REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-01738

BETWEEN

IRWIN HERCULES

SAMUEL MAPP

KENNETH MURRAY

(on their own behalf and as members of the Charlotteville Beachfront Movement)

Applicant/Intended Claimants

AND

TOBAGO HOUSE OF ASSEMBLY

Respondent/Intended Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER RAJKUMAR

APPEARANCES:

Ms. Rekha P. Ramjit instructed by Mr. Alvin Pariagsingh for the Claimants

Mr.Mervyn Campbell instructed by Alvin Pascall for the Defendant

JUDGMENT

BACKGROUND

1. The Defendant proposed to embark upon development of 15,580 sq meters of land at Charlotteville. It described the development as the construction of a Vendor's Mall (**the Project**). The proposed site was occupied by vendors, including the Claimants, operating booths on land, the ownership of which was claimed by the Defendant.

2. The National Maintenance Training And Security Company Limited ("MTS") was contracted to provide project management services and allegedly to obtain all the necessary statutory approvals relating to the project.

3. A construction contract was **awarded** to Towers Consortium Consultancy Limited on **September 7th, 2012**.

4. A Notice of Grant of Permission to Develop Land subject to Conditions was issued on **17th May 2013** by the Town and Country Planning Division of the Ministry of Planning and Sustainable Development. It referred to an application made and plan submitted on **October 24th 2012**, and **amended plans** submitted on **May 17th 2013**, the very day that the permission was granted.

5. The Defendant applied for a Certificate of Environmental Clearance ('CEC') to establish a wastewater or sewerage treatment facility. The Defendant obtained the CEC for that aspect of the project on the **16th day of December 2013**.

6. The EMA requested information as to whether the scope of the project would involve the need for CECs for other aspects of the project. For example it queried whether other activities such as use as a shopping mall, or kitchen facilities, would fall within the scope of the project.

7. The claimants seek to challenge, inter alia, the following decisions of the defendant:-

   (a) The decisions of the Defendant made on or around the 20th November, 2012 **to move** the first two Claimants and/or their vendor's booths from the spot on Bay Street Charlotteville Tobago where they operated their business.

(b) The decision of the Defendant made on or around March 2013 **to demolish** the booths owned and/or operated by the first two Claimants at Bay Street Charlotteville, Tobago.

(c) The **demolition** of the booth operated by the **2nd Claimant** on 9th April, 2013.

(d) The **decision** of the Defendant **to construct** a two storey concrete and glass building ("the building") on the area where the booths were erected.

8. In fact however, it is not the **decision to construct** so much as **the decision to embark upon and commence construction** that has been squarely raised and challenged in these proceedings, and both parties have framed their submissions to address this.

9. Those decisions were challenged on the bases, inter alia, that they were unlawful, being in contravention of:-

a. the Town and Country Planning Act, and,

b. the Environmental Management Act.

ISSUES

10.

(i) Whether the Defendant had the necessary statutory approvals to commence construction?

(ii) Whether the Defendant had the lawful authority to demolish the booth occupied by the second named claimant?

CONCLUSION

11. It is clear from the affidavits of Pascall and Anderson that at the time the defendant commenced demolition of vendors' booths at Charlottesville, and embarked upon site clearance activities, that the THA did not have either a Certificate of Environmental Clearance, or permission from the Town and Country Planning Division, for this project. It is not in dispute that the THA is subject to the requirements of both Acts.

12. No finding is made as to the rights of the applicants over the land on which stand the booths that they occupy. The second applicant is a tenant. It has not been established that the demolition of the booth that he occupies was without the consent of the owner , - his landlady. The first applicant merely attests to occupation for 16 years. Any further period of alleged occupation is merely vague hearsay and irrelevant for this purpose. This is less than the period of 30 years, being the minimum period of occupation required before the title to State lands can be extinguished.

13. Trespass is a claim in respect of possession .Demolition of the booth occupied by the second named applicant without lawful justification or permission is therefore capable of constituting a trespass. As seen above there cannot be said to be lawful justification if the defendant has ignored the statutory regime that governs such a project. However the landlady of the second named applicant has not indicated that the demolition of her booth actually was without her permission.

14. In fact there is reason to believe from the Trestrail affidavit, and paragraph 6 of the affidavit of the second applicant himself, that she, like the first applicant, may have been provided with alternative occupation in exchange. The second claimant states that his belongings were removed from the booth, not destroyed.

15. The question of damages for trespass to his goods does not therefore arise, as there is no suggestion whatsoever that he has been deprived of the use of his goods. The allegation is that he has been deprived of the use of the booth. That booth belongs to one Ms. Campbell, and he rents from her. The second claimant's evidence, vague as it is, does not disclose sufficient basis for any assessment of damages to be ordered for any loss to him as a result of the demolition of his landlady's booth, in respect of which she herself has not complained .(There is no reason why, if his landlady was offered a booth, and at age 76 she is not inclined to use it herself, (which second claimant suggests is the basis on which she rented the previous booth to him), a similar arrangement could not apply to any new booth offered to her, as the second claimant suggests has occurred). However, this is a matter beyond the scope of this judicial review application, which is to assess the validity of the decision making process, not the decision itself).

16. The defendant has not been forthcoming as to whether the EMA has indicated to it the need for further CECs in relation to other aspects of the project. The need for these would depend, for example, on the area of land that it is intended to clear, the number of persons that the facility is intended to accommodate, and the amount of water that the kitchen facilities, if any, are expected to utilize. None of this has been addressed by the defendant in its attempted defence of this matter. This is important, as if additional CECs are required for other activities, it is within the discretion of the EMA, prior to issuing such CECs, to require an Environmental Impact Assessment. Hence the order of the court that the defendant must first have the EMA certify that the defendant has received all approvals in relation to the entire project, not simply the waste water plant, when it reconsiders these decisions, and before it attempts to embark again on the project.

17. The decision by the defendant to embark upon site clearance and construction activities before obtaining the necessary approval was therefore clearly amenable to Judicial Review on the ground of illegality, being in breach of both the **Environmental Management Act Chapter 35:05** and **Town and Country Planning Act**. Accordingly therefore that decision was unlawful and voidable.

18. The claimants are entitled to the cost of this application to be assessed by this court in default of agreement.

19. The decision will be remitted to the Defendant for reconsideration in accordance with law. The defendant is mandated to take into account **all** the necessary legal requirements **including** those set out under the environmental and planning legislation.

20. In those circumstances it is not necessary to ascertain whether there are further grounds for quashing the decision, as even on the defendant's own evidence illegality has been clearly established.

DISPOSITION AND ORDERS

Orders

i. An order of certiorari is granted to remove into this Honourable Court and quash the

decision of the Defendant to **embark upon construction activities**, including site clearance activities preparatory to construction of a two storey concrete and glass building ("the building") on the area where the booths occupied by the claimants were sited.

ii. It is ordered that that decision be, and it is hereby, remitted to the defendant for **reconsideration**, and, -

a. the defendant is **mandated** to **ensure** that any further decisions for the continuation of the Project are taken in **compliance** with **all necessary statutory requirements,** and

b. the defendant is mandated to **obtain and file the certification** of **all** statutory bodies whose approvals are required for the project, and **in particular** certification by the Town **and Country Planning Authority**, and certification by the **Environmental Management Authority**, that **all necessary permissions have been obtained** from those agencies **before** continuing the project.

iii. Until such certifications are produced the Defendant is restrained from demolishing the booth occupied by the first named Applicant.

iv. It is further ordered that the Defendant do **provide the Applicants** with

(a) all such certifications obtained ,together with

(b) copies of **all** approvals obtained from the EMA, Town and Country Planning Division and any other agency of the State from whom approvals are required ;

v. that the defendant is to pay to the claimants costs to be assessed by this court in default of agreement.

ANALYSIS AND REASONING

21. On May 10th 2013 this court granted leave for judicial review and an interim order restraining the continuation of the challenged activities of the defendant in the following terms:

> ***UPON HEARING*** *Attorney at Law for the Applicants and Attorney at Law for the Indented Respondent*
>
> *And the Intended Respondent indicating that there is no objection to granting of Leave*

IT IS ORDERED *that:*

1. *Leave is granted to the Applicants/Intended Claimants ("hereinafter "the Applicants") to apply for Judicial Review of:*

    a) *The decision of the Defendant made on or around the 20th November 2012 to move the Applicants and/or their vendors' booths from the spot on Bay Street Charlotteville Tobago where they operated their business*

    b) *The decision of the Defendant made on or around March 2013 to demolish the booths owned and/or operated by the first two Applicants at Bay Street Charlotteville, Tobago.*

    c) *The demolition of the booth operated by the Second Applicant on the 9th April 2013.*

    d) *The decision of the Defendant to construct a two storey concrete and glass building (hereinafter "the building") on the said area where the booths were erected.*

    e) *The alleged failure and/or refusal of the Defendant to consult and/or engage in meaningful discussion with the Applicants about its plan to construct the building.*

    f) *The alleged failure and/or refusal of the Defendant to fully inform and explain to the Applicants their plans for the development of the village of Charlotteville and/or for the construction of the building (hereinafter "the proposed construction")*

g) *The alleged failure and/or refusal of the Defendant to obtain the approval of the Town and Country Planning Division and the Environmental Management Authority (EMA) for the proposed construction.*

IT IS HEREIN RECORDED THAT:

1. *The Defendant has provided the Applicants with copies of* ***final design plans*** *for the proposed development to wit the building that it proposes to construct;*
2. *The Defendant undertakes to provide the Applicants with copies of* ***any*** *Environmental Impact Assessment that it has in its possession;*
3. *The Defendant undertakes to provide the Applicants with copies of* ***all approvals obtained from the Environmental Management Authority and the Town and Country Planning Division if any exist****.*

IT IS FURTHER ORDERED THAT:

1. *The Defendant do file written submissions* ***to demonstrate any lawful authority*** *it has for the work being carried out at Charlotteville,* ***in particular*** *satisfaction of the requirements of the Environmental Management Authority Act on or before the 3rd of June 2013,*
2. *Until such Lawful authority is produced or established the Defendant is restrained from demolishing the vendors' booths in particular the 1st Applicant's booth.*
3. *---*
4. *A Stay of Construction Work is granted until the next hearing of this matter*

The substantive application for Judicial Review was adjourned to the 21st June 2013 pending the filing of submissions by both parties.

22. The submissions ordered were eventually all filed by March 17th 2014.

23. In December 2013 what purported to be a bare Certificate of Environmental Clearance, unattached to any affidavit, and apparently not even filed, was submitted to the court under cover of a letter dated December 20th 2013 ,purportedly copied to attorney at law for the claimant.

24. To date the claimant has not **demonstrated that it had lawful authority** for the work embarked upon at Charlotteville, or that it has satisfied **all** the requirements of the Environmental Management Act, or even all the requirements of the planning permission it eventually obtained.

LAW

25. **The Environmental Management Act Chapter 35:05** – (all emphasis added)

Section 35 (5)

> *"s. 35 (1) For the purpose of determining the* ***environmental impact*** *which might arise out of new or significantly modified* ***construction****, process, works or other activity, the Minister may … designate a* ***list of activities requiring a certificate of environmental clearance****.*
>
> *s. 35 (2)* ***No person shall proceed*** *with any* ***activity*** ***which the Minister has designated as requiring a Certificate*** *unless such person* ***applies*** *for and* ***receives a Certificate*** *from the Authority …"*
>
> *s. 35 (4) The Authority in considering the application* ***may ask*** *for further information including, if required,* ***an environmental impact assessment****,* (hereinafter referred to as an EIA) *in accordance with the procedure prescribed.*
>
> *s. 35 (5)* ***Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment*** *in accordance with section* ***28 before any Certificate is issued by the Authority****."*

26. Under the **Certificate of Environmental Clearance (Designated Activities) Order** such activities include the following: –

Clearing, excavation, grading and land filling, Waterproofing/caulking/paving ***The establishment of a paved area (inclusive of associated works) of more than 4,500 square meters*** *during a two-year period.*

27. Given that the area of the land to be developed was 15,000 square meters, and given the query from the EMA, it is not clear whether any other activities sought to be conducted by the defendant, apart from construction of a waste water treatment plant, fell within the scope of those activities requiring a CEC.

28. It is also clear that that statutory framework was completely bypassed, necessitating the instant application for judicial review. The queries of the EMA referred to below were either not addressed or if they were, the result and responses to those very relevant queries were not supplied to the court to date .Therefore it still remains unclear whether activities for other aspects of the project also require CECs, and if so, whether the EMA may yet require EIAs in respect of these aspects.

29. It is clear that there exists a comprehensive statutory framework which provides for consultation and recording of concerns similar to those expressed by the applicants **if** an EIA is required by the EMA prior to grant of a CEC for any activity.

30. It is for the court to ensure that there is compliance with any statutory regime provided by Parliament. The process embarked upon by the defendant cannot bypass the required preconditions prescribed by that statutory regime. The apparent attempt to do so rendered illegal the subsequent actions of the THA in embarking upon the project, including the site clearance activities.

THE SIGNIFICANCE AND EFFECT OF THE CEC

31. **It is clear that long after leave had been granted for judicial review the THA had not been in possession of a CEC**. See affidavit of A Pascall filed July 26th 2013, which set out communication received from the EMA inquiring as to whether the CEC, which had been sought in respect of the wastewater treatment plant proposed for the project, was also required in respect

of other activities relating to other aspects of the project. Exhibit "A.P.1" to the affidavit of Alvin Pascall filed on July 26, 2013 indicates that an application was made for a Certificate of Environmental Clearance (CEC) by application number CEC3927/2013. The application itself was not disclosed.

32. On page1 of the document exhibited as "A.P.1" the EMA inquired whether "**Activities** 10 (a**) (ii)** [shopping malls;] and **43 (c)** [kitchen facilities] which are identified in the CEC (Designated Activities) Order (as amended) were considered to be possibly within the scope of your proposal, given the type of proposed activity, Vendor Mall. Please verify whether the activities, as stated above, are relevant to your proposed development, with appropriate justification.

33. It is clear that no CEC had been granted by this time. It is also clear that the EMA reminded the defendant repeatedly in that communication of s. 35 (2) of the EM Act-

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

34. The EMA at this point was still attempting to ascertain the scope of the proposed activities for the project so that it could properly address its mind to the necessity for a CEC, both in relation to the waste water facility and possibly other **activities**. By letter dated December 20th 2013, and purportedly copied to the attorney for the claimants, a purported CEC 3927/2013 was forwarded directly to the court. This was unverified by affidavit and apparently not filed. It states on its face that it is addressed to MTS, (the consultant and agent of the defendant for the project), and is "for the specific purpose of the establishment of a waste water treatment plant for a proposed vendors mall" - Activity 42 -at Charlotteville North East Tobago.

35. There is no context provided by any deponent to any affidavit, and specifically, there is no indication as to whether the EMA received satisfactory responses to its queries which were detailed in the Pascal affidavit of July 2013. Those queries by the EMA were directed to ascertaining whether a CEC would have been required for any other designated **activity**

associated with the Project, apart from the construction of the waste water treatment plant, which had been the subject of the initial application.

36. One year after the court order of May 10th 2013 the defendant has not adequately addressed the simple issue of whether it is in possession of **all** the necessary approvals for this project. The need for other approvals is also referred to in the planning permission it obtained on May 17th 2013, including approvals from the Fire Service, approval from the Water and Sewerage Authority, (WASA), and approval of the structural details of the building by the Division of Infrastructure.

37. Further the need to comply with any other environmental or other applicable written laws is referred to at page 15 of that CEC for the Waste Water treatment plant.

PLANNING PERMISSION

38. **It is also clear that the defendant had not been in possession of planning permission**. See affidavit of Kimba Anderson filed on June 20, 2013.This annexes as exhibit "K.A.1 a copy of a Notice of Grant of Permission to Develop Land Subject to Condition(s) dated May 17th 2012, (one week after leave had been granted for judicial review), in respect of an original application made on October 24th 2012. It refers to amended plans having been submitted on the very day, (May 17th 2013), that the permission was granted.

39. The first paragraph of the Notice reads:

> *" You are hereby permitted to carry out development of the land situated at Bay Road, Charlotteville, and stated to comprise **15580m2** in area, by the carrying out of building operations, namely, structural addition to a building for use as a vendors mall and continued use as a community centre, in accordance with the proposals set out in your application dated October 24, 2012 and submitted October 24, 2012, and shown on the plans submitted therewith, and amended plans submitted **May 17, 2013** subject to the conditions hereunder."*

40. The permission granted is subject to five (5) other conditions. There is no evidence by the Defendant that it has complied with any of the five (5) conditions upon which permission was granted.

41. It is clear therefore that at the date that leave was granted planning permission had not been obtained. It is not in dispute that the defendant required Planning permission for its proposed development.

Whether the application is now academic in light of the grant of the CEC

42. The Defendant accepted that it was required to obtain Town and Country Planning Approval and "the" CEC. Town and Country Planning approval was granted on 17th May 2013 and "the" CEC was granted on 16th December 2013 after these proceedings were commenced.

43. It submitted however that "the decision of the Environmental Management Authority to grant '*the'* CEC has rendered the judicial review on the ground of illegality an academic exercise, and that the Claimants' challenge, on the ground of illegality, no longer presents a justiciable controversy because the issue involved is nonexistent".

44. It cited Lord Slynn of Hadley in **R v Secretary of State for the Home Department Ex Parte Salem [1999] 1 AC 450** where he stated:

> *"I accept, as both counsel agree, that in cases where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal even if by the time the appeal reaches the house* ***there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se*** *(…) The discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so as, for example (but only by way of example), where a discrete point of statutory construction which does not involve detailed consideration of the facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."*

45. This, however, is a misunderstanding of the evidence. The fact that a CEC was granted in respect of the wastewater treatment plant, without any explanation as to whether the queries raised by the EMA were adequately addressed, leaves alive the possibility that a CEC may yet be required for other aspects of the project.

46. This is not a matter about which the defendant can be reticent. It is a matter that is directly before the court, which has inexplicably not been addressed. The evidence is clear that without the instant application for judicial review the project was proceeding to the construction phase without any concern that the necessary Planning approvals or the necessary environmental approvals had been obtained.

47. In fact the applications for these were only finalized after these proceedings were filed, notwithstanding that the applicants had raised concerns as to whether any such approvals had been obtained. It is still not clear whether **all** necessary environmental approvals have been obtained, or whether the conditions attached to the planning approval have been complied with.

48. The issue remains a live one, especially as the defendant proceeded, notwithstanding the absence of those statutory approvals, to award a construction contract, and to demolish the booth occupied by the second applicant. That issue remains justiciable. It does not evaporate merely because, long after action was taken to demolish that booth without the necessary statutory approvals, those approvals, (and query whether even all of the approvals), have been obtained.

49. The very fact that those approvals had to be obtained after the fact demonstrates that at the time of the demolition the land development, and therefore any incidental site clearance and construction activities embarked upon, were unlawful,.

50. The issue is far from academic, as there is clearly a lis to be determined, both in relation to the second named claimant, and with respect to the other applicants in so far as they challenged the decision making process which led to the attempt to ignore or defy the statutory requirements of the applicable planning and environmental legislation.

51. It was further contended that the Defendant has been bestowed with the legal authority to proceed with the project in the form of the CEC. Again this is a misunderstanding of the evidence and the purpose of a CEC.

a. The CEC itself makes it clear that its grant does not absolve the defendant from **compliance** with **other statutory** requirements.

b. Further a certificate of environmental clearance is simply a certificate that the **environmental** requirements for such **activity specified therein** have been complied with. The activity specified in that CEC was **construction of a waste water treatment plant**. The project itself is wider in scope – namely development of land comprising 15,000 plus square meters in accordance with plans and amended plans submitted to the Town and Country Planning Division.

52. By no stretch of logic can it be inferred that the grant of a CEC for the construction of a waste water treatment plant by itself bestowed upon the defendant the blanket legal authority to proceed with the project. The project is not simply construction of a waste water treatment plant.

53. It was submitted that the question of whether a CEC should have been granted or not is a matter for the Environmental Commission. However the applicants are not seeking review of the decision by the EMA to grant a CEC, and the issue may not be obfuscated in this manner.

54. The applicants are contending in effect, that the decision making process which led the defendant to embark upon the project and commence construction activities, including relocation of booths preparatory to site clearance , bypassing the need to first secure the necessary Planning and Environmental statutory permissions, were without lawful authority, tainted by illegality, and therefore voidable.

55. The grant of planning permission, and of a CEC for a limited purpose, **after** those actions, cannot possibly ratify an action which was unlawful at the time. No basis in law for such a startling proposition was produced.

ALTERNATIVE REMEDIES

56. It was contended that the court had no jurisdiction to consider the legality of the activities taken by the defendant as there existed the alternative remedy of an action before the Environmental Commission, which, as a specialized body set up to deal with environmental issues, allegedly had exclusive jurisdiction.

57. This argument is rejected. The allegations of illegality do not relate solely to compliance by the defendant with requirements under the EM Act. They relate to the failure to obtain approvals from the Town and Country Planning Authority, and the need to ensure that this project in fact has received **all** necessary statutory approvals.

58. In any event it does not require a specialized body such as the Commission to detect whether the defendant has complied with obligations to observe requirements imposed by the Authority under the Act, when

a. the defendant itself acknowledges that it required a CEC for the waste water treatment plant associated with the project, and

b. it is beyond dispute that it simply did not have the CEC for this at the time that it took the above decisions , or even by the time that leave to review those decisions was sought.

59**.** **Section 9** of the **Judicial Review Act Chap 7:08** provides that ***"****the Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in* ***exceptional circumstances****."*

60. It was submitted that:-

a. The Claimants have contended that the Defendant has not obtained the necessary documentation, that is to say, the Certificate of Environmental Clearance ("CEC") before commencing works,

b. The Claimants have alleged therefore that there has been a breach of the provisions of the **Environmental Management Act Chap 35:05,**

c. Breaches of the Environmental Management Act should attract, firstly, the attention of the Environmental Commission.

61. **Section 81(5)** of the Environmental Management Act Chap 35:05 provides as follows:

"The Commission shall have jurisdiction to hear and determine—

*(h) complaints brought by persons pursuant to section 69, otherwise known as the direct private party action provision**;** and*

62. **Section 69 of the Environmental Management Act Chap 35:05** provides as follows:

"(1) Any private party may institute a civil action in the Commission against any other person for a claimed violation of any of the specified environmental requirements identified in section 62, other than paragraphs (c), (d) and (l), save where—

(a-d – not *applicable)*

(2) For purposes of this section, any individual or group of individuals expressing general interest in the environment or a specific concern with respect to the claimed violation shall be deemed to have standing to bring a direct private party action.

Section 62 (f) includes among the "environmental requirements", *"apply for and obtain a Certificate of Environmental Clearance."*

63. The alternative remedy argument proceeds under the misconception that the applicants are merely challenging the failure to obtain a CEC. In fact they are challenging the decision to embark upon construction and to incidentally demolish the booth occupied by the second named claimant on a basis wider than this – namely the failure to have first obtained a CEC, AND the failure to have first obtained planning permission before so doing.

64. It is alleged that the ensuing illegality rendered the demolition of the booth occupied by the second claimant/applicant an illegal trespass. While the Environmental Commission may have jurisdiction to consider a claim by the applicants against the defendant in respect of a failure to have obtained a CEC, the matters other than that of enforcement of environmental laws

– namely enforcement of Planning Permission requirements, and the instant claim for damages for trespass in respect of demolition of the booth occupied by the second claimant are beyond the scope of the EM Act. The jurisdiction of the High Court cannot therefore be considered to ousted, more so as such ouster of jurisdiction on the basis of an existing alternative remedy is on a discretionary basis. See the **Alutrint** case –supra paragraph 121.

If it were even necessary to so find, the instant circumstances would constitute exceptional circumstances, especially as leave was unopposed and the alternative remedy point only raised long after leave had been granted.

WHETHER THE DECISION OF THE DEFENDANT WAS UNREASONABLE IN LAW?

65. The Defendant embarked on the demolition of the booth and construction of a trench without having sufficient lawful authority to so do.

i. EMA approval, for at least the waste water treatment plant component of the project was outstanding;
ii. Town and Country Planning Approval was then outstanding.

It cannot be contended that a reasonable authority properly directed would have so acted in defiance of the need for those statutory approvals.

CONSULTATION

66. The authorities on consultation were considered at length in– the **People United Respecting the Environment and Anor v The Environmental Management Authority And Anor (the Alutrint Case) CV2007-02263 per the Honourable** Justice Dean-Armorer at pages 103 -104, including:-

i. **R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities [1986] 1 All ER 164,** where Webster J stated-

"There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a

genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation ***sufficient information must be supplied*** *by the consulting to the consulted party* ***to enable it to tender helpful advice. Sufficient time*** *must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available* ***for such advice to be considered*** *by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."*

ii. Also cited was the case of **R v North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850,** where Lord Woolf **at para 108** stated:

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

At **page 887 paragraph 112 -** *It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent from statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response". The obligation, although it may be quite onerous, goes no further than this".*

71. In **Fishermen and Friends of the Sea v The Environment Management Authority and Another [2006] 2 LRC 384,** Lord Walker at paragraph 28, emphasizing the need for public consultations, indicated that-

> *"Public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy."*

72. It is clear that even on the evidence of the applicants there was consultation. In this case the adequacy of consultation would make no difference to its outcome. The outcome is the quashing of the decisions challenged, on the basis of illegality and unreasonableness.

73. It is therefore not necessary to consider or even comment upon whether there was adequate consultation or whether such consultation as there was is reviewable by a court on the evidence presented by the applicants, save that in the event that the EMA were to require an EIA in respect of any other activity related to the project, (a matter entirely within its sole discretion), the issue of the adequacy and content of consultation may assume relevance.

DISPOSITION AND ORDERS

Orders

74. i. An order of certiorari is granted to remove into this Honourable Court and quash the decision of the Defendant to **embark upon construction activities**, including site clearance activities preparatory to construction of a two storey concrete and glass building ("the building") on the area where the booths occupied by the claimants were sited.

ii. It is ordered that that decision be, and it is hereby, remitted to the defendant for **reconsideration**, and, -

a. the defendant is **mandated** to **ensure** that any further decisions for the continuation of the Project are taken in **compliance** with **all necessary statutory requirements,** and

b. the defendant is mandated to **obtain and file the certification** of **all** statutory bodies whose approvals are required for the project, and **in particular** certification by the Town **and Country Planning Authority**, and certification by the **Environmental Management Authority**, that **all necessary permissions have been obtained** from those agencies **before** continuing the project.

iii. Until such certifications are produced the Defendant is restrained from demolishing the booth occupied by the first named Applicant.

iv. It is further ordered that the Defendant do **provide the Applicants** with
(a) all such certifications obtained, together with
(b) copies of **all** approvals obtained from the EMA, Town and Country Planning Division and any other agency of the State from whom approvals are required;

v. that the defendant is to pay to the claimants costs to be assessed by this court in default of agreement.

Dated the 19th day of May, 2014

Judge
Peter A. Rajkumar