

**The Republic of Trinidad and Tobago**

**IN THE HIGH COURT OF JUSTICE**

**Claim No: CV2008-04593**

**BETWEEN**

**IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE FISHERMEN AND FRIENDS OF THE  
SEA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN ACCORDANCE WITH CPOR  
1998 PART 56.3**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT ACT CHAPTER 35:05  
AND THE REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF THE DECISION OF THE MINISTER RESPONSIBLE FOR THE  
ENVIRONMENT TO PUBLICH AND/OR ISSUE THE WATER POLLUTION FEES  
(AMENDMENT) REGULATIONS 2006**

**BETWEEN**

**FISHERMEN AND FRIENDS OF THE SEA**

Claimant

**AND**

**THE MINISTER OF PLANNING, HOUSING AND THE ENVIRONMENT**

Defendant

**APPEARANCES:**

**Claimant** Marina Narinesingh

**Defendant** Martin Daly S.C. leading Antoinette Alleyne and instructed by Amrita  
Ramsook

DATE OF DELIVERY: 18<sup>th</sup> October 2012

**Before The Honourable Mr. Justice Devindra Rampersad**

## JUDGMENT

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*"The struggle to save the global environment is in one way much more difficult than the struggle to vanquish Hitler, for this time the war is with ourselves. We are the enemy, just as we have only ourselves as allies."*

**~ Al Gore-**

## **Introduction:**

1. Section 26 of the Environmental Management Act ("the Act") allows the defendant to make rules for the procedures for the registration of polluters who may be allowed to release pollutants into the environment along with the quantity, condition or concentration of pollutants or substances containing pollutants that may be released into the environment and for the procedures and standards with respect to permits or licences required for polluters to install or operate any process or other source from which pollutants will be or may continue to be released into the environment.
2. In other words, the Act allows the defendant to grant permits for the pollution of the environment under terms and conditions authorized by the issuance of a permit.
3. In 2001, regulations were introduced by the defendant under the powers and in the manner set out later in this judgment which fixed a standard fee for the obtaining of a permit by a polluter for the "legitimate" pollution of the water supply. In 2005, the Authority carried out a study and made certain recommendations. In 2006, the 2001 regulations were amended to include minor adjustments in two areas but without adjusting the standardized permit fee.
4. The claimant is a public interest group which has brought this claim to challenge the defendant's decision to institute the standardized permit fee under the provisions of the Act and basically says that that fee structure which exists at present is contrary to an internationally accepted environmental principle known as the polluter pays principle ("the PPP").
5. The current permit arrangement charges one fixed fee for permits without regard to the differentiating aspects of a polluter's business and levels of pollution. The question arises as to whether this is a proper application of the PPP?
6. It is important to note that this is not an application being made by a polluter for a declaration that the permit system is inequitable. Rather, this is an application being made by the claimant that the current standardized permit fee is contrary to the PPP. Therefore, this court does not

deem it necessary to consider the inequities involved, if any, in paying a standardized permit fee regardless of the level of pollution the permit holder expects to generate except in so far as it relates to the court's exercise of its discretion under well-established judicial review principles.

### **The application made:**

7. This claim was filed on 31 December 2008 for the following reliefs:
  - 7.1. A declaration that the defendant improperly delegated its legislative powers to the Authority in prescribing the permit fees and in particular the annual permit fees under the Water Pollution (Fees) (Amendment) Regulations, 2006.
  - 7.2. A declaration that the methodology of employing a flat fee or fixed fee structure and/or system which said methodology was used by the defendant for the calculation of annual permit fees under the Water Pollution (Fees) (Amendment) Regulations, 2006 is illegal and/or ultra vires and/or contrary to the NEP<sup>1</sup> and/or the Act and /or the policy of the Ministry responsible for the environment and/or the policy of the Authority and/or customary international law and treaties to which Trinidad and Tobago is a signatory.
  - 7.3. An Order of *certiorari* to bring into the High Court of Justice and quash the decision of the defendant to use and employ a fixed or flat fee methodology, which said methodology was used by the Defendant to determine the annual permit fees under the Water Pollution (Fees) (Amendment) Regulations, 2006.
  - 7.4. An order of *mandamus* compelling the defendant to use, consider and apply the polluter pays principle in calculating and/or determining and/or fixing the annual permit fee under the Water Pollution (Fees) (Amendment) Regulations, 2006.
  - 7.5. A declaration that the Water Pollution (Fees) (Amendment) Regulations, 2006 not be implemented and/or enforced by the Authority unless the defendant have adequately and properly considered and applied the polluter pays principle in calculating and/or determining and/or fixing the annual permit fees under the Water Pollution (Fees) (Amendment) Regulations, 2006.

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<sup>1</sup> NEP – The National Environmental Policy

- 7.6. A declaration that the Water Pollution (Fees) (Amendment) Regulations, 2006 is illegal and/or ultra vires and/or contrary to the NEP and/or the Act and/or the policy of the defendant and/or the policy of the Authority and/or customary international law and treaties to which Trinidad and Tobago is a signatory.
- 7.7. Costs.
- 7.8. Such further and/or other relief as the Honourable Court may deem just and necessary.
8. In response, the defendant made it clear that the reasons for the use of the Water Pollution Regulations were clear and that there was a satisfactory explanation for the decision to use Model 2 - the Egalitarian approach model of the Water Pollution Management Programme (WPMP) which is described later on. It was submitted that the decision to use such was not irrational and was in conformity with the PPP.
9. The defendant has also argued that the court should be concerned with the delay in bringing the proceedings to challenge the decision of the Minister in applying the methodology for water permits. The defendant submitted that where there is a lengthy delay the court should infer that the granting of any relief would be detrimental to good administration and prejudice the rights of some persons. The defendant argues that the fact that the policy was formulated and published in 2001 and implemented in 2007 yet the proceedings were only commenced in November 2008 with no explanation for the seven year delay meant that the claimant should be denied relief.

### **Concessions made at the hearing:**

10. At the hearing, the claimant's attorney indicated to the court that she would not be pursuing the second relief claimed i.e. the declaration that the defendant had improperly delegated his legislative powers to the EMA.
11. At the same hearing, the defendant's attorney at law indicated that the defendant would not be pursuing the issue of delay.

## **The decision:**

12. The impugned decision centers around the methodology of employing a flat fee or fixed fee structure for the calculation of annual permit fees under the Water Pollution (Fees) Regulations, 2001, the Water Pollution (Amendment) Rules, 2006 and the Water Pollution (Fees) (Amendment) Regulations, 2006.

## **The fee structure:**

### **The 2001 Rules and Regulations by The Honourable Minister Nanan:**

13. In 2001, the Water Pollution Rules 2001 [Legal Notice No 230] was laid in Parliament by the then Minister of the Environment the Honourable Adesh Nanan, its overall objective being to improve and preserve water quality in Trinidad and Tobago. In 2001, the Water Pollution (Fees) Regulations, 2001 [Legal Notice No.142], was also laid in Parliament by the said Minister of the Environment. These Notices were made pursuant to section 96(2) of the Act whereby a Minister is vested with the power to make these types of regulations.
14. The Water Pollution Rules 2001, provides for the payment of an annual permit where a polluter intends to release a water pollutant outside of the permissible level into the water supply and the environment. These polluters are required to obtain a permit and pay a prescribed fee (Rule 8). The schedule to the Water Pollution (Fees) Regulations, 2001 sets out the fees payable for the application related to certificates and permits as required by the Water Pollution Rules 2001. The implication of the payment of such a fee is therefore that a polluter is allowed to discharge a pollutant into the environment once the fee is paid and the prescribed terms and conditions met. It has been stated that the permit fees are intended to cover the costs of administering the management of water pollution and include the PPP.<sup>2</sup>

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<sup>2</sup> See paragraph 11 of the affidavit of Glenn Goddard filed on September 30<sup>th</sup> 2009

15. The permit fees under the 2001 Regulations are as follows:

SCHEDULE

FIRST COLUMN	SECOND COLUMN
<i>Rule 6</i>	
Application for Registration Certificate	\$1,000.00
<i>Rule 7(4)</i>	
Application for Renewal of Registration Certificate	\$500.00
<i>Rule 8(2)</i>	
Annual Permit Fees thereof	\$10,000.00 per annum or part
<i>Rule 10 (1)(b)</i>	
Application for a permit	\$2,500.00
<i>Rule 16(2)</i>	
Application for changes as after grant of registration certificate or permit	\$500.00
<i>Rule 17(4)</i>	
Application for Variation of Permit	\$4,000.00
<i>Rule 18(1)</i>	
Application for Transfer of Permit	\$500.00
<i>Rule 19(1)</i>	
Application for Renewal of Permit	\$3,500.00
<i>Rule 19(4)</i>	
Annual Permit Fees for Renewed Permit thereof	\$7,000.00 per annum or part
<i>Rule 25(3)</i>	
Application for extract from Registrar of Water Pollutants	\$0.50 per page
<i>Rule 26(1)</i>	
Application that Information supplied be omitted from the Water Polluters Register	\$250.00

### **The 2006 Amendment to the Rules and Regulations by the Honourable Minister Beckles:**

16. In 2006, the Water Pollution (Amendment) Rules 2006 [Legal Notice No. 325] was laid in Parliament by the Honourable Penelope Beckles, the then Minister of Public Utilities and the Environment and on December 18 2006, the Water Pollution (Fees) (Amendment) Regulations 2006 [Legal Notice No. 330] was also laid in Parliament by the said Minister. Under the amended fees the application for changes after grant of registration certificate was increased from \$500.00 to \$1000.00, the application for variation of permit was increased from \$4,000.00 to \$10,000.00 per annum but not exceeding \$150,000.00, the application for renewal of permit was increased from \$3,500.00 to \$5000.00 and the annual permit fees for renewed permits was increased from \$7,000.00 to \$15,000.00. There was no change to the actual annual permit fee of \$10,000.00.
17. It is important to note that the WPMP was dated the 6<sup>th</sup> February 2005<sup>3</sup> - more than 3 ½ years after the Water Pollution (Fees) Regulations, 2001 which identified the permit fee structure and which structure was not altered by the two 2006 amendments in relation to the issue at hand. The fee prescribed in 2001 before the WPMP remained the same.

### **The Complaint:**

18. The claimant advanced seven ground of challenge. The claimant advanced that the defendant in issuing the Water Pollution (Fees)(Amendment) Regulations, 2006:
  - 18.1. Acted contrary to the NEP by failing to consider and/or apply the polluter pays principle in establishing the permit fee structure. The claimant alleged that this was ultra vires the NEP and perverse and without regard to a material consideration namely that the requirements of section 2.3 of the NEP had not been met.
  - 18.2. Acted contrary to the Act by failing to consider and/or apply the polluter pays principle in establishing the permit fee structure and was therefore ultra vires the Act and perverse.
  - 18.3. Acted contrary to the policy of the Ministry responsible for the Environment by failing to consider and/or apply the PPP in establishing the permit fee structure and was a breach of the legitimate expectation of the claimant that the defendant would promote and implement the policy of the Ministry responsible for the Environment

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<sup>3</sup> See paragraph 33 of the affidavit of Gary Aboud filed on 31 December 2008 admitted in paragraph 7 of the affidavit of Glen Goddard filed on 30 September 2009

that the PPP should form part of and be applied in the development of pollution control policy such as the Water Pollution (Fees) (Amendment) Regulations, 2006.

- 18.4. Acted contrary to the policy of the Authority. The claimant alleged that the Water Pollution Rules 2001 and its subsidiary rules and regulations including the Water Pollution (Fees) (Amendment) Regulations 2006 are supposed to give legislative effect to the WPMP as developed by the Authority and should consider and apply the policies and recommendations of the Authority. The failure of the defendant to consider and/or apply the PPP in establishing the permit fee structure was therefore a breach of the legitimate expectation of the claimant that the defendant would promote and implement the policy of the Authority that the PPP should form part of and be applied in the development of pollution control policy such as the Water Pollution (Fees) (Amendment) Regulation, 2006.
- 18.5. Acted contrary to customary international law and treaties to which Trinidad and Tobago is a signatory. The claimant alleged that the failure of the defendant to consider and/or apply the PPP in establishing the permit fee structure was a breach of the legitimate expectation of the claimant that the defendant would promote and implement the principles of the 1992 Rio Declaration on Environment and Development such that the PPP should form part of and be applied in the development of pollution control policy such as the Water Pollution (Fees) (Amendment) Regulations, 2006 and principles of sustainable development as established in customary international law.
- 18.6. Failed to take into consideration material facts being the PPP.

### **The defendant's rationale:**

19. The defendant responded through the affidavits of Dr. Reeza Mohammed and Mr. Glenn Goddard.
20. Dr. Mohammed was the Minister of the Environment from 1999 to 2000 and held himself out as being responsible for the legislative frameworks relative to the Environment and by extension the Act and subsidiary legislation. His position was that the most appropriate model for Water Pollution Regulation (WPR) would be the model that was user-friendly and the simplest to administer and he therefore gave directions on this basis.
21. Mr. Glenn Goddard deposed that he was involved in the WPMP and that the programme was the joint work of Wayne Rajkumar and himself. He noted that the WPR was one of the mechanisms by which objectives of the programme was to be achieved. He noted that the fees

payable to the Authority by virtue of the Water Pollution (Fees) Regulations 2001 was intended to make the programme self sufficient and sustainable and to recover the cost of operating the programme from those who discharge pollutants in to the country's water resources. He deposed that the permit fees method of implementing the PPP was well recognized and that he made recommendations to the then CEO of the Authority, Dr. Dave Mc. Intosh, concerning what model might be used in Trinidad and Tobago. He stated that Dr. Dave Mc. Intosh, who communicated his recommendations to Dr. Reeza Mohommed, instructed him that the model that was the simplest to administer should be the model used for the WPR.

22. Mr. Goddard noted that Model 2- the "*Egalitarian Approach*", as described at page 32 of the WPMP - was a model easy to administer and which was reasonable for the state of institutional development of Trinidad and Tobago. It also incorporated the basic tenet of the PPP. This was therefore the model chosen to be used.

### **The Judicial Review test:**

23. The claimant wants to court to find that the Water Pollution (Fees) Amendment Regulations were ultra vires the NEP and the Act.
24. The defendant in their submissions of March 01 2010 set out the applicable test for the determination of when subsidiary legislation could be regarded as ultra vires. The defendant relied upon the case of *R v Secretary of State for Social Security ex part Joint Council for the Welfare of Imigrants; R v Secretary of State for Social Security ex parte B* (1996) 4 All ER 385 which stated that:

*"The principle is undisputed. Subsidiary legislation must not only be within the vires of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."*

25. The defendant submits that the defendant has claimed that the WPR has satisfied this test as the Water Pollution (Fees) Amendment Regulations 2006 are wholly consistent with the purpose and objectives of the Act.

26. It is trite law that the principle that arose out of the landmark case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1947) 111 JP 216 dictates how courts will intervene to correct administrative decisions on grounds of unreasonableness. Lord Greene MR in that case concluded that:

*“The court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account.”*

27. In *CCSU v Minister for the Civil Service* [1984] 3 All ER 935 cited by the claimant, Lord Diplock acknowledged that administrative decisions are subject to review where they are unreasonable, which he defined as follows:

*“It applies to a decision which 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 to be decided could have arrived at it.”*

28. Lord Keith of Kinkel in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759 said:

*“It is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he acts unreasonably in the Wednesbury sense.”*

29. In the case of *Jeffrey Holder v Margaret Farray (Permanent Secretary of the Ministry of Sport and Youth Affairs) Claim* High Court Action No. CV2008-03829 [Unreported], Kokaram J quite correctly, to my mind, stated:

*“In reviewing a decision on the ground of unreasonableness the Court must be astute to confine its jurisdiction to a supervisory and not appellate jurisdiction and to determine whether the decision maker acted within the bounds of his discretion and not as Lord Mance described in Lackston Robinson v Coke and ors PC 49 of 2007 as “outside the range of the reasonable.”*

## Discussion of the models used:

### What is this legislation intended to achieve?

#### Introduction:

*“Thousands have lived without love, not one without water.”*

W. H. Auden

30. Water is arguably Earth's most precious resource. It is non-renewable and it has been suggested that less than 1% of the world's water can be used as drinking water<sup>4</sup>.
31. One definition and discussion of water pollution is given as follows:<sup>5</sup>

*“Water pollution:*

*A change in the chemical, physical, biological, and radiological quality of water that is injurious to its existing, intended, or potential uses (for example, boating, waterskiing, swimming, the consumption of fish, and the health of aquatic organisms and ecosystems).*

*The term “water pollution” generally refers to human-induced (anthropogenic) changes to water quality. Thus, the discharge of toxic chemicals from a pipe or the release of livestock waste into a nearby water body is considered pollution. Conversely, nutrients that originate from animals in the wild or toxins that originate from natural processes are not considered pollution.*

*The contamination of ground water, rivers, lakes, wetlands, estuaries, and oceans can threaten the health of humans and aquatic life. Sources of water pollution are generally divided into two categories. The first is point-source pollution, in which contaminants are discharged from a discrete location. Sewage outfalls and oil spills are examples of point-source pollution. The second category is non-point-source or diffuse pollution, referring to all of the other discharges that deliver contaminants to water bodies. Acid rain and unconfined runoff from agricultural or urban areas are examples of non-point-source pollution. The principal contaminants of water include toxic chemicals, nutrients and biodegradable organics, and bacterial and viral pathogens.*

*Water pollution can threaten human health when pollutants enter the body via skin exposure or through the direct consumption of contaminated food or drinking water. Priority pollutants, including dichlorodiphenyl trichloroethane (DDT) and polychlorinated biphenyls (PCBs), persist in the natural environment and bioaccumulate in the tissues of aquatic organisms. These persistent organic pollutants are transferred up the food chain (in a process called biomagnification), and they can reach levels of concern in fish species that are eaten by humans. Finally, bacteria and viral pathogens can pose a public health risk for those who drink contaminated water or eat raw shellfish from polluted water bodies.*

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<sup>4</sup> See <http://www.lenntech.com/water-trivia-facts.htm>

<sup>5</sup> See <http://www.ecomii.com/science/encyclopedia/water-pollution>

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*Contaminants have a significant impact on aquatic ecosystems. For example, enrichment of water bodies with nutrients (principally nitrogen and phosphorus) can result in the growth of algae and other aquatic plants that shade or clog streams. If wastewater containing biodegradable organic matter is discharged into a stream with inadequate dissolved oxygen, the water downstream of the point of discharge will become anaerobic and will be turbid and dark. Settleable solids, if present, will be deposited on the streambed, and anaerobic decomposition will occur. Over the reach of stream where the dissolved-oxygen concentration is zero, a zone of putrefaction will occur with the production of hydrogen sulfide, ammonia, and other odorous gases. Because many fish species require a minimum of 4–5 mg of dissolved oxygen per liter of water, they will be unable to survive in this portion of the stream.*

*Direct exposures to toxic chemicals is also a health concern for individual aquatic plants and animals. Chemicals (e.g., pesticides) are frequently transported to lakes and rivers via runoff, and they can have unintended and harmful effects on aquatic life. Toxic chemicals have been shown to reduce the growth, survival, reproductive output, and disease resistance of exposed organisms. These effects can have important consequences for the viability of aquatic populations and communities.”*

32. This court has no doubt that this definition includes matters and concepts which are generally accepted and are therefore undisputed.
33. According to a United Nations report<sup>6</sup>, in developing countries:
  - 33.1. 70% of industrial wastes are dumped untreated into waters where they pollute the usable water supply;
  - 33.2. Every day, 2 million tons of sewage and other effluents drain into the world’s waters
34. The Executive Summary to the paper entitled “**Clearing the Waters: A Focus on Water Quality Solutions**”<sup>7</sup> put together by the UNEP<sup>8</sup> and delivered in Nairobi in March 2010 described the situation as follows:

*“Every day, millions of tons of inadequately treated sewage and industrial and agricultural wastes are poured into the world’s waters. Every year, lakes, rivers, and deltas take in the equivalent of the weight of the entire human population— nearly seven billion people — in the form of pollution. Every year, more people die from the consequences of unsafe water than from all forms of violence, including war. And, every year, water contamination of natural ecosystems affects humans directly by destroying fisheries or causing other impacts on biodiversity that affect food production. In the end, most polluted freshwater ends up in the oceans, causing serious damage to many coastal areas and fisheries and worsening our ocean and coastal resource management challenges.*

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<sup>6</sup> [http://www.unwater.org/downloads/WWD2012\\_water\\_quality.pdf](http://www.unwater.org/downloads/WWD2012_water_quality.pdf)

<sup>7</sup> See [http://www.unep.org/PDF/Clearing\\_the\\_Waters.pdf](http://www.unep.org/PDF/Clearing_the_Waters.pdf)

<sup>8</sup> United Nations Environment Programme [UNEP]

*Clean, safe, and adequate freshwater is vital to the survival of all living organisms and the smooth functioning of ecosystems, communities, and economies. But the quality of the world's water is increasingly threatened as human populations grow, industrial and agricultural activities expand, and as climate change threatens to cause major alterations of the hydrologic cycle. Poor water quality threatens the health of people and ecosystems, reduces the availability of safe water for drinking and other uses, and limits economic productivity and development opportunities. There is an urgent need for the global community – both the public and private sector – to join together to take on the challenge of protecting and improving the quality of water in our rivers, lakes, aquifers, and taps. To do so we must commit to preventing future water pollution, treating waters that are already contaminated, and restoring the quality and health of rivers, lakes, aquifers, wetlands, and estuaries; this enables these waters to meet the broadest possible range of human and ecosystem needs. These actions will be felt all the way from the headwaters of our watersheds to the oceans, fisheries, and marine environments that help sustain humanity.”*

35. Achim Steiner, UNEP Executive Director and Under-Secretary-General of the United Nations said at the 18th Forum of Ministers of Environment of Latin America and the Caribbean in his speech entitled “**Rio+20-A Paradigm Shift Towards a Sustainable Century**”, which was delivered at Quito on 2 February, 2012:

*“There are some countries who consider that there is an excessive emphasis on 'monetizing' nature and that its services are being priced rather like consumer goods. Others are concerned considering that market mechanisms will produce unhealthy results and concentrate natural wealth in the hands of the few. Still others have expressed their preference for the term "Ecological Economy" as it denotes an even stronger reliance and more direct connection to the natural world.*

*I can assure you that UNEP shares these concerns and we understand that nature's worth should be recognized in terms of its spiritual and cultural dimensions, as well as its social benefits. We all stand behind the objective of development in harmony with Nature, because we recognize that it is the very foundation of all life - and protecting nature is at the very core of UNEP's mission.*

*But, its economic value should also be recognized in order to enhance the likelihood of its survival in a world of competing interests where all too often current ideas of returns on investment in the short term, tip the balance in favour of unsustainable rather than sustainable development.*

***It is clear, that nature and its services are the wealth of the poor and that the poor's wealth-and their role in maintaining and sustaining it- should be recognized more formally if they are to thrive and enjoy a right to development in a globalized world. We know from experience that it is precisely the poor and socially excluded who suffer most from environmental degradation. We therefore***

*need strong institutions that are capable of addressing this situation and correcting the market failures which produced the unsustainable outcomes we currently experience.”*

**[Emphasis mine]**

36. Closer to home, and in existence prior to the preparation of the WPMP although not referred to in the list of references thereto, the “**National Report On Integrating The Management of Watersheds and Coastal Areas in Trinidad and Tobago**” prepared by The Water Resources Agency for The Ministry of the Environment in March 2001<sup>9</sup> stated in its Executive Summary at pages (ii) and (iii):

*“Pollution is a problem that is on the rise throughout the country. The main water pollutants are urban, domestic and industrial waste, solid and toxic agricultural products and waste, sediments, petrochemicals and oil spills from the oil and energy industries, waste from fishing vessels, ships, tourist facilities and yachts. The pollutants affect both inland freshwater and coastal water resources, including the beaches and shores. The most serious threats to groundwater come from nitrate and bacterial contamination arising from agro-chemical use and sewage effluents from pit latrine soakaways and septic tanks. Another serious concern is saltwater intrusion as a result of overabstraction in coastal aquifers ....*

*Like other countries, economic growth and development coupled with growth of the human population is resulting in environmental degradation of watersheds, water resources and coastal areas. For Trinidad and Tobago, a twin island state, the coastal habitats and ecosystems assume significant importance. The coastal areas support a variety of life systems and valuable natural assets and within them are located key industries and economic activities. Similar to the watersheds, these areas are subjected to threats arising from a variety of land based activities. The country experiences much of the full range of environmental problems, from widespread pollution of its waterways and coastal areas, chemical spills, illegal dumping, deforestation, excessive soil erosion, fisheries and wildlife depletion. These problems are attributed to poor land use practices and an inadequate legal and institutional framework for watershed/water resources and coastal zone management. The watersheds and coastal areas are also under threat from natural disasters (tropical storms, earthquakes, floods and droughts) as well as climate change and sea level rise .....*

*The issues articulated above, present major challenges to the sustainability of a quality environment in the watersheds and coastal areas of Trinidad and Tobago. A national management framework must therefore be formulated to deal with the pressures of increasing growth (in population, urban development*

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<sup>9</sup><http://www.oas.org/reia/iwcam/pdf/trinidad%20and%20tobago/trinidad%20and%20tobago%20national%20report.pdf>

and industrial activity), and the accompanying pressures on the environment. Such a framework must undoubtedly recognise the direct impacts, which emanates from their supporting systems (upstream watersheds and the marine environment). It must also explicitly recognise the trade-offs between development and environmental sustainability. To establish this framework the following group of actions is recommended:

1. Implementation of the concept of integrated resource management to attain sustainable development of the nation's watersheds and coastal areas.
2. Establishment of an effective financially autonomous institutional framework that facilitates proper water resources, watershed and coastal zone management.
3. Protection of the environmental quality and ecosystems of watersheds and coastal areas.
4. Development of capacity and tools within a suitable institution to support the decision making process.

37. The report continued at page 39:

*“The land based water bodies in Trinidad and Tobago comprise rivers/streams, reservoirs and aquifers. These water bodies fulfil a wide range of uses including potable water supply, irrigation, recreation, religious rituals, waste disposal, small-scale transportation, ecosystem support and aesthetics. This heavy multiple use of the resource is occurring without a suitable water quality management framework, resulting in significant negative water quality impacts.*

*One of the most important issues contributing to watershed depletion and water pollution has been the lack of enforcement of environmental legislation. Although there has been some historical background on environmental legislation with at least one hundred and twenty-four (124) environmental law references dating back from the 1950's and 1960's, there has been little enforcement because of:*

- *Few environmental officers;*
- *No qualitative standards i.e. the legislations are vague and difficult to strategically enforce; and*
- *The spread of these historical laws among forty (40) different agencies.”*

38. Without a doubt, the issue of the preservation of water as a resource is a very important national and international issue which must be handled with care and planning after a careful and thorough consideration of all of the factors, balancing the economic needs of the country with the need to preserve our environment in the present and for the future. The magnitude of the task is one which must not be undertaken lightly as the national and international agencies

seem to all reflect upon the need to ensure that the issue is handled with seriousness and resolve so that it is addressed in the context of the grave global and national implications.

## **The legislative framework:**

### ***The provisions in the Act:***

39. Section 26 of the Act, which places the responsibility to make the decision which is now being challenged on the defendant, provides:

*26. The Minister may, in accordance with section 27, make Rules subject to negative resolution of Parliament, for the following:*

*(a) procedures for the registration of sources from which pollutants may be released into the environment and the characterisation of such sources;*

*(b) The quantity, condition or concentration of pollutants or substances containing pollutants that may be released into the environment generally or by specific sources or categories of sources;*

*(c) Procedures and standards with respect to permits or licences required for a person to install or operate any process or other source from which pollutants will be or may continue to be released into the environment;*

*(d) The form and manner of —*

*(i) applying for any licence, permit or certification that may be required or granted by the Authority;*

*(ii) revoking, suspending, varying or cancelling a permit or licence or a condition in that permit or licence;*

*(e) Procedures, standards and guidelines for the formal designation and protection of “environmentally sensitive areas” or “environmentally sensitive species” under section 41;*

*(f) incentive programmes or mechanisms which encourage the use of effective environmental systems and the achievement of improvements in environmental quality, as provided in section 34;*

*(g) designation of hazardous substances or categories of hazardous substances under section 59, and the performance standards, procedures, safeguards and licensing or permitting requirements in accordance with which such hazardous substances shall be handled;*

*(h) The procedure to be followed by any person required to apply for and receive a certificate of environmental clearance, and the standards for preparation and submission of any environmental impact assessment which may be required under sections 35 to 38 inclusive;*

*(i) The definition of various categories of waste under sections 55 to 57 inclusive, the requirements with respect to the handling and disposal of such categories of waste, and the licensing of facilities at which such wastes are handled or disposed;*

*(j) Procedures and standards for the periodic or continual monitoring of pollutant releases in conjunction with any process, activity, vehicle or premises;*

*(k) The establishment of ambient environmental quality criteria and standards which may be taken into account in setting any general, categorical or source-specific limitations under paragraph (b) for any new or continued release of pollutants into the environment;*

*(l) The design, construction, operation, maintenance and monitoring of facilities or processes for the control of pollution and the handling of wastes; and*

*(m) Any other matter required to be, or which may be prescribed by the Authority.*

....

40. Section 27 provides:<sup>10</sup>

*27. (1) in the course of developing Rules, the Minister shall—*

*(a) Submit draft Rules for public comment in accordance with section 28;*

*(b) Consider the public comments received and revise the Rules as he thinks fit;*

*(c) Cause the Rules to be published in the Gazette and laid thereafter in Parliament.*

*(2) Any Rules made by the Minister shall become effective when the Rules are published in the Gazette or at such later time as may be specified in the Rules.*

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<sup>10</sup> There has been no issue raised in respect of the s.27 procedure so that even though there is no evidence of compliance, the court assumes that the procedure was adhered to since no complaint was made otherwise.

### ***The National Environmental Policy:***

41. The National Environmental Policy (NEP) was first adopted in 1998, but was subsequently revised in 2005 under Section 18 (5) of the Act which allows for the revision of the policy as the Authority sees fit. The goal of this policy is environmentally sustainable development, meaning the balance of economic growth with environmentally sound practices in order to enhance the quality of life and meet the needs of present and future generations.
42. Section 2.3 of the NEP provides:

#### ***“Polluter Pays Principle:***

*A key principle of pollution control policy is that the cost of preventing pollution or of minimising environmental damage due to pollution will be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources. Important elements of the principle are:*

- a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and*
- b) Money collected will be used to correct environmental damage.”*

43. Under the rubric “**Water resources**” at section 3.7, the NEP goes on at the following subparagraphs to state that Government will:

*(h) Develop a registration programme for all facilities that are the sources of any release of water pollutants so as to develop a water pollution inventory in Trinidad and Tobago. These facilities include those that intend to release water pollutants and those that are already in the process of releasing water pollutants;*

*(i) Control water pollution through a system of permits for facilities that are the sources of any release of water pollutants. This control system will be based on the Polluter Pays Principle, which will set pollution limits or performance standards for water. The cost of pollution prevention or of minimising environmental damage due to pollution will be borne by those responsible for pollution;*

*(j) Ensure that in the permitting of any new point source or non-point source of water pollution, which would lower the water quality in any area, the responsible party for such pollution shall establish and use at least the most cost-effective and reasonable environmental management practices to address such pollution. In addition, to the extent practicable, all new point sources of pollution shall not discharge into near-shore or fresh surface waters;*

## The Polluter Pays Principle:

44. The PPP holds the polluter responsible for any damage that he may have caused to the environment whether willfully or otherwise.
45. In 1972 a principle whereby the polluter 'pays' for any damage that he caused to the environment was referenced by the Organization for Economic Co-Operation and Development (OECD). In the recommendation made by the OECD for its implementation, the PPP was defined as "*the principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment.*"<sup>11</sup> In 1974 the OECD officially implemented the principle by the signing of the "**Implementation of the Polluter-Pays Principle**". That principle was adopted formally on 14th November, 1974.
46. There is no doubt that the PPP is not only a universally accepted and established Environmental Principle but it has also been inducted in International Environmental Law as evidenced by its adoption in the *Rio Declaration* and the 1997 *Kyoto Protocol* and other international environmental treaties. Both parties in this case have agreed to its applicability so there is no issue as to its applicability to the case at hand.

## Are the models used legitimate models?

47. In light of the evidence before this court and the corresponding research in respect of the WPMP, which reposes in the defendant's care and control, it is startlingly obvious that there was, and is, a remarkable dearth of information regarding the basis for the making of the decision in question.
48. After the hearing of submissions on 9 March 2012, this court, being of the view that more evidence of the basis for the decision was required, made an order for the defendant to file a further affidavit to give details of the six (6) models referred to at pages 31 to 33 of the Authority's WPMP particularising the authors and/or the academic and/or other sources of the said models and providing whatever research or other material is available relative to the said models and/or each of them and verifying and/or criticizing the acceptance of the same in the relevant field to establish whether the said models are accepted industry standards and/or are academically accepted in the relevant field.

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<sup>11</sup> *OECD Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, 26 May 1972, Article 4

49. That affidavit was filed on 4 April 2012 by Wayne Rajkumar who described himself as the Assistant Manager, Water Waste and Geographic Information Systems, at the Authority. Mr. Rajkumar went on to describe himself as the holder of a Bachelor of Science in Natural Sciences, which he completed in 1987, and a Masters of Philosophy in chemistry, the date of the attainment of which was not given. He says that he joined the staff of the Authority in 1997 and worked jointly with Mr. Goddard in the manner described at paragraph 7 of Mr. Goddard's affidavit. Specifically he became involved in the preparation of the WPMP and brought it to a conclusion under the supervision of Mr. Goddard. He is an Assistant Manager responsible for Water Pollution at the Authority and has held that position since 2006 carrying out this core function since he joined the Authority.
50. At paragraph 4 of his affidavit, Mr. Rajkumar said that the WPR were prepared after Mr. Goddard made recommendations to the CEO of the Authority, Dr. Dave Mc. Intosh concerning what model might be used in Trinidad and Tobago and after consultation with the then Minister of the Environment, Dr. Reeza Mohammed. In relation to the models used, which formed the basis of the defendant's rationalisation of the fee structure, Mr. Rajkumar said:

*".... the responsibility for that aspect of the research and analysis was that of Dr. Rajendra Ramlogan. Dr. Ramlogan worked as a Consultant with the EMA at or around the period 1998 to 2001. Although I have no knowledge of the specific terms of reference of his consultancy, I am aware that he had responsibility for the research and analysis of the "fee – models" component of the Management Programme and that, subsequently, he worked on the Water Pollution Rules. As such, the content at pages 31 to 33 of the Management Programme is based solely on the research and submissions of Dr. Ramlogan."*

51. He went on to say at paragraph 5 of his affidavit that:

*"I am not privy to the specific references which would have informed Dr. Ramlogan's research at the time. There is no documented reference list and the Management Programme document does not specify the references that were used. I am also not privy to the reference which is made at paragraph 17 of the Goddard affidavit to the assessment of the comparative regimes of permit fee models in the United States. Mr. Goddard has also left the employ of the EMA and a diligent search of the EMA's records has not produced any account of the academic research which would have informed the conclusions drawn at pages 31 to 33 of the Management Programme."*

52. Mr. Rajkumar went on to volunteer assistance to the court in terms of an independent search of available literature and he quite candidly admitted at paragraph 6 that he was unable to find references to the specific named models summarized at pages 31 to 33 of the Management Programme. He qualified that response, however, by inserting the following provisos:
- 52.1. That, given the timeframe, his research was not very extensive and was restricted to commonly referenced sites;
- 52.2. The Management Programme (i.e the WPMP) was produced over 12 years ago.
53. No application was made to extend the time for the filing of the affidavit to produce further research on the point despite it being crucial to the issue at hand.
54. Mr. Rajkumar then went on to produce certain documents which, according to him, speaks to the learning that **would have been available** at the time that the Management Programme and the WPR would have been produced. Of course, this court is not able to say that those documents were in fact considered in the formulation of the rules and the models by the decision-maker.

#### **The applicability of the models:**

55. Mr. Rajkumar's candid assertion that he did not know the specific terms of reference of Dr. Ramlogan's consultancy and the fact that those terms of reference were not provided to this court raises serious doubts as to the applicability of the models referred to in the WPMP.
56. First of all, this court has absolutely no idea of who Dr. Ramlogan is [other than the fact that he was named as the advocate attorney at law in these proceedings but has never appeared before this court at all] or his expertise to generate the model referred to in the Management Programme and upon which reliance seems to have been placed and for which no recognised scientific basis has been established . No resume was provided for him nor was any expertise in this area of very great sensitivity and national and international importance established. In those circumstances, how is this court to reach to a conclusion that the models upon which the system seems to have been based was a reasonable approach to have been adopted and that proper consideration was given to all of the factors in the right balance and with the appropriate weights to enable a fully informed decision? The court does not accept the evidence of the claimant's witness Terence Beddoe in this regard since Mr. Beddoe's evidence in relation to Dr. Ramlogan's expertise is clearly hearsay and no reason was given for Dr. Ramlogan failing to file an affidavit to clarify his terms of reference.

*The lack of evidence from Dr. Ramlogan:*

- 56.1. It is more than just passing strange that Dr. Ramlogan failed to file an affidavit in these proceedings to clarify this most salient issue. The court notes that he was a named participant in the claim before the court as advocate attorney yet he never attended and neither side saw it necessary to have him summoned before this court.
- 56.2. Dr. Ramlogan seemed to have been a major player in the formulation of the WPR and his apparent decision to become involved in this campaign to set aside the fixed fee structure, which was clearly one of the possible outcomes envisaged by the six models he propounded even if it was not the preferred outcome, suggests a dissatisfaction with the eventual decision made by the defendant.
- 56.3. He did not seek to reduce the ambit of his involvement in the formulation of the WPMP, if any, in writing by way of affidavit.
- 56.4. If this suggestion of dissatisfaction holds true, this would in fact be a troubling precedent where a participant in a policymaking or decision making process can possibly undermine the whole process by questioning it through a third-party and starve the proceedings of information which that participant himself was best placed to provide. To my mind, this could very well subvert the course of justice.
- 56.5. In these proceedings, however, there was nothing suggesting that the defendant could not have properly retained the appropriate records to substantiate its basis for the decision. On the contrary, the failure to so produce those records without explanation suggests to this court that such information was not treated as being sufficiently important to have warranted it being kept safely and securely.
57. The court appreciates the fact that the WPMP was developed twelve years ago so that it may be that the sense of importance of keeping the research data was overlooked in some manner but it is important to bear in mind that the issue of delay was not pursued by the defendant and, in any event, no proper explanation for the failure to provide the information was presented to this court other than the assertion that the timeframe was too short to allow more detailed and extensive research in the area.

## The Court's findings:

58. As mentioned above, the Water Pollution (Fees) Regulations, 2001 was dated 9 July 2001, prior to the WPMP dated February 2005. Dr. Reeza Mohammed, who deposed to an uncontroverted affidavit which was filed in these proceedings on 30 September 2009, described himself as the Minister of the Environment from 22 October 1999 to 10 December 2000. He said that, as Minister, he was:

*“...responsible for the policy and legislative frameworks relative to the Environment and by extension Environmental Management Act (the Act) and subsidiary legislation made thereunder.”<sup>12</sup>*

59. He said in his affidavit that, as Minister of the Environment, he gave directions for a policy to one Dr. McIntosh, who was the Chief Executive Officer of the Environmental Management Agency (EMA), that, having regard to the state of economic development and the level of institutional development of the country, the most appropriate model for the subsidiary legislation under the Act namely the Water Pollution Rules 2001, the Water Pollution (Amendment) Rules, 2006 [Legal Notice No. 12], the Water Pollution (Fees) Regulations, and the Water Pollution (Fees) (Amendment) Regulations, 2006 [Legal Notice No. 333] would be the model that was user-friendly and the simplest to administer. It has to be noted that the state of economic development and the level of institutional development of the country were never raised by the claimant as issues to be considered in these proceedings so that the court does not intend to investigate those considerations as issues in this matter.

60. Dr. McIntosh did not depose to an affidavit in these proceedings. Instead, Glenn Goddard, who deposed to an affidavit on 30 September 2009 in these proceedings, refers to information given to and received from Dr. McIntosh which was not objected to by the claimant's attorney at law and upon which he was not cross-examined. That information in relation to Dr. McIntosh was, in essence, consonant with the evidence of Dr. Mohammed in relation to the stated policy.

61. There is no evidence of there being any data whatsoever to have informed that policy in July 2001. The WPMP was not done until 2005 by which time the Water Pollution (Fees) Regulations, 2001 was already in place. The NEP was revised in 2005. There is no suggestion

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<sup>12</sup> See paragraph 4 of his affidavit

by anyone post-February 2005, when the WPMP was issued, that the defendant did or did not consider the NEP or the WPMP finding and recommendation at page 34 thereof that:

*"... it is the Authority's expert opinion that Model 6 (i.e. the pollution load approach) is perhaps the most equitable and will be used as the basis for determining water pollution fees."*

62. In the years 2005 and 2006, the decision-maker was the Honourable Penelope Beckles. The court can take judicial notice of the fact that the initial policy referred to by Dr. Mohammed was a policy instituted by a United National Congress (UNC) Minister of Government whereas the decision-maker after the delivery of the WPMP was a Minister of Government of the People's National Movement (PNM). In such circumstances, this court would have expected a statement from the relevant minister who would have been in charge after the WPMP was delivered to have deposed to an affidavit confirming the continuation of the policy espoused by Dr. Mohammed and a further confirmation of the consideration of the findings of the WPMP and of the principles espoused in the NEP. Regrettably, the court did not receive the assistance save that in the correspondence from the Honourable Penelope Beckles, dated November 21 2008 annexed as "GA9" in the affidavit of Gary Aboud, she mentions that the polluter pays principle was one of the key principles of the nation's pollution control policy as stated in the 1998 NEP and its 2006 revision.
63. Obviously, had that evidence of consideration of the WPMP prior to the 2006 amendment been forthcoming, the claimant would have been hard-pressed to have questioned the exercise of the Honourable Minister's discretion. As it stands, however, there's nothing to suggest that the findings of the research and the recommendation referred to in the WPMP was considered by the Honourable Minister at the time and at any time prior to the 2006 amendments. To my mind, in the circumstances, the full extent and purport and purpose of the "research" which comprises the WPMP seems to have been lost in the decision making process.
64. I have chosen to refer to the WPMP research in quotation marks because no one has been able to verify the scholarship or academic acceptance of the research despite the opportunity given by this court to do so as mentioned above. It is incomprehensible to this court at this time that, given the deep importance of this subordinate legislation and the tremendous environmental impact that permitted pollution would have on the environment, that a more complete account of the developmental blocks for the fee structure and its rationale was not possible. According to Mr. Goddard, the WPMP is *"... a living document. The mechanism for achieving its overall*

*objectives will be revisited and revised from time to time.*"<sup>13</sup> It is difficult to understand how any revisitation would be possible without a record of the basis for the formulation of the original mechanism. In any event, it may very well be that the time has come for the objectives and mechanism for achieving them to be revisited and revised.

65. This court has serious doubts as to how it is possible for the WPMP to be "*self-sufficient and sustainable*"<sup>14</sup> and for the current permit fee structure to be able "*to recover the cost of operating the program from those who discharge pollutants into the country's water resources.*"<sup>15</sup> The basis of those statements, in so far as they apply to the current permit fee structure, were not forthcoming before this court.
66. It seems rather doubtful that a polluter which has a complex potential for pollution should really be charged the same fee as an entity whose effluent is more easily distinguished and determined. For example, a poultry farm emitting waste product into a water system may possibly require less scientific chemical analysis than a company emitting complex chemical substances. Who pays for that differentiation in the scientific analysis and research process for the determination of the terms and conditions which may accompany a permit? The court bears in mind that the terms and conditions form a part of the permit which, necessarily, would have been determined as a result of an application made and which application would have to be assessed and the potential of harmful effluent identified and analyzed before terms and conditions could be stipulated. After identification, it is probable that substantial research into ways and means and methods of ameliorating the effects of the harmful effluent along with the identification of the appropriate equipment and technology would be necessary in order to determine the terms and conditions. Who pays for that? Is that a part of the permit fee structure? There was no information given in that respect.
67. Is the process self-sufficient and sustainable? What are the costs of operating the program and have those costs been met through the permit fee structure which operates at present? How was the permit fee of \$10,000 arrived at?
68. To my mind, to examine the rationality of the decision, the identification and presentation to this court of information which was at hand at the time that the initial decision was made in 2001 would have been necessary - information which would have assisted in informing this court that the whole process was in fact self-sufficient and sustainable and that all the

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<sup>13</sup> See paragraph 9 of his affidavit.

<sup>14</sup> See paragraph 10 of Mr. Goddard's affidavit

<sup>15</sup> Ibid

information which should have been considered was considered and information which should not have been considered was not. The same applies to the 2006 deliberation. Respectfully, to limit the policy to one that was user-friendly and the simplest to administer without regard to the exigencies and other factors which proper research and reporting would have identified, and without regard to a programme – the WPMP - which purported to do in-depth research into the appropriate fee structure and in respect of which there is no evidence of it having been considered in relation to the permit fee structure, would not, in the respectful opinion of this court, be a rational exercise of the Honourable Minister’s discretion.

69. Bearing in mind the rules which this court is constrained to follow in relation to matters of judicial review and the principle of ministerial decision-making, this court is not satisfied that the methodology used to determine the permit fee structure can stand up to review by this court. The employment of the existing permit fee structure seems rather arbitrary and irrational as this court did not receive information as to how that fee was determined or how it meets the requirement of the PPP especially in light of the dubious status of the WPMP research and the lack of evidence to suggest that it was even considered .

### **The Order:**

70. As a result, the court shall make the following orders and give the following declarations:
  - 70.1. The court declares that the methodology of employing a flat fee or fixed fee structure and/or system which said methodology was used by the defendant for the calculation of annual permit fees under the Water Pollution (Fees) (Amendment) Regulations, 2006 is illegal and/or ultra vires and/or contrary to the NEP and/or the Act and /or the policy of the Ministry responsible for the environment and/or the policy of the Authority and/or customary international law and treaties to which Trinidad and Tobago is a signatory.
  - 70.2. An order of *certiorari* is hereby quashing the decision of the defendant to use and employ a fixed or flat fee methodology, which said methodology was used by the Defendant to determine the annual permit fees.
  - 70.3. An order of *mandamus* is hereby granted compelling the defendant to properly use, consider and apply the polluter pays principle in calculating and/or determining and/or fixing the annual permit fee.

- 70.4. The court declares that the Water Pollution (Fees) (Amendment) Regulations, 2006 not be implemented and/or enforced by the Authority unless the defendant has adequately and properly considered and applied the polluter pays principle in calculating and/or determining and/or fixing the annual permit fees.
- 70.5. The court further declares that the Water Pollution (Fees) (Amendment) Regulations, 2006 is illegal and/or ultra vires and/or contrary to the NEP and/or the Act and/or the policy of the defendant and/or the policy of the Authority and/or customary international law and treaties to which Trinidad and Tobago is a signatory.
- 70.6. The defendant shall pay the claimant's costs of the claim to be assessed pursuant to part 67.12 of the CPR. The claimant to file and serve a statement of costs by 5 November, 2012. Defendant to file and serve notice of objections by the 26 November, 2012. The assessment of costs is fixed for the 16 January, 2013 at 9:30 a.m. in POS 16.
- 70.7. Stay of Execution granted to the 7 November, 2012, such stay to continue in the event of an appeal.

**Devindra Rampersad**  
**Judge**

**Assisted by: Krystal Richardson**  
**Attorney-at-Law**  
**Judicial Research Assistant**