of the consultation process was flawed.

60. The next step would be to consider whether this flaw in the consultation process means that the decision should be quashed. According to Justice ***Sykes*** in the ***Jamaican Case***[126], the Court is required to consider the :

> *"seriousness of the flaw and the impact that it had or might have had on the consultation process…"*

See page 40 of the judgment of Justice Sykes. Justice Sykes urged further, that the Court is required to make a "*qualitative decision*…" The Court is required to examine "…*what took place and make a judgment on whether those flaws were serious enough to deprive the process of efficacy…"*

61. In assessing whether the admitted flaw deprived the process of efficacy, the flaw may be tested by considering what difference would have resulted had the developer complied with this requirement of the TOR. In that hypothetical situation, the developer would have received public comments prior to embarking on the preparation of the EIA. This in my view was substantially achieved by the use of questionnaires and the smaller cottage meetings. The failure of the developer to hold the public consultation prior to preparing the TOR in itself does not deprive the process of efficacy.

62. However, the Claimants have also complained of the proximity of the first and the second public consultation meetings, the first having been held on the 9th November, 2005 and the Second on the 14th November, 2005.

63. The compound effect of the developer's failure to hold the meeting at the start of the EIA process and the proximity of the two meetings in my view would have operated to escape and therefore to frustrate the provisions of the TOR, which required the first meeting at an early stage to "*sensitize stakeholders to the project and gather stakeholders concerns, ideas and perceptions*…." Having done so, time must be allotted to allow stakeholder concerns to inform the data collection phase, after which the developer is required to return to the stakeholders to provide information on its findings and proposed management plans. The time was not allowed. It may very well be the case that strict compliance would have yielded no different result. However, in this regard the TOR places the stakeholder centre stage. The stakeholder must be sensitized; the developer must take into account stakeholder concerns and then return, reporting on its findings and proposed management plans. In my view, this was no minor flaw. The omission to comply with this aspect of the TOR deprived the developer of the time envisaged to take stakeholder views into account. This was a flaw which diminished the quality of public consultation.

64. This Court is obligated to implement the caveat of Lord Walker in ***FFOS v. EMA*** that the Court should approach the doctrine of substantial compliance with caution, when public consultations are affected. Even if it could be argued that there may have been substantial compliance, in my view, it would have been procedurally irregular for the ***EMA*** to issue the CEC on the basis of flawed public consultation.

Issue no. 3

65. A number of issues targeted the brevity of different parts of the consultation process. At the third issue of his submissions, Learned Senior contended that the Defendant did not allow

sufficient time for meaningful consultation. The Claimants contend that the two public comment periods were too short. No ground of illegality could be established because public comment periods were within the minimum time stipulated by s. 28(3) of the ***EM Act***[(b)]. While accepting that the issues canvassed by the proposed project were both deep and numerous, the time allotted in this case cannot be regarded as unreasonable, having regard to the timetable set by the ***Rules***[(b)]. The Authority finds itself in this unenviable predicament of having to balance environmental with economic considerations, or more specifically having to balance the need of the public for thorough consultation with the developer's need to press on with the project. In my view the EMA cannot be faulted for complying with the statutory timetable. The actions of the Authority is in stark contrast with the defendant in the ***Jamaican Case***[127], where only eight (8) days including a weekend was allowed for the claimant to study technical material.

Issue No. 4

66. As his fourth issue, Learned Counsel for ***PURE*** argued that the Defendant in granting the CEC acted unfairly in permitting only a selection of invitees to participate in the consultation.

67. The advertisement in respect of which the Claimant has advanced this ground was dated 26th May 2006, and was published pursuant to the EMA's power at s 28(3) [(a)], that is, to conduct a public meeting of its own. In my view there is nothing in the advertisement to prevent participation by anyone outside of La Brea. In my view therefore, this argument is entirely unfounded and the issue must be resolved in favour of the Defendant.

Issue no. 5

68. By their fifth issue, the Claimant raised for the Court's consideration the alleged failure of the Defendant to supervise the developer's consultations with the public. Such failure, according to the Claimant, rendered the grant of the CEC ultra vires s. 16 of the ***EM Act*****,** in breach of the ***NEP*** and in disregard for material considerations.

69. It is accepted that there is no express provision which requires the Defendant to supervise the public consultations which was being held by the Developer.

70. I agree with Learned Counsel for the Claimant ***PURE***. The net effect of s. 31, the ***NEP*** and s. 35 of the ***EM Act*** is to invest in the stakeholder the right to participate in the decision making process through the process of public consultations. I agree with Learned Senior Mrs. Peake that it is extravagant to describe the decision-making process as tri-partite. Ultimately the decision to grant the CEC is invested by Parliament in the Authority. However, the public is entitled to participate through the operation of s. 28 [(a),] which allows them to make written comments and through the public consultations which allow them to make verbal comments. Moreover, the right of the public is protected by s. 36, which confers on the Authority the power to decide whether or not to grant the CEC after it has considered "… *all relevant matters, including the comments or representations made during the public comment period…"*.

71. In my view however, it is impossible to read into the legislation an obligation on the part of the Authority to micro-manage the developer's public consultations.

72. The structure of the ***CEC Rules*** suggest that there is an obligation on the part of the ***EMA*** to macro-manage the consultations. The ***EMA*** dispatches the developer to conduct its investigations and then receives and considers its report and decides whether to require the developer to supplement the exercise or to re-do it altogether.

73. This pattern can be discerned for example, in the preparation of the TOR. The ***EMA*** consults the developer, provides it with the draft TOR and dispatches it to conduct consultations in accordance with Rule 5 (2) of the ***CEC Rules***[(b)]. The developer upon its return to the Authority may seek modification to the TOR. The ***EMA*** is then empowered to finalize the TOR. Prior to doing so, the ***EMA*** is required to consider "*written representations"*. In this way, the ***CEC Rules***[(b)] provide for the supervision of the exercise by the Authority.

74. Similarly, the developer is dispatched by the Authority to conduct the EIA. The EMA's supervision begins with the guide provided in the TOR. In the instant matter, the final TOR is remarkable for its detail, particularly in respect of the conduct of public consultations and stakeholder participation. It reflects careful thought and even knowledge of the ***Coughan***[128] principles.

75. Upon completion of the EIA exercise the developer returns to the EMA, whose supervisory role is clear in its power conferred by Rule 6(2), to send the developer back. In fact in the instant matter, the ***EMA*** sent the developer back on at least three occasions for the preparation of the Supplementary Report, the preparation of the HHERA; the preparation of the Addendum.

76. In my view, therefore, the ***EMA*** acquitted itself well in its supervisory role and this issue must be resolved in favour of the Defendant.

Issue no. 2

77. The second issue canvassed on behalf of ***PURE*** was:

> "……*whether the Defendant in granting the CEC acted ultra vires s.28(2) of the* ***EM Act,*** *in that it failed to include within the Administrative Record certain key documents….."*

The documents alleged to have been omitted are:

- Review and Assessment Report
- Review Comments on the Supplementary Report
- The Addendum
- The Human health and Ecology Report (The HHERA)
- The Cumulative Impact Assessment

78. There appears to be some doubt as to whether these documents had in fact been placed on the

Administrative Record in accordance with s. 28(2). Thus, Learned Attorneys for the Interested Party at page 24 of their Written Submission suggest that all documents except the CIA had been placed on the Administrative Record.

79. An examination of the affidavit of Dr. Mc Intosh suggests otherwise. The Review Assessment Report and the HHERA were placed on the National Register, in accordance with Rule 8 of the ***CEC Rules***[(b)]**.**

80. It is doubtful whether the addendum was ever placed on the Administrative Record. Dr. McIntosh does not so depose. It is, however, certain that the CIA had never been placed on either the Administrative Record or the National Register.

81. In any event s. 28(2) requires the ***EMA*** to place on the Administrative Record such document as it "*believes"* would assist the public. The legislature has invested discretionary power in the Authority as to the documents which ought to be placed on the Administrative record. In my view the exercise of this discretion is reviewable only on ***Wednesbury*** grounds, which do not form part of the grounds on which this issue was raised. Accordingly the second issue must be resolved in favour of the Defendant.

Issue No. 8

82. The Last issue identified by ***PURE*** is to public consultations was:

> "*Whether the Defendant in granting the CEC acted ultra vires s. 28(2)… and/or in breach of the legitimate expectation of affected persons…. by deferring the determination of key issues likely to have implications on the environment and/or human health...."*

83. This issue relates to Ground 9 of the Claimant's Grounds and straddles issues of both public consultation and defect in the EIA. Ground 9 provides:

"*…The Intended Defendant, in deferring until the post CEC issuance stage, certain major environmental issues… affectively removed the ability of the public to participate in those decisions which properly should form part of the pre –CEC issuance process and acted ultra vires s. 28 (2).*

84. The key decisions related to those identified as conditions in the CEC. The Claimant contends that this deferral was both illegal and irrational.

85. At para 55 of the Notice of Motion, the Ground continues:

"*Notwithstanding the importance of the above matters, they formed no part of any process of public consultation. In the circumstances, the Intended Defendant acted ultra vires its duties under s. 28 (2) and (3)"….*

86. Section 36 (1) of the ***EM Act*** specifically empowers the Authority to grant a CEC "… *subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures…"*The content of conditions placed on the CEC are not required by the ***EM Act*** to be subjected to public scrutiny, in the same way as the pre-CEC environmental issues. It therefore follows that by identifying conditions to the grant of the CEC, the Authority cannot be faulted for illegality. It is also difficult to accept that the Claimant had a legitimate expectation of consultation. Legitimate expectation arises in the absence of a right (***See O'Reilly v. Mackman***[129]) and arises where there has been a regular practice, or an express promise emanating from the decision-maker that a specified procedure would be followed (***See CCSU per Lord Diplock***[130]). Neither element is present in this case, and therefore in respect of both illegality and legitimate expectation, the issue must be resolved in favour of the Defendant.

Defects in the EIA

87. The EIA is an information-gathering process. See ***Bell and Mc Gillivray Environmental Law (6th edition)***. It is a means to decision making and is not a decision-making end in itself. (***Prineas***)[131]. Its objective is to alert the decision-maker and members of the public to the effect of the activity on the environment.

88. When the Authority required the developer to conduct an environmental assessment both the developer and the Authority are governed by the provisions of the ***CEC Rules*** as to the contents of the EIA, the manner of its preparation and the timeline within which it should be prepared.

89. Rule 10 in particular provides standards for preparation of the EIA. In the claims before me, great emphasis has been placed on Rule 10 (e). Rule 10 (e) itemises a number of components of the environment in respect of which an activity is likely to have an effect, and which must be identified and assessed in the EIA. The timeline components are adequately rehearsed earlier in this judgement.

90. A number of authorities have addressed the issue of defects in the EIA and whether defects ought to invalidate the clearance certificates or planning permission granted on the basis of defective EIA.

91. The decision of the highest authority is **BACONGO #2**[132] from which the following principles may be extracted:

- The question of whether or not an EIA complies with the statute is a decision to be made by the Authority reviewable according to principles of administrative law (paragraph 68). In particular on the ground of irrationality or that the decision frustrated the purpose of the Act.
- In considering the adequacy of the EIA, the Court does not employ a standard of perfection.
- The EIS should be <u>comprehensive</u> in its treatment of the subject matter, <u>objective</u> in its approach and alert the decision-maker and the public as to effects on the

environment (***Prineas***). To this list is added the quality of being substantial see ***FFOS v. ALNG***[133] per Stollmeyer J.

- The EIA process in Trinidad and Tobago as in Belize is iterative and is not the last opportunity of the Authority to exercise control.

92. The Court found the decision of Justice Stollmeyer in ***FFOS v ALNG***[134] to be very useful. The following principles in respect of judicial review of cumulative impact assessment, may be extracted from ***FFOS v ALNG***[135]***:***

- The Court must ensure, by scrutinising the record that the agency took a "hard look" at all relevant circumstances.
- Once the agency has taken the hard look, the Court cannot impose its views.

93. The Court derived assistance from the block of English cases. In spite of the difference in the respective regimes, the following guidelines emerge from the English cases:

- There is no requirement of perfection in the preparation of an EIS. The Court will exercise its power of review in the rare case where an environmental statement is so deficient that is could not reasonably be described as an environmental statement. ***(See Blewett***[136]***)***

94. The Court will strike down environmental clearance if the Court can see clear differences in the evidence before it. See ***Viridor***[137]***.*** Such a situation is to be distinguished from cases where it is possible for the Court to see <u>some</u> material on which the decision-maker could have relied on to reach a decision as to all relevant matters (***Viridor)***[138] **.**

CONDITIONS

95. A major ground of challenge in all three claims related to the issue of the CEC subject to stated conditions

96. By the 8th issue identified by the Claimant, ***PURE***, the grant of the CEC subject to mitigation measures and monitoring plans is construed as a deferral of key issues likely to have implications on the environment.

97. It is a matter of record in this claim that the CEC was granted on the 2nd day of April, 2007, subject to nine (9) general conditions and a host of mitigation measures including the preparation of :

- Buffer Zone Management and Monitoring Plan
- Medical Monitoring Plan
- Source Emissions Testing Plan
- Ambient Air Quality Monitoring Plan
- Spent Pot Lining Management Plan
- Decommissioning Plan

98. It is accepted by the Claimants that the EMA was invested by s. 36 to issue the CEC subject to conditions. It follows very clearly then, that in themselves, conditions and their presence in the CEC do not vitiate the CEC.

99. The Court is required however to consider whether the information sought by the conditions ought by law to have been included in the EIA thereby, subjecting such information to public scrutiny by the machinery of s. 28 of the ***EM Act***[(a)]. The issue and the specter of a defective EIA therefore resolve themselves ultimately into one of flawed public consultation.

100. Mitigation measures are required by Rule 10(h), of the ***CEC Rules***[(b)] .The identification of potential hazards (such as SPL) and an assessment of the level of risk that may be caused is a

requirement of Rule 10(1). Rule 10 is however, governed by the word *"may*". It is accepted on both sides on the strength of the highest authority that the Court should avoid the terms "*mandatory*" and "*directory*" and rather seek the intention of the legislator. In my view, Rule 10 creates a flexible pattern, which is capable of being adjusted by the Authority through the machinery of the TOR to meet the needs of the project in question. Accordingly, the mere fact that an EIA falls short of Rule 10 does not in itself render it and the consequent CEC invalid.

101. Similarly, every falling short of the TOR does not necessarily imply a failed EIA and CEC. The TOR describes itself as a "*guide"*. It is not a mere guide. One of the earliest statements of the Authority to the applicant /developer in the former's letter of 13th February, 2006, was that the acceptability of the submission would be based on "*….adherence to the TOR…"* Whether or not the EIA adhered to the TOR is principally a matter for the Authority, when it is engaged in discharging its statutory duty pursuant to s.36 of the ***EM Act,*** that is to say its duty of "*considering all relevant matters"*. It will be for the Authority to decide on the gravity of the shortfall. The resulting decision will be reviewable only on the ground that the Authority acted irrationally or in such a way as to frustrate the purpose which an EIA is intended to serve. In support, the court relies on the words of Lord Hoffman in ***BACONGO 2***[139] at paragraph [68].

102. It is therefore necessary to consider each of the impugned conditions and determine firstly whether they sought environmental information that ought properly to be included in the EIA. Assuming that the first question is answered in the affirmative, whether the decision of the Authority to accept the EIA without such information was irrational or had the effect to frustrate the purpose which an EIA is intended to serve.

103. The court has considered each of the cited conditions along with the expert testimony of Dr. McIntosh for the Authority. At paragraph 143, Dr. McIntosh stated in his characteristic erudite and persuasive manner that:

"*…the various plans...are intended to provide mechanisms whereby the impact on the environment can be managed, monitored and measured to ensure that the plant is indeed operating within acceptable standards…"*

104. Carefully reading each condition, the court has found it difficult to disagree with the assessment of Dr. McIntosh, finding such conditions to have fallen within the broad band of decision-making power held by the Authority. All the conditions that is with the exception of that relating to the spent pot lining.

105. The CEC at page 21 prescribed the following "*management plan*" for SPL:

"The applicant shall develop and implement a SPL management plan to minimize the risk of contamination to the environment. The plan shall address the life cycle of the pot liner from the beginning of the electrolysis process, conduct of pot liner repairs, crushing of SPL, storage of SPL, transportation to the port and shipping and disposal. The plan shall address potential contamination pathways including but not limited to, fugitive particular emissions and decontamination of employees."

106. The plan was required to be submitted to the EMA, who would make a decision within twenty working days. Site activities would not be able to proceed until outstanding issues are resolved.

107. The hazardous nature of SPL was mentioned in the EIA. See para 8. 5, 2.3.3:

"SPL is the primary hazardous waste generated by aluminium smelters, by virtue of its fluoride and cyanide content and the possibility for emitting noxious gases upon contact with it"

In the EIA five methods of SPL disposal were identified. The Authority in its Review Assessment Report found some of the options to have been "*unrealistic"*. The Authority required the applicant/developer to provide a "*definitive and viable proposal for the disposal of SPL"*

108. The applicant/developer responded in its Supplementary Report by stating that it maintained that its option of first recourse was off island disposal at a licensed hazardous waste facility in the U.S. Further information is supplied in Annex II and Appendix III of the Supplementary Report. Annex II provided a description of the container of which would be used to transport SPL by rail or truck. Appendix III provided a photograph. This was essentially a description of the vehicle that would be used for over-land transport of the SPL. One does not have to be an "*academy of science*" as suggested by Stollmeyer J in ***FFOS v ALNG***[140]***,*** to observe the differences between Appendix III of the Supplementary Report and the SPL Management Plan prescribed at p.21 of the CEC. The latter requires a plan to minimize the risk of contamination to the environment. The plan is required to address the entire life cycle of SPL and not just the container in which it would be transported to the port. Moreover, Dr. Murphy for the EMA conceded that SPL risks needed further research.

109. The Court reminds itself of the caveat issued by Justice Stollmeyer that the Court is not an academy of science. Moreover, the Court reminds itself of the submission of learned Senior, Mr. Martineau, that this Court is required to exercise deference to specialist decision makers such as the EMA. However, it appears to me that having regard to the hazardous nature of the SPL and its potential to cause harm to human health. It was outrageous of the decision-maker to leave such issues unresolved before the CEC was granted. A reasonable decision-maker would have insisted that the information sought by conditions would have been settled before the Certificate was granted.

110. The environmental control is iterative and the EMA continues to exercise control even when the Certificate is granted. The very obvious difference is that as long as the CEC is granted the door is forever shut to the public input, which must be factored in when the EMA decides to grant or withhold the CEC under s. 36. The problem resolves itself to one of public consultation, in respect of which I am bound by the words of Lord Walker in ***FFOS v. EMA***[141] to exercise ***caution***.

Issue #10 Cumulative Impact

111. The Claimant contends that the Authority in granting the CEC failed to have regard for the cumulative impact of the three constituent part of the Smelter project, in respect of which three different applications had been made.

112. Learned Counsel contends that this alleged failure constituted a breach of Rule 10(e) and a failure to take account of material considerations.

113. In respect of the obligations of the Authority to consider cumulative effects, the Court is guided by the judgment of Justice Stollmeyer in ***FFOS V ALNG[142],*** from which the following principles are to be extracted:

(i) The requirement for the EMA to consider cumulative effects is provided by Rule 10, without any specific guidelines.

(ii) The Court is required to assess whether the Authority took a hard look at all relevant circumstances.

(iii) The Authority's hard look must be supported by substantial evidence.

(iv) The Court ought not to impose its own views and ought to set aside the decision only if the Authority's decision is not supported by substantial evidence.

(v) The Court's mandate is to verify two things:

- procedural compliance
- substantive compliance

(vi) Compliance by the Authority is judge by the level of detail and the decision-making process must exhibit transparency.

114. The Court considered whether the ***EMA*** satisfied the "*hard look doctrine"*. On the 30th January, 2007, the ***EMA*** wrote to Alutrint forwarding its "*Interim Addendum Review Report"*. At para 3 of the Interim Addendum Review Report:

"*The EMA has suggested in the Review and Assessment Report dated May 26th 2006, and the Review Comments on the Supplementary Report dated October 17th, 2006, that the cumulative effects of the proposed port and the proposed Aluminium Smelter on the environment be addressed. Alutrint indicated regarding the cumulative impacts… that there will be no significant incremental effects. Given Acutrint's position… this statement must be substantiated"*.

115. Alutrint's response was dated the 28th March 2007. They addressed:

- the definition of similar emissions;
- the level and probability of similar emissions;
- geographical proximity and meteorological characteristics;
- assessment of possibility of significant cumulative impact.

116. Alutrint concluded:

"*…. there will be no significant incremental environmental impact by the Port and Conveyor Facility that will affect the cumulative impact assessment findings from the Alutrint CEC Application"*.

The March 28th, 2007, letter which has been occasionally referred to as the Cumulative Impact Assessment addressed only the impact between the Complex and the Port.

117. Immediately following this letter the CEC was granted. The only evidence of a "*hard look*" was contained at paragraph 153 of the affidavit of Dr. Mike Murphy, principal of Messrs. Jacques Whitford. Dr. Murphy testified that he conducted a review of the March 28th, 2007, report. Although it is unclear whether this was done prior to the grant of the CEC, it is highly improbable that the EMA could have commissioned a peer review by Jacques Whitford obtained characteristic insightful and lucid comments of Jacques Whitford and prepare the complete 27 page CEC within the five days separating 28th March, 2007 and 2nd April, 2007.

118. In my view there was no evidence, transparent or otherwise to prove the hard look on the part of the EMA of the cumulative impact of the three parts of the project.

119. For no apparent reason the March 28th report was shrouded in secrecy. Not only did it escape the Administrative Record, it was never placed on the National Register.

120. It seems that it is no answer to say that the Authority had no time to place it in the public domain. The Authority had on two former occasions sent the developer back. It seem that in respect of a factor as important as cumulative impact which could have far reaching effects on human health and safety the Authority could have on one last occasion exercised the meticulous care of which it had taken throughout the preceding two years.

Alternative Remedy

121. The existence of an alternative remedy is a discretionary bar to the grant of relief. Where such an alternative exists, the Court may exercise its discretion to refuse relief. The existence of the discretionary bar does not denude the Court of jurisdiction. See ***Harricrete***[143] page 21 of 38 of the judgment of Myers J.

122. Where there is an alternative remedy the Court must consider whether exceptional circumstances exist. Justice Myers expressed the view that the Claimant had to show something more and further broke it down into (i) abuse of power and (ii) grave circumstances disturbing the conscience of the Court.

123. Justice Myers, also expressed the view that the decision had to made on a case by case basis. In my view, the instant case falls into a category of its own, where errors on the part of the defendant can have far reaching consequences for the health and safety of the national population. The Court does not have to be an academy of science to make an observation of this is kind. Where the Court has gone through the exercise of the review and found the decision reviewable, it would seem to be unconscionable to turn the Claimant away,

notwithstanding a finding that the decision was flawed. The Court therefore exercises its discretion against upholding the discretionary bar.

124. Accordingly, it is my view and I hold that the decision of the defendant, ***EMA*** procedurally irregular, irrational and made without regard to a relevant consideration, that is to say, the consideration of the cumulative impact of the three related projects: The Power Plant, the Aluminium Complex and the Port Facility.

125. The decision is hereby quashed and remitted for the consideration of the defendant.

Orders:

(i) An Order of certiorari is issued quashing the decision of the EMA to issue a Certificate of Environmental Clearance on the 2nd April 2007.

(ii) The decision is remitted for the further consideration of the Authority.

Dated the 16th day of June 2009.

Mira Dean-Armorer
Judge

Judicial Research Assistant - Renee Mc Lean
Secretaries: Emily Yearwood
Lisa Charles-Baptiste

GLOSSARY AND LIST OF ABBREVIATIONS

ADM	Air Dispersion Modeling Report
CEC	Certificate of Environmental Clearance
CIA	Cumulative Impact Assessment
CO	Carbon Monoxide
CO2	Carbon Dioxide
EIA	Environmental Impact Assessment
EMA	Environmental Management Authority
HF	Hydrogen Fluoride
HHERA	Human Health and Ecological Risk Assessment
NEC	National Energy Corporation
NEP	National Environmental Policy
NO	Nitric Oxide
PAH	Polyaromatic Hydrocarbons
PURE	People United Respecting the Environment
RAG	Rights Action Group
SIA	Social Impact Assessment
SO2	Sulphur Dioxide
SPL	Spent Pot Lining
SRTM	Shuttle Radar Topography Mission
TOR	Terms of Reference
USEPA	United States Environmental Protection Agency
WHO	World Health Organisation

TABLE OF LEGISLATION

(a) **Environmental Management Act, Ch.35:05**

(b) ***Certificate of Environmental Clearance Rules***

(c) ***Certificate of Environmental Clearance Rules (Fees and Charges) Regulations***

(d) ***Judicial Review Act, No. 60 of 2000***

Endnotes

[1] Northern Jamaica Conservation Association v The Natural Resources Conservation Authority and the National Environmental Planning Agency HCV 3002 of 2005.
[2] Talisman (Trinidad) Petroleum Limited v EMA No. EA 3 of 2002
[3] R v Environmental Agency, ex p Edwards [2008] UKHL 22
[4] Saskatchewan Action Foundation for the Environment v Saskatchewan (Minister of Environment and Public Safety) (1992) 97 Sask. 135
[5] R v Brent LBC, ex p Gunning (1986) 84 LGR 168
[6] *Ibid.*
[7] *Supra*, Note 1
[8] Earthlife Africa v Director General of Environmental Affairs and Tourism [2005] ZAWCH 7
[9] *Supra,* Note 3
[10] Padfield v Ministry of Agriculture, Fisheries and Food [1968] AC 997
[11] Shiu Wing Steel Limited v Director of Environmental Protection and Airports Authority of Hong Kong, Civil Appeal No. 350 of 2003 (Hong Kong)
[12] Bentley v BGP Properties Ltd. [2006] NSWLEC 34
[13] R v Rochdale Metropolitan Borough Council, ex. p. Tew [2000] Env. LR 1
[14] R v Cornwall County Council, ex. p. Hardy [2001] Env. LR 473
[15] Hereford Wastewatchers Ltd. v Hereford Council [2005] EWHC 191
[16] Belize Alliance of Conservation Non-Governmental Organisation v Department of the Environment and Belize Electricity Company Ltd. [2004] 64 WIR 68
[17] R v North and East Devon Health Authority ex. p. Coughlan [2001] Q.B. 213
[18] *Supra,* Note 3
[19] *Supra,* Note 16
[20] *Supra,* Note 17
[21] Fishermen and Friends of the Sea v EMA (P.C.) [2005] 66 WIR 358
[22] R (on the application of Greenpeace Ltd.) v Secretary for Trade and Industry [2007] EWHC 311
[23] *Supra,* Note 8
[24] *Supra,* Note 1
[25] *Supra,* Note 1
[26] *Supra,* Note 16
[27] Prineas v Forestry Commission NSW [1983] 49 LGERA 402
[28] Telstra Corporation Ltd. v Hornsby Shire Council (2006) NSWLEC 133
[29] Greenpeace Australia v Redbank Power Company [1994] 86 LGERA 143
[30] *Supra,* Note 14
[31] *Supra,* Note 13
[32] *Supra,* Note 16
[33] *Supra,* Note 14
[34] Re W (an infant) [1971] AC 682
[35] *Supra,* Note 16
[36] *Supra,* Note 16
[37] *Supra,* Note 3
[38] Berkley v Secretary of State for the Environment [2000] 3 All ER 897
[39] *Supra,* Note 21 at p. 372
[40] *Supra,* Note 13
[41] *Supra,* Note13
[42] *Supra,* Note 21
[43] Inco Europe Ltd. V First Choice Distribution [2000] 3 All ER 897
[44] *Ibid*
[45] Herbert Charles v Judicial and Legal Service Commission, P.C. Appeal No. 26 of 2001

[46] Gillette Marina Ltd. V Port Authority of Trinidad and Tobago HCS 1747 of 2002
[47] *Supra* Note 16
[48] *Supra* Note 16
[49] Bow Valley naturalist Society v Minister of Canadian Heritage [2001] 2 F.C. 461 (C.A.)
[50] *Supra,* Note 16
[51] *Supra,* Note 16
[52] Chandresh Sharma v Dr. Lenny Saith and Ors. HCA No. 991 of 2005
[53] Dougnath Rajkumar v Kenneth Lalla and Ors. P.C. Appeal No. 1 of 2001
[54] Charles Matthew v The State P.C. Appeal No. 12 of 2004
[55] Director of Mineral Development, Gauteng Region and Ors. v Save the Vaal Environment and Ors. (1999) ZASCA 9
[56] Gouriet and Ors. v H.M.A.G. and Post Office Engineering Union and Ors. [1977] 3 WLR 300
[57] Sutcliffe et al v Minister of the Environment 242 D.L.R. 709
[58] Sherman McNicolls v The Judicial and Legal Service Commission, Civ. Appeal No. 27 of 2008
[59] Bow Valley Naturalists Society v Minister of Canadian Heritage [2001] 2 F.C. 461 at p. 494
[60] *Supra,* Note 16
[61] R v Epping and Harlow General Commissioners ex. p. Goldstraw [1983] 3 All ER 257 at p. 262 per Sir John Donaldson M.R.
[62] R v Chief Constable of Merseyside Police, ex. p. Calveley [1986] 2 WLR 144 at pp. 150 and 155
[63] R v Inland Revenue Commissioners ex. p. Preston [1985] AC 835 at p. 852
[64] Sharma v Brown-Antoine and Ors. [2007] 1 WLR 780 at para. 14
[65] R v Lambert London Borough Council ex. p. Crookes (1997) 29 HLR 28 at page 35
[66] Harricrete Limited v Anti-Dumping Authority HCA No. 1254 of 2000
[67] *Supra* Note 17 at paras 108 and 112
[68] *Supra,* Note 22 at paras. 62 and 63
[69] *Supra,* Note 21
[70] *Supra,* Note 21
[71] *Supra,* Note 16 at para. 68-73
[72] Sharma v Registrar of the Integrity Commission [2007] 1 WLR 2849
[73] *Supra,* Note 45
[74] *Supra,* Note 52
[75] *Supra,* Note 45
[76] *Supra,* Note 45
[77] *Supra,* Note 53
[78] *Supra,* Note 43
[79] *Supra,* Note 54
[80] *Supra,* Note 17
[81] R v Secretary of State for Social Services, ex. p. Association of Metropolitan Authorities [1986] 1 All ER 164
[82] *Supra,* Note 8
[83] R v Shropshire Health Authority and Ors. ex. p. Duffus [1990] COD 131
[84] *Supra,* Note 22
[85] *Supra,* Note 2
[86] Robertson v Methow Valley Citizens Council 490 US 332 (1989)
[87] *Supra,* Note 1
[88] The Grand Council of the Crees of Quebec v Attorney General Hdro-Quebec Energy Board [1994] SCR 159
[89] *Supra,* Note 21
[90] *Supra,* Note 16

[91] *Supra,* Note 27
[92] Fishermen and Friends of the Sea v EMA and ALNG CV 2148 of 2004
[93] *Supra,* Note 3
[94] R (Blewett) v Derbyshire CC [2003] EWHC 2775
[95] *Supra,* Note 13
[96] R v Rochdale Metropolitan Borough Council, ex p. Milne [2001] Env. LR 2230
[97] *Supra,* Note 14
[98] *Supra,* Note 15
[99] *Supra,* Note 94
[100] R (on the application of PPGII LTD.) v Dorset County Council and Viridor Waste Management Ltd. [2003] EWHC 1311
[101] *Supra,* Note 13
[102] *Supra,* Note 96
[103] *Supra,* Note 14
[104] *Supra,* Note 92
[105] *Supra,* Note 28
[106] *Supra,* Note 29
[107] Murrumbidgee Groundwater Preservation Association v Minister of Natural Resources [2004] NSWLEC 122
[108] J.R. Bentley v BGP Properties Pty Ltd. [2006] NSWLEC 34
[109] Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270
[110] *Supra,* Note 107
[111] *Supra,* Note 28 at para. 134
[112] *Supra,* Note 28
[113] *Supra,* Note 28
[114] CCSU v Minister for the Civil Service [1984] 3 All ER 935
[115] *Ibid*
[116] *Supra,* Note 28
[117] *Supra,* Note 27
[118] *Supra,* Note 16
[119] *Supra,* Note 17
[120] *Supra,* Note 5
[121] *Supra,* Note 1
[122] *Supra,* Note 21
[123] *Supra,* Note 21
[124] *Supra,* Note 21
[125] *Supra,* Note 21
[126] *Supra,* Note 1
[127] *Supra,* Note 1
[128] *Supra,* Note 17
[129] Oreilly v Mackman, [1983] 2 AC 237
[130] *Supra,* Note 114
[131] *Supra,* Note 27
[132] *Supra,* Note 16
[133] *Supra,* Note 92
[134] *Supra,* Note 92
[135] *Supra,* Note 92
[136] *Supra,* Note 94
[137] *Supra,* Note 100

[138] *Supra,* Note 100
[139] *Supra,* Note 16 at para. 68
[140] *Supra,* Note 92
[141] *Supra,* Note 21
[142] *Supra,* Note 92
[143] *Supra,* Note 66 at p. 21