**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV2017-04558

BETWEEN

**PRIMNATH GEELAL**
**RUPNARINE GEELAL**

**Claimants**

AND

**THE CHAIRMAN, ALDERMEN, COUNCILLORS AND ELECTORS OF THE REGION OF SAN JUAN/LAVENTILLE**

**Defendant**

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Friday 22 February, 2019**

**Appearances:**

**Mr. Ramesh Lawrence Maharaj S.C leads Mr. Kingsley Walesby and Ms. Vijaya Maharaj instructed by Ms. Odylyan Pierre, Attorneys at Law for the Claimants**

**Mr. John S. Jeremie S.C leads Mr. Kerwyn Garcia instructed by Ms. Raisa Caesar, Attorneys at Law for the Defendant**

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**JUDGMENT**

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**Introduction**

***"..in matters of planning control it is not so much the letter of the law which counts as the manner in which that law is going to be administered. The field of planning control is dappled with the overnight mushrooms of discretionary decision. How is this discretion being exercised at any given time? That is the question."[1]***

1. The San Juan/Laventille Regional Corporation[2] has signalled to the Geelals[3], that they are in breach of our planning laws[4]. The Geelals have built their home without obtaining the relevant statutory approvals required by these laws. Enforcement action against the Geelals is an immediate priority for the Regional Corporation. Enforcing the law means, among other things, that an entire third floor of Mr. Primnath Geelal's residence must be torn down. However, like with the exercise of any administrative discretion, the touchstone is fundamental fairness.

2. As a public law Court grapples with this question of the enforcement of planning laws, the message to the wider community about the observance of these laws should be clear: that while our planning laws must be observed, the discretionary powers of enforcement are to be exercised fundamentally fairly and with the observance of due process.

3. How does the rule of law flourish in creating a modern democracy, an orderly citizenry and just society? Does the rule of law gain its currency from "external constraint" or "inner inspiration"? Can modern regulators champion the rule of law through building consensus with the subjects of the rule of law? Is consent to and respect for the rule of law earned when decisions of the State are transparent, accountable and achieved through a process that is fundamentally fair? These are the much deeper issues that underlie this public law claim brought by the Geelals, against the Regional Corporation for taking enforcement action against them for alleged violations of our planning laws.

4. The Geelals complain that the decisions embodied in a Notice to Demolish and a Show

[1] **An Outline of Planning Law by Sir Desmond Heap 7th Edition, Preface vi-vii**
[2] The Defendant, also referred to as "The Regional Corporation"
[3] The Claimants, Primnath Geelal and Rupnarine Geelal
[4] Public Health Ordinance Chapter 12 No. 4, The Municipal Corporations Act Chapter 25:04 and the Town and Country Planning Act Chapter 35:01 collectively referred to as "the planning laws".

Cause Notice made in December 2017[5] by the Regional Corporation[6] are irrational, illegal and procedurally improper. The Geelals also complain that these decisions constitute a breach of their constitutional rights to the protection of the law, the right to the enjoyment of property and the right to equality of treatment. The Regional Corporation disagrees. They contend that the notices were properly issued within the jurisdiction of the relevant legislation, consistent with the Regional Corporation's statutory and common law powers, made for a legitimate purpose and breached no fundamental human rights guaranteed by the Constitution[7].

5. The main question raised in the Geelal's public law claim is whether the Regional Corporation as a planning authority fairly and rationally enforced our planning codes and regulations?

6. Enforcement of laws has notoriously plagued our nation. Philosophically, Professor Drayton observed the deeper problem of enforcement of laws in the Caribbean:

> **"..no incarceration, flogging or hanging can do the work of rooting the law in the spirit of the people. … Laws can only move from external constraint to inner inspiration, if they are grounded in justice and embody the personality of all citizens. …"**[8]

7. There may be deep socio-political reasons for non-compliance with the law as examined by Professor Drayton in his examination of true consent of a post-colonial society to a rule of law that was superimposed and not one which is an organic "Caribbean centric" legal system. Enforcement also poses unusual challenges for our regulators of planning laws in light of the development of unregulated and sporadic settlements, the by-product of our colonial past. While unregulated development can be seen as a scourge on a nation's progress, many communities may have already been developed around the haphazard erection of buildings, businesses and homes without reference to standards, building codes

[5] Notice to Demolish dated 6th December 2017 and Show Cause Notice dated 14th December 2017

[6] Issued pursuant to sections 36, 46 and 47 of the **Public Health Ordinance Chapter 12 No.4** and section 163 of the **Municipal Corporations Act Chapter 25:04**

[7] The Constitution of the Republic of Trinidad and Tobago Chap 1.01

[8] **Whose Constitution? Law, Justice and History in the Caribbean,** Sixth Distinguished Jurist Lecture 2016 by Professor Richard Drayton PhD FRHistS, page 27

or buildings regulations. It may be both a recipe for chaos as well as a reflection of a deeper underlying problem of our peoples' lack of consent to the rule of law. In this case which involves planning laws dating back to 1917, an era of "barracks" and "tenement yards", the challenge faced by planning authorities such as the Defendant is obtaining true consent from the public to regulate their buildings and homes in conformity to the planning laws.

8. Enforcement of building violations are no doubt a pressing and urgent matter. It appears from the Regional Corporation's evidence that steps are being taken against many persons who have unauthorised structures. While enforcement of the law is a priority, the enforcement process adopted by the Regional Corporation must comport to the basic principles of public law, the familiar tripartite categorisation of Lord Diplock of rationality, legality and procedural propriety[9], as well as due regard to fundamental human rights. Moreover, the Regional Corporation must act in the context of the history of the Geelal's, their homes and businesses, humanely or proportionately and fundamentally fairly. In matters such as these, the Court must evenly balance the rights and interests of the State in enforcing undoubtedly salutary sound principles of planning regulations and on the other end, the important proprietary interests of citizens which are detrimentally impacted by such enforcement action.

9. Ultimately, enforcement action must therefore be conducted within the strict prism of public law and constitutionality. While insisting upon a strict and rigid adherence to statutory formalities when enforcing the planning laws, the Court must also balance the rights of owners subjected to interference and an interference which is for the common good.

10. For the reasons set out in this judgment I have held that it is open to the Regional Corporation to take enforcement action against the Geelals notwithstanding the time limit imposed in the provisions of the Town and Country Planning Act Chapter 35:01. The issuing of the Notice to Demolish and the Show Cause Notice, however, are procedurally irregular, unreasonable and a breach of the principles of natural justice. Ultimately, a proper inquiry

[9] **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935

must be conducted by the Regional Corporation to determine the true nature of the offending works and it would be wrong and premature for the Regional Corporation to act without properly satisfying itself of all the relevant circumstances that will impact on the question of enforcement.

11. In this judgment, I have set out the main issues for determination, the brief factual backdrop, an examination of the notices which are the subject of the action, the main legal principles and an analysis of these traditional public law principles with the undisputed facts. Although not central to determining the issues in this matter, I explore the new test of proportionality in judicial review and its application for the exercise of discretion by modern regulators. As consent to the rule of law can only be achieved through proportionate and rational responses of administrators, this judgment will also highlight the role of administrators in public law and examine their responsibility to act humanely in order to inspire its citizens to consent to the creation of an orderly society by compliance with its laws.

**Issues**

12. I commend both Senior Counsel and their respective legal teams for diligently setting out their detailed arguments in their written submissions. A main problem highlighted by the Claimants is the failure of the Regional Corporation to determine whether the offending works were conducted prior to 2000 or are "old works". They allege that the Regional Corporation failed to properly inform itself of a material precedent fact before it could take enforcement action. If these works indeed preceded the passage of the Municipal Regulations then no enforcement action can be taken. Further by the cumulative effect of the Public Health Ordinance Chapter 12 No. 4, The Municipal Corporations Act Chapter 25:04 and the Town and Country Planning Act Chapter 35:01, illegal structures which have no approval after an effluxion of time (4 years) are legitimised pursuant to section 16 of the Town and Country Planning Act and no enforcement action can be taken against the Geelals at all. The Claimants submit that the time limit of section 16 of the Town and Country Planning Act must be read into the entire enforcement regime. Indeed, if these are in fact "old works", the Regional Corporation could also be guilty of unreasonable delay in taking

enforcement action, making their decisions unreasonable.

13. The Regional Corporation contends that the Claimants were making recent additions and alterations to their properties and even though they were in constant communication with the Regional Corporation's employees, they proceeded knowing they were breaching the applicable legislation. The Claimants also knowingly did not comply with the notices served upon them to show cause why the alterations and additions should not be removed and were aware of the violations in the Notice to Show Cause and the Notice to Demolish. The Town and Country Planning Act, the Regional Corporation contends, does not apply because an application of the time limit under section 16 of the Town and Country Planning Act to legitimize any development must be only for town and country planning purposes. Where the four (4) year period has elapsed under the Town and Country Planning Act for the Minister to issue a notice, this does not preclude enforcement notices under the Public Health Ordinance and the Municipal Corporations Act from being served.

14. From the parties detailed written submissions, the main issues that fall for determination are:

A. **The Legality/Jurisdiction Issue**

(i) Whether the alleged structural works and/or alterations have been legitimized by the passage of time by the conjoint effect of sections 36, 46 and 47 of the Public Health Ordinance, section 163 of the Municipal Corporations Act and section 16 of the Town and Country Planning Act and the Defendant accordingly has no power to exercise any enforcement action in relation to the alleged development works at all.

(ii) Whether in any event the Municipal Corporations Act can be relied upon by the Defendant to impugn any additions to a building that took place prior to the said Act coming into force in 1991.

(iii) Has the Defendant acted ultra vires the Public Health Ordinance in failing to comply with the Show Cause process.

(iv) Whether the impugned decisions are illegal by failing to give the Claimants notice of all of the alleged contraventions and by failing to give them sufficient opportunity to show cause why all of the alleged contraventions should not be demolished.

B. **The Rationality Issue**

(i) Whether the impugned decisions were unlawful, irrational or disproportionate because they were taken by the Defendant in the absence of evidence, without taking into account all relevant considerations and without conducting a sufficient enquiry.

(ii) Whether there has been unreasonable and excessive delay by the Defendant in purporting to take enforcement action against the Claimants and whether the impugned decisions in the circumstances are irrational.

(iii) Whether the impugned decisions in all of the circumstances are unduly oppressive and wholly disproportionate.

C. **The Natural Justice Issue**

Fair Hearing:

a) Whether the Defendant has acted unfairly by failing to give the Claimants an opportunity to be heard before issuing the Notice of Demolition[10].

b) Whether the requirements of natural justice in this case necessitated an oral hearing.

D. **The Bad Faith/Bias Issue**

Whether the impugned decisions reveal bad faith, abuse of power and apparent bias on the part of the Defendant in that the failure of the Defendant to refuse to withdraw the Notice to Demolish whilst issuing a second Notice to Show Cause demonstrates that notwithstanding any representations that the First Claimant

[10] The Claimants abandoned their claim that there was a breach of legitimate expectation

makes in response to the said Notice to Show Cause, that the Defendant has already pre-determined the question of the alleged violations against the Claimants.

E. **The Constitutional Rights Issue**

Are the decisions in breach of the Geelals' Constitutional rights enshrined in section 4(a) (b) and (d) of the Constitution in that they amount to a breach of the Claimants' rights to the enjoyment of property and the right not to be deprived of same without due process of law, the right to protection of the law and equal treatment.

F. **Damages**

Whether this is an appropriate case for an award of damages if there are breaches of the Claimants constitutional rights.

**Planning Law: Regulatory Framework**

15. The Municipal Corporations Act was enacted in 1990 establishing regional corporations as central to the system of local government. It replaced the system of local government administered by county councils under the County Council Act No 25 of 1967. The Corporations are governed by a Council comprising of the Mayor, Aldermen and Councillors[11]. Decisions of the Corporations are taken at meetings which are minuted and are open to the public.

16. The Defendant is but one of fourteen Regional Corporations established under the Municipal Corporations Act. The Corporations play an extremely important role in the lives of our citizens. They are responsible under the Municipal Corporations Act for the good governance of municipalities. Specifically, such matters as the regulation and development of roads, streets, drains, pavements, building, markets, slaughterhouses, vending and public health and the policing of municipalities all fall under the jurisdiction of the Corporation. The regulatory powers of the Corporation are exercisable either by the issuing of fines or the more oppressive power of the removal of any offending structure or material[12].

[11] Section 10 of the Municipal Corporations Act Chapter 25:04
[12] See Part VII of the Municipal Corporations Act

17. Specifically, in relation to buildings, new buildings are not to be constructed within the municipality otherwise than in accordance with the requirements of the Town and Country Planning Act and Building Regulations. Buildings should also conform to the Public Health bye laws enacted pursuant to section 15 of the Public Health Ordinance.

18. Those bye laws, the Public Health (Street and Building) Bye laws, set out several restrictions to the development of streets, building lots and buildings. With respect to buildings, there are for instance, restrictions in relation to its coverage (Regulations 20 and 21), eaves and downpipes (Regulation 28), height (Regulation 32B) and spaces between buildings and streets (Regulation 69).

19. The Regional Corporation regulates the addition or alteration of buildings to the extent that if a person has made an alteration or addition to a building which is not in conformity with Town and Country Planning Laws or Building Regulations that person can be guilty of an offence and liable to a fine (Regulation 158(2)). Further, section 163 of the Municipal Corporations Act sets out a specific enforcement process requiring serving a notice of violation on the owner or builder before any enforcement action is taken.

20. With respect to the Public Health Ordinance, section 46 prohibits the making of an addition or alteration to a building (except that of necessary repair not affecting the construction of any eternal party wall) or to erect a new building other than in accordance with the provisions of the Ordinance or the regulations/bye laws. Section 47 of the Public Health Ordinance sets out a similar enforcement provision as section 163 of the Municipal Corporations Act. The section 46 infringement does not appear in Part IV of the Public Health Ordinance to be a criminal offence.

21. Insofar as the problem of enforcement of these laws, rules and regulations involves a complex question of the rule of law and the consent of a people to the rule of law[13], it is

[13] **"Whose Constitution? Law, Justice and History in the Caribbean"** Sixth Distinguished Jurist Lecture 2016 by Professor Richard Drayton PHD FRHistS, page 9:

> "The rule of law emerges at the tension between three elements across the past and present of a society. Legislation is the language, fixed through writing on stone or parchment, through which the past sends forward principles and processes for collective life. Judicial review, second, is the process through which privileged men (and recently women) are empowered to give meaning to those rules in the present. And,

important to note some archaic features of the planning laws. The Public Health Ordinance was first enacted in 1917. The debates in the Legislative Council was in the midst of the 1st World War. In truth, the hands of enforcement are reaching from an ancient and archaic time. At that time, housing and public health would have been an urgent concern with a society dealing with the emergence of new households and businesses and the transitioning from slavery/indentureship to a "free society"[14]. The Public Health Ordinance has been amended over the years in 1920's to 1970's[15]. However, although section 46 of the 1917 legislation required conformity to the Public Health Regulations in relation to buildings, the section 47 enforcement process of the local authority was only introduced some thirty (30) years later in 1944.[16] The Municipal Corporations Act enacted some seventy three (73) years later in 1990 did not modernise either the building regulations under the Public Health Ordinance nor the enforcement process. In fact, the latter Act prescribes to the ancient ordinance with regulations passed from time to time by the Minister.

22. The Town and Country Planning Act was first enacted as an ordinance in 1960. It repealed the Town and Regional Planning Ordinance Ch. 37. No 4 and the Restriction of Ribbon Development Ordinance Ch. 16 No. 2. This in effect "reformed" our planning laws. There were several amendments over the years in Act 13 of 1974, Act 49 of 1977 Act 31 of 1980, Act 21 of 1985 and Act 21 of 1990. Section 16 of the Town and Country Planning Ordinance

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third, often forgotten, consent, through which men and women choose to live within those rules, even to embody them, so that the law describes not external compulsion but the way a community freely lives.2 We have in our Caribbean an abundance, even perhaps an excess, of legislation; we are fortunate in a judiciary which is able, independent and honest, but we are less lucky in our history and experience of consent."

[14] The Bill generated great debate on the question of the wide powers being conferred on the Board of Health. The Honourable Dr. Lawrence is reported to have concluded:

> "If I myself have been at times rather slow to adopt some of the more progressive ideas of sanitary science, it has not been so much out of disregard for sanitary progress itself, or because I do not realise its advantages in this respect, but chiefly on account of the rather mixed condition of our local population. If this bill has evoked sharp and strong expressions of opinion and at times has led to rather dogmatic expressions of views, I am quite sure that that very fact has done a great deal to clear the atmosphere for the co-operation of those to whom in the near future will be entrusted the very large powers which the bill is intended to confer on them with regard to matters of public health." (Debates in the legislative Council of Trinidad and Tobago, 25th June 1915, page 505.)

[15] Cap. 98 of 1925, No. 5 of 1928, No. 4 of 1930, No. 15 of 1934, No. 30 of 1939, Ch 12 No. 4 1940, No. 17 of 1941, No 23 of 1944, No. 58 of 1952, No. 8 of 1969, No. 54 of 1975

[16] No 23 of 1944, An Ordinance to amend the Public Health Ordinance Ch. 12. No. 4.

was amended by Act No. 21 of 1985 which repealed and replaced subsection (1) of section 16. Section 16 has remained unchanged since then.

23. One only need to examine some aspects of the Public Health Ordinance with reference to "baking houses", "barber shops" and reference to infectious diseases such as the "plague" to understand its antiquity. This law of a 21st century Trinidad and Tobago still refers to a place known as the "barrack yards" which is described ignominiously as "any building or collection of buildings divided into rooms occupied singly or in sets by **persons of the poorer class**, and to which there are a common yard and common conveniences."

24. It is trite law that the Regional Corporation must understand the law that regulates its decision making power and give effect to it[17]. However, understanding that the origins of such powers were created in an era where public law was in its infancy, gives the public law Court in the 21st century a useful context to interrogate the discretionary powers exercisable by the Regional Corporation under such laws. The authoritarianism associated with discretion of the early 20th century (let alone plantation societies) would of course be entirely misplaced if allowed to feature in the "democratism" of 21st century Trinidad and Tobago. To this extent, it is important to briefly set out the enforcement process chosen by the Regional Corporation which is under scrutiny in this case.

**Planning Law: The Enforcement Provisions**

25. The Regional Corporation opted to exercise its discretion to take enforcement action under section 163 of the Municipal Corporations Act and sections 36 and 47 of the Public Health Ordinance. Both sections 163 and 47 provide for a notification process before action is taken against an alleged violator of the building laws. It provides for notice in writing served upon or delivered to the owner of the building requiring the owner on a specific day specified in the notice to show cause in writing or orally why the building or work ought not to be altered, removed or pulled down. If the owner fails to show sufficient cause why the building or work sought ought not to be removed, altered or pulled down, the authority may do so at the expense of the authority to be paid by the owner and which debt shall be a

[17] **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, Lord Diplock p 410

charge on the property. Importantly, the offending works are different for each method of enforcement.

26. For the section 163 of the Municipal Corporations Act enforcement procedure, the offending works refers to "any building or other structure" "commenced or completed" or work done **in contravention with the Building Regulations of the Council or The Town and Country Planning Act**. The offending works in the section 47 of the Public Health Ordinance enforcement procedure, refers to an "addition or alteration to any building (except that of necessary repair not affecting the constriction of any external or party wall) or to erect a new building "**in violation of the ordinance or regulations**[18].

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[18] **The Public Health Ordinance**

**Section 36 of the Public Health Ordinance** states:

*36. (1) No owner of any land wheresoever situate shall utilize such land for the erection of buildings or lay out such land into building lots, without having obtained the previous approval in writing of the local authority.*

*(2) The application for the approval of the local authority shall be in writing and shall be accompanied by a plan in duplicate of the buildings to be erected and in the case of buildings lots, of the land, prepared, if so required by the local authority, by a Licensed Land Surveyor from an actual survey on the ground. Such plan shall show –*

- *a) Contours of the land at such vertical intervals as the local authority may require ;*
- *b) The design or lay out of the land showing he dimensions of the streets and building lots ;*
- *c) The line of buildings ;*
- *d) The course of the proposed drainage ;*
- *e) The nature of the soil, aspect, direction of prevailing wind and other physical features or conditions ;*
- *f) The proposed water supply to the building lots ;*
- *g) Such other particulars either on the plan itself or in a separate written statement as may be required by the local authority.*
- *h) In the case of land situate elsewhere than within a prescribed area the local authority may accept a sketch plan giving such details and information as may be required by the local authority*.

**Section 46 of the Public Health Ordinance** states:

46. (1) *It shall not be lawful in any prescribed area to make an addition or alteration to any building ( except that of necessary repair not affecting the construction of any external or party – wall) or to erect a new building otherwise than in accordance with the provisions of this Ordinance and any regulations or bye – laws made thereunder.*

*(2) For the purposes of this Part of this Ordinance and of any regulations or bye – laws made thereunder*

*each of the following operations shall be deemed to be the erection of a new building, namely –*

a) *the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building, and of any frame building so far pulled down or burnt down as to leave only the framework of the lowest storey ;*

b) *the conversion into a dwelling – house of any building not originally constructed for human habitation, or the conversion into more than one dwelling – house of a building originally constructed as one dwelling – house only ;*

c) *The reconversion into a dwelling – house of any building which has been discontinued as or appropriated for any purpose other than that of a dwelling – house ;*

d) *The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only ; and*

e) *The roofing or covering over of an open space between walls or buildings.*

**Section 47 of the Public Health Ordinance** states:

47. (1) *In any case where a new building is erected or any work done in or upon any building in contravention of any of the provisions of subsection (1) of the last proceeding section, the local authority may, by notice in writing served upon or delivered to the owner of such building, require such owner, on or before a day to be specified in such notice, by a statement in writing under his hand and addressed to and duly served upon the local authority, to show cause why such building or such work shall not be removed, altered or pulled down, or require such owner, on such day and at such time and place as shall be specified in such notice, to attend personally or by an agent duly authorized in writing in that behalf before the local authority and show sufficient cause why such building or such work should not be removed, altered or pulled down.*

*(2) If such owner shall fail to show sufficient cause why such building or such work should not be removed, altered or pulled down, the local authority may remove, alter or pull down the same, and the expenses incurred by the local authority in removing, altering or pulling down such building or such work shall be repaid by such owner, and shall be a debt due to the local authority by the owner, and, until repayment, shall be a charge on the premises on which such building shall have been commenced or completed, or such work executed, in contravention of the provisions aforesaid.*

*(3) The power conferred by this section shall be in addition and without prejudice to any other remedy provided by this Part of this Ordnance or by any regulations made thereunder for the recovery of any penalties for breach of any of the provisions contained in this Part of this Ordinance or any regulations made thereunder.*

*(4) The provisions of subsections (1) and (2) of this section shall not have effect with respect to any building erected or any work done in or upon any building when such erection or such work, as the case may be, has been completed prior to the 14th of September, 1944 ."*

**The Municipal Corporations Act**

**Section 163 of the Municipal Corporations Act** states:

***163.*** *(1)Where any building or other structure is commenced or completed within the Municipality or any work is done in contravention of any of the provisions of this Part or of any Building Regulations of the Council or of the requirements of the Town and Country Planning Act or any other written law, the council may serve on the owner or builder of the building, structure or work a written notice specifying the contraventions and requiring such owner and builder –*

*(a) on or before a day to be specified in the notice, by a statement in writing, to show cause why such building or other structure or such work should not be removed, altered*

27. In other words, with regard to these enforcement processes, it is important to identify not only the nature of the offending works so that it qualifies as an "alteration or addition" to any building or the "commencement" or "completion" of any building or structure but also the provisions in the legislation which those works fail to comply. Alteration/addition, commencement/completion simpliciter are not violations unless in breach of the planning laws.

28. There are other enforcement processes provided by the Municipal Corporations Act and the Public Health Ordinance. For example, the Municipal Corporations Act provides for a person to be liable to a fine of five hundred dollars for the breaking up of pavements or obstruction of streets without prior consent of the Council.[19] Where a sign, blind, shade or awning is displayed, erected or retained contrary to the provisions of sections 150, 152 or 153 or after the licence for the display, erection, maintenance or retention thereof has expired or become void, the Council may cause the sign, blind, shade or awning to be removed and taken away after giving twenty-four hours notice in writing to the licensee or to the owner

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*or pulled down; or*

*(b) on such day and at such time and place as shall be specified in the notice to attend personally or by an agent duly authorised in writing in that behalf before the Council and show sufficient cause why such building or structure should not be removed, altered or pulled down.*

*(2) When an owner or builder upon whom a notice was served under subsection (1) fails to show sufficient cause why the building or other structure or work which is the subject of the notice should not be removed, altered, or pulled down, the Council may remove, alter or pull down the building or other structure or work.*

*(3) Subject to section 182, the expenses incurred by the Council in removing, altering or pulling down a building or other structure or work under this section shall be a joint debt due to the Corporation by the owner and builder and, until payment, shall be a charge on the premises on which the building or other structure was commenced or completed, or the work executed.*

*(4) The power conferred by this section is in addition and without prejudice to any other remedy provided by this Part or by any written law providing for the recovery of any penalties for breach of any Building Regulations."*

[19] Section 125 Municipal Corporations Act. See also section 127 of the Municipal Corporations Act which states a person can also be liable on summary conviction to a fine of three thousand dollars for encroaching upon the streets by erecting any structure, signboard, planting any hedge, erecting any fence, arch or bridge or by digging any ditch or drain. Section 128 states the Council can also demolish or remove any bridge or other structure erected or standing over the side drains of any street within the Municipality. Under section 133 if there are overhanging trees or bush on a street within a Municipality, the Council can issue a notice on the owner or occupier of the lands to remove the overhanging portion of the tree or bush.

or occupier of the premises of its intention to do so, and the expenses incidental to such removal, if unpaid, shall be recovered in a summary manner as a fine in addition to the penalty incurred for contravening sections 150, 152 and 153.[20] If a person commences to do any work in contravention of the Town and Country Planning Act or any other written law, he may be served a notice specifying the contraventions and requiring that the work be discontinued. If the person continues the work after the notice is served, he can be liable to a fine of one thousand dollars for every day during which he continued the work.[21] Pursuant to section 168, any person who erects or alters any building without having the plans approved by the Council or contrary to the plans approved by the Council is liable for each offence of a fine of one thousand dollars and in the case of a continuing offence to a further fine of one hundred dollars for every day during with the offence continues.

29. Section 36 of the Public Health Ordinance which speaks to the approval of the Regional Corporation for the laying out of building lots, makes the person erecting such building or plot of land otherwise than in accordance with an approved plan signed by the local authority guilty of a criminal offence publishable under the Summary Court Ordinance. The section 47 enforcement process found in Part IV of the Ordinance does not apply to a section 36 violation found in Part III of the Ordinance.

30. Ultimately, with respect to the enforcement process of section 163 of the Municipal Corporations Act and section 47 of the Public Health Ordinance, there are a number of elements which are left to the discretion of the administrator. In particular: the specificity of the notice to the alleged violator; the choice of an oral hearing or one in writing; the nature of such a hearing; the question of "sufficient cause" and the proportionate response of the Regional Corporation to alleged violations. There are no detailed provisions prescribing a process which resembles a tribunal hearing. There are no time limits. There is no specific forum where such deliberations are made. Nor are there any appeals or statutory reviews. It is a broad power which even some contributors to the debate in the Legislative Council in

[20] Section 156 of the Municipal Corporations Act
[21] Section 162 of the Municipal Corporations Act

1915 were wary of[22]. It resembles a perfunctory administrative exercise which may tempt modern administrators to treat with the process in such a summary manner it unwittingly runs afoul of basic public law principles of legality, procedural propriety, rationality and constitutionality.

31. A summary process may have been appropriate in the days of a society struggling with the concept of freedom and equality of the 19th and 20th century but in fairly recent times there have come to the aid of administrators several elements of due process and fair play that make administrative decision making accountable, transparent and trustworthy.

32. Understanding this history and origin of statutory powers is important for administrators as it underscores the responsibility of their proportionate response to violations under such laws. Administrators must always refresh themselves with the requirements of fair process especially when invested with wide discretionary powers to determine whether its powers are properly being exercised. Indeed, to make the point, section 178 of the Public Health Ordinance contains a no certiorari clause. No party in this case has sensibly argued that such a clause has any impact on these proceedings. Importantly, however, it is a measure of the authoritarian approach to administration[23] which is outdated in a modern era where administrative decision is scrutinised to determine whether it is within the bounds of

[22] See page 505 of the Debates in the Legislative Council of Trinidad and Tobago, 25th June 1915

[23] Sir Desmond Heap in **An Outline of Planning Law** in cautionary tones the exercise of power under the UK planning law at page X:

> "Planning at its best must, if it is to be effective, come very near to being a sort of benevolent despotism. At its worst it could, of course, develop into an objectionable dictatorship. The most energetic enthusiasts of the new Act are not likely to agree with this view, but whatever may be one's attitude to the disposition of planning powers under the new Act, it is undisputable that one its outstanding features (as is shown by the arrangements made for the progressive reduction in the number of local planning authorities) is its concentration of an increasing number of powers in a decreasing number of persons. The ultimate implications of a policy of that kind are manifestly important. If the enhanced planning powers which the new Act creates ever got into unenlightened hands an unsatisfactory state of affairs would arise in which the private individual would find himself more planned against planning. Planning should at all times be simply a means to an end and it is to be hoped that every care will be taken to ensure that the complex administrative machinery of the new Act is not worked in such a fashion that planning becomes not merely a means to an end but an end in itself.
>
> With an imperfect understanding of what is happening the little man of this country is now setting out on a planning expedition into what are to him unchartered seas. For the welfare of his ship as a whole he has surrendered a great deal of his own individual freedom. His voyage is one of discovery and he will want to discover something really worthwhile (and this is where the enthusiastic developer joins hands with the administrative planner) or he will be profoundly dissatisfied. He is going to weight critically the gains with the losses, and the gains must be substantial or the voyage will not be worth the price of the ticket."

rational, just and proportionate decision making processes.

33. An authoritarian approach to decision making would commend itself to the submissions of the Regional Corporation which seeks to maintain a high threshold of reviewability of its decisions leaving the legitimacy of its decisions in the exclusive preserve of the authority, beyond judicial scrutiny save for the "outer fringes of irrationality", absurdity or perverse decisions. The Geelals on the other hand call for a more searching analysis of the Regional Corporation's decisions and decision making process in step with a modern approach of demanding greater accountability from administrators in their decision making processes and moreover where its decisions impact upon human rights.

34. In this case, the offending works of which complaint was made were in relation generally to structural additions/alterations to an existing building to create a third floor, an elevated ground floor to create a storage facility and expanding the building to the boundary line on the North, West and Southern sides and the construction of a shed on the Eastern side. The impugned decisions arose out of the First Show Cause Notice dated 19th April 2017. Based on this notice and the subsequent interaction of the parties a Notice to Demolish was issued and then later, according to the Regional Corporation, a gratuitous notice to show cause to further particularise the works was issued to give Primnath an opportunity to respond.

35. These decisions will be examined in detail below. However, on a practical level, had the Corporation proceeded, there was no magic wand that would have made these alleged illegal structures disappear. The upshot of these decisions was that the Regional Corporation would by its agents have proceeded to break down and demolish an entire third floor of a residential building in which a family has been living for a significant period of time. Moreover, large pieces of the Geelal's building would presumably be cut and carted away. It is unknown the extent to which such demolition works would in fact affect, impact or destroy the remaining legitimate structures of the Geelal's residence.

36. There is no doubt that the Regional Corporation has the authority to utilise the section 163 and Section 47 enforcement processes. However, the main contest in this matter is whether the provisions of the Town and Country Planning Act overrides this process in relation to the

Geelal's and further, whether these decisions could pass public law muster. It is important to understand briefly the factual context in which these decisions were made.

**Brief Context to the Enforcement Decisions**

37. Save for the question as to when the Geelals executed renovations or alterations or completed any building or structure, most of the facts in this case are not in dispute. Primnath owns and occupies the three storey building at LP No. 50 El Socorro Road, San Juan while Rupnarine owns and occupies the two storey building at Corner Fazal Avenue and El Socorro Road, San Juan.

38. They both operate separate businesses at the premises as well as their own private residences. Over the years the Regional Corporation alleges that it issued enforcement notices to Primnath with respect to several structures in the main part an awning, a shed and the construction of a third storey to their homes.

**The Geelal's home**

39. In 1973[24], Primnath and Rupnarine's father, Geelal Ramdhanie became the owner of a parcel of land at the corner of El Socorro Road and Fazal Avenue, San Juan. There was an old wooden structure on the said lands.

40. During the period 1973-1975 their father conducted the following works:

    a) He demolished the old wooden structure and constructed a two storey concrete structure on the southern side of the said lands with a "L" shape steel framed shed with wooden rafters covered with galvanise sheeting which ran along the southern boundary and the western boundary of the building.

    b) He constructed a three storey building on the northern side of the said lands bounding and adjoining the two storey concrete structure on the southern side. The three storey consisted of the ground floor, a mezzanine floor and an upper floor.

41. While the two properties adjoin each other, they are separate buildings and cannot be accessed through each other. Their family initially lived in the two storey building but when

[24] By Deed of Conveyance registered as No. 13045 of 1973

the three storey building was constructed some of their family members moved to the upper level of the third storey building. At the downstairs of the two storey building their father established a variety business. He rented out the mezzanine floor and the ground floor of the three storey building to various businesses over the years.

42. In the 1980's the Geelal brothers inherited the lands from their father.[25] These two parcels of lands conveyed to the two sons, Rupnarine and Primnath, carry two different residential addresses[26]. The two storey building of Rupnarine is on the South lot and the three storey building of Primnath on the North lot.

43. There was a variety store downstairs the two storey building registered as "Geelal and Sons Company" now known as "Geelal and Daughters."

44. In 1987, Primnath got married and his wife moved in with him on the upper level of the three storey building. In 1987, he and his father established a liquor store and a supermarket on the mezzanine and ground levels of the three storey building. His father at that time constructed a steel shed on the western boundary of the buildings along the El Socorro Road. This shed measured approximately 80 feet in length and 25 feet in width. It joined the "L" shaped shed which had been constructed in the 1970's along the southern boundary of the said lands and along the western boundary of the two storey building.

45. In the 1990s, the supermarket and liquor store became officially known as "Superwholesalers and Distributors Ltd". In 2000, his father arranged for an awning to be constructed approximately 200 feet in length, 4 feet in width and 15 feet above the ground along the western boundary of the said lands.

46. Since the 1990's both Primnath and Rupnarine contend that they have conducted routine maintenance to the three storey building and the two storey building respectively in which they occupy such as painting and upgrading the plumbing and electrics.

[25] See Deeds of Conveyance dated 3rd August 1982 and registered No. 17404 of 1982 and registered as No. 17403 of 1982

[26] Primnath's address is LP 50 El Socorro Road, San Juan and Rupnarines address is Corner Fazal Avenue and El Socorro Road, San Juan.

**The Geelal's Interaction with the Regional Corporation**

47. The first enforcement notice was allegedly issued to Primnath by the Regional Corporation in 2001 stating that certain works were done by him without Town and Country Planning approval. The main concern then was the construction of a third floor.

48. Primnath only concedes to receiving any notice from the Regional Corporation in 2007. He decided to apply for Town and Country Planning permission but when he approached the Town and Country Planning Division he was advised that if the building was constructed more than four (4) years ago, Town and Country Planning permission was not required.

49. After the notice was received in 2007, a meeting was convened between him, the Corporate Secretary of the Regional Corporation and the Building Inspector of the Regional Corporation who indicated that he should apply to Town and Country Planning Division to address the matters raised in the Regional Corporation's letter. To his understanding, the Regional Corporation would abide by any decision made by Town and Country Planning Division. He therefore visited Town and Country Planning Division and was informed that because his building, including the alleged additions, were erected approximately forty (40) years ago, his building was automatically legitimised under the Town and Country Planning Act and he was not required to take any further steps to regularize the building. He communicated this decision to the Regional Corporation. Primnath contends that after that, no steps were taken by the Regional Corporation until April 2017.

50. The Regional Corporation, contends that they have been in constant communication with Primnath and made repeated attempts to have him comply with the Building Regulations and Codes. Their records show[27]:

    - On 8th November 2001 a Show Cause Notice was served on Primnath requiring him to show cause by statement in writing why the building recently erected without the necessary approvals and in contravention of s46(1) of the Public Health Ordinance should not be removed or pulled down.

[27] See affidavit of Gabrielle Figaro-Jones filed 7th March 2018

- On 8th January 2002, a Notice to Demolish was served on Primnath in relation to a new steel framed building.
- By letter dated 14th September 2004, the Regional Corporation wrote to Primnath and informed him that a site investigation conducted on 10th August 2004 revealed that he was carrying out building operations to the existing building without the necessary approvals. He was advised to cease all development works and to remove the illegal structures, failure of which would result in enforcement actions being instituted against him.
- On 5th October 2004 a show cause notice was issued to Primnath for failure to comply with the letter dated 14th September 2004.
- On 11th August 2006 a show cause notice was issued to Primnath when he started construction of a third level structural addition to the existing building.
- A Notice to Demolish was issued to Primnath on 27th December 2006 when he failed respond to the show cause notice of 11th August 2006.
- On 5th February 2007, Primnath's attorney wrote to the Regional Corporation and informed it that Primnath was in the process of applying for approval from the Town and Country Planning Authority regarding the additional alteration to the building.
- On 7th November 2007, the Regional Corporation issued another Show Cause Notice to Primnath since he did not produce any evidence that he applied to the Town and Country Planning Division for approval and he did not seek the consent of the Regional Corporation but continued to construct additions and alterations to his premises.

51. In 2011, Primnath contends that he did repairs to the roof of the third story building and in 2014 he upgraded the interior of the upper level of the building by installing wood flooring, replacing the cupboards, upgrading the kitchen and bedroom, installing gypsum ceilings, new mouldings around the windows and painting the three storey building. He contends that these works do not constitute "an addition" or "alteration" to an existing building or

completion or commencement of a three storey building for which approval is required under the planning regulations. They were works which were conducted on the building to enhance its "curb appeal" and would thereby not require any approvals under the planning regulations.

52. There were several meetings between Primnath and representatives of the Regional Corporation eventually leading up to the issuing of a notice to show cause dated 19th April 2017 which was followed by a Notice to Demolish on 6th December 2017 where the Regional Corporation took the decision that it would demolish the offending works identified. Subsequently, after further representations, they issued another show cause notice on 14th December 2017 which in their view did not alter the first notice but simply gave clarification to the Geelals of the Regional Corporation's position. The notice to demolish still remains in effect and has not been withdrawn and appears in the Regional Corporation's view to have been validly issued with respect to the works that they have identified in the latest show cause notice. It was only by the Court's order dated 20th December 2017 an injunction was granted restraining the Regional Corporation from taking enforcement action pending the hearing of this claim.

53. There are several defects in the notices and in the procedure leading up to them. It would be relevant at this stage to examine the notices in some detail.

**The Enforcement Decisions**

54. The three decisions that fall under scrutiny in this claim are as follows:

    (i) **The first decision –** The decision of the Defendant contained in a Notice to Demolish served by the Defendant on the First Claimant on 6th December 2017 (The Notice to Demolish) requiring the First Claimant to demolish and removed alleged unauthorized structures (structural addition/alterations) located at El Socorro Road, San Juan, failing which the Defendant would remove same without further notice.

    (ii) **The second decision-** The continuing decision of the Defendant to refuse to withdraw the Notice to Demolish.

(iii) **The third decision-** The decision of the Defendant contained in the Show Cause Notice served by the Defendant on the First Claimant on the 14th December, 2017, requiring the First Claimant to show cause before the 21st December, 2017 why the alleged unauthorized structures (structural addition/alterations) contained in the said Notice to Demolish should not be removed/altered or pulled down failing which the Defendant may remove same.

**The First Decision: The Notice to Demolish**

55. The Notice to Demolish was the culmination of the Regional Corporation's enforcement process under section 163 of the Municipal Corporations Act and section 47 of the Public Health Ordinance. They contend they were not satisfied that the works they identified in its April 2017 Show Cause Notice were not removed. The First Show Cause notice issued on April 2017 was addressed to Primanth[28] requiring him before the 03rd day of May, 2017 to show cause in writing to the Regional Corporation, why the "building/s recently erected and/or works executed and/or now in the course of being executed by you located at **Geelal Wholesalers, El Socorro Road, San Juan (The Structural Addition/Alteration to an existing Building to create a third floor on one part and an elevated ground floor to create a storage facility, also, expanding the building to the boundary line on the Northern, Western and Southern sides and the construction of a shed on the Eastern side to the footpath with El Socorro Road)** without necessary approval and without the consent of the Local Authority in contravention of Section 46 of the Public Health Ordinance Chapter 12 No.4 and in contravention of Section 163 of the Municipal Corporations Act Chapter 25:04 should not be removed/altered or pulled down…."

56. The notice goes on to set out the Regional Corporation's power to pull down and remove the offending works if he "fails to show cause" why it ought not to be so removed. The notice finally explains that it is "in addition and without prejudice to any other remedy by the said Ordinance or said Act and any Bye-Laws or Regulations made thereunder for the

[28] **Owner/Occupier: Primnath Geelal**
**El Socorro Road,**
**San Juan**

recovery of penalties for breach of any Building Regulations."

57. The notice takes issue with (a) the construction of an entire third floor (b) an elevated ground floor (c) expansion of the building to the boundary lines (d) construction of a shed but it provides no further particulars or details. No dimensions are provided. No details of expansion are provided. Nor are there any reference to specific statutory violations or building codes. Are the building codes Town and Country Planning building codes or Public Health building codes? What are the dimensions of the alleged breaches? Where are they on the property? How far has the building expanded to the boundary line to be in breach of a planning law? What is the violation with respect to the shed? Is it too close to the boundary? Is it overhanging a pavement? Is this a reference to the failure to obtain general planning approval? These are all unanswered questions. In the submissions of the Regional Corporation it is fair to assume that the notice was issued on the premise that the Claimants ought to have known what the Regional Corporation had in mind in pointing out the alleged violations. However, this is a misunderstanding of the requirements of fundamental fairness in the enforcement process.

58. After being served with this First Show Cause Notice, Primnath met with Mr. Safraz Ali, Councillor of the Defendant for the area. Then later, a Mr. Mahabir of Town and Country Planning Division. Subsequently, he met with Mr. Guelmo, Building Inspector of the Defendant. He explained to them that the three storey building was over forty (40) years old. He was advised by Town and Country Planning that he did not require any planning permission in relation to the building and based on his interactions with them he left those meetings believing that no action will be taken.

59. However, by letter dated 24th July 2017, the Regional Corporation notified him that the Council at its 7th Spatial Planning and Building Committee Meeting held 6th June 2017 resolved that the structures should be demolished. By that letter, the Regional Corporation signalled its intention to formally serve a Notice to Demolish.

60. He also issued two letters from his attorney dated 31st July 2017 and from himself on 7th August 2017 setting out his claims of "old works" and the illegality of the process. The

Regional Corporation responded by letter of 29th September 2017 indicating their reasons that they were not satisfied that Primnath had shown any cause why demolition should not be proceeded with.

61. It then issued its Notice to Demolish dated 6th December 2017. It is accepted that there is no statutory requirement to serve a Notice to Demolish. The notice is treated as the formal decision of the Regional Corporation to take corrective action against the Geelals pursuant to section 47 of the Public Health Ordinance and section 163 of the Municipal Corporations Act. It confirms, however, the Regional Corporation's position taken on 6th June 2017 to demolish. It was addressed to Primnath[29]. It referred to "his" letter dated 29th September 2017[30] and "observations made on site" continued to reveal that his structure at L.P #50 El Socorro Road, San Juan was not in conformity with building regulations. He was advised that he had contravened section 36 (now introduced for the first time), sections 46 and section 47 of the Public Health Ordinance and section 163 of the Municipal Corporations Act by erecting without the approval of the Regional Corporation a number of structures. Astonishingly, for the first time, these structures are spelt out in greater detail:

1. **Western Side of Property- Front**

   **Violation-** encroachment onto the building setback.

   ***An addition of a steel framed shed approximately 80' x 25' with metal roofing, covered with galvanized sheeting and secured with wrought iron works is constructed in this open space.***

   **Violation-** encroachment onto the building setback.

   - ***An Awning approximately (200') two hundred feet constructed with metal with metal guttering attached overhangs the footpath along the El Socorro Main Road.***
   - ***An addition of a steel framed structure approximately (120' x 180') with***

[29] **Owner or Occupier- Mr. Primnath Geelal**
**L.P #50 El Socorro Road,**
**San Juan**

[30] That was in fact the Regional Corporations letter.

***block work and reinforced concrete floor slabs to a height greater than (50ft) fifty feet, (three storey) from the ground floor to the apex of the roof, constructed north of the steel framed shed along the El Socorro Main Road and along the northern boundary line.***

**See pics no.8-10.**

2. **Southern side of property- Right**

   **Violation-** encroachment onto the building setback

   ***"An addition to the existing building with a steel framed shed constructed with "I "rafters, "Z" Purlins, and covered with galvanize sheeting and secured by wrought iron works to the boundary line.***

3. **Eastern Side of Property- Back/Rear**

   **Violation-** encroachment onto the building setback.

   - ***The addition of a steel framed structure to an existing building constructed with reinforced concrete blockwork to the boundary line.***

4. **Northern side of property- Left**

   **Violation-**encroachment onto the building setback

   - ***An addition to an existing building with a steel frame structure approximately (180') with reinforced blockwork and floor slabs to the boundary line to a height greater than (50ft) fifty feet, (three storey) from the ground floor to the apex of the roof.***

5. **Violation-The structural addition of a third floor.**

   The height of the building is greater than the (30ft) thirty feet from the ground floor to the apex of the roof.

   - ***An addition of a third storey to the existing building with concrete block walls, steel framed roof, reinforced concrete floor slab covered with Aluzine sheets. See***

62. It also pointed out that by Resolution of the Council dated 05th December 2017, he was required within fourteen (14) days after receipt of this Notice to Demolish to remove the unauthorized structures (structural addition/alterations) located at L.P #50 El Socorro Road, San Juan. If he failed to demolish and remove the aforesaid structural additions/alterations the Regional Corporation would remove same without further notice and the expenses incurred in doing so shall be repaid by the Geelals and until repayment there shall be a charge on the premises on which such building has been erected.

63. There are a number of difficulties with this decision to demolish. It was the first time such detail of the offending works was communicated to the Geelals and there is a stark difference between the First Show Cause Notice and the Notice to Demolish. The shed on El Socorro Road is partially in front of Primnath's property and partially in front of Rupnarine's property. Both are alleged to have been constructed in the 1970 or 1980s. Worse it is a notice to Primnath in relation to property which belongs to his brother, Rupnarine. There are no specific dimensions of the violations to the "building setbacks". The awning is again like the shed partly on Primanth's and Rupnarine's property. It was conspicuously absent in the first Show Cause Notice as a violation. This construction in relation to part of the three storey building was allegedly constructed by the Claimants' father in the 1970's and the specific violations in relation to the construction were not stated in the first Show Cause Notice. The shed to the South of the property is in fact part of Rupnarine's two storey structure along Fazal Avenue and forms part of the original building allegedly constructed by the Claimants' father in the 1970's. This alleged violation was not stated in the First Show Cause Notice.[31]

64. Further, this Notice to Demolish alleges for the first time that Primnath breached sections 36 of the Public Health Ordinance but the First Show Cause Notice (and the second show cause Notice as indicated below) refer only to breaches of section 46 of the Public Health Ordinance and section 163 of the Municipal Corporations Act.

[31] See the evidence of Primanth Geelal in Joint Affidavit of Primnath Geelal and Rupnarine Geelal filed 18th December 2017.

**The Second Decision: Refusal to Withdraw the Notice to Demolish**

65. By letter dated 8th December 2017, Primnath's attorneys wrote to the Regional Corporation that based on preliminary instructions it was the clear that the works identified in the Notice to Demolish was over four (4) years old and had been legitimized by an effusion of time. It was also pointed out that the Notice to Demolish contained violations that were not in the first Show Cause Notice. The Regional Corporation refused to withdraw its Notice to Demolish. In their submission it was not made entirely clear whether the notice was still effectual or whether it was overtaken by the subsequent events of issuing another notice to show cause on 14th December 2014. It was contended by the Regional Corporation in its submissions that this was simply confirmatory of the violations referred to in both the first Show Cause Notice and Notice to Demolish and for the Geelals to know what was required to be demolished.[32]

**The Third Decision: The Second Show Cause Notice**

66. This Second Show Cause notice was again addressed to Primnath directly[33]. It was in response to the Geelal's attorney's letter dated 8th December 2017 indicating that it would be seeking urgent interim relief against the Regional Corporation. At its statutory meeting on 13th December 2007 the Regional Corporation considered the attorney's response and issued this new Show Cause Notice together with a letter dated 14th December 2017. By its letter the Regional Corporation stated that the Notice to Demolish contains the alleged violations in greater detail and does not contain any violation which was not in the First Show Cause Notice. The Regional Corporation also denied that Primnath was not granted the opportunity to make representations in relation to the alleged violations.

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[32] See paragraph 37 of the Defendant's submissions filed 21st November 2018:

> "**Yet further, we say that (as stated in paragraph 48 of the affidavit of Gabrille Figaro Jones) the purpose of the more detailed information on the second show cause notice was for the Claimants to know exactly what was required to be demolished;** it was not to inform the Claimants of what the violations were. The Claimants were at all times fully aware of what the violations were because (as the evidence in cross-examination served to emphasize only too well)."

[33] **Owner/Occupier: Primnath Geelal**
**LP #50 El Socorro Road,**
**San Juan.**

67. The notice called upon him to show cause in writing why the "building/s, structural addition/s, alteration/s recently erected and/or works erected and/or now in the course of being executed" without necessary approval or consent of the Local Authority in contravention of section 46 of the Public Health Ordinance and in contravention of Section 163 of the Municipal Corporations Act should not be removed/altered or pulled down. In this Show Cause Notice particulars of the works were provided:

1. **Western Side of Property- Front**

   **Violation-** encroachment onto the building setback.

   ***An addition of a steel framed shed approximately 80' x 25' with metal roofing, covered with galvanised sheeting and secured with wrought iron works is constructed in this open space.***

   **Violation-** encroachment onto the building setback.

- ***An Awning approximately (200') two hundred feet constructed with metal with metal guttering attached overhands the footpath along the El Socorro Main Road.***
- ***An addition of a steel framed structure approximately (120' x 180') with block work and reinforced concrete floor slabs to a height greater than (50ft) fifty feet, (three storey) from the ground floor to the apex of the roof, constructed north of the steel framed shed along the El Socorro Main Road and along the northern boundary line.***

2. **Southern side of property- Right**

   **Violation-** encroachment onto the building setback

   ***"An addition to the existing building with a steel framed shed constructed with "I "rafters, "Z" Purlins, and covered with galvanize sheeting and secured by wrought iron works to the boundary line.***

3. **Eastern Side of Property- Back/Rear**

**Violation-** encroachment onto the building setback.

- ***The addition of a steel framed structure to an existing building constructed with reinforced concrete blockwork to the boundary line.***

**4. Northern side of property- Left**

**Violation-**encroachment onto the building setback

- ***An addition to an existing building with a steel frame structure approximately (180') with reinforced blockwork and floor slabs to the boundary line to a height greater than (50ft) fifty feet, (three storey) from the ground floor to the apex of the roof.***

**Violation-The structural addition of a third floor.**

The height of the building is greater than the (30ft) thirty feet from the ground floor to the apex of the roof.

- ***An addition of a third storey to the existing building with concrete block walls, steel framed roof, reinforced concrete floor slab covered with Aluzine sheets[34]***

68. By letter dated 15th December 2017, the Claimants' attorneys informed the Regional Corporation that the Second Show Cause Notice was not in compliance with the requirements of the law and was null and void and of no effect.

69. This Second Show Cause Notice was in fact a recital of alleged violations which were stated in the Notice to Demolish, some of which were not even recited in the First Show Cause Notice. The Claimants contend that the Second Show Cause Notice does not contain the necessary particulars and details that are required by law for Primnath to fully know the

[34] "**TAKE FURTHER NOTICE THAT IF** you fail to show cause as to why such buildings should not be removed or pulled down, the Local Authority/Council may remove/alter or pull down same and the expenses incurred by the Local Authority/Council in removing or pulling down such buildings shall be repaid by you and until re-payment shall be charge on the premises on which such building has been commenced or erected or such works executed in contravention of the Public Health Ordinance or the Municipal Corporations Act.
**AND TAKE NOTICE FURTHER** that the above is in addition and without prejudice to any other remedy by the said Ordinance or said Act and any Bye-Laws or Regulations made thereunder for the recovery of penalties for breach of any Building Regulations.
Dated this **14th day of December, 2017.**"

case he has to answer.

70. Against this backdrop with alleged building violations which may have been in existence for over twenty (20) years, with confusing communication from the Regional Corporation themselves with respect to the offending works and the specific violations of the planning laws and the summary approach to enforcement adopted by it in the face of Primnath's letters, it is important to remind the Regional Corporation of well-established public law principles which will guide this Court in analysing the decisions made by it.

**The Court's Approach-Judicial Review Principles**

71. Judicial review is the mechanism by which the Courts fulfil the rule of law by preventing arbitrary, unwarranted and unlawful actions of the executive and public bodies. The principles governing judicial review seek to address the tension between judicial vigilance and judicial restraint to arrive at the right balance of legitimate administrative action. See Kangaloo JA in **Steve Ferguson v The Attorney General of Trinidad and Tobago** C.A. CIV 207/2010.[35]

72. Judicial review actions ought not to be viewed by this Defendant as an attack or an action against it but rather an examination of its decision and where appropriate be seen as an opportunity to improve the quality of the decision making process. See **Re Waldron** 1986 QB 824.

73. The Court in an application for judicial review will not substitute its views for that of the administrator nor conduct an "appeal" of its decision. Its focus is on the process by which administrative decisions are made. See **Fordham, Judicial Review Handbook, 6th Edition** para 2.1.3 and **R v Panel on take overs and mergers ex parte Datafin PLC and another** [1987] QB 815.

[35] In **David Dunsmuir v Her Majesty the Queen in Right of the Province of New Brunswick as respresented by Board of Management** [2008] 1 S.C.R. it was observed at paragraph 27:

> "Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures."

74. Decisions of a public body will be unlawful if it is irrational, illegal or procedurally improper. The test of "Wednesbury unreasonableness" is whether the decision could have been reached by a decision maker acting reasonably or whether it was within the range of reasonable decisions open to the decision maker. A deferential approach to an authority in not conducting merit based reviews preserves the doctrine of separation of powers. However, there are cases which warrant a greater intensity of review such as where property and human rights are involved. In such cases, the demands of accountability, transparency, rationality and fairness all call for anxious scrutiny of the merits of the decision. To this end, the Court have developed an issue sensitive approach to the question of the reasonableness test. See **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, **R v Secretary of State for the Home Department** [2003] EWCA Civ 364.[36]

75. In appropriate cases therefore the traditional **Wednesbury** unreasonableness[37] test gives way to a "hard edged review" or to a test of proportionality. **Wednesbury** is not to be regarded as a monolithic concept. It is a mutable standard of review; "it is no Procrustean bed". There are now various standards of the **Wednesbury** ground of review. The graver the impact of the decision on the individual affected by it, the more substantial the justification that will be required of the decision maker and the discretionary area of judgment of the decision-maker is smaller; the standard of review of the Court is stricter. The "super-Wednesbury test", a more searching test in the context of fundamental rights, has been counterbalanced by a less searching standard in cases involving macro-economic issues or

[36] In **R v Secretary of State for the Home Department** [2003] EWCA Civ 364, Lord Phillips observed at paragraph 112:

> "Starting from the received checklist of justiciable errors set out by Lord Diplock in the *Council of Civil Service Unions v Minister for the Civil Service* case [1985] AC 374, [1984] 3 All ER 935, the courts … have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them. Beyond this, courts of judicial review have been competent since the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208 to correct any error of law whether or not it goes to jurisdiction; and since the coming into effect of the Human Rights Act 1998, errors of law have included failures by the state to act compatibly with the Convention."

[37] **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** [1948] 1 KB 223

questions of policy. The intensity of review "will depend on the subject-matter in hand" which will call for variable reasonableness. Ultimately, the context of the decision will determine the required scrutiny of the Court. See **Fordham, Judicial Review Handbook, 6th Edition** para 60.6.1. In **Kennedy v Information Comr (SC(E))** [2014] 2 WLR, Lord Mance JSC referenced **IBA Health Ltd v Office of Fair Trading** [2004] EWCA Civ 142, [2004] ICR 1364 at paragraph 53 where Lord Carnwath LJ observed (paras 90-92):

> “91. Thus, at one end of the spectrum, a ‘low intensity’ of review is applied to cases involving issues ‘depending essentially on political judgment’ (de Smith para 13-056-7). Examples are R v Secretary of State, Ex p Nottinghamshire County Council [1986] AC 240, and R v Secretary of State, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of ‘the extremes of bad faith, improper motive or manifest absurdity’ ([1991] 1 AC, per Lord Bridge of Harwich, at pp 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with ‘absurdity’ or ‘perversity’, and a ‘lower’ threshold of unreasonableness is used:
>
> > "Review is stricter and the courts ask the question posed by the majority in Brind, namely, ‘whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.’ (de Smith para 13-060, citing Ex p Brind [1991] 1 AC 696, 751, per Lord Ackner)."
>
> 92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not ‘equipped by training or experience or furnished with the requisite knowledge or advice’ to decide issues depending on administrative or political judgment: see Ex p Brind [1991] 1 AC at 767, per Lord Lowry. On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene: such questions are to be answered not by reference to Wednesbury unreasonableness, but “in accordance with the principles of fair procedure which have

been developed over the years and of which the courts are the author and sole judge"' (R v Panel on Take-overs and Mergers, Ex p Guinness plc [1990] 1 QB 146, 184, per Lloyd LJ)."

76. In my view, in suitable cases, our Courts can recognise "proportionality" as a separate ground of review. There is no reason in principle why such a ground cannot be applicable in our jurisdiction as a tool by which the Court can analyse the actions of the Executive. In this case, when fundamental property rights are at stake it is appropriate to consider whether the decisions made are proportionate, whether a suitable balance was struck by the decision maker and whether all the circumstances were evenly weighed and balanced before arriving at a decision. Such an enquiry raises the profile of administrative justice and provides for the citizen a greater guarantee that decisions made are humane if it was subjected to a process that was fundamentally fair. See **Kennedy v Information Comr (SC(E)), R v Ministry of Defence ex parte Smith** [1996] QB at 556, **Daly v Secretary of State for the Home Department** [2001] 2 WLR 1622**.**

77. An administrator or executive authority entrusted with the exercise of a discretion must direct itself properly in law. A public body cannot choose to deploy powers it enjoys under statute in so draconian a fashion that the hardship suffered by the affected individual in consequence will justify the Court in condemning the exercise as irrational and perverse. See **Kennedy v Information Comr (SC(E))**.

78. A public body must act conscientiously, fairly and not so unfairly as to abuse its powers. Fairness will 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 procuring a favourable result or after it is taken with a view to procuring its modification or both. **R v Secretary of State for the Home Department ex p Doody** [1994] 1 AC 531 and **Lloyd v McMahon** [1987] AC 625.

79. Natural justice and fairness require that a consultation be done at a time when proposals are at a formative stage with adequate time to provide a proper and informed response. The product of consultation must be conscientiously taken into account when the ultimate

decision is taken. **Lloyd v McMahon** [1987] AC 625.

80. The public body must subscribe to the "**Tameside**[38] duty" of sufficiently acquainting itself with relevant information, fairly presented and properly addressed and to take reasonable steps to acquaint itself with the relevant materials so that it can answer the questions before it correctly. See **Secretary of State for Education for Science v Tameside Metropolitan Borough Council** [1977] AC 1014, **Fordham, Judicial Review Handbook, 6th Edition, para 51.1, The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago** CA. Civ P075/2018.

81. The administrator must be cognisant of fundamental human rights. Due process requires the administrator to comply with the principle of fundamental fairness and observe the four corners of its statutory powers. To do otherwise is a breach of the citizen's right to the protection of the law and the right not to be deprived of his property unless by due process. See **The Mayor of Alderman and Burgess of San Fernando v Chandrawatee Ramlogan** Civil Appeal 54/1985.

82. I first deal with the Claimants' submission that section 16 of the Town and Country Planning Act Chapter 35:50 provides that no enforcement proceedings can be taken in relation to development works where no permission has been granted after four (4) years from the works being carried out. As a consequence of the correlation between the Public Health Ordinance and The Town and Country Planning Act, the Claimants contend the works admittedly carried out more than four (4) years ago have been "legitimised by effluxion of time." It is a fundamental question which has been tagged under the "illegality" head of review and, if the Geelals are correct, puts an immediate end to the enforcement action of the Regional Corporation.

**The Jurisdiction Issue**

83. Even assuming that the works complained of were conducted at least four (4) years prior to the issuing of the notices, that is in 2013, the Geelals contend that by virtue of the provisions of the Town and Country Planning Act, the impugned works have been

[38] **Secretary of State for Education for Science v Tameside Metropolitan Borough Council** [1977] AC 1014

legitimised by the failure of the authorities to take any enforcement action. Such a submission is made by the Geelals as the effect of three main principles which both parties agree: (a) that the Town and Country Planning authority is the "supreme planning body" in this jurisdiction; (b) that a development commenced more than four (4) years prior to the service of a notice of enforcement under the Town and Country Planning Act for town and country planning purposes becomes legitimatised by effluxion of time[39]; and (c) that there is no time limit expressly prescribed in the Public Health Ordinance and the Municipal Corporations Act to take any enforcement action under sections 47 and 163 of the respective legislations.

84. Senior Counsel for the Geelals relying on **Maharaj Trading and Transport Limited v Minister of Planning and Development** H.C.A No. 2057 of 1993 and **The Mayor of Alderman and Burgess of San Fernando v Chandrawatee Ramlogan** Civil Appeal 54/1985 contend that the Town and Country Planning Act operates as the supreme planning law and the other laws must be construed in conformity with it. Accordingly, there is a clear conflict in giving the local authorities carte blanche authority to take enforcement action at "any time" while the "supreme authority" for the development of land is constrained by a four (4) year limit. This conflict, he contends, is also supported by the evidence of the Regional Corporation's advice to the Geelals to seek Town and Country planning approval. He also contends that the Regional Corporation's real complaint is the lack of Town and Country Planning approval. If this is so, it gives the submission even greater force that the time limits of that Act should apply.

85. Senior Counsel for the Geelals also rely on **The Mayor, Alderman and Burgess of San Fernando v Chandrawtee Ramlogan** and section 38 of the Town and Country Planning Act for the proposition that where there is a conflict between the Town and Country Planning Act and the other planning legislation, the former prevails. Further, that the time limit prescribed in section 16 of the Town and Country Planning Act should therefore be read into the Public Health Ordinance and Municipal Corporations Act. Section 38 of the Town and Country Planning Act provides:

[39] Section 16(1) of the Town and Country Planning Act

"38. For the avoidance of doubt it is hereby declared that this Act, and any restrictions or powers thereby imposed or conferred in relation to land, apply and may be exercised in relation to any land notwithstanding that provision is made by any Act, Bye-laws, Orders, Rules or Regulations in force at the passing of this Act, for authorising or regulating any development of the land."

86. However, a proper construction of the legislation demonstrates that the jurisdiction of central government and regional corporations are two streams leading to the same river of planning and development. One is by no means bound to the other.

87. Although the Honourable Justice Warner (as she then was) observed in **Maharaj Trading** in relation to the Town and Country Planning Act that the development which was commenced more than four (4) years prior to the service of the Notice for town planning purposes became legitimated by the effluxion of time, no comment was made in either **Maharaj** or **Chadrawatee Ramlogan** as to whether the Regional Corporations under the Town and Country Planning Act must prescribe to a similar time limit to take enforcement action under the Public Health Ordinance of the Municipal Corporations Act.

88. It is pellucid that while the Town and Country Planning Act has imposed a statutory time limit within which the Minister may act in relation to development which is not in conformity with that Act, no such time limit was imposed on the Municipal Corporation seeking to enforce the Public Health Ordinance or the enforcement provisions of the Municipal Corporations Act. Both sections 46 and 47 of the Public Health Ordinance and section 163 of the Municipal Corporations Act carry no time limit.

89. While a time limit for the taking of enforcement action by the Regional Corporation is desirable, there is no conflict between these three pieces of legislation. The Town and Country Planning law has simply set out clear timelines and fettered the discretion of the Minister. The Public Health Ordinance and Municipal Corporations Act did not.

90. Both **Maharaj** and **Chandrawatee Ramlogan** analysed the effect of these three streams of legislation as our planning laws in this jurisdiction. **Chandrawatee Ramlogan** is not an authority with any blanket moratorium on unauthorised works under the Public Health

Ordinance and the Municipal Corporations Act. It concerned the exercise of the powers under sections 46 and 47 of the Public Health Ordinance. It was contended by the Respondent that sections 46 and 47 of the Public Health Ordinance were repealed by the sections 8 and 16 of the Town and Country Planning Act. The Court held that there was no such repeal and both legislation still ran their separate courses side by side:

> "In my view, the coming into operation of the Town and Country Planning Act resulted in a person seeking to erect a new building or to carry out alterations being required to obtain permission or approval of plans from the Authority under the Town and Country Planning Act, in addition to the approval already required under the Public Health Ordinance (and in San Fernando under the San Fernando Corporation Ordinance). There is nothing prima facie inconsistent about requiring approval for the same act from more than one authority."

91. It was further observed:

> "..a person wishing to carry out a development which requires permission under more than one statute must satisfy the requirements of all the relevant statutes. Exemption from or suspension of demolition in respect of one statute does not involve exemption or suspension in respect of the other."

92. The case of **Maharaj Trading** concerned the validity of an enforcement notice issued pursuant to section 16 of the Town and Country Planning Act. The Claimant was appointed as a distributor of liquid petroleum gas. The company's facilities were unsuitable and an alternative site on lands was located where a shed was erected to accommodate ten vehicles. The shed was approved by the Committee in August 1985. The company used the facilities as a depot for parking its vehicles used in the haulage distribution and overnight storage of L.P.G. cylinders. In 1986 the shed was extended to accommodate 14 vehicles. In 1987, they were informed by an officer of the Town and Country Planning Division that the use of the land constituted a development and planning permission was required under the Town and Country Planning Act. An application was submitted but permission was refused because their site under the present planning policy was allocated for residential purposes

and the use of the site for storage did not conform with planning policy for the area. The Applicant requested a reconsideration of the refusal but the refusal was not retracted. Instead, the Claimant was given a period to relocate its activity. An enforcement notice was served on 26th February 1992 requiring the Claimant to demolish and remove the shed and discontinue the use of the lands.

93. Justice Warner (as she then was) quashed the notice, noting that the contents of the notice were invalid and there was no service of the notice on all the owners. Additionally, the development had commenced more than four (4) years prior to the service of the notice and for town and planning purposes became legitimated by effluxion of time.

94. In **Zorad Khan v The Chairman, Alderman and Burgesses of the Chaguanas Regional Corporation** CV2010-03197 the issue for determination was whether the Defendant had unlawfully demolished the Claimant's structure. The Claimant contended that he was denied the opportunity to be heard and the Borough had breached the rules of natural justice and contravened the provisions of the Constitution which guaranteed the Claimant the right not to be deprived of his property except by due process of the law. Rajkumar J (as he then was) held the Claimant was afforded the opportunity under the legislation to show cause having been issued a show cause notice and therefore had the opportunity to be heard. Further, demolition was not illegal because of the length of time between service of notice and the demolition and afforded the Claimant an opportunity to rectify the matters brought to his attention.

95. These authorities establish the following propositions which undermine the Geelals submissions:

- Our planning laws confer powers of enforcement on two entities, the Minister under the Town and Country Planning Act and the Regional Corporation under both the Municipal Corporations Act and the Public Health Ordinance. Both entities are simply required to comply with their statutory discretion and comport with the fundamental principles of public law.
- A person seeking to erect a new building or carry out alterations are required to

obtain approvals under our public health laws. There is nothing inconsistent about requiring approvals for the same act from more than one authority. See page 17 of **Chandrawatee Ramlogan**.

- A developer must not lose sight of the fact that the code of planning law and the code of public health law run their separate course side by side (see page 17 of **Chandrawatee Ramlogan)** and the necessary approvals are required from the Defendant's agencies.
- While the enforcement procedures in the Town and Country Planning Act are more modern compared to the archaic Public Health Ordinance it by no means signals that the Public Health Ordinance is rendered obsolete.
- Section 38 of the Town and Country Planning Act however clearly sets the marker of the need for Town and Country Planning approvals and that notwithstanding any regulation or approval obtained it does not exclude the operation of the Town and Country Planning Act.
- Although no enforcement action can be taken under the Town and Country Planning Act by effluxion of time nothing debars the Regional Corporation from taking action under the Public Health Ordinance. Indeed this scenario was contemplated in **Chandrawatee Ramlogan** in clear terms at page 20:

  > "There is no conflict if an application to retain a building is granted under Town and Country Planning so that the enforcement notice under that Act ceases to have effect, but demolition is proceeding with under the Public Health Ordinance pursuant to a notice under the Ordinance."

- There could be no repeal by implication of the Public Health Ordinance and Municipal Corporations Act enforcement provisions by the Town and Country Planning Act.

96. The authorities clearly demonstrate that the Town and Country Planning Act cannot legitimise building violations which call for its own special treatment under the concurrent

pieces of legislation. I, however, do not accept, as contended by the Regional Corporation, that it necessarily means that these offences are continuing offences. First, the Municipal Corporations Act operates prospectively and not retroactively. Second and more importantly, under section 163 of the Municipal Corporations Act the violations are committed when the building or structure has been **commenced** or **completed** or **work** done in violation of a specific law/regulation. So long as the offending work has commenced or completed the breach has then occurred at that point in time. It can only be a continuing breach if the work continues. This similar rationale applies to section 46 of the Public Health Ordinance for "alterations" and "additions" to buildings. See **Thomas David v Penybont Rural District 21 Council** [1972] WLR 1526. In that case in dealing with the regulation of "mining operations" under the planning law "every shovelful is a mining operation. Mining operations are carried out each day and each week." It is in that sense, by the nature and context of the statutory violation that a continuing breach can be said to arise. It is apposite for the Geelals' if these works were in fact completed in the 1970s or 1980s.

97. Persons wishing to carry out a development which requires permission under more than one statute must then satisfy the requirements of all the relevant statutes. Exemption from or suspension of demolition in respect of one statute does not involve exemption or suspension in respect of the other. This system may be inconvenient even clumsy or may produce inconsistent results. However, the code of planning law and the code of public health law still run their separate courses side by side and can only comingle through deliberate legislative enactment or legislative intervention to modernise our planning regime.

98. I agree with the Defendant's submissions that the real effect of the Claimants' submission is to impose by a "side wind" a statutory provision of four (4) years to the enforcement provisions in the Public Health Ordinance. Even subjecting these pieces of legislation to traditional interpretation criterion will not yield the result sought by the Geelals. In **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No. P 075 of 2018, Jamadar JA provided the following useful general comments on statutory interpretation:

“4. The general purpose of statutory interpretation is to discover the purpose and meaning of a statute. This is self-evident. This interpretative undertaking is in service of the application of the provisions of a statute, to particular circumstances that arise for consideration and resolution by the courts, for the benefit of both individuals and the society. In pursuit of these objectives - interpretation and application - the courts deploy several forms of legal argumentation. Resolving the issues in this case requires the interpretation and application of both the LPA and the Constitution.

5. First, there is textual analysis. One looks to the actual language and structure used in the statute in order to ascertain meaning. If the language is plain and unambiguous, then the literal meaning of the words used is considered. One also looks at the statute as a whole, considering structure, context and the impact of different parts of the statute on the provisions that fall to be interpreted and applied. This intratextual approach can deepen understanding, and so assists in the task of statutory interpretation. Finally, one considers the hallowed ‘canons of construction’ that have evolved over time as guides to the discovery of meaning. Second, the intention of the makers of the statute is also an aid to interpretation and application. Textual analysis may fully reveal intent, but at times it is necessary to look elsewhere, such as to prior versions of the statute/provision, the historical background, supporting green/white papers, relevant and jurisprudentially permissible parliamentary debates, and even contemporary commentaries.

6. Third, judicial precedents which have considered, interpreted and applied the same or similar provisions, may be relevant. Here relevance is influenced by similar fact patterns, principles, values, and language/intent - what are described as analogous situations. Extrapolation that is logical and consistent with the principles/values/reasoning in the precedents considered is permissible. Fourth, policy considerations may at times be deployed and determinative. This is when one first determines the likely outcomes/consequences that flow from one interpretation/application or another - a predictive assessment; one then determines which outcome is preferable and aligned with the underlying values, purposes and

intent of the law - an evaluative judgment."[40]

99. Applying these various tests, the Claimants' submission to imply a "four year time limit" into the statutory enforcement process of the Public Health Ordinance and the Municipal Corporations Act is unstainable. From a textual analysis, the legislators clearly left the authorities under the Public Health Ordinance and Municipal Corporations Act with an "open ended" discretion. From an examination of the enforcement processes set out in sections 46 and 47 of the Public Health Ordinance and generally Part II of the Municipal Corporations Act, it is plain and unambiguous that no time limit was meant to have been imposed. Conversely, the structure of the Town and Country Planning Act, a more modern piece of legislation, clearly has in built statutory safeguards for the overall planning of development in the jurisdiction with inbuilt appellate mechanisms. As a matter of policy it may well be that matters of public health generally, with its obvious effects and impact on the community, may call for compliance without a statutory time bar.

100. Further the Claimants' submission goes against the presumption that the law should not be subject to casual change. In **Statutory Interpretation, Bennion, section 26.8:**

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions."

101. The presumption that Parliament does not intend to make a radical change in existing law by a sidewind arises from the nature of the legislative process. It is serious business. Changes in the basic law, since they seriously affect everybody, are to be carefully worked out.[41]

102. Finally, the judicial precedents examined above of **Chandrawatee Ramlogan** and **Maharaj** demonstrate that the inconsistency in action by the authorities, although undesirable, is not by themselves unlawful.

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[40] **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No. P 075 of 2018 paragraphs 4-6

[41] **Statutory Interpretation, Bennion, 4th Edition** page 694

103. The real problem for the Claimants is that there is no time limit for the exercise of such a draconian power of enforcement of building violations under the Public Health Ordinance and the Municipal Corporations Act. While this is a legitimate concern, reaching to the Town and Country Planning Act to superimpose a four (4) year limit is equally arbitrary, unnecessary and inconsistent with basic principles of statutory interpretation.

104. Where the Claimants' argument has some greater force is in examining the context in which the Regional Corporation can act at all if it is demonstrated that there has been considerable delay in exercising its discretion under statute (which provide for no specific time limit to take enforcement action) and in the context of the correlation with other planning laws contained in the Town and Country Planning Act.

**A Flawed Process**

105. While the Regional Corporation is entitled to take enforcement action, in my view, the enforcement process was fundamentally flawed. As pointed out above, the judicial review Court will not substitute its views for that of the administrator but will anxiously scrutinise the decision making process. In this case, while I am not convinced that the Regional Corporation acted in bad faith, I am satisfied for the reasons set out below, that the decisions were irrational as the Regional Corporation was guilty of unreasonable delay; failed to make a proper inquiry into the critical facts; failed to establish and verify precedent facts to trigger their jurisdiction; acted out of proportion and out of context to the nature of the complaint. The decision was also unfair as there was a breach of natural justice in failing to properly inform the Geelals of the complaint they must face; failed to afford them an oral hearing which was reasonably required in the circumstances of this case; the notices themselves exhibited manifest irregularities for it to make the enforcement process substantially unfair and the process was tainted by apparent bias (pre-determination).

**Unreasonable Delay**

106. A decision can be quashed on the ground of unreasonable delay that satisfies the "unreasonableness" or "irrationality" head of review. See **Fordham, Judicial Review Handbook, 6th Edition 57.3.5.** This is a relevant factor in the context that the works or the

majority of them may well have been executed in the 1980s according to the Geelals. To proceed to take enforcement action in relation to works which were in existence or completed for over twenty (20) years is prima facie unreasonable and would run afoul of the **Wednesbury** reasonableness test unless there are justifiable reasons for the delay.

107. As discussed above, in the context of the Municipal Corporations Act and the Public Health Ordinance, there are no statutory limits for the Regional Corporation to take enforcement action. This cannot translate into, as Senior Counsel for the Claimants submitted, holding a "sword of Damocles" over the heads of the Geelals in perpetuity. Hypothetically speaking, presuming that the Geelals had effected alterations and additions to their property in 2014 contrary to the provisions of the Act and had violated those planning laws, the Regional Corporation would, according to them, be entitled to act at any time after the breach was committed ad infinitum. In other words, in response to such violations committed in 2014, they can decide to take enforcement action in 3014. The Regional Corporation's simple response to the question of delay is that the violations are a continuous breach. Quite apart from the fact that the breaches cannot continue unless the specific offending acts continue as explained earlier[42], this submission misses the mark entirely on the responsibility placed on administrators to act "within a reasonable time".

108. Although there is a conspicuous silence as to a statutory time limit to take enforcement action by the show cause machinery under the Public Health Ordinance and the Municipal Corporations Act, in contrast, taking enforcement action by means of criminal proceedings are subject to the time limits of the **Summary Courts Act Chapter 4:20**. See section 33. There are no other usual determinate factors in the legislation to act "without delay" or "as soon as practicable" or "forthwith". Where a public authority is not subjected to such time limits the Court will be reluctant to countenance it having an indefinite period with which to act. **R v. Secretary of State for the Home Department, Ex parte Phansopkar** [1976] 1 QB 606. The Court will impose on public bodies a duty to act within a reasonable period of

[42] Paragraph 95 of the judgment above

time.[43]

109. The concept of unreasonable delay is a flexible one and the question is resolved in whether the body acted irrationally by not acting sooner. See **Regina v Commissioners of Inland Revenue (ex parte Opman International UK)** [1986] 1 WLR 568. This is a fact specific and a contextual question where all the circumstances are be taken into account. In **Judicial Review, Principles and Procedure, Auburn, Moffett, Sharland** it was stated at paragraph 9.13:

> "The concept of a reasonable time is a flexible one. In essence, the question is whether the public body has acted irrationally by not acting any sooner. What constitutes a reasonable time in a particular case will, therefore, depend on all the circumstances and the courts will not attempt to specify a particular period as being the general limit of what is reasonable in respect of a particular function. The circumstances to which the courts have had regard when assessing what constitutes a reasonable time have included the nature of the matter to which the public body's inaction relates, the volume of matters with which the public body has to deal, any policy of the public body in relation to timing, the adverse consequences for the individual of any delay and the need to ensure fairness and consistency of treatment."

110. The question of the length of time and the prejudice to be borne by the Geelals are therefore relevant considerations that ought to have been taken into account by the Regional Corporation. It could not therefore, as the Claimants have submitted, choose to deploy powers it enjoys under statute in so draconian a fashion that the hardship suffered by affected individuals in consequence will justify the court in condemning the exercise as irrational and perverse.

111. In this case presuming the works were as old as the Geelals submitted, there is no acceptable reason for the delay by the Regional Corporation in taking enforcement action in

[43] Indeed section 23 of the Interpretation Act Chapter 3:01 provides:

> "23. Where a written law requires or authorises something to be done but does not prescribe the time within which it shall or may be done, the law shall be construed as requiring or authorising the thing to be done without unreasonable delay having regard to the circumstances and as often as due occasion arises."

circumstances where there is clear prejudice to the Geelals in taking steps which may have a detrimental and draconian impact on them. Of course, this will naturally apply to a demolition of an entire third floor. It is however unclear from the evidence the extent to which the other works can be easily remedied as the Regional Corporation has not made it clear by reference to dimensions the extent to which those works are in breach of any specific bye laws.

112. The question of unreasonable delay of course will arise in the context of the determination of when the works were actually conducted by the Geelals, what are the nature of the corrective works and what are the reasons for the delay. On this issue, the Geelals are correct to submit that a fundamental requirement of fairness demanded that a proper enquiry should have been conducted by the Regional Corporation in the first place to determine the question whether these were "old" or "new works" before any enforcement action was taken.

**No Proper Enquiry**

113. It is a fundamental requirement in this case that the Regional Corporation should have conducted a proper enquiry before taking enforcement action to determine when the alleged works were executed. It may be a difficult exercise to obtain accurate information from an alleged violator but steps must be taken to determine the true state of affairs before committing itself to an enforcement action[44].

114. The concept of a proper enquiry touches both the rationality and fairness heads of review. Fairness will 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 procuring a favourable result; or after it is taken, with a view to procuring its modification or both. The rules of natural justice and fairness also require that a consultation be done at a time when proposals are at a formative stage with adequate time to provide a proper and informed response. The product of consultation must be conscientiously taken into account when the ultimate decision is taken.

[44] See page 351 of **A Practical Approach to Planning Law**, Michael Purdue

115. As a requirement of reasonableness, a public body that fails to properly inform itself of the relevant factors that impacts on its discretion will be acting irrationally. See **Fordham, Judicial Review Handbook, 6th Edition, para 51.1.1** and **R v Secretary of State for the Home Department ex p Iyadurai** Imm AR 470, 475.[45]

116. In this case, the Regional Corporation failed to subscribe to the basic elements of the **Tameside** duty to properly inform itself of the key precedent fact of whether the works were indeed as alleged by them "new or recent works" to justify taking enforcement action.

**The Tameside Duty**

117. A public body must sufficiently acquaint itself with relevant information fairly presented and properly addressed and to take reasonable steps to acquaint itself with the relevant material so that it can answer the questions before it correctly. The **Tameside** duty can be characterised as comporting to the following general principles:

- The authority must ask itself the right question and take reasonable steps to acquaint itself with relevant information to answer the question correctly;
- The obligation is a corollary to the duty to make an informed decision;
- Having decided to resolve certain factual issues it must carry out investigations in that regard in a thorough and balanced way;
- The authority must take reasonable steps to answer the question it poses correctly;
- The wider the discretion imposed on the authority the more important it is to obtain all the relevant information before making a decision;
- Unless the Tameside duty is complied with the decision is unlawful.

118. The recent authorities of **The Law Association of Trinidad and Tobago v The**

[45] Lord Woolf Mr observed in **Iyaduri:**

> "Whether the Secretary of State has (i) taken adequate steps to inform himself of the position… (ii) properly considered the information which is available to him and (iii) come to an opinion which is consistent with that information recognising that it is his responsibility to evalutate the material which is available to him."

**Honourable The Chief Justice of Trinidad and Tobago** CA. Civ P075/2018 and **The Honourable Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie O.R.T.T. v The Law Association of Trinidad and Tobago** [2018] UKPC 23 examined the extent to which public bodies are held to a high standard of properly informing itself of the facts before making important decisions that touches and concerns the lives of citizens, no less than the Chief Justice in that instance, in this case the home and business of the Geelals. The Court of Appeal and Privy Council confirmed the duty of authorities to conduct sufficient enquiries as well as the duty to adequately and fairly consider and assess relevant material before making a decision. These are the hallmarks of a proper investigation as it is with a reasonable decision making process to take enforcement action. See **Barl Naraynsingh v The Commissioner of Police** Privy Council Appeal No. 42 of 2003, **R v Nottingham City Council, ex p Costello** [1989] 21 HLR 301, **R v Kensington and Chelsea Royal London Borough Council ex p Bayani** [1990] 22 HLR, **Reid v Secretary of State for Scotland** [1999] 2 AC 512.

119. In the Court of Appeal, Mendonca JA made the following observation on the **Tameside** duty at paragraphs 51 and 53:

> "The principle derives its name from Lord Diplock's speech in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014. In that case the question arose whether the decision of the Secretary of State was reasonable. Lord Diplock put the question for the court's determination in these terms (1064-5):
>
> > "51. It is not for any court of law to substitute its own opinion for [the Secretary of State]; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were relevant to what he had to consider:… Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to

acquaint himself with the relevant information to enable him to answer it correctly?"

……

53. It may well be that because of the Tameside duty the question that usually engages the court is whether the decision maker has discharged his obligation to take reasonable or adequate steps to inform himself, not whether he has any duty to do so..."

120. Neither before the issuing of the demolition notice nor prior to the second Show Cause Notice was there any evidence of a proper enquiry conducted by the Regional Corporation into the single most important question whether the alleged works were "new" or "recent" or to establish specifically the nature of the offending violations in relation to specific regulations of the planning law. The Regional Corporation's letter of September 2017 summarily dismissed the Claimants allegations that the works were completed many years ago based on the "constant communication" with Primnath since 2001. Ms. Gabrielle Figaro-Jones deposed in her affidavit[46] that from her perusal of the Regional Corporation's records she is aware that since in or around 2000 Primnath has undertaken works in additions and alterations to the premises located at LP 50 El Socorro Road San Juan as follows:

a) The Regional Corporation's records show that there was no steel shed which runs along the Western Boundary of the said premises in existence in 1987. Sometime in 2000s an addition of a steel framed shed approximately 80' and 25' with metal roofing covered with galvanised sheeting and secured with wrought iron works was constructed on the western boundary of the said premises.

b) The awning which exists on the western boundary of the property is a new addition and/or alteration to the building erected in 2000. The awning is approximately 200 feet constructed with metal gutting and overhands the footpath along the El Socorro Main Road in violation of building regulations and without an permission and

[46] Affidavit of Gabrielle Figaro Jones filed 7th March 2018

contrary to building regulations.

c) The Claimants commenced construction of a third level addition to the existing building. The works conducted in 2011 were a continuation of the construction of the third storey and the works done were more than the replacement of galvanised sheets.

d) During the period 2014 to 2017 the Claimants continued to erect additions and alterations to the said premises.[47]

121. These "findings' are Ms. Figaro's surmise based on the Regional Corporation's records. But what records? She has not given any first-hand account of these matters. Ordinarily, this may be of no moment but in the context of this case this dearth of information is unsatisfactory. In this case there is substantial evidence, admittedly not in the form of photographs, but in the form of first hand testimony of the state of the Geelal's premises from the 1970s by their neighbours. There is simply no proper rebuttal to this evidence by the Regional Corporation save for an offhand reference to "records" which were not exhibited in these proceedings. They also refer to general acknowledgments by Primnath that he would obtain Town and Country planning approval. This does not detract from the main question whether the works were conducted in the 1970s or 1980s. Seeking to regularise ancient works does not make those works new or recent.

122. Not only are the records not before the Court, their photographic evidence of "works" show nothing of the sort but fixtures present at the time the photographs were taken. The alleged construction activity is ambivalent as to whether there were permissible repair works or new buildings or alterations within the meaning of the planning laws. Further, the cross examination of Mr. Guelmo and his answers to my questions still did not shed any light on whether all the offending works were recent or old. Even further, the failure of the Defendant to cross examine the Claimants on this conflict of fact makes it difficult for it to suggest that the Court should not believe the Claimants' version of the facts. See **Blackstone Civil Practice** 2014 para 49.65.

[47] This information is also reflected in the affidavit of Michael Guelmo filed 7th March 2018

123. Unfortunately, the Regional Corporation has not complied with its duty of candour on this issue of the nature of the works. Such a duty is an imperative in public law cases to respond fully and transparently with all the cards upwards on the table. See **Winston Gibson v The Public Service Commission** Civil Appeal No.56 of 2006. This is so not only because the information lies with the body whose decision is being reviewed or challenged or because on the question of human rights arising the State has an unfair advantage over the private citizen, but more importantly, honest, open and frank sharing of information builds trust in the accountability and transparency in decision making of public institutions and strengthens our respect for the rule of law. See also **Ganga-Persad Kissoon v The Honourable Prime Minister Mr. Patrick Manning and The Public Service Commission** Civil Appeal No. 22 of 2006.

124. One only need reflect on our recent jurisprudence on the Freedom of Information Act Chapter 22:02 (FOIA) to underscore the point of the premium that is now placed on the provision of information which was once sealed in the cabinets of administration. This intense demand for accountability by provision of information was not part of the landscape in the 20th Century. Indeed, it has in my view fast tracked the development of our pubic law jurisprudence in this jurisdiction by legitimatising the citizen's demand for accountability and transparency in decision making. In **The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry** Civil Appeal No. P 200 of 2014, Bereaux JA observed at paragraph 69:

> "[69] The intention of the FIA in making available information about the operations of public authorities is a radical departure from a culture of secrecy and confidentiality which pervaded the public service at the time of the Act's passage. I draw in that regard on my own experience as a legal officer in the public service." Drawing reference to the judgment of Kirby J in **Osland v Secretary to the Department of Justice** [2008] HCA 37, it sets out the new premise of "open disclosure" in matters concerning public administration.[48]

[48] At paragraphs (60), (62) and (66) in **Osland**, Kirby J said:

125. In my view, such jurisprudence gives even more meaning to the duty of candour in public law proceedings as discussed in cases such as **R v Lancashire County Council ex parte Huddleston** [1986] 2 All ER 941 and **Dennis Graham v The Attorney General** [2015] UKPC 3. The duty of candour is consistent with the demand of public accountability, if not honesty, in the conduct of public administration.

126. The failure to reveal such evidence of the Regional Corporation's records or worse the minutes of the deliberations of the Regional Corporation would therefore trigger the Court's default of drawing an adverse inference that such evidence more than probably does not exist. See **Wisniewski (A Minor) v Central Manchester Health Authority** [1998] EWCA Civ 596 and **Shairoon Abdool v B&L Insurance Company Limited** H.C.A. No. 434 of 2001. See also **"Spoilation-What is it"** by Shane H Katz, B.A., LL.B, pages 2-4.[49]

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"[60] The Freedom of Information Act 1982 (Vic) ('the FOI Act') introduced to Victoria (as like statutes have introduced elsewhere) an important change in public administration. Australian public administration inherited a culture of secrecy traceable to the traditions of the counsellors of the Crown dating to the Norman Kings of England. Those traditions were reinforced in later dangerous Tudor times by officials such as Sir Francis Walsingham (Walsingham was Principal Secretary of State to Elizabeth I. See A-G v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86 at 127; cf Hogge God's Secret Agents (2005), pp 6, 115, 124–125, 276). They were then strengthened by the enactment throughout the British Empire of official secrets legislation (see, eg, Official Secrets Act 1911 (UK)). (See also Heinemann (1987) 10 NSWLR 86 at 129; [1987] HCA 45, [1988] LRC (Const) 1007 at 1013–1014). A pervasive attitude developed 'that government "owned" official information' (see Lane and Young Administrative Law in Australia (2007), p 294). This found reflection in a strong public service convention of secrecy …

[62] The basic purpose of the introduction of freedom of information legislation is the same in all jurisdictions. It is to reinforce 'the three basic principles of democratic government, namely, openness, accountability and responsibility' (see New South Wales Legislative Assembly Parliamentary Debates (Hansard), 2 June 1988 at 1399, cited in Comr of Police v District Court of New South Wales (1993) 31 NSWLR 606 at 612). The central objective is to strengthen constitutional principles of governance not always translated into reality because of a lack of material information available to electors. Fundamentally, the idea behind such legislation is to flesh out the constitutional provisions establishing the system of representative government; to increase citizen participation in government beyond a fleeting involvement on election days; and to reduce the degree of apathy and cynicism sometimes arising from a lack of real elector knowledge about, or influence upon, what is going on in government.
(66).. It assigns very high importance to a public interest in greater openness and transparency in public administration…."

[49] **"Spoilation-What is it"** by Shane H Katz, B.A., LL.B, pages 2-4:

"that should a party to litigation have evidence which would establish a fact necessary to the litigation, that evidence should be produced, or the court will draw a rebuttable presumption that the evidence would be unfavourable to that party's case. One can assume that the presumption is used by the Court to draw inferences that establish facts that could have been established had the evidence been produced. The presumption will not be made if other evidence exists that can be used to either establish a fact or

127. To date there is simply no evidence before this Court of the deliberations of the Regional Corporation itself on this issue. While there are references to two meetings of the Council on 6th June 2017 and 13th December 2017, there are no minutes of the Council's decisions. This is a very important matter. See **R v East Hertfordshire District Council ex parte Beckham** (1998) 76 P & CR 333. The Court must anxiously scrutinise the decision making process of the decision maker. The only two deponents for the Regional Corporation have not spoken for the Council on critical factors of the decision making process. What factors did the Council take into account? What matters of mitigation were considered? What weight was ascribed to Primnath's representations? What did they consider to conclude that **offending** works were ongoing or were new? It is disclosed in the letters to demolish[50] that a decision was taken by the Council since 6th June 2017 and December 2017. However, there is no evidence of what considerations were taken into account. Ms. Figaro does not even depose to the fact that she participated in such a decision. Mr Guelmo is of no assistance either.

128. Indeed, the only meeting held with Primnath was 3rd February 2017 with the Regional Corporation's Corporate Secretary, Mr. Guelmo, the building inspector and a Mario Alfonso. However, this was not the Council of the Regional Corporation whose duty it was to make the decision. Nor is there evidence that the deliberations of that meeting, however relevant, was communicated to the Council. Nor was it explained what was the purpose of such a meeting or the authority that they had at such a meeting. Indeed, it is admitted by Ms. Figaro that "none of us had the authority to make such representations on behalf of the Corporation since it is only the Council of the Corporation through a collective resolution that can make such a decision."

129. Furthermore, the "findings" of Ms. Figaro, who is not the Council, based on the Regional Corporation's "records" were presumably based on Mr. Guelmo's report[51] which was not

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refute an allegation and the presumption can be rebutted if the party can establish facts that prove the concealed or destroyed evidence would not have been unfavourable."

[50] Letter dated 24th July 2017 and 14th December 2017 exhibited "G.F.J 13" and "G.F.J.20"

[51] See report exhibited "M.G.7" in affidavit of Michael Guelmo filed 7th March 2018 "Report on the violations that exists at premises located at L.P 50 El Socorro Road, San Juan- Mr. Primnath Geelal."

provided to the Geelals for their input or rebuttal. Mr. Gulemo did not even make it clear to this Court under cross examination what new works were being complained of, when it was actually constructed, the extent of those works, and whether they were indeed alterations to the building. Nor is it clear whether the Guelmo report was even considered by the Council.[52] It was addressed to the CEO in November 2017 long after the Regional Corporation had replied to the Geelals in September alleging that the works were new works and in June 2017 when they decided to demolish. If they were so satisfied at that stage before Mr. Guelmo submitted his report, what material were they relying on to draw such a conclusion? It is unfortunate for the Regional Corporation that this judgment contains these several unanswered questions. It was their duty to answer them when their decisions are under review. Their duty was to place material at least in the form of minutes before this Court or some record of the "gist of the reasons of the Council's decisions". See **R v East Hertfordshire District Council ex parte Beckham**. Lord Mance in his elucidating judgment in **Kennedy** remarked "information is the key to sound decision making". Conversely, as in this case the lack of information paves the path for perverse decisions.

130. In these circumstances, the Regional Corporation conspicuously failed to discharge its **Tameside** duty to properly investigate and inform itself of the facts before taking enforcement action and has acted unreasonably.

**"Old or New Works" – A Precedent Fact**

131. Whether the works were recent or "old works" was an important precedent fact to be established by the Regional Corporation. Failing to establish such key facts before exercising a discretion also renders a decision unreasonable or irrational. In **Judicial Review Handbook, Michael Fordham 6th Edition, paragraph 49.2.1** the learned author noted:

> "*R v London Residuary Body ex p Inner London Education Authority [1987] [1998] JR 238, 240* "a mistake as to fact can vitiate a decision as to where the fact is a condition precedent to an exercise of jurisdiction, or where the fact is the only basis for the decision or where the fact was as to a matter which expressly or impliedly had to be

[52] **R v Canterbury City Council ex parte Springimage** July 1993, QBD [1993]

taken into account."

132. The Regional Corporation clearly could not have assumed that regardless of the time when the works were carried out it still had the authority to issue a demolition notice. That much is clear as it is apparent in the notice the complaint was with respect to "recent works" and its September letter stressed its allegations that the works were "recent". However, in light of all the evidence before the Court, it is not clear, firstly, whether all of the works identified were indeed recent works or were works conducted prior to 1980 and secondly and more importantly, to what extent did the Regional Corporation deliberate upon the question of the antiquity of the works and the impact that would have on now deciding to take enforcement action under the regulations.

**Irrationality-Wednesbury Unreasonableness**

133. For the reasons advanced above the decisions fail the traditional test of Wednesbury unreasonableness. There was no proper enquiry, the Regional Corporation did not properly inform itself, there is no evidence of what considerations were taken into account by the Council to arrive at its decision, worse it would have taken into account any irrelevant considerations of Guelmo's report without properly investigating the facts and is prima facie guilty of unreasonable delay. For these reasons, no reasonable tribunal would have issued these notices in the circumstances of this case.

134. The reasonableness standard and its level of scrutiny is now much of a moving target that varies with the context of the particular case. Courts still struggle on the intrusiveness of review under the "reasonableness standard" which exists on a spectrum from a very deferential approach as adopted in **Council of Civil Service Unions v Minister for the Civil Service** and **ex parte Smith** in reviewing matters of policy, to a rigorous and searching examination as adopted in **Daly.** In this case, even taking the outer edges of rationality, the Defendant failed to demonstrate that any reasonable or sensible administrator would have made the decisions. However, although raised peripherally by the Claimants, the decisions also fail the proportionality test which has sometimes been treated, without recognised as a separate ground of review, as part of the reasonableness standard. The Geelals'

submissions on proportionality focused on the question of the disproportionate action of demolishing in the context of this case and therefore perverse. The authorities relied on by the Geelals do however make reference to the emergence of "proportionality" as a distinct head of review. See **Kennedy, ex parte Smith.**

135. In my view, proportionality should be recognised as a valid ground of judicial review of administrative actions in this jurisdiction. It calls upon administrators to conduct the right balance between cause and effect, the object of the power and rational measures to achieve it. To weigh fairly the competing factors of compliance with detriment and prejudice. Without such a careful balancing exercise, decisions will be prone to be made on the basis of misinformation, false facts, false premises and a disregard to a human approach to enforcement.

136. In **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469, Lord Donaldson of Lymington MR commenting on proportionality had this to say:

> "In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950, [1985] AC 375 at 410 Lord Diplock classified under three heads the grounds on which administrative action was subject to judicial control. These were illegality, irrationality and procedural impropriety. However, he added:
>
> > "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic community … "
>
> Even at that time, the principle that administrative action could be quashed if it was disproportionate to the mischief at which it was aimed had been accepted by the courts, albeit not as a classified ground for judicial review: see *R v Barnsley Metropolitan BC, ex p Hook* [1976] 3 All ER 452 at 456, 461, [1976] 1 WLR 1052 at 1057, 1063.
>
> …….
>
> For my part, I think that Lord Diplock's speech in the *Council of Civil Service Unions* case

has been misunderstood. He was providing three chapter headings for a review of the grounds on which, in the reported cases, judicial review had been granted. He was not, as I think, suggesting that there were three separate grounds. Rather he was saying that in due time, and under the influence of European law and lawyers, there might be enough cases in which decisions had been quashed on the ground that the administrative action was disproportionate to the mischief at which it was aimed for this to be treated as a separate chapter.[53]

137. In **R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd** [1999] 1 All ER 129, it was observed at 145:

"In *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696 the House treated *Wednesbury* reasonableness and proportionality as being different. So in some ways they are, though the distinction between the two tests in practice is in any event much less than is sometimes suggested. The cautious way in which the European Court usually applies this test, recognising the importance of respecting the national authority's margin of appreciation, may mean that whichever test is adopted, and even allowing for a difference in onus, the result is the same."

138. In **Daly** it was observed at paragraph 27:

"**27.** The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional

[53] **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469 at 480-481

grounds of review……

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."

139. Recently, proportionality as a separate ground has emerged in our Caribbean jurisprudence. See **Wesk Limited v Saint Christopher Air and Sea Ports Authority** CLAIM NO. SKBHCV2017/0241 and Sykes J in **The Northern Jamaica Conservation Association et al v The Natural Resources Conservation Authority et al** (Claim No. HCV 2005/3022 dated 23 June 2006).

140. In my view, a proportionality review usefully allows the Court to more effectively balance the rights of administrative bodies and the citizens affected by their decisions.

141. In any event, the decisions while irrational and unreasonable (in the traditional sense of Wednesbury unreasonableness) also did not comport to the basic requirement of fairness.

**Natural Justice-An Oral Hearing?**

142. There is much force in the argument of the Claimants that they deserved an oral hearing where the issue of the nature of the alleged works could have been thoroughly investigated. This is so in light of the conflicting evidence on the record of the Geelals and

their neighbours namely, Mr. Malcolm Maharaj[54], Mr. Leroy Rampersad[55], Mr. Nandlal Seetaldass[56] and Mrs. Edith Maharaj[57] on the one part clearly identifying the major items of the shed and the third storey being in existence since the 1980s. In contrast is the evidence of Mr. Guelmo who was not present in the Regional Corporation prior to 2014; whose pictures are in 2014 and 2017 with no photographic evidence nor survey prior to that period; with no substantial evidence of the nature of the alterations conducted at that time as distinct from observing in place at that time, finished works which are contrary to the regulations with the date of its construction unknown to him.

143. The choice of forum by the Regional Corporation to resolve the dispute of fact which it should have been aware of prior to issuing the Show Cause Notice in April 2017 is therefore flawed. They should have been aware of the contention that the offending works were not new works, however, even without first properly informing itself before taking enforcement action, they persisted in the view that inviting written representation was a proper forum to deal with the enquiries. Clearly, fundamental fairness in these circumstances demanded the choice of the oral hearing under the enforcement process.

144. While the requirement of fairness is a contextual question (See **Barl Narynsingh)**, I do not agree with the Defendant's submissions that the Claimants had a fair opportunity to be heard. The Regional Corporation being a "master of its own procedure" does not mean it will trample over fundamental facets of fair hearing demanded in these circumstances of the Geelals. Administrators dealing with fundamental rights should achieve a high standard of fairness and where there are central issues of fact to be determined, an oral hearing is required. See **R v Army Board of Defence Council ex p Anderson** [1991] 3 All ER 375. In **Judicial Review by Supperstone, 6th Edition,** the learned authors stated at 11.198:

> "Hearings will normally but not necessarily be oral. In *Lloyd v McMohan,* it was held that an auditor had acted fairly towards councillors who were surcharged by him for willful misconduct in failing to make a valid rate in offering to entertain representations in

[54] Affidavit of Malcolm Maharaj filed 18th December 2017
[55] Affidavit of Leroy Rampersad filed 18th December 2017
[56] Affidavit of Nandlal Seetaldass filed 18th December 2017
[57] Affidavit of Edith Maharaj filed 18th December 2017

writing to his detailed complaints. It is to be noted however that the councillors had acted as a unit and that none had asked for a hearing. If, however, material factual evidence is in dispute then it can only be properly resolved by cross-examination and that will require an oral hearing. The decision-making body cannot rely upon disputed evidence to the prejudice of the individual unless it has been raised by cross-examination."

145. In **R v Secretary of State for the Home Department ex p Doody** [1994] 1 AC 531, 569 D-G Lord Mustill stated:

> "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."

See also **The Honourable Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.TT v The Law Association of Trinidad and Tobago** [2018] UKPC 23 paragraph 38.

146. While it is true that the Regional Corporation had a choice under section 47 of the Public Health Ordinance and section 163 of the Municipal Corporations Act to conduct a hearing in writing or orally, a reasonable authority would have invited oral representations and fundamental fairness demanded no less in these circumstances: the establishment as a fact or to resolve the conflict of the date the works were carried out and the nature of them. This is critical to even assume jurisdiction over any alleged violation. Having resolved that issue, to then determine the impact of the length of delay in enforcement action and the nature of the or any enforcement action required.

**The Right To Be Informed**

147. The Regional Corporation further submitted that the proper procedure for the issuance of a Show Cause Notice or Notice to Demolish is for the local authority upon becoming aware of a contravention to serve a written notice on the owner and/or builder specifying the contraventions and requiring him to show cause why the building or work should not be removed, altered or pulled down which is what the Regional Corporation did. The Regional

Corporation contended that its Show Cause Notices and Notice to Demolish followed proper procedure in specifying the contravention. In the case of the Show Cause Notices they required the Claimants to show sufficient cause why the authorized structure should not be pulled down.

148. The Regional Corporation submitted that the Notice to Demolish and the Second Show Cause Notice reflected in more detail the violations previously recorded in the First Show Cause Notice. They further submitted that there is no provision in the Municipal Corporations Act which requires a Notice to Demolish. All that is required is the issue of a Show Cause Notice which was complied with by the Regional Corporation.

149. This is an enforcement process in the exercise of a wide power with draconian consequences. In this case the Geelals were entitled to be informed with reasonable specificity as to the nature of the violations. While section 46 of the Public Health Ordinance and section 163 of the Municipal Corporations Act merely states that it is illegal if the offending works are not in accordance with the provisions of the Ordinance and any regulations or bye-laws, the Regional Corporation must in its Show Cause Notices and Notice to Demolish clearly by reference to the sections and sub sections of the relevant legislation show what law or regulations it was alleged that the Claimants had breached and in what manner. As demonstrated above[58] the alleged works in the notices are not particularised nor the relevant regulatory violations nor the date of commission. It was insufficient for the Regional Corporation to merely state in the Notices to Show Cause and in the Notice to Demolish that the alleged additions recently constructed by Primnath were not in conformity with the Building Regulations without stating what specific regulation were breached and how they were breached.

150. I am not sure the Council could in fact point to the specific regulations as I have examined the Guelmo report which purportedly details the statutory breaches, a report which was not given to the Geelals, and it fails to do so. He refers to the general sections 36 and 47 of the Public Health Ordinance but he does not refer to the specific regulations

[58] Paragraph 150

which give the Regional Corporation the jurisdiction to act on a violation. Indeed, amongst the copies of the legislation he provides to the CEO is section 55. But that section simply gives the authority power to enact regulations to deal with specific planning issues. He must let the Geelals know which specific requirement of the law in those regulations are being breached for the act to constitute a violation under sections 36 and 47 of the Public Health Ordinance.

151. Furthermore, it is a fundamental principle of fairness that all adverse material be provided to the Geelals for their comment and response. In this case, the report of Mr. Guelmo is purported to have played a dominating and fundamental feature in the decision making process and justifies the decision, however, Primnath was not given an opportunity to respond to this report prior to the issue of the show cause or the Notice to Demolish.

152. Similarly, sections 36(2), (3) and section 37 of the Public Health Ordinance only deals with new buildings and lands that are being used to erect new buildings. They simply do not apply to the alleged violations in the Notice to Demolish and the Defendant's reliance upon section 36 is of no effect.

**Bad Faith/Bias**

153. I do not view the acts of the Regional Corporation rising to the level of bad faith. I give credit to the evidence of the Regional Corporation of the interaction with Primanth and their officers. I note the "practice" of referring him to submit an application to Town and Country Planning. Indeed their interaction with him suggests more of an authority working with an alleged violator. However, upon deciding to take enforcement action they must fully comport with the law which they seek the Geelals to respect.

154. The process, however, in my view, is tainted by apparent bias or the appearance of pre-determination. It is well established that the test for establishing apparent bias by a decision-maker is whether the fair minded and informed observer having considered the facts would conclude that there was a real possibility of bias. A decision maker must not predetermine a matter that falls for its decision or make up its mind in advance or refuse to consider the matter on the merits. In **Locabail (UK) Ltd v Bayfield** [2000] QB 451, [2000] 1

All ER 65, [2000] 2 WLR 870, Lord Bingham of Cornhill (now CJ) observed at paragraph 25:

> ". . . in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 569)……The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection."

155. Administrative decision makers are however given a greater degree of latitude in expressing strong views compared to judicial decision makers. Administrative decision makers, unlike judges, are expected to express strong views on policy. They may be legitimately pre-disposed to ascertain positions based on for instance political affiliation or strongly held views. However, while administrative decision makers are permitted to be pre-disposed in favour or against a particular decision on a matter to be decided, they are not permitted to be pre-disposed or appear to pre-determine the matter to be decided. The Courts will draw the line between permitted pre-disposition where his mind remains open, to impermissible pre-determination where it does not appear to remain open. See **Judicial Review, Principles and Procedure, Auburn, Moffett, Sharland** ,paragraphs 8.86, 8.88, 8.01. While the appearance of pre-determination in respect of administrative decision makers is difficult to establish, the test is also contextual.

156. In the context of this case, it is not difficult for the Geelals to establish that the appearance that the Regional Corporation has closed its mind and a fair minded and informed observer knowing the facts would think that the Regional Corporation had pre-determined the matter. This is not the case of an administrator that prematurely arrives at a wrong conclusion and is therefore not necessarily pre-disposed to that result. This is a case where the evidence demonstrates a closed mind on the issue of demolition. I say so for

as early as June 2017, not having heard from the Geelals, the Regional Corporation resolved to demolish the offending structures. Despite all that has passed between the parties, they have not altered their course. In fact, after receiving the Claimants' letters in August 2017, they replied in September 2017 that they were not satisfied that there is a reason not to demolish. They issued their Notice to Demolish in December 2017 and after receiving representations from the Claimants, issued a new show cause notice but (a) refused to withdraw the Notice to Demolish of 6th December 2017 and (b) contend that the second Notice to Show Cause of 14th December 2017 confirms what ought to be demolished. Further, they have advanced in this case, without proper evidence, their views of a long history of non-compliance. A fair minded and informed observer would certainly draw the conclusion that despite the Geelal's representations, that "the demolition crew" will be coming. The Court expects, however, that the advice the Regional Corporation receives in this judgment of open, transparent and fair decision making would guide it in its future deliberations with the Geelals for any future enforcement action.

157. I turn now to the constitutional dimension of this claim. It is important as the human rights in play demonstrate that the exercise of administrative decision making must be scrupulously scrutinised.

**The Constitutional Dimension**

**Protection of the law**

158. The failure of the Regional Corporation to comply with the statutory scheme and to comport with the principles of fundamental fairness constitute a breach of the Geelal's right to the protection of the law. In **Sam Maharaj v The Prime Minister of Trinidad and Tobago** [2016] UKPC 37, Lord Kerr at paragraph 26 referred to the case of **The Maya Leaders Alliance v Attorney General of Belize** [2015] CCJ 15 where the CCJ observed:

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It

encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

159. It stands to reason therefore that the failure by the Regional Corporation to comport to the basics of the enforcement notice process and its failure to act fairly in relation to the Geelals is a breach of their right to the protection of the law.

160. As explained above, Rupnarine's property was endangered without compliance with the enforcement process. The section 47 and section 163 show cause process was flawed from the outset without a proper enquiry and without complying with the requirement to properly particularise the breaches. Furthermore, the failure to afford the Geelals an oral hearing as prescribed in the enforcement process all removed the protection that the law provided to the Geelals. They were entitled to an enforcement process that was clear, not confusing and fair, not oppressive.

**Right to Property**

161. The actions of the Regional Corporation also constitute an infringement of their right to property and not to be deprived save by due process. The decisions seek to demolish separate properties owned by the Claimants with as explained above is inconsistent with the due process provided under the regulations and public law principles of fundamental fairness. In **Chandrawatee Ramlogan** the Court of Appeal rightly observed that a breach of

the enforcement process legislation would give rise to complaints of a breach of constitutional right to property.

**The Right to Equality of Treatment**

162. I do not agree, however, that the actions of the Regional Corporation constitute a breach of the right to equality of treatment. Fundamentally, in my view, the Claimants failed to properly identify suitable comparators. In paragraph 50 of the joint affidavit of the Claimants filed 18th December 2017 they simply identified neighbouring properties who they are of the view are also violating planning laws. There is no evidence of this. Simple photographs are insufficient. In the same way, the Geelals complain of carte blanche and generalised statements of "unlawful" structures made against them, they cannot point fingers at the neighbouring properties without proper evidence.

163. Even if there are similarly circumstanced persons in the form of similar violators of the regulations, I am satisfied with the reasons advanced by the Regional Corporation. In **Francis Paponette and others v The Attorney General of Trinidad and Tobago** [2010] UKPC 32 Sir John Dyson SCJ observed at paragraph 52:

> "52. Mr Knox submits that there is no evidence that these differences are material. In particular, he says that there is no evidence that the value of the accommodation (ie the respective taxi stands) would be affected by the factors identified by the Court of Appeal. It is tempting to say, for the reasons given by Warner JA, that the differences must have been material. But in the Board's view this not self-evidently true. The reasons for the difference in treatment should have been explained by the government in evidence. In the absence of such evidence, the court was placed in the realms of speculation. For that reason, the Board will allow the appeal on the section 4(d) claim too."

164. There was justification for prioritised enforcement action against the Geelals as part of the Regional Corporation's administrative exercise in enforcing compliance with the bye laws. I am also satisfied by their evidence that they have in fact taken enforcement action against other persons. The Court would not insist on the rigors of adducing the quality of

evidence demanded by the Claimants of their other enforcement action in the context of the very speculative nature of the allegations of unequal treatment made by the Claimants themselves.

**Notices Invalid as against Rupnarine Geelal**

165. I deal finally with what the Claimants submitted in limine that the Regional Corporation simply has no answer to Rupnarine's claim that these notices are to be quashed as against him. The focus and intent of the notices have been on Primnath and not Rupnarine. While the notices are addressed to Primnath at his residential address, they identify alleged offences in relation to the building owned by Rupnarine. The structures that were the subject of the first notice were a third floor, expanding the building to the boundary line and construction of a shed. There is no doubt that the notice really directed to Primnath enjoins him in a contest in relation to his third floor and so much of his own structures and shed on the El Socorro Road. However, the Notice to Demolish incorporated structures on both of the Geelals' properties:

(a) An 80 x 25 feet steel shed which straddles both properties;

(b) A 200 ft awning on the El Socorro Road that is partially on both properties;

(c) A steel frame shed which is partially on Mr. Rupnarine's property.

166. Rupnarine and Primnath maintain two separate residences and business although both buildings adjoin each other and are built on a parcel of land owned by their father. The Regional Corporation simply did not identify on any of the notices which structures were that of Primnath to whom the notices were addressed as distinct from Rupnarine.

167. It is elementary that this notice is invalid with respect to Rupnarine as the Regional Corporation failed to comply with the elementary rule of natural justice of providing to Rupnarine a fair opportunity to be heard before any enforcement action can be taken against him. Simply put, no notice was given to Rupnarine at all before the draconian measure of demolition was proposed.

168. The Regional Corporation's defence to Mr. Rupnarine's claim is a non-starter. They

contend that their requirement of section 46 of the Public Health Ordinance and section 163 of the Municipal Corporations Act is simply to serve notice in writing on the owner of the property. It is clear that no notice was delivered or served on Rupnarine nor even addressed to him. It is clear that one of the most important aspects of the alleged infringement was the construction of a three storey dwelling which could only relate to Primanth's building. The clear inference is that the notice was served on, delivered and indeed intended to be relevant to Primnath. No notice was served or delivered to Rupnarine, the owner of the building in which the alleged violations of the construction of a shed and awning relates. All of the correspondence and the interaction related to Primnath and not Rupnarine.

169. The contention that the Claimants' attorney did not draw this distinction to their attention is also irrelevant. It is for the Regional Corporation to properly inform itself of the relevant facts, in this case the identity of the owner/occupier of the offending building.

170. The notices are therefore ineffectual in relation to Rupnarine and are quashed as against him. There is nothing prohibiting the Regional Corporation from taking such enforcement action against Rupnarine, however, it must comply with the statutory provision and the principles of public law as outlined in this judgment.

**Damages**

171. In this case declaratory relief is sufficient to vindicate the rights of the Claimants. There is no justification either on the basis of the Claimants' submissions or their evidence to award any compensatory or vindicatory awards in constitutional proceedings.

172. In the **Attorney General v Ramanoop** (2006) 1 AC 328, Lord Nicholls of Birkenhead at paragraphs 17 to 18 stated:

> "18. When exercising this constitutional jurisdiction the Court is concerned to uphold, or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful

guide in assessing the amount of this compensation. But this measure is no more than a useful guide because the award of compensation under Section 14 is discretionary and moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law."

173. Recently, Jamadar JA in **The Attorney General of Trinidad and Tobago v Selwyn Dillon** Civil Appeal No. P 245 of 2012 usefully set out the following principles as a guide in the assessment of constitutional damages at paragraph 20:

(1) the award of damages is discretionary;

(2) the nature of any award of damages is always with the intention and purpose of upholding and/or vindicating the constitutional right(s) infringed and in furtherance of effective redress and relief for the breaches;

(3) whether an award of damages is to be made depends on the circumstances of the case, including consideration whether a declaration alone is sufficient to vindicate the right(s) infringed and whether the person wronged has suffered damage;

(4) in determining the sufficiency of a declaration and/or the need for damages, the effect(s) of the breach on the party seeking relief is a relevant and material consideration;

(5) compensation can thus perform two functions - redress for the in persona damage suffered and vindication of the constitutional right(s) infringed;

(6) compensation per se is to be assessed according to the ordinary settled legal principles, taking into account all relevant facts and circumstances, including any aggravating factors;

(7) in addition to compensation per se, an additional monetary award may also need to be made in order to fully vindicate the infringed right(s) and to grant effective redress and relief;

(8) such an additional award is justified based on the fact that what has been infringed is a constitutional right, which adds an extra dimension to the wrong, and the additional

award represents what may be needed to reflect the sense of public outrage at the wrongdoing, emphasise the importance of the constitutional right and the gravity of the breach, and/or to deter further similar breaches;

(9) the purpose of this additional award remains, as with compensation, the vindication of the right(s) infringed and the granting of effective relief and redress as required by section 14 of the Constitution, and not punish the offending party; and

(10) care must be taken to avoid double compensation, as compensation per se can also take into account similar considerations, including relevant aggravating factors and is also intended to uphold and/or vindicate the right(s) infringed."

See also **Oswald Alleyne and 152 others v The Attorney General of Trinidad and Tobago** CV2018-00447.

174. The only evidence of damage or inconvenience is contained in paragraphs 54-57 of the Geelals' affidavit[59]. There is no financial detriment nor quantifiable loss. I have also considered whether an award may be suitable for vindicating the right of the Geelals or some award to reflect the public outrage of these breaches. I see no warrant to do so in this case. The fundamental rights of the protection of the law and due process are important pillars of the rule of law, yet in the context of this case, the administrative missteps coupled with a lack of any real detriment ought not to sound in damages. The real purpose of this litigation is achieved by quashing the decisions made by the Regional Corporation and making the declarations sought.

**A Fresh Perspective**

175. There will be a time to explore the ground of proportionality in judicial review discussed in this judgment as a free standing head of review in the appropriate case. In this case it was not articulated as a separate ground of challenge by the Geelals. Reference to proportionality in their submissions are fairly to be taken in the context of the decision being disproportionate and therefore characterised as Wednesbury unreasonableness. However, there is merit in giving life to the proportionality ground of review in this

[59] Filed 18th December 2017

jurisdiction for several reasons. First, our Judicial Review Act Chapter 7:08 in setting out the heads of review certainly did not create an exhaustive list. Second, it is a much more appropriate test to apply to administrative decision making in 21st century Trinidad and Tobago in light of our growing judicial review jurisprudence. As Justice of Appeal W. Kangaloo observed, our judicial review is developing beyond a galloping pace[60]. The reasons lie in a growing demand by our citizens for transparency, accountability and good governance. The jurisprudence of the FOIA is but a reflection of this growing sensitivity to the transparency of decision making. Third, such a test would, rather than stymie decision making, create the environment for enlightened decision making. Finally, such demands for a measure of balance in decision making may infuse a humanism which will instil respect for the rule of law. Proportionality may well develop into not only steps taken to weigh competing interests but steps taken to avoid conflict and engage mediation or ADR. When described in this way we may well foster a new breed of responsible and humane administrators condemning the "bull in the China shop" style of decision making to the archaic days of the plantations in the 1900s.

**Conclusion**

***"..land must not be wantonly nor irresponsibly used. It must.. be subjected to planned control…the proof of the pudding is in the eating and the success of this enactment will demand largely upon the manner of its administration which will be a matter requiring tact, patience and understanding of a high order."***[61]

176. Even more, patience must be exhibited by the Regional Corporation in its interaction with the Geelals. While the enforcement of planning laws may prove challenging, this judgment sets out clear guidance for the Regional Corporation in its steps to regularise buildings in conformity with our regulations which will redound to the public good.

177. It must not be misunderstood that this judgment provides an escape route for persons

[60] **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civil Appeal No:207 of 2010, Kangaloo J.A observed at paragraph 12:

> "..It was once said of judicial review that it is galloping jurisprudence. In my view it is now jurisprudence which has passed the stage of galloping and is now at racing pace.."

[61] **An Outline of Planning Law Sir Desmond Heap 7th Edition**, Extract from preface of first edition 1949 page x

who would flout our planning laws. Far from it. It seeks to achieve two main objects: to demonstrate the legitimacy of the rule of law when enforcers of our laws responsibly approach the balancing exercise of promoting the public good and individual rights and to instil an ethos of administrative discipline acceding to the citizens their rights to hold public bodies accountable and thereby build trust in our institution life.

178. Returning to the questions I asked at the beginning of this judgment, the rule of law is vital to the creation of a modern democracy, an orderly citizenry and just society. It is created when we can achieve consent from citizens to the rule of law. Modern regulators must champion the rule of law through building consensus with the subjects of the rule of law when decisions of the state are transparent, accountable and achieved through a process that is fundamentally fair.

179. Building consensus is a useful approach and to that extent I had explored with the parties at the beginning of these proceedings the steps that can be taken to amicably deal with the concerns of both parties. I still hold the hope that discussions can still continue even after this judgment.

180. Ultimately, enforcement action must be adopted humanely, that is reasonably and proportionately: in this case that means that the Regional Corporation must fully inform itself of all the relevant facts before invoking a section 47 and/or section 163 enforcement process; act within a reasonable time from the date of the alleged violation; ensure that notices are properly drafted and served with full particulars provided and sufficient enquiries conducted; where appropriate conduct oral hearings; properly minute their deliberations and reasons for their decisions taking into account all relevant factors and above all; balance all competing factors to arrive at a proportionate response to the alleged violations. It should go on to consider possible alternative options available to the regulators to regularise violations. In this way, with our authorities seeking to build consensus with citizens in compliance with our laws, the rule of law is strengthened by inward inspiration rather than external oppression.

**Relief**

**IT IS HEREBY DECLARED** that:

1. The decisions of the Defendant:

    a) contained in the Notice to Demolish served by the Defendant on the First Claimant on the 6th December, 2017 ("Notice to Demolish") requiring the First Claimant to demolish and remove alleged unauthorized structures (structural addition/alterations) located at El Socorro Road, San Juan, failing which the Defendant would remove same without further notice;

    b) contained in the Show Cause Notice served by the Defendant on the First Claimant on the 14th December, 2017 requiring the First Claimant to show cause before 21st December 2017 why the alleged authorized structures (structural addition/alterations) contained in the said Notice to Demolish should not be removed/altered or pulled down failing which the Defendant may remove same;

    c) the continuing decision of the Defendant to refuse to withdraw the Notice to Demolish;

    are all null and void and of no effect because the Defendant acted unlawfully, unreasonably, irrationally and in breach of the rules of natural justice and procedural fairness.

2. The said decisions are in breach of the Claimants' constitutional rights to the enjoyment of property and not to be deprived thereof except by due process of law guaranteed by Section 4 (a) of the Constitution; to the protection of the law guaranteed by Section 4 (b) of the Constitution.

**IT IS HEREBY ORDERED**

1. That by order of certiorari the said decisions of the Defendant are hereby quashed.
2. The Defendant do pay to the Claimants their costs to be assessed by the Court in default of agreement.

**Vasheist Kokaram**

**Judge**