

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

CV2014-01602

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

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION MADE ON OR AROUND 15<sup>th</sup> NOVEMBER 2013 MADE BY AND/OR ON BEHALF OF THE TOBAGO HOUSE OF ASSEMBLY TO ENDORSE THE BHP BILLITON 2014 PETROLEUM FRAMEWORK FOR IDENTIFYING AND COMMUNICATING WITH AFFECTED USERS OF BHP BILLITON 2014 DEEP WATER SURVEY AREA AND OTHER RELATED DECISIONS

BETWEEN

THE ALL TOBAGO FISHERFOLK ASSOCIATION

Claimant

And

THE TOBAGO HOUSE OF ASSEMBLY

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Appearances:

Ms. D. Moore-Miggins and Ms. M Henry for the Claimant

Mr. E. Prescott SC and Mr. G. Ceasar for the Defendant

Ms. K. Persad observer for BHP Billiton

## JUDGMENT

1. This is a claim to review the decision of the Defendant to expressly endorse the contents of a document entitled 'Framework for Identifying and Communicating with the Affected Users of BHP Billiton's (BHPB) 2014 Deep Water Seismic Survey Area', (hereinafter referred to as "the framework") submitted to the Environmental Management Authority on the 19<sup>th</sup> November 2013 without consultation with the Claimant. In so doing, according to the Claimant, the Defendant would have also supported or endorsed BHPB's conclusion that no fisherman in Tobago is directly and/or indirectly affected by a seismic survey that was to be conducted by the said BHPB in the waters off the north eastern coast of Tobago. The Claimant therefore asks the court to move the decision into the high court and quash it. Several other decisions allegedly made have been challenged but they all touch and concern the very same issue and appear to be prolix in the circumstances of the substantive claim.
2. The Claimant is a non-profit organisation registered as such under the Companies Act Chap 81:01 and its principal objective is to represent the interest of its members who are fishermen and/or owners of fishing vessels operating in the waters off the island of Tobago. The Defendant (THA) is a body corporate created by section 141 of the Constitution with powers prescribed by the Tobago House of Assembly Act Chap 25:03 (hereinafter referred to as "the Act"). It is responsible for the formulation and implementation of policy in respect of the matters set out in the Fifth Schedule of the Act in respect of the island of Tobago, which includes agriculture and fisheries. For the better performance of its functions, the Assembly is empowered to do all such acts and take all such steps as may be necessary for, or incidental to the exercise of its powers or for the discharge of its duties and in particular the matters set out at section 25(2)(a),(b) and (c) of the Act.
3. There exists a department within the THA called the Marine Resources and Fisheries Department, which itself is a department of the Division of Agriculture, Marine Affairs, Marketing and the Environment of the THA. That department is responsible for the sustainable management of Tobago's marine resources. The department is subdivided into the Fisheries Aquaculture Unit and the marine Area Unit. The first unit is

primarily responsible for the development and management of the fishing industry and the second has responsibility for the marine and coastal resources around Tobago.

4. The Claimant has with the permission of the court, relied on the affidavit sworn to and filed by Junior Quashi in support of the application for leave on 9<sup>th</sup> May 2014 in support of the Fixed Date Claim. There is also an affidavit on the Claimant's behalf filed by Kerwin John on the 29<sup>th</sup> September 2014 in reply to the affidavit of Nevlín Renwick filed by the Defendant on the 23<sup>rd</sup> September in opposition to the claim.

### **The case for the Claimant**

5. Junior Quashi, the president of the Claimant, owns the fishing vessel named 'Look Meh' and has fished in the waters of Tobago for over thirty years. He is also employed with the Defendant in the capacity of Road Overseer. He testifies that there are about 1400 individual persons and 14 fishing organizations within the membership of the Claimant. He states that in late 2013, he became aware that the government of Trinidad and Tobago was considering the grant of a licence to BHPB for the purpose of conducting seismic surveys and/or exploration activity for crude oil and natural gas in the waters of Tobago. He says that he knew from past experience that there would be extensive discussions and consultations with the fisherfolk and members of the Claimant, explaining the details of the proposed activity, the location and duration. That they would consider the effect on the livelihood of the fisherfolk and negotiate with them in good faith in relation to compensation.
6. According to Quashi, BHPB held a meeting on the 26<sup>th</sup> September 2013 with the Claimant and other fisherfolk to introduce themselves and discuss BHPB's proposed activities. A copy of notes of that meeting signed by Quashi is exhibited to his affidavit. A perusal of that note shows that the meeting was chaired by Mr. Garth Ottley, referred to as Director of Fisheries Division. The court pauses to observe at this stage that it appears that the notes taken by Quashi, referring to the Fisheries Division is in fact a reference to the Marine Resources and Fisheries Department of the THA (Fisheries Department). This is to be distinguished from the Fisheries Division of the Ministry of Food Production of Trinidad and Tobago. The error is a common one throughout the

documents filed by the Claimant but the Defendant has made the difference clear in its affidavit. That being said it appears that Mr. Ottley was present at that meeting on behalf of the Fisheries Department of the THA.

7. Next according to the Claimant, Ms. Carla Noel Mendez of BHPB who told the meeting that the surveys were proposed to begin in 2014 and extended into 2016. The location of the survey area was also provided. The floor was then opened for questions and someone enquired about compensation. In response Ms. Mendez stated that the meeting was an introductory one only and other meetings would be held to discuss the issue of compensation. This statement was supported by another of BHPB's representatives Mr. Larry Ward. The meeting ended shortly thereafter.
8. On the 11<sup>th</sup> February 2014 another meeting between BHPB and the Claimant was held. The members of the Claimant were provided with several documents including a map which purported to show an area where Tobago fishermen fished and they were informed by BHPB that based on that map, the members of the Claimant were not affected by the proposed seismic surveys as there was no fishing in that area by the members of the Claimant. Despite the protests of the Claimant, BHPB responded that they could only use the information which they received and that the said map was in fact provided by the Defendant. Concerns were raised about the turning radius of the survey vessels and the length of the fishing lines of some boats which would encroach into the survey area. See exhibit 'E' to affidavit of Quashi on 9<sup>th</sup> May 2014.
9. The documents annexed to the affidavit of Quashi, having been received at that meeting show that Certificates of Environmental Clearance (CECS) were received from the Environmental Management Authority (EMA) on 8<sup>th</sup> January 2014 and that the closest distance to the Tobago shore is 17 miles. The document entitled 'Trinidad and Tobago 3D marine Seismic Survey 2014-Overview' also sets out that BHPB will implement the Framework which according to them was approved by the Department of Fisheries of the THA. The documents also set out meeting dates for community meetings. Further, the document explains the process of the seismic survey as being that of sending sound waves into the earth's layers by compressed air. Those sound waves reflect to the surface and are captured and recorded. The document sets out that there are no consequential changes to the migratory pattern of fish but that independent studies show that there could be temporary changes in catch rates with no long term

effects documented to date. In that regard no definition of long term has been provided. The document also states that studies have shown a negligible impact on fish populations when compared with the significant natural mortality rate for fish eggs and larvae.

10. It is when the framework was handed to the persons present at the meeting of 11<sup>th</sup> February, that Quashi observed that the framework had been submitted to the EMA on the 19<sup>th</sup> November 2013. Further, attached to that document was a letter under the hand of the Administrator of the Division of Agriculture, Marine Affairs, Marketing and the Environment of the THA dated the 15<sup>th</sup> November 2013 which is addressed to Mrs. Carla Noel-Mendez and reads as follows:

***Re: Framework in keeping with CEC 3956/2013***

*We are in receipt of the above captioned Framework for communicating with the relevant persons in respect of your company's 2014 deepwater survey completed following consultations with the Department of Marine Resources and Fisheries, Tobago House of Assembly. We have reviewed the framework and endorsed the approach outlined therein.*

*We look forward to its implementation prior to the start of the survey.*

11. The letter is attached to the framework as attachment 6 and is called 'Compensation Framework Letter of Endorsement', Department of Marine Resources and Fisheries, Tobago House of Assembly. There is no issue as to whether this letter emanated from the THA.
12. So that according to the Quashi, this was the first time that the Claimant was seeing the letter of endorsement, namely on the 11<sup>th</sup> February 2014. Further, according to Quashi, it was also the first time that the Claimant became aware that the Fisheries Department of the THA had given a map to BHPB which purported to show the area within which they fished and that five meetings between the Defendant and BHPB had taken place as stated in the framework. Quashi also states unequivocally that the map presented is old and outdated and does not reflect the true position as to where his members actually fish.

13. He testifies that they explained to BHPB that some of the members did in fact fish in the area to be surveyed, some for at least fifty years catching king fish, tuna, dolphin and several pelagic species. Also that all fishermen would be affected because of the method of fishing employed namely drifting. The method of drifting according to him yields good results in catching fish. It involves the practice of turning off the engines of the boat thereby allowing the vessel to drift with the current. The drifting season begins in October and ends in June. The migratory path which the fish have followed runs at certain times during the year from the north-eastern areas of the waters in a southerly direction. He states that any disturbance to the fish even miles away would cause the fish to disperse and affect their ability to catch. That the effect of this could last for three to four years. In fact according to Quashi, this was the basis upon which they obtained compensation from Petrocanada and Centrica in the past.
14. In relation to the notes taken at the two meeting by the Claimant which have been exhibited, the court observes that the notes are not minutes of meetings approved by those who attended but are simply previous consistent statements of the witness Quashi. In those circumstances the court is to adopt a very cautious approach as to their accuracy having regard to their self serving character.
15. The Claimant also alleges that it was based on the endorsement by the THA that the EMA did not stipulate that mechanisms be put in place for the protection of the spawning grounds of the fishery in the waters north east of Tobago. Further, that is because of this endorsement that BHPB refused to pay compensation to them.
16. It is to be noted at this point that the court was informed during the hearing that a separate claim has been brought against the EMA. That claim is assigned to another court and does not in any way impact on the issues to be determined by this court.

### The Framework

17. The framework states that the submission of a proposed framework for identifying and communicating with the affected users of the survey area was a pre-requisite of the EMA for the issuance of the CEC. Further, that the framework was drafted in

consultation with the Department of Marine Resources and Fisheries, Division of Agriculture, Marine Affairs, Marketing and the Environment of the THA and the framework will be executed by BHPB upon receipt of the CEC. The framework sets out that BHPB proposes to undertake a 3D Marine Seismic Survey off the east coast of Tobago to be conducted over an area of 10,938 square km. (4,223,2 sq miles), with a distance from the nearest part of the survey to the coast of Tobago being 27km (16.7 miles). The document states that line changes and vessel turns can bring the vessel to be used to within 17 km (10.5 miles) of the east coast of Tobago during a small part of the survey timeframe. Further, that BHPB will organise community presentations in the villages of Castara, Charlotteville and Lowlands and will organize a separate presentation for representatives of the main fishing associations in the presence of the Fisheries Department. The framework then sets out a complaints process and a process for fishermen related claims. Under the rubric '*Consultation with the Fisheries Department*', the framework indicates that BHPB held five meetings with the Fisheries Department and the department provided BHPB with a list of officially registered fishing vessels in Tobago which undertake fishing within the survey area consequent upon a request for same by BHPB. A map which purports to show areas of concentrated fishery activity is included in the framework as figure 2.

18. Further, and of substantial importance in this case, the framework states that **BHPB believes that there are no users of the sea who are directly impacted by the survey.** Further the framework sets out that subsequent to the issuance of the framework, if consultations reveal that there are any fishermen who have historically fished in the survey areas BHPB will engage them directly to determine if and how they are to be impacted by the survey. Finally, the letter of endorsement is attached. The letter purports to be attachment number 6 to the framework but as exhibited, there are no other attachments.

### **Defendant's response**

19. The Defendant responded by way of the affidavit of Nevlin Renwick, the Administrator of the Division of Agriculture, Marine Affairs, Marketing and the Environment of the THA. According to Renwick, in 2012, The Ministry of Energy and Energy Affairs (the Ministry) concluded its evaluation of bids received for the 2012 Deepwater bid round.

The results were presented to the Standing Committee on Energy and subsequently to the Cabinet. **BHPB** was successful in its bidding for five blocks with an area of over 4,100 km and was awarded production sharing contracts which were entered into by the Ministry and **BHPB** on the 11<sup>th</sup> June 2013. In order to obtain the CEC, **BHPB** was required to submit the framework which it did. **BHPB** first met with the Administrator of the Division of Agriculture, Marine Affairs, Marketing and the Environment at the time Ritchie Toppin and with senior members of the **THA** including the Chief Secretary and the Chief Administrator. Officers of the Fisheries Department also met with **BHPB**. A request for a list of registered fishing vessels and fishermen was made and same was provided to **BHPB** by the Fisheries Department. At one of those meetings, the issue of compensation was raised by **BHPB** with the Fisheries Department but the Department took no position as to who was payable. Having supplied the list of registered vessels including the names and addresses of owners, and registered fishermen, the Department did not stand in the way of continued discussion as between the Claimant and **BHPB**. The list contains 1,194 registered fishermen and 511 fishing vessels. The list is attached to the affidavit of the Defendant. Renwick states that during the meetings between the **THA** and **BHPB** there was no need to have the input of the members of the fishing community as the meetings simply dealt with matters of a statistical nature. Renwick admits the introductory meeting of the 26<sup>th</sup> September 2013 but says that in respect of the meeting of the 11<sup>th</sup> February 2014, the fisherfolk specifically requested that no personnel from the Fisheries Department be present. Renwick says that he is informed that subsequent to the meeting of the 11<sup>th</sup> February 2014 there were several meetings between **BHPB** and the Claimant. Suffice it to say that he has not stated his source of information and there is no such evidence elsewhere in this case.

20. Renwick denies that a map of concentrated fishing was in fact provided to **BHPB** by the Defendant. He says that the Fisheries Department does not have the responsibility for the preparation of such maps and that the map used by **BHPB** was based on a map produced by the Ministry and not the **THA**. That map would have been drawn based on information gathered by data collectors of the Ministry. He further states that in his opinion drifting would mean that the boats would drift towards the shore and not away from the shore into the survey area because of the north east winds. Also that no scientific data has shown a depletion in fish stock since the survey began in March 2014



or in relation to any other previously conducted survey. It is his assertion that the Fisheries Department did not represent the Claimant or negotiate for and on behalf of the Claimant with BHPB but was a stakeholder on its own. He denies that the decision to endorse the framework by the THA conflicted with THA policy or national policy and that the only body authorised in law to decide whether an Environmental Impact Study is necessary is the EMA and not the THA.

### Reply by the Claimant

21. Kerwin John, Vice President of the Claimant replied by way of affidavit of the 29<sup>th</sup> September 2014. He states that fishermen regularly fish more than thirty miles off the coast which brings them clearly within the survey area and that the framework shows that vessel turns will bring the vessel within 17 km (9 miles) away from the coast. In that case according to him, clearly every Tobago fisherman in that area will be affected. That it appears from paragraph 11 of the Defendant's affidavit that at the time of endorsing the framework, the Defendant was of the impression that the survey area would only be 4,100 km but that it is in fact more than double that amount. That had the officers of the Defendant consulted with the Claimant prior to the endorsement, these matters would have been drawn to their attention.

22. John makes the point at paragraph 9 of his affidavit that having regard to the tensions which have historically existed between the fishermen, oil companies and the Defendant, the Defendant ought to have known of the issue of compensation was a thorny one and ought to have consulted with the Claimant prior to endorsement of a framework which says that they (the fishermen) are not affected. In support of his assertion of the existence if tension in the past, John has annexed a newspaper article and two pre-action protocol letters from fishermen in relation to a similar dispute with Petrocanada wherein the fishermen were, according to him, forced to take private legal action because of the refusal by the Defendant to assist. Additionally, he sets out the terms of a previous settlement in relation to a similar issue by Centrica. John disputed the accuracy of the list provided by the Fisheries Department and in so doing identified several owners and vessels which appear to be absent from the list. He also stated that

the Fisheries Department was not debarred from the meeting of the 11<sup>th</sup> February 2014 and that the Department was in fact invited but that Mr. Ottley stated that he was not comfortable attending the meeting and so did not attend.

23. In relation to the map which the Defendant says was provided by the Ministry, John does not deny this but says that data collectors are unseen in the lifetime of those currently fishing so that it must be that the map is of some vintage and therefore inaccurate. He also states that during the process of drifting, boats can drift in either direction and there is no set pattern as set out by the Defendant. That the Defendant is attempting to deceive the court when it says that the survey began in March 2014, when in fact it knows that this was a date which was proposed but that the survey actually began in July 2014.

### **The Facts**

24. Neither party applied to cross examine the witnesses on their affidavits but there is nevertheless sufficient evidence set out therein from which the court can make the relevant findings of fact. It is not in dispute that the Defendant endorsed the framework. It is also not in dispute that the Defendant was present at the meeting of the 26<sup>th</sup> September 2013 and was not present at the meeting of the 11<sup>th</sup> February 2014. The reasons for the absence from the meeting of the 11<sup>th</sup> are disputed but a determination of this court on that fact is quite unnecessary having regard to the issues to be decided. The terms of the framework, the letter of endorsement, and the documents handed to Claimants on the 11<sup>th</sup> February 2014 are not disputed.

25. It equally does not appear to be in dispute that a map was provided to BHPB which said map was prepared by the Ministry and not the Defendant. In this regard, whether the Defendant in fact physically provided the map to BHPB is irrelevant as the evidence shows clearly that the contents of the map were known to the Defendant at the time it endorsed the framework in any event. The Claimant submits that the information provided in that map is inaccurate as the map appears to have been made many years ago. In support of that argument the Claimant sets out in the John affidavit that no data collectors have been collecting data for many years. The issue for this court's determination is not dependant on the accuracy of the said map but on whether

the decision of the Defendant to endorse the framework (which contains a copy of the map) in the light of what is purportedly shown on the map can be impugned. So that it is unnecessary for the court to determine whether the map is accurate.

26. There is a dispute as to the accuracy of the list of registered fishermen and fishing vessels supplied to BHPB by the Defendant. In this regard, it appears that the evidence of John is of assistance. John sets out specific boats and owners who are absent from the list and annexes registration cards to his affidavit in support of his evidence. These persons so registered do not appear to be included on the list. The tenor of his evidence makes it quite plausible in the absence of other evidence that there may be persons and vessels which do not appear on that list. His evidence is therefore to be preferred on this issue. The court therefore finds that the list supplied by the Defendant is not an accurate reflection of the registered fishermen and boats.

## **INEQUALITY**

### *Territorial*

27. This is a challenge to jurisdiction in its literal meaning. The Claimant submits that section 4 of the Act limits the territorial jurisdiction of the Defendant to within 6 nautical miles of the baseline of the island of Tobago. Section 4(b) reads:

*4. No provision of this Act or of an Assembly Law shall be construed or interpreted so as to authorise—*

*(b) any operation of any Assembly Law beyond the confines of the island of Tobago and such part of the territorial sea of Trinidad and Tobago comprising those areas of the sea having as their inner limits the baselines of Tobago as determined in accordance with section 5 of the Territorial Sea Act, and as their outer limits, a line measured seaward from those baselines, every point of which is distant six nautical*

*miles from the nearest point of those baselines  
unless the contrary is expressly stated therein.*

Thus the Claimant submits that as a consequence of this provision, the Defendant would have acted outside of its jurisdiction when it endorsed the framework which dealt with seismic surveys being conducted beyond the territorial waters within which the Defendant has jurisdiction. With this submission this court simply cannot agree. Section 4 treats with the interpretation of the Act itself and of THA laws. The ordinary and natural meaning to be given to the words in section 4 lends itself to the imposition of a limit on the territorial jurisdiction of THA is making laws. The challenge here has nothing to do with a law made by the THA.

28. In relation to the interpretation of the Act, section 4 must be read and taken together with section 25(1) which reads as follows:

*25. (1) Without prejudice to section 75(1) of the Constitution,  
the Assembly shall, in relation to Tobago, be responsible for the  
formulation and implementation of policy in respect of the matters  
set out in the Fifth Schedule.*

As stated above the matters set out in the Fifth Schedule of the Act in respect of the island of Tobago, include agriculture and fisheries. It means therefore that in creating a policy for fisheries, the Defendant is by virtue of the provisions of the Act, permitted to set policy in relation to those matters which fall within the territorial waters therein set out and no further. The decision to endorse a framework is not akin to the setting of a policy and therefore this submission must fail.

### *Ultra Vires*

29. The Claimant submits that the provisions set out above do not authorise the Defendant to endorse proposals for marine activities formulated by private interests with the result that such interests gain a benefit to the detriment of other persons without consultation with the affected persons or to provide erroneous information to those private interests,

to hold meetings with those private interests to the exclusion of the affected party, to fail to require comprehensive information from the private interest as to the likely impact of the process which it is about to endorse, to provide information to the private interest information about a competing interest group without seeking verification of the information and declare that it has no position on the issue of compensation but at the same time endorse a document which provides for no compensation to the competing interest group. The Claimant relies on the well known case of *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147.

30. In response the Defendant submits that the submission of the Claimant is misconceived and the Claimant has failed to specifically any of the powers granted to the Defendant by the Act which has been breached. It is the submission of the Defendant that it does not have the power to require that an Environmental Impact Assessment (EIA) be provided or be considered by the EMA. That when the Defendant met with BHPB and when it endorsed the framework, it was not exercising a power under the Act and therefore did not abuse such a power by failing to take account of the interest of the claimant. That there is no evidence that the THA was acting outside its powers. According to the Defendant, the Defendant's limited mandate is to formulate policy in relation to fisheries and the endorsement of a framework is not the same as formulating policy. The Defendant therefore submits that there is no exercise of power by the Defendant pursuant to the Act which is judicially reviewable.
31. According to Lord Diplock in the *locus classicus* *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at page 949 j to 950 b:

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

*itself, i.e., that part of the common law that is given by lawyers the label of "the prerogative." Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank."*

32. It seems to this court that the answer as to whether the decision to endorse was an exercise of a power which the THA was empowered to make is to be found within the walls of the Act and in particular section 25. The formulation and implementation of policy are two separate events. Formulation entails the act of creation of a policy for fisheries in the island of Tobago and implementation entails the execution of that policy. To that end, section 25(2) of the Act empowers the Defendant, for the better performance of its functions, to do all such acts and take all such steps as may be necessary for, or incidental to the exercise of its powers or for the discharge of its duties. Specifically, sections 25(2)(a),(b) and (c) set out particular powers none of which are relevant to this claim but in any event it seems to the court that the list set out therein is not an exhaustive one once the power can be reasonably exercised and is necessary for or incidental to the discharge of its duties. It would therefore follow as a matter of logic that should there be a fishing policy in existence for the Island of Tobago, any act which has the potential to operate against the grain of that policy would be an impediment to the implementation of such a policy. In such a scenario the Defendant would be empowered to either endorse or not endorse such an act so long as it affects the implementation of its policy.

33. The difficulty faced by the Claimant in this regard is that nowhere in the evidence is the policy of the THA in respect of Fisheries set out. However, it cannot be, that in an island such as Tobago where an entrenched fishing industry forms a substantial part of the local economy and livelihood of a sizeable portion of the population, the body empowered to make policy for this industry would have failed to create a policy for fisheries since its inception in 1980. So that although no policy for Fisheries has been annexed to the affidavits, the court can take judicial notice of the fact that there is a policy for Fisheries which is implemented by the THA. The court is fortified in its view by that which is contained at paragraph 8 of the affidavit of Renwick, wherein he deposes that the Fisheries Department is responsible for the sustainable management of Tobago's maritime resources and the development and management of the fishing

industry. It is therefore reasonable to infer, in keeping with the evidence as set out by Renwick, that there exists a fishing policy for Tobago.

34. It follows therefore that the powers set out at section 25 includes a power to endorse a framework which may or may not impede the implementation of the Fisheries policy.
35. The issues for the court's determination would then be whether the Defendant exceeded its power by making the decision to endorse the framework for an improper purpose or failed to take into account relevant considerations or took into account irrelevant considerations in the exercise of its power.

#### *Improper purpose*

36. Fundamental to the legitimacy of public decision making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice, personal self-interest or bad faith. These motives which have the effect of distorting or unfairly biasing the decision maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power. See *De Smith's Judicial Review* 7<sup>th</sup> Edition at page 290.
37. A power is exercised fraudulently if it is intended to be exercised for an improper purpose to achieve an object other than that which is being sought. The intention may instead be to the promotion of another public interest or a private interest. This is the essence of the Claimant's argument on this issue. Bad faith has been defined in an Australian case to be a lack of an honest or genuine attempt to undertake the task. See *SCA v Minister of Immigration* (2002) FCAFC 397 at [19]. Bad faith is a serious allegation which carries a heavy burden of proof. See *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576. Malice involves personal animosity. The Claimant says that if the court finds that there is such a power, the exercise of the power was for the purpose of the private interests of BHPB and not in the interest of those for whose benefit the power is to be exercised. The Claimant therefore appears in substance to be relying on the exercise of the power for an improper motive. Specifically, in oral arguments, attorney for the Claimants submitted

that the THA has in fact joined with BHPB in an effort to persuade the EMA to grant the CEC.

38. The Defendant submits that this could not be the case as the endorsement of the framework by the THA was not in law a requirement for the grant of the CEC. It submits that the grant of the CEC is a matter which falls solely under the purview of the EMA which is the body authorised to call for an EIA and to grant the CEC.

39. Section 31 of the Environmental Management Act Chap 35:05 reads as follows:

*31. The Authority and all other governmental entities shall conduct their operations and programmes in accordance with the National Environmental policy established under section 18.*

Section 35 reads:

*35. (1) For the purpose of determining the environmental impact which might arise out of any new or significantly modified construction, process, works or other activity, the Minister may by order subject to negative resolution of Parliament, designate a list of activities requiring a certificate of environmental clearance (hereinafter called "Certificate").*

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

*(3) An application made under this section shall be made in accordance with the manner prescribed.*

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



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

40. So that the Defendant argues that the provisions of the EMA Act are inconsistent with a finding by this court there was fraud or some improper motive in the exercise of the power by the endorsement of the framework as it would not and could not have made a difference to the EMA's decision to grant the CEC in any event. Under the EMA Act, the EMA is the only authority with the power to call for further information or for an EIA and there was no request by the EMA for an EIA nor did the EMA ask for an endorsement by the THA. So that even if the THA had refused to give such an endorsement, BHPB could have nonetheless been in receipt on its CEC.
41. This court agrees with the submission of the Defendant on this issue. It is one thing to say that the effect of the endorsement was that of a favourable consideration by the EMA of the application for the CEC but quite another to impute a fraudulent or improper motive as a consequence of that effect without more evidence. In this case the evidence does not remotely lead the court to the conclusion that the intent of the THA was to take sides in the issue and to dishonestly promote the interest of the private party BHPB. The court agrees that the endorsement was a wholly unnecessary document for the purpose of the grant of the CEC. It was not required by law neither was it requested by the EMA. Additionally, neither is there in fact a scintilla of evidence which gives rise to the inference that BHPB would have received favourable consideration because of the endorsement. It would be to stretch the limits of reasonable inference should the court so hold. In other words, to so find would be pure speculation in the absence of supporting evidence from which such a conclusion can be made. The burden on the Claimant to prove improper motive is a heavy one and it has failed to discharge that burden.
42. Further, and on that issue, the court accepts the evidence of the Defendant that the meetings held between the Defendant and BHPB were in respect of statistics and so the presence of the Claimant was not needed in so far as the allegation of the Claimant may have been that these meetings evidenced some sort of collusion on the part of the Defendant and BHPB. The court also accepts (as set out above) that the map provided

to BHPB was one which was provided ultimately by the Ministry and that there would have been no collusion in respect of the information set out in the map. In relation to the list of fishermen and vessels provided to BHPB by the Defendant, it is a reasonable inference in the absence of other evidence that the list was inaccurate because of error in proper record keeping and not out of an attempt by the THA to interfere with the list so as to remove persons there from as this dishonest act could be of assistance to either BHPB or the THA.

*Failure to take into account relevant considerations or the taking into account of irrelevant considerations in the exercise of its power*

43. In this regard the Claimant submits that the Defendant failed to consult with them and to consider their input as persons directly affected by the decision to endorse. That the Defendant failed to consider whether their members would be affected and whether there should be a mechanism for compensation contained in the framework; that they failed to consider the likely impact on fish stock in the survey area; that the Defendant is generally regarded in law to be the final authority on matters of fisheries and the environment in Tobago; that a letter emanating under its hand could be persuasive; that its powers should not be discharged in a partisan manner and ought to be discharged only after weighty consideration; that it possessed the power to request BHPB to engage in meaningful discussions with the Claimant on matters required by the EMA before endorsing the framework.

44. In answer the Defendant submits that there was in fact consultation with the Claimants prior to the endorsement. As a matter of evidence it must be that the Defendant is relying solely on the meeting of the 26<sup>th</sup> September 2013 as evidence of such consultation. This is so as by the time the second meeting was held on the 11<sup>th</sup> February 2014, the framework had long been endorsed on the 15<sup>th</sup> November 2013 and submitted to the EMA on the 19<sup>th</sup> November 2013. There is no other reliable evidence of other meetings between the Claimant and the BHPB or between the Claimant and the Defendant prior to the date of endorsement.

45. The Defendant submits in oral addresses that consultation was clearly the modus operandi of the BHPB as is set out in the framework. In this regard, the Defendant relied on what was stated in the framework at page 1 (Introduction); the grievance process; page 4 under the rubric 'Consultation with the Fisheries Department', that is the request for the list for the purpose of consultation; page 5 under the rubric 'Directly Affected Users of the Sea' and the rubric 'Communications'. The Defendant also relied on the document entitled 'BHP Billiton Trinidad and Tobago What we Operate...' to demonstrate the level of consultation. In so doing the Defendant highlighted the schedule of meetings which were to take place. For full documents see exhibits 'C' and 'D' attached to the affidavit of Quashi.
46. The court is somewhat taken aback by the submission of the Defendant in this regard. When read, both documents clearly show an intention by BHPB to meet with various stakeholders in the future. This means that having obtained a CEC, after obtaining an endorsement from the THA based on erroneous information as to whether there was fishing activity in the survey area and erroneous information as to the number of registered fishermen and vessels operating in the area and having decided that no compensation was payable on the basis that there was no concentrated fishing activity in the survey area, BHPB was now intending to meet with parties, figuratively after the horse had bolted. What then was to be the purpose of these meetings. Surely they could not have been for the purpose of consulting the Tobago folk about whether they fished in the area and about compensation for depletion of stock or inconvenience to their means of earning a living. These meetings could only have been for the purpose of informing the residents of the procedures involved during the survey for complaints, compensation for damage to fishing vessels or fishing equipment, non financial and financial compensation for FADS (Fish attracting devices) and a procedure for engaging directly with anyone who can show that they have historically fished in the survey area to determine if and how they are impacted by the survey. These meetings were essentially not meetings of consultation but meetings to disseminate information. Further, these post endorsement meetings were to be between BHPB and residents, not the THA. See the framework pages 2 to 5.

28. So that the intention reflected in the framework on the part of BHPB does not answer the Claimant's argument that the Defendant failed to take relevant matters into consideration prior to endorsing the framework. The only meeting which upon which the Defendant can rely on the evidence is the meeting of the 26th September 2013 which likewise on the evidence was merely an introductory meeting. As stated by Their Lordships of the Privy Council in *Fishermen and Friends of the Sea v. The Environment Management Authority & Anor* [2005] UKPC 32 (25 July 2005), public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy. Their Lordships went on to quote from Lord Hoffman in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615, 616, as follows,

*"The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues.*

...

*A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues."*

47. In this case there was in effect no public consultation prior to the endorsement of the framework. See also *R v North and East Devon Health Authority ex p Coughlan* 200 3 AER 850 at paragraphs 108 and 112.

48. In the court's view therefore, the Defendant failed to take into account relevant considerations prior to endorsing the framework. They are as follows;

- a) That the tensions which exist and have traditionally existed between fishermen, oil companies and the Defendant concerning seismic surveys off the coast of Tobago required a pragmatic and fair approach to the decision as to whether to endorse the

framework and this approach would have mandated consultations with the Claimant on the issue. In this regard, the question of relevancy may relate not to specified factors that need to be taken into account by the decision maker, but to the decision maker's approach to the evidence before him. See *R. (on the application of National Association of Health Services) v Department of Health* [2005] EWCA Civ 154;

- b) That the map provided by the Ministry may have been old and outdated and therefore not reflective of current fishing patterns around the island of Tobago with the result that the position may in fact be opposite to that which was presented to the Defendant by that map, which map was being used by BHPB;
- c) That the list of fishermen and fishing vessels in the possession of the Defendant and which was passed onto to BHPB was factually inaccurate with the result that several fishermen and vessels duly registered would have been excluded there from. It may well have been that some of the excluded vessels and fishermen may have been among those who fished in the survey area;
- d) That fishermen regularly fish more than thirty miles off the coast which brings them clearly within the survey area;
- e) That vessel turns will bring the vessel within 17 km (9 miles) away from the coast. In that case every Tobago fisherman in that area will be affected. See framework;
- f) That the survey would be conducted over an area of 10,938 km sq and not 4,100 km sq as the Defendant believed prior to making the endorsement. See paragraph 11 of the Renwick affidavit and the framework;
- g) That the Defendant could have sought to satisfy itself of the environmental impact of the survey prior to endorsing the framework by requesting disclosure of any EIA which may have been in possession of BHPB. In this regard the court does not find that the Defendant had the power to compel any other body to produce such a report but it did have to power to make a request.

49. In the court's view, the influence of these relevant considerations, had they been known by the Defendant, would have been material and substantial in relation to the decision as to whether to endorse the framework and would have more likely than not have resulted in a change of that decision. The court therefore finds on this basis that the power to endorse had not been validly exercised.

### **IRRATIONALITY**

50. A decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it." See the well known dicta of Lord Diplock in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) KB 223. The Claimant submits that in this case the decision is such that it does not on its substantive merits fall within the range of reasonable responses open to the decision maker.

51. The court can readily dispense with this submission. Having regard to the information in the possession of the Defendant at the time of the endorsement of the framework, it cannot be said that the decision to which the THA came was unreasonable or irrational in that the Defendant would have acted based on information which showed that there were no persons to be affected by the survey. Further, there is no evidence that undue weight was given to one consideration in preference to another unjustifiably or that the decision lacked comprehensible justification. This submission must therefore fail.

### **PROCEDURAL IMPROPRIETY**

#### *Legitimate Expectation and Natural Justice*

52. Justice Charles in the case of *Buddie Gordon Miller & ors v The Minister of the Environment and Water Resources & ors* CV2013-04146 set out the definition of legitimate expectation at page 14, paragraphs 23 and 24 as an expectation which, although not amounting to an enforceable right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his

claim would be dealt with in a particular way. The terms of the representation by the decision maker (whether express or implied from past practices) must entitle the party to whom it is addressed to expect, legitimately one of two things, namely; i) that a hearing or other appropriate procedures will be afforded before the decision is made or ii) that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied. See also the dicta of Their Lordships of the Court of Appeal in the case of the *AG of Trinidad and Tobago v The United Policy Holders Group* Civ Appeal 82 of 2013 wherein the court adopted the dicta of Lord Bingham LJ that in order for a promise to form the basis of a successful claim of legitimate expectation the promise had to be clear unambiguous and devoid of relevant qualification.

53. The Claimant submits in this regard that a clear and unambiguous promise was made by BHPB at the meeting of the 26<sup>th</sup> September 2013, that more meeting would be convened in the future to address their concerns about compensation. This was done in the presence of the Defendant. The difficulty which the Claimant faces with this submission is simply that even if this was a clear and unambiguous promise devoid of relevant qualification, it was a promise by BHPB and not a promise by the Defendant in this case. It was a promise that BHPB would meet with the Claimants to discuss compensation but not that the Defendants would meet with the Claimants to discuss compensation. Further, it could not have been the case that there was a promise that the Defendants would meet with the Claimants to discuss compensation prior to the endorsement as there is no evidence that an endorsement was raised or discussed at that meeting. So that there could have been no legitimate expectation in relation to the Defendant and this submission must therefore fail.

54. In relation to the submission of breach of the rules of natural justice, the submission by the Claimant is simply that the duty to act fairly in this case encompasses the duty of the Defendant to give to those who may be adversely affected by the decision, namely the Claimant, an opportunity to be heard prior to the making of the decision. The Defendants say that the Claimant was in fact heard, and that in any event, it was not acting as a stakeholder itself and was therefore not duty bound to consider the representations of the Claimant.

55. The rules of natural justice require that the decision maker approaches the decision making process with 'fairness'. What is fair in relation to a particular case may differ. As pointed out by Lord Steyn in *Lloyd v McMahon* [1987] AC 625, the rules of natural justice are not engraved on tablets of stone. In this case the Defendant was in the process of making a decision which may or may not have impacted the livelihood of Tobagonians, the persons in respect of which it owes a duty and a responsibility under the provisions of the Act. It could be said that the decision maker failed to disclose the fact that it had been approached for an endorsement and that it was in the process of collecting, considering and providing relevant information in relation to that endorsement. Further that the decision maker failed to provide an opportunity to those who may have been adversely affected by the decision, to consider and confirm the validity of the information upon which it was going to rely in making that decision and to provide feedback thereon to the Defendant.
56. The duty of fairness ought not to be restricted by artificial barriers or confined by inflexible categories. The duty admits of the following according to the authors of the *Principles of Judicial Review* by De Smith, Woolf and Jowell;
- i. Whenever a public function is being performed there is an inference in the absence of an express requirement to the contrary, that the function is required to be performed fairly. *Mahon v New Zealand Ltd* (1984) A.C. 808.
  - ii. The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.
  - iii. The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative or too remote to qualify for a fair hearing. This will depend on the circumstances.
57. In that regard, the fisherfolk of Tobago have reposed in the Defendant the ultimate responsibility for the management of the resources which form the basis of their livelihood and contribute in no small measure to the tourist economy of the twin island. To whom much is given much is expected. A decision to endorse a framework which states that none of the Tobago fisherfolk will be affected is to endorse a process which



may endanger the livelihood of the ones on whose behalf the trust is reposed without permitting the opportunity to those persons to be heard on the accuracy of the information presented and which forms the basis of the decision. The fact that the EMA does not require an endorsement for the grant of a CEC, while relevant to the harm to be suffered does not in the court's view make the potential damage so insignificant, remote or speculative so as to negate the entitlement to a fair hearing by the Claimant before the making of the decision as to endorsement. It may have equally been the case that the EMA would have in any event, asked for the views of the THA, which they were entitled to do, (see section 35(4) of the Environmental Management Act) and may have taken those views on board when deciding whether to grant the CEC. In the circumstances the Claimants were entitled to their say in relation to the framework and the information upon which it was based whether in writing or otherwise at the least. Fairness would have demanded nothing less. The court therefore finds that the decision to endorse the framework was made in breach of procedural fairness, namely breach of the right to be heard.

58. Having regard to the findings above in particular the court's findings on the issue of unreasonableness there is no need to treat specifically and separately with the abuse of power submissions. In relation to damages there has been insufficient information presented before this court in support of a claim for damages and therefore the court will make no such award. See *Dennis Graham v Police Service Commission* [2011] UKPC 46.
59. Before closing the court must treat with an issue which was raised by Learned Senior Counsel for the Defendant. Learned Senior has commented on the undesirability of loading an application of this nature with a multitude of permutations of the decision to be challenged when in fact in substance the challenge is made to one decision. The court agrees with Learned Senior and would caution that such an approach to litigation is not only undesirable but it is a practice which may result in the disproportionate allocation of limited judicial resources and may also result in the party who is guilty of such wastage being visited with a suitable order for costs.

60. The order of the court shall therefore be as follows:

- a. It is declared that the decision by the Defendant to endorse the document **entitled ‘Framework for Identifying and Communicating with the Affected Users of BHP Billiton’s (BHPB) 2014 Deep Water Seismic Survey Area’** communicated by letter dated the 15<sup>th</sup> November 2013 (hereinafter referred to as “the decision”) was made in breach of the principles of natural justice, and is null and void and of no effect.
- b. Certiorari is granted to remove into this Honourable Court and quash the decision.
- c. The Defendant is mandated to withdraw the letter of endorsement of the 15<sup>th</sup> November 2013 in writing addressed to BHPB and copied to the EMA.
- d. The Defendant is mandated to consider representations by the Claimant should the Defendant embark on a fresh process of deciding whether to issue an endorsement.
- e. The Defendant is to pay to the Claimant the costs of the claim to be assessed by a Registrar in default of agreement.

Dated the 17<sup>th</sup> day of November 2014

Ricky Rahim

Judge