REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2014-03319**

IN THE MATTER OF BREACH OF THE
MUNICIPAL CORPORATIONS ACT, CH.25:04
BY THE OWNER/OCCUPIER
OF
129 LONG CIRCULAR ROAD, MARAVAL, TRINIDAD

IN THE MATTER OF THE BREACH OF INTER ALIA
SECTION 170 OF THE MUNICIPAL CORPORATIONS ACT, CH.25:04
BY THE OWNER/OCCUPIER
OF
129 LONG CIRCULAR ROAD, MARAVAL, TRINIDAD

BETWEEN

(1) THE CHAIRMAN, ALDERMEN, COUNCILLORS AND ELECTORS OF THE REGION OF DIEGO MARTIN
(2) THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Claimants

AND

EDFAM
(Trading as and/or known as and/or operating as the Following entities, Arbor and Rosewood Schools)

Defendant

Claimants:

- Alvin Fitzpatrick SC leading Stuart Young and instructed by Anabelle Sooklal for the first named claimant
- Larry Lalla and Carol Cuffy Dowlat instructed by Kamala Carter and Bryan Basdeo for the second named claimant

Defendant*:*

- Christopher Hamel Smith SC leading Jonathan Walker and instructed by Gregory Pantin for the defendant

Dated the 28th of September 2014

Before the Honourable Mr. Justice Devindra Rampersad

Ruling on Injunction

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1. On 10 September 2014, the Honourable Madame Justice Dean-Armorer granted an application for an injunction restraining the defendant from operating Arbor and Rosewood schools at the property and premises found at 129 Long Circular Road, Maraval, Trinidad until the hearing and determination of the substantive injunction application or until further order. The substantive application for the injunction is now before this court for determination.

2. Mr. Hamel Smith, attorney at law for the defendant, has suggested that this case is about traffic in that the source of the complaint in relation to the opening of a school in this area is the concern that the residents in the area have for the impact that it would have on the already overwhelming traffic situation. Respectfully, this court is of the view that this case is really much wider than that. It is, to my mind, about the application of the rule of law and our willingness, as a society, to abide by it and how it impacts upon the lives of the defendants in this particular matter.

3. According to the claimants, the defendant has opened a school at 129 Long Circular Rd., Maraval without having obtained the required approvals from the Town and Country Planning Division, as is required under section 8 of the Town & Country Planning Act, from the Diego Martin Regional Corporation, as is required under sections 158 and 170 of the Municipal Corporations Act, and without having registered the school under section 30 of the Education Act.

4. The defendant, however, says that the provisions of these Acts do not apply for the reasons given below, save in respect of the Education Act, and that if an injunction is continued preventing the school from opening, it would cause substantial prejudice and damage to the 240 children and the 35 teachers involved in the school and would amount to a breach of their constitutional right to attend a school of their choice and may result in the permanent closure of the school as the defendant would be unable to meet its financial commitments and obligations and may be forced to close as teachers and students would be forced to seek alternative arrangements for the next school year – a consequence which may very well have permanent effects.

A brief history

5. According to Mr. Andrew Bernard, one of the defendant's directors, the defendant is a company incorporated under the laws of Trinidad and Tobago which is "*a not-for-profit organization which has as its primary objective the provision to families in the national community an alternative in the education of the children. It operates 3 schools under the names of Arbor, Rosewood and Trimont. Arbor is a bilingual kindergarten while Rosewood and Tremont are the respective primary and secondary schools for the girls and boys*."[1] Arbor teaches children from age 2 ½ to 6 and then the girls transition into Rosewood from age 7.

[1] Paragraph 3 of his affidavit sworn to and filed on 11 September 2014.

6. The defendant itself was incorporated on 23 June 2008 and has been operating Arbor as a kindergarten since 2008. Rosewood and Trimont were opened 3 years ago as a natural progression from the kindergarten to primary and then secondary schools. As at the scheduled start of the academic year 2014/2015, there were approximately 180 students enrolled in Arbor and 60 enrolled in Rosewood with a complement of 35 teachers between them both.

7. Prior to July 2014, Arbor was housed in premises situated at the corner of Alexander and Hayes Street, St. Clair while Rosewood was apparently housed at Ariapita Drive, Woodbrook – both of them under leases. The latter's lease expired in or around July 2014 and apparently the landlord had indicated he was not willing to renew due to the fact that the property was under acquisition. No details were given as to when the defendant became aware of this. With respect to Arbor, despite the fact that there were 4 years still running on the lease, the defendant decided to vacate those premises as a result of unexplained circumstances arising in relation to the landlord of that property.

8. The inference arising out of the affidavits before the court is that by July 2014, the defendant sought and obtained the alternative premises which are the subject of these proceedings at 129 Long Circular Road, Maraval. Mr. Bernard indicated that a lease was signed[2] in relation to the premises in the context of the following circumstances:

   8.1. that these premises were previously occupied as a commercial enterprise by a restaurant and lounge open to the public and trading under the name "Tao";

   8.2. there were no restrictions on the user in so far as the title documents will concerned;

   8.3. a traffic plan would have to be implemented because of concerns about traffic;

   8.4. a submission would have to be made to Town & Country Planning Division (referred to hereafter as "T & C").

9. A&L Estate Management Consultancy Limited (A & L) was immediately engaged[3]. Further, a Land Use Planner and Development Planning Consultant, Rosemarie De Four, was hired "*on the matter of 129 Long Circular Rd. including to advise on the history of the approved use for that property*" [4].

10. Mrs. De Four conducted searches at the offices of T & C [5] which revealed that the property had been in existence since 1966 when it was used as the site of the Cipriani College of Labour until 1971. T & C had no application nor approval for a material change of use of the subject lands since then so that, according to her, the records of T & C revealed that the

[2] No details of this lease was given to the court and it is not known whether the searches mentioned later on in his affidavit were done before or after lease was signed.
[3] No date of engagement was given by Mr. Bernard.
[4] Paragraph 3 of her affidavit deposed to on 12 September 2014 and filed on even date. No date was given for her hiring.
[5] No date was given for these searches. The result of her searches were in fact quoted by Mr. Andrew Bernard in his affidavit and that information was subsequently confirmed by Mrs. De Four in her affidavit of the 12th and September 2014.

last approved use for lot 129 was for educational and/or institutional use[6]. She went on to confirm that the Port Of Spain Land-Use Plan (1987) described the St. Clair – Long Circular District as a "*band of open space and institutional facilities which generally extend along Serpentine Road, St. Clair Avenue and Long Circular Road*."

11. The court will now conduct a chronological analysis of the circumstances leading up to these proceedings.

12. By application dated **10 October 2008**, attempts were made to register Arbor. At that time, Arbor was at its previous location at #8 Hayes Street, St. Clair. Those premises were tenanted from one Adolphus Daniell who indicated that he was familiar with the process for registration with the Ministry of Education. As a result, he was given the said application to submit on their behalf.

13. By email dated **17 June 2009**, Mr. Daniell indicated that that application had been lost at the Ministry of Education and a new application form was filled out and given to Mr. Daniell to complete the registration process.

14. In or around **November 2009**, forms were submitted on behalf of the school to become a Cambridge Centre to the Ministry of Education.

15. The Ministry of Education issued a memorandum dated **9 March 2010** to the school advising that the University of Cambridge had allotted Arbor an institution centre number – TT 614.

16. On **4 October 2010**, Cambridge emailed the school, to thank them for becoming a registered Cambridge International Centre, and the Ministry of Education, to confirm that they were happy for the school to upgrade to an independent Cambridge International Centre. Around that same time, the Honourable Minister of Education, together with one or more representatives of the Ministry conducted an official tour of the school where they were shown its operations and provided a detailed information package.

17. By letter dated **14 November 2011**, the Ministry of Education directed the school to the Director of Educational Planning Division to guide Arbor through the requirements for partnership with the Ministry of Education.

18. On **18 January 2012**, the Educational Facilities Planner from the Ministry of Education visited the school together with the Ministry's Curriculum Coordinator to inspect the premises and classrooms. At that meeting, it was pointed out that the school was not registered and that these persons allegedly indicated that since the school was contemplating a move to a new location that it would be better for it to wait until it moved to that new location before applying for registration. Contact details were then given by the Ministry representative to the school for the Property and Real Estate Services Division of the Ministry of Housing and the Environment in relation to the schools' concern for finding another location for Arbor and Rosewood.

[6] Neither side produced any evidence confirming this statement. It has to be noted that the Town and Country Planning Act came into force on 1 August 1969 – prior to the use of this site by the Cipriani Labour College in 1966 and no evidence was provided by either side to suggest that any official designation of the use of the site for educational/institutional use was ever given.

19. No information was given with respect to the exact date when Arbor and Rosewood left their previously leased premises.

20. By letter dated **10 May 2012**, Arbor and Rosewood invited representatives from the Ministry of Education to attend the schools' Spanish showcase week. Apparently, Ms. Jennifer Hussein, Director of Educational Planning and Ms. Lisa Henry-David, Educational Facilities Planner, attended.

21. Work started on the property at 129 Long Circular Road, Maraval on **3 July 2014** to carry out internal works of a non-structural nature to adapt the building for use as a school. Apparently, Mr. Christopher Chin Lee, Engineer, was engaged as the project manager and he described and gave details of the work which was done. He confirmed[7] that none of the works that he conducted or supervised "*impacted upon, or involved, structural changes to the already existing structure. The works were refurbishment and constructing of partitions and installation of fixtures.*"

22. By "Letter of Advice" dated **4 August 2014**, the Director of T & C wrote to the defendant. Given the importance of that letter, the entirety of its contents are set out below:

> *"EDFAM*
> *C/O Mr. Philip Hamel-Smith,*
> *H.S. Services Limited,*
> *Eleven Albion Street,*
> *Corner Dere and Albion Streets*
> *Port of Spain*
>
> *Sir,*
>
> ***Re: Proposed establishment of the Arbor and Rosewood Schools at a site located at 129 Long Circular Raod, Maraval and proposed establishment of car-parking and or related facilities to the Schools, at a site located at the corner of Long Circular Road and Champs Elysees Road, Maraval.***
>
> *1. The Division is in receipt of a complaint from Residents of Champs Elysees informing of the intention of your organization to establish a co-educational Kindergarten School (Arbor) and a Primary School for girls (Rosewood), at 129 Long Circular Road.*
>
> *2. The Division is also informed that the site located at the corner of Long Circular Road and Champs Elysees Road is proposed to be used for car-parking and or other facilities related to the proposed School operations.*
>
> *3. The Division is also in receipt of a flyer advertising the intended relocation of the Arbor and Rosewood Schools to the site located at 129 Long Circular Road (Copy attached).*
>
> *4. The Town and Country Planning Division has searched its Register of Applications which revealed that the Minister with responsibility for Town And Country Planning did not grant permission required under Section 8 (1) of the*

[7] See paragraph 5 of his affidavit deposed to on 11 September 2014 and filed on even date. His evidence was not contradicted by the claimants

Town and Country planning Act, Chapter 35:01 to carry out School operations and related facilities at the above mentioned sites.

5. YOU ARE HEREBY ADVISED that you will be in breach of the provisions of Section 8 (1) if the Schools and related facilities are established without the prior grant of planning permission.

6. YOU ARE FURTHER ADVISED that within fourteen (14) days of the receipts of this letter, you are required to submit an Application for planning permission pursuant to Section 14 (1) of the said Act, for the retention of the building and or works undertaken and the use of the said lands for the School operations and or other related facilities. Note, however, that under Section 11 (1) of the said Act, the Minister may grant permission either unconditionally or subject to such conditions as he thinks fit, or may refuse permission.

7. YOU ARE HEREBY ADVISED that under present planning policy as framed within the context of the Development Plan for Trinidad and Tobago, the proposed Schools and or proposed car-parking and or other facilities on the subject sites will not be permitted.

8. AND FURTHER TAKE NOTICE that in the absence of planning permission, the Minister may initiate enforcement action against the owner or occupier of the land pursuant to Section 16 (1) of the said Act. Failure to comply with the requirements of an Enforcement Notice is an offence that renders the owner or occupier liable on summary conviction, to the payment of a fine, in addition to the removal of any unauthorized development and or discontinuance of the use of the said lands.

You are therefore advised to discuss your proposals for any proposed development on the subject sites at the earliest mutually, agreed time."

23. By letter dated **6 August 2014**, the Director of Highways wrote to T & C in relation to an objection letter from the residents of Champs Elysées Road in which he stated that:

> *"The location of the proposed school and its road access is ill-advised as the current road network system in the Maraval/Long Circular area is unable to effectively support the incoming traffic that is expected with this infrastructural addition.*
>
> *We therefore strongly recommend that the consideration for the approval of the aforementioned school be rescinded."*

There is no suggestion on the evidence that the defendant was aware of this letter prior to the commencement of these proceedings.

24. Sometime prior to, or on, **8 August 2014**, a letter was penned by the Lower Maraval Residents' Association and signed by one Gillian Crooks. That letter was addressed to the first named claimant calling upon it to enforce the law and stop the establishment of the school. Mention was made in that letter of a meeting between the Directors of the school and the local residents held on 24 July 2014 when the Directors admitted not having any T & C planning approval and that the Councillor for the area put the concerns of the local

residents to the schools' Directors and received no satisfactory answers. The letter went on to mention that the issue was raised in Parliament in the House of Representatives on 11 July by the MP for the area to which the Honourable Minister of Planning and Sustainable Development, Dr. Bhoendradatt Tewarie responded that the matter was being investigated.

25. On **8 August 2014**[8], as a result of the undated letter from the Lower Maraval Residents' Association which was allegedly received by the first named claimant that same day, representatives of the first named defendant, including its CEO, Mrs. Marva Carter, Nkese Kendell (an Engineer in the employ of the claimant), Kern Solomon (the Councillor for the area) and Keri Smith (a member of the Building Inspector's Department) visited the premises and spoke to Mr. Chin Lee, asking him for copies of his approvals. No documents were given to them but they were advised to speak to his principals.

26. Mr. Francis E Antoine, Civil Structural Engineer, visited the subject premises on **11 August 2014** on behalf of the defendant to report on the structural integrity of the subject building to be used as a primary school.

27. On **14 August 2014**, A&L, acting on behalf of the defendant, submitted two applications to T & C for the retention of an existing building, relating to the actual building on the site in respect of which work was being done, and for subdivision in terms of an amalgamation of a portion of the adjoining property to the 129 Long Circular Road location. On that same day, A&L also wrote to the Traffic Engineer at the Ministry of Works and Infrastructure seeking guidance for a proposed traffic plan which was set out in that letter. The proposed traffic plan was accompanied by a plan showing the road layout, the property and the proposed traffic flow.

28. On **15 August 2014**, the defendant's Chairman, Mr. Philip Hamel-Smith met with the Honourable Minister of Planning and Sustainable Development, Dr. Bhoendradatt Tewarie (the Minister) along with his Permanent Secretary and the Acting Director of Town and Country Planning. That same day, at around 11 am, Mr. Hamel Smith and Mr. Andrew Bernard visited the first named claimant's office and met with the first named claimant's CEO, Marva Carter, Mr. Kern Solomon (the Councillor for the area) and Mr. Keri Smith. Ms. Carter indicated that she and Mr. Smith emphasized that they needed all approvals including T & C, Fire, WASA and Ministry of Education.

29. By report dated **18 August 2014** and addressed to "The Building Inspector", Mr. Francis Antoine indicated that to all intents and purposes the building was structurally complete and that having regard to the history of the building, the building regulations and codes of Trinidad and Tobago and the investigations that he did, he certified that the building was fit for use as a learning establishment and more particularly as a primary school. Mr. Antoine indicated in his report that the building had currently undergone extensive internal modifications using gypsum partitioning and ceilings without interfering with the building's structural system. The report went on to say that he was informed that the building was originally used for residential purposes and then for commercial purposes housing at different times a furniture store and restaurant. He noted that the design live loads for

[8] Mr. Andrew Bernard said that he was told by Mr. Christopher Chin Lee that this visit took place on 2 August 2014.

restaurants and stores can be as much as twice times than that for classrooms loadings. This report was annexed to the affidavit of Ms. Kendell but there is no evidence as to when it was received by her.

30. On **20 August 2014**, Ms. Kendall indicated that she saw additions and alterations being made to the building so she issued a notice pursuant to section 158 of the Municipal Corporations Act to immediately cease work.

31. By letter dated **22 August 2014** addressed to the CEO of the first named claimant, A&L acknowledged receipt of the notice and indicated that the defendant had complied with the first named claimant's stop notice of 20 August. The letter also confirmed that an application was submitted on 14 August 2014 (obviously referring to the defendant's application made on 14 August to the T & C) and it went on to confirm that there would be no "*additions, extensions or expansion work done on the site, however, we are aggressively pursuing approval for the proposed change of use of the existing building*."

32. On **27 August 2014**, T & C wrote to the defendant acknowledging receipt of the two applications which were reviewed by them. Reference was also made to the meeting held with the Honourable Minister of Planning and Sustainable Development on 14 August 2014. The letter, written by the Acting Director of T & C, stated as follows:

> *"I wish to reiterate that no further consideration can be given to your proposal* ***until consensus from the majority of residents from the Lower Maraval Residents Association is obtained and the issues of traffic generation and circulation can be adequately dealt with and approved by the relevant agencies****.*
>
> *Any continuance of development in terms of building operations and change of use without the necessary planning permission shall be a breach of the Town and Country Planning Act Chap. 35.01"*
>
> ***[Emphasis added]***

33. Dr. Bhoendradatt Tewarie, the Honourable Minister of Planning and Sustainable Development wrote to the defendant's Chairman on **29 August** referring to the "Letter of Advice" of 4 August 2014, the letter from T & C of 27 August 2014 and their meeting of 15 August 2014. The Honourable Minister reiterated his decision articulated at their meeting that T & C could not consider granting permission for the opening of the school **in the face of widespread community objection** and indicated that no further consideration could be given to the matter **unless a consensus was achieved**. He went on to state:

> *"While I empathize with the children concerned and their parents, the predicament in which you find yourself is entirely your own making. There was ample time for you to avoid running headlong into a waiting conflict situation and you proceeded to prepare the building for school knowing that you had no permission.*
>
> *It is my understanding that yesterday the Regional Corporation responsible for the district in which the school is located issued a show cause order which is equivalent to a stop order.*
>
> *I would urge you to abide by the Law, to be prudent and to set a good example.*

The building does not have Town & Country Planning approval. Please be guided."

34. By letter dated **2 September 2014**, A & L wrote to the Director (acting) of T&C – Stara Ramlogan - in a letter referenced "*Requesting a hold on any decision by Town & County (sic) Planning Division, your reference: T 1466 & 1468/2014 for property situated at Lot#129 Long Circular Road, Maraval i.n.o. Arbor Rosewood School*" stating that the school board members were aggressively perusing all the prerequisite information requested by T & C so that "the application submitted can be properly assessed." In the meantime, A & L indicated that the Directors of the school had agreed to hold their hands from opening until the information requested by T & C's technical team was provided including:

> *"1. Ministry of Works approval for the traffic arrangement;*
>
> *2. Letter from persons in the surrounding area giving their support for the school's temporary location. This information must consist of then name, address, email and telephone number.*
>
> *3. The process of engagement via professional consultancy firm to mediate with residents who are objecting to the school's proposed location."*

The letter went on to state that the Directors had engaged the services of a professional mapping company to conduct aerial videotaping of the traffic flows before and after the school reopens. The data collected would be submitted to the Ministry of Works as soon as it was completed.
On that same day, it seems that a petition of some 224 Maraval residents supporting the relocation of the school to 129 Long Circular Road was received.[9]

35. On **4 September 2014**, the Parent Teacher Association of Arbor/Rosewood schools wrote to the first named claimant's Chairman to appeal on humanitarian grounds to protect the fragile educational beginnings of the children at the "temporary location at #129 Long Circular Road".

36. On **5 September 2014**, the Lower Maraval Residents Association wrote to the first named claimant objecting strongly to the placement of the school in their "*residential area without the required approvals to do so*". That letter was accompanied by a petition allegedly signed by persons who were against the school and who were against the commercialization of Lower Maraval. That same day, the first named claimant issued another notice under section 158 of the Municipal Corporations Act addressed to A & L and/or the owner/occupier of No. 129 Long Circular Road, Maraval which was delivered that very same day and was allegedly signed for by Mr. Chin Lee. That notice indicated to the defendant that they had failed to provide justification for the renovations being carried out without an approved plan and contrary to the Building Regulations. Attention was drawn to the fine of $1500 and the further fine of $150 per day which applied as a result of this infringement.

37. On **8 September 2014**, a third notice was issued by the first named claimant, this time under section 170 of the Municipal Corporations Act addressed to A & L and/or the owner/occupier of No. 129 Long Circular Road, Maraval which was delivered that very same

[9] The exhibit "A.B.8 (a)" to Mr. Bernard's supplemental affidavit of 12 September 2014 bears a stamp "Received Sep 02 2014" but no details were given as to who received it. Presumably, and logically, it would have been the defendant.

day and was allegedly signed for by one Anne Pounder. By that notice, the addressees were mandated to desist from occupation of the premises until or unless requisite approvals had been obtained and failure to comply would render them liable to prosecution. That very day, the defendant's Attorney-at-Law wrote to the first named claimant indicating, for the first time, that the previous section 158 notices were flawed, invalid and null and void by reason of its lack of particulars to indicate the provisions of the corporation which had allegedly been breached, that the defendant had, in fact, not breached any provisions of the Municipal Corporations Act or the Town & Country Planning Act and that the defendant had been singled out for this type of treatment contravening the defendant's fundamental right to equality of treatment contrary to section 4 of the Constitution of Trinidad and Tobago.

38. The next day, **9 September 2014**, the first named claimant's instructing attorney wrote a pre-action protocol letter to the defendant. On that same day, the defendant's Attorney-at-Law wrote to the first named claimant and addressed the inapplicability of section 170 of the Municipal Corporations Act and rejected the notice of 8 September. A letter was also sent by the defendant's Attorney-at-Law that same date to the first named claimant's Attorney-at-Law denying that any approval was required and indicating that the defendant stood to sustain significant irreparable and unquantifiable damage and loss, both economic and reputational in the event that an interim injunction is granted particularly in light of this hardship that will follow for some odd 220 young children enrolled with the defendant. Following on from that, Mr. Philip Hamel Smith wrote to the parents of the children enrolled in the school indicating:

> *"Overnight there were some positive developments and additional planning and legal advice that have afforded us the facility of reversing our decision of yesterday and again committing to a timely opening tomorrow (Wednesday 10th).*
>
> *I truly regret exposing you to this "roller coaster ride", but believe me we have all times had uppermost in our deliberations the best interest of you, our parents, and our beautiful children."*

39. By letter dated **10 September 2014**, the Permanent Secretary of the Ministry of Education advised that there had been no application or approval for the conduct of education for the Arbor and Rosewood schools from the Ministry of Education.

40. These proceedings were commenced on **10 September 2014** and an interlocutory injunction was granted restraining the defendant from opening and or operating the school until the hearing and determination of the injunction application.

41. On **11 September 2014**, A&L submitted to the Traffic Engineer of the Ministry of Works & Infrastructure a copy of a traffic impact assessment report to aid in the completion of their assessment.

42. By letter dated **12 September 2014**, the Director of Highways advised that the Highways Division of the Ministry of Works and Infrastructure was still of the view that the location of the proposed school was ill advised and went on to say that the current road network system in the Maraval/Long Circular area was unable to effectively support the incoming traffic that is expected with this infrastructural addition.

Analysis

What is the strength of the parties' case?

43. The claimants have argued that the defendant is in breach of the Town and Country Planning Act, the Municipal Corporations Act and the Education Act.

The Town and Country Planning Act

The claimants' contentions

44. The claimants have relied on the following sections of this Act in support of their case against the defendant:

> *"3. The Minister shall secure consistency and continuity in the framing and execution of a comprehensive policy with respect to the use and development of all land in Trinidad and Tobago in accordance with a development plan prepared in accordance with the provisions of Part II.*

45. The preceding section sets out the framework within which the Honourable Minister is expected to operate and in relation to which factors he must have regard:

> *"8. (1) Subject to the provisions of this section and to the following provisions of this Act permission shall be required under this Part for any development of land that is carried out after the commencement of this Act.*
>
> *(2) In this Act, except where the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under any land, **the making of any material change in the use of any buildings or other land**, or the subdivision of any land, except that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say—*
>
> > *(a) the carrying out of works for the maintenance, improvement or other alteration of any building, if the works affect only the interior of the building or do not materially affect the external appearance of the building;*
> >
> > *(b) the carrying out by a highway authority of any works required for the maintenance or improvement of a road if the works are carried out on land within the boundaries of the road;*
> >
> > *(c) the carrying out by any local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;*
> >
> > *(d) the use of any buildings or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling house as such;*
> >
> > *(e) the use of any land for the purposes of agriculture or forestry (including afforestation);*

(f) in the case of buildings or other land that are used for a purpose of any class specified in an Order made by the Minister under this section, the use thereof for any other purpose of the same class."

[<u>Emphasis added</u>]

"SECOND SCHEDULE

MATTERS FOR WHICH PROVISION MAY BE MADE IN DEVELOPMENT PLANS

PART II

BUILDINGS AND OTHER STRUCTURES

1. Regulating and controlling, either generally or in particular areas all

or any of the following matters:

(a) the size and height of buildings;

(b) building lines, coverage and the space about buildings;

(c) the objects which may be affixed to buildings;

(d) the purposes for and the manner in which buildings may be used or occupied including in the case of dwelling houses, the letting thereof in separate tenements;

(e) the prohibition of building or other operations on any land, or regulating such operations.

2. Regulating and controlling the design, colour and materials of buildings and fences.

3. Allocating any particular land, or all land in any particular area, for buildings of a specified class or classes, or prohibiting or restricting either permanently or temporarily, the making of any building or any particular class or classes of buildings on any specified land.

4. Limiting the number of buildings or the number of buildings of a specified class which may be constructed, erected or made, on, in or under any area.

PART III

COMMUNITY PLANNING

1. Providing for the control of land by zoning or designating for specific uses.

2. Regulating the layout of housing areas including density, spacing, grouping and orientation of houses in relation to roads, open spaces and other buildings.

3. Determining the provision and siting of community facilities including shops, schools, churches, meeting halls, play centres and recreation grounds in relation to the number and siting of houses."

46. With respect to the claimants' submissions in relation to the breach of the Town & Country Planning Act, reliance was placed on the highlighted portion of section 8 (2) to say that

there was a material change in the use of the building for which the defendant received no approval. Since there was no definition of "material change of use" set out in the Act, Mr. Fitzpatrick, for the first named claimant, contended that the court had to look at the ordinary meaning of the words. According to Mr. Fitzpatrick, it is not permissible to import the definition of "public buildings" from the Municipal Corporations Act to assist with the interpretation of the Town and Country Planning Act.

47. He went on to say that there is no issue that the site was previously used for a restaurant and the court had to take into account the fact that schools are not mentioned in the same breath as restaurants in the Second Schedule of the Act and they therefore cannot be seen as the same type of use. As a result, the claimant submitted that there was a material change of use for which approval is required and for which none was given.

48. More directly, however Mr. Fitzpatrick relied upon the "Letter of Advice" issued by the T & C on 4 August 2014 which specifically provided

> *4. The Town and Country Planning Division has searched its Register of Applications which revealed that the Minister with responsibility for Town and Country Planning* ***did not grant permission required*** *under Section 8 (1) of the Town and Country Planning Act, Chapter 35:01 to carry out School operations and related facilities at the above mentioned sites.*
>
> *5. YOU ARE HEREBY ADVISED that* ***you will be in breach*** *of the provisions of Section 8 (1) if the Schools and related facilities are established without the prior grant of planning permission.*
>
> .....
>
> *7. YOU ARE HEREBY ADVISED that under present planning policy as framed within the context of the Development Plan for Trinidad and Tobago, the proposed Schools and or proposed car-parking and or other facilities on the subject sites will not be permitted.*
>
> ***[Emphasis added]***

49. This position was reiterated at the meeting held between Mr. Hamel Smith and the Minister on 15 August and in the correspondence from T & C on 27 August and from the Minister on 29 August.

50. Mr. Fitzpatrick went on to say that if the defendant was of the view that there was no breach of section 8 of the Act, then they could have challenged the decision by the objection procedure set out in the Act or by judicial review but what the defendant could not do was to just ignore this directive.

The defendant's contentions

51. The defendant contends that no such approval was required. According to the defendant, the original use of these lands was for institutional/educational use which dated back to 1966 when the site was used for the Cipriani Labour College. When the Act came into force on 1 August 1969, the site was still being used in this manner until 1971 when the college relocated to another site. Since then, according to the defendant, there has never been any official change in the use allowed for the lands according to the searches conducted by Mrs.

De Four, so that there was no material change in use. There may have been different uses put to the site over the years since the Cipriani Labour College moved out but none of those different uses were ever authorized.

52. In any event, all of the work which was being done on the property was not of a structural nature and involved purely internal work in creating partitions and other modifications necessary to transform the interior of the building for use as a school. No structural work was performed so no approval was required.

53. Nevertheless, Mr. Hamel Smith has contended that an application was lodged for approval by T & C on 14 August and that application was still outstanding.

Resolution

54. The court was concerned that there was no real evidence with respect to the authorized use for this site recognized by T & C prior to August 2014. However, there is no doubt that the T & C quite definitively directed that a school would not be permitted on the site in its missive of 4 August 2014. In such a case, to my mind, there is no clearer indication of what would not be allowed on the site as at that date.

55. Quite obviously, Parliament has delegated to the Honourable Minister the responsibility and duty to determine the uses for which lands in Trinidad and Tobago are to be put. It is not for this court to second-guess the thinking behind it at this stage. Had there been a challenge by way of judicial review, not forgetting that there is an appeal procedure available under the Act, the most that the court could have considered was whether or not this decision, as intimated on 4 August 2014, was reasonable, rational and fair. But that is not the case that this court has to decide. The factual situation before this court is that the defendant was aware, at least by 4 August 2014, that the school would not be allowed on the site. There is no evidence that the searches done by Mrs. De Four were done prior to the lease for the site being signed by the defendant so that there is nothing to suggest that the defendant in any way relied upon any state of affairs existing at T & C at the time of the signing of the lease. In that regard, it is difficult to see, at this stage, any creation of a legitimate expectation in respect of authorized user.

56. At this interlocutory stage, it would be difficult for this court to reach any finding with respect to whether there was a material change in the use but there is surely enough evidence to suggest that the defendant expected that T & C would require an application to be approved and that the defendant was aware of this prior to the execution of the lease as per the evidence of Mr. Bernard, if only for the purposes of the registration under the Education Act.

57. In those circumstances, it seems that the claimant have a strong prima facie case especially in light of the unchallenged "Letter of Advice" as opposed to the defendant who, by electing to engage the process of an application for permission from T & C, have, to my mind, waived their right to challenge the "Letter of Advice". One cannot approbate and reprobate at the same time. The court accepts the submission made by Mr. Hamel Smith that if the underlying facts do not show that the defendant was in breach of law then they could not be held to be in breach of a law which does not exist. However, T & C quite categorically

and definitively declared a refusal of the user as a school. Mr. Hamel Smith has suggested that the applications filed on 14 August are still pending. However, in light of the clear statements made by T & C and by the Honourable Minister himself, in whom reposes the relevant responsibility and discretion, it seems foolhardy to expect a different outcome without more. Whether or not, as suggested by the Honourable Minister and T & C, the consideration of the concerns of the residents has to be resolved before approval is granted is not a consideration which this court can entertain. That may be more suited for another forum.

The Municipal Corporations Act

The claimants' contentions

58. The claimants placed reliance on the following sections of this Act.

> *124. (1) In this Part and in any Bye-laws, Rules or Regulations made or continued under this Part—*
>
> .....
>
> *"**public building**" means a building used, constructed or adapted to be used either ordinarily or occasionally as a church or a chapel or other place of public worship or as a hospital, **school**, cinema, pavilion, stadium, nightclub, library, museum, pool-room, hotel, **restaurant**, theatre, public hall, public concert room, public ballroom or public exhibition room, or as a public place of assembly for persons admitted thereto by tickets or otherwise, or used, constructed or adapted to be used either ordinarily or occasionally for any public purpose;*
>
> ***[Emphasis added]***

> *158. (1) Every addition to or **alteration** of any building within a Municipality, and any other work made or done for any purpose in or upon any such building, shall, so far as regards such alterations or additions, or such other work, be subject to the provisions of the Town and Country Planning Act, to the provisions of this Part and of the Building Regulations and of any other written law applicable to such Municipality.*
>
> *(2) A person who without the required consent makes such alterations to a building with the result that the building is not in conformity with the requirements of the Town and Country Planning Act or this Act or the Building Regulations is, in addition to any other liability he incurs, guilty of an offence and liable to a fine of one thousand five hundred dollars and to a further fine of one hundred and fifty dollars for each day that the offence continues after written notice thereof.*
>
> ***[Emphasis added]***

168. Any person who in any Municipality—

*(a) erects or **alters** any building without having the plans thereof approved by the Council;*

(b) erects or alters any building or alters any building in any wise contrary to the plans and sections which have been approved by the Council; or

(c) otherwise offends against any of the provisions of this Part or of any Regulations made hereunder if no penalty is elsewhere prescribed,

is liable for each offence to a fine of one thousand dollars and, in the case of a continuing offence, to a further fine of one hundred dollars for every day during which such offence continues after notice thereof from the Council.

[Emphasis added]

*170. (1) No **public building** within a Municipality may be occupied as such unless and until the Engineer, by notice in writing addressed to the owner, declares his approval of the construction of the building and of its adequacy and adaptability **for the purpose for which it is permitted to be used**.*

(2) After the Engineer gives his approval, no work affecting or likely to affect the building in its structural aspects may be done to, in, or on such building without the approval of the Engineer.

171. Where permission is granted under the Town and Country Planning Act to convert or alter any building within a Municipality erected for a purpose other than a public purpose into a public building, the conversion or alteration shall be carried out, and such building shall be constructed in the manner approved by the Engineer and provisions of this Part and of any other written law applicable to public buildings shall apply to the alteration or construction as if it were the construction of a public building.

[Emphasis added]

59. Mr. Fitzpatrick argued that whereas no permission is required under the Town & Country Planning Act to gut a building, permission is required under the Municipal Corporations Act since that amounts to an alteration. Further, he went on to say that whereas the definition of "public building" in section 124 of the Act covers a range of buildings, those words "public building" really designates a category in respect of which the buildings mentioned therein all have different actual usage and it is the actual usage which has to be considered. He went on to suggest that a pool-room is a public building but one cannot say that it could be used for a church or school without approval. Consequently section 170 (1) requires approval from the engineer before it is occupied in respect of the purpose for which it is to be used. As I understand his submission, if one wants to use a public building, which includes cinemas, restaurants schools, churches etc., as a restaurant instead of a cinema, for example, approval must be obtained from the engineer under section 170 even though both of them fall under the category of "public building".

60. As a result, approval before first-time usage after construction is not the only occasion intended to be covered by section 170 (1). Every time there is a change in usage, approval

would be required. Mr. Fitzpatrick also submitted that the burden of proof on the claimant was not to prove that the property was not structurally sound. All that had to be proven was that there was no approval.

The defendant's contentions

61. Mr. Hamel Smith submitted that Mr. Fitzpatrick's reading of section 158 was an extreme one. Instead, alterations had to mean those alterations engaged by the Town & Country Planning Act, the provisions of this part of the Act or the building regulations. Accordingly, section 168 had to be read in the context of section 158 which relates to alterations which had to be interpreted in the manner he suggested.

62. He went on to suggest that the first time a building was used as a public building required approval. Since it had been used as a public building since the days of the Cipriani College, there was no need to have the site and building reapproved. In that respect, Mr. Hamel Smith said that there is no disaggregation of the types of uses referred to in section 124 so that any of the buildings referred to therein are public buildings and do not require fresh approvals. The focus of section 170 seems really to be structural integrity rather than adaptability and, for that submission, he invited the court to look at section 170 (2) and section 171. He went on to say that in any event, the defendant was 'snookered' in that the first named claimant said that they would not inspect the premises until the defendant obtained T & C approval and, according to him, that approval is not necessary so that there was no way of the defendant moving forward.

Resolution

63. A purposive reading of section 124 lends itself to the interpretation suggested by Mr. Fitzpatrick. It seems almost comical to suggest that all of the uses set out under the definition of "public building" in section 124 are interchangeable without the need for an examination of each particular use. In this case, the court agrees that there is in fact the disaggregation of the uses envisioned by section 170 (1) in so far as it relates to the purpose for which it is to be used. To suggest that approval would not be required by the engineer under section 170 (1) if a person were to change the use of a building within the category of "public building" as defined by section 124 would, to my mind suggest a serious lapse in the public duty and responsibility of the first named claimant. It must have been the intention of Parliament that a Municipal Corporation, charged with the responsibility of protecting the public interest, would be required to assess any particular building whenever its actual usage changed. To suggest that an approval of a building for a restaurant or a poolroom, for that matter, both of which would engage a largely adult patronage, would satisfy the requirements of a building for use as a school, especially in these days of extreme technology and health and safety awareness and especially where minors are involved for an extended period of time outside of the direct care and control of their parents, would definitely shake the very core of any right minded person. That could not have been the intention of Parliament and that is not the intention that this court is willing to ascribe to the legislation.

64. Having described the types of buildings which can be categorized as "public buildings", to my mind, section 170 hones in on the use to which these public buildings are to be put. It then falls upon the first named claimant, and any Municipal Corporation, to exercise its responsibility to assess each particular usage envisioned under the category according to the appropriate terms, conditions and considerations which would apply. To give an extreme example, a building approved 10 years ago for a restaurant may very well have built up grease deposits in the kitchen which may therefore be a potential fire hazard in the event that it is now to be used as a school, especially for minors. With the very same notorious failure to clampdown on breaches which the defendant has raised in this matter, the court would not be surprised that a restaurant operating for a long period of time may very well have committed extended and continuous breaches of the Health & Safety Codes so that if that building is now to be used as a school, common sense suggests that the Municipal Corporation in question have its Engineer and Building Inspectors re-visit and approve the same for the use for which is now intended.

65. In this regard, it is clear, once again, that the defendant has never sought nor obtained approval from the first named claimant. To suggest that they ought to have had the premises inspected notwithstanding the fact that there was no T & C approval does not, respectfully, take into account the fact that there is ministerial responsibility delegated by Parliament in respect of the use for which a particular building in an area can be put. It may make no sense to have a building declared approved for a school if that is contrary to the policy laid out by the T & C. Therefore, procedurally and naturally, it makes practical sense to have T & C approve the user before the Municipal Corporation gets involved. In an already understaffed facility, one can see the wisdom of not having the first named claimant inspect and approve a building within its remit if there has been no zoning approval from T & C.

66. On this limb, the court is of the respectful view that the claimants do in fact have a strong arguable case and that, based on this court's interpretation of the relevant sections, the defendant may not be able to successfully maintain a challenge to the section 158 and section 170 notices issue by the first named claimant.

The Education Act

The claimants' contentions

67. The third limb upon which the claimants have relied upon is with respect to the Education Act. The relevant sections are set out below.

> *2. In this Act—*
>
> > *"school" means an institution approved by the Minister for the education of children;*

30. Subject to this Act, no person shall keep or continue to keep a private school unless the school and the proprietor are registered in the Register of Schools required to be kept under this Act.

34. (1) Whenever there is any change in the ownership of the school or its location, or any modification in respect of any of the prescribed particulars, the proprietor shall forthwith furnish the Minister with a supplemental return containing the correct particulars.

68. Mr. Lalla, appearing for the second named claimant, has suggested that the defendant's schools – Arbor and Rosewood – are not even schools according to the definition set out in the Act since they have never been approved by the Minister for the education of children. Both Mr. Lalla and Mr. Fitzpatrick have indicated that the provisions of the law is clear and it is also clear that the defendants had been operating schools since 2008 without being registered and without due regard for the provisions of the law. Even if the original application from 2008 was in fact misplaced, the replacement application of 2009 was never produced and, in fact, the Permanent Secretary of the Ministry of Education confirmed that no such application was ever received.

The defendant's contentions

69. Quite candidly, the defendant's attorney at law, Mr. Hamel Smith, admitted that the defendant had dropped the ball with respect to the registration. He admitted that, in hindsight, entrusting the application into the hands of Mr. Daniell may not have been the wisest thing and, quite obviously, there was never any follow-up. But, however, the court had to bear in mind that there were guidelines which were provided by the Ministry of Education which were flawed in that they indicated that the school could operate for six months without any registration and before any registration was applied for[10]. Further, Mr. Hamel Smith submitted that the Ministry of Education was fully aware of the existence of these schools due to the fact that Arbor was located right across from its office in St. Clair and clear dialogue ensued between the school's administration and the Ministry over the years with respect to partnering opportunities and even visits from the Ministry's representatives. Finally, unchallenged representations were made to the defendant to wait until they moved to their new premises before registering. Therefore, registration never seemed to have been an issue and ought not really to be made one now.

Resolution

70. First of all, this court does not agree with the interpretation suggested by Mr. Lalla in relation to the definition of what a "school" is. That interpretation can obviously lead to a rather circular argument when one adopts that approach. As Mr. Hamel Smith quite rightly said, section 30 provides that no person may keep or continue to keep a school unless registered but if a school is not registered and therefore cannot be defined as a school, then

[10] These guidelines were amended on 16 September 2014 – after the filing of this action – striking out to the six-month grace period before registration

there is no onus on an unregistered school to register at all. Of course, this does not carry with it the true intention of Parliament to my mind as the mischief which is intended to be addressed must be that all schools, especially ones that are unregistered, must in fact be registered under the Act so that the proper safety and checks can be put into place. In this case, it must be that Arbor and Rosewood are schools which must be registered under the Act.

71. To my mind, notwithstanding the flawed guidelines, it is clear that, even accepting a six-month grace period before registration, the defendant was miles out in respect of any interpretation of the Act, no matter how generous.

72. In this regard as well, the court is of the view that the claimants do in fact have a strong prima facie case to which the defendant has no plausible answer. At some point in time, it must have occurred to the defendant's schools' administration that it had not received any registration documents from Mr. Daniell. Even if it was missed on the first occasion, there was a clear second opportunity and chance to have the matter dealt with and completed in 2009 yet, for no plausible reason, there was no follow-up.

73. In January 2012, it was, again, obviously in the forefront of the minds of the parties involved on behalf of the defendant that they had not yet obtained registration. The excuse for not having done it at that time was that they were intending to move and were advised to wait. Yet, more than 2 ½ years had passed since then and they made no effort to obtain suitably approved premises to move to nor did they take any steps to at least lodge an application. It does not at all seem reasonable for a school operating since 2008 to expect a court to accept that for six years it has operated outside of the provisions of the Education Act and that it should be excused for this slip-up.

Should the injunction be continued?

74. Having considered and reached the view that the claimants have a strong prima facie case and the defence is not as comparatively strong in light of the information before the court, the court's attention must now be turned to whether the injunction should be continued.

75. The competing interests in this matter are both compelling.

76. The claimants represent the public interest. It is within the public domain that there is widespread non-compliance with the provisions of the Town & Country Planning Act and that the general public is not always compliant with the laws unless they are actively supervised. The claimants have suggested that should this court not grant the injunction, it would be sending a message to the wider public that it is acceptable to break the law. In this case, there is not one alleged breach but there are three alleged breaches of three different sets of legislation involving three sets of governmental agencies/departments. It must be said that the defendants have failed to disclose or discuss in their affidavits the fact of the "Letter of Advice" or either of the letters dated the 27th August, from T & C, 29th August from the Honourable Minister. It must also be observed that, even though Mr.

Hamel Smith has suggested otherwise, the defendants seem to have deliberately proceeded along a path contrary to the provisions of the law as directed to them. Mr. Fitzpatrick has described it as flagrant breach of the law whereas Mr. Hamel Smith has suggested that, that is not so and in fact the defendant is willing to do all that is necessary to comply. The fact remains, however, that the defendant embarked upon this exercise without any regard whatsoever for governmental state agencies or departments or ministries and have pressed on to bring the school to a state of readiness despite, and in spite of, matters which were drawn to their attention by no less a person than the actual Minister, in one instance of alleged breach.

77. The claimants have expressed their concern that the school involved houses children who must be protected and there is no certification or authorization in place confirming the suitability of the site for these children to be housed. That, to my mind, is a legitimate and troubling concern. It is not good enough for children to be placed into an environment which has not been tested and approved as being suitable for the intended use.

78. The court must confess, however, that it has found it rather curious, to say the least, that the authorities at T & C, including the Honourable Minister, have expressed a definitive refusal to consider whether to grant T & C approval until a consensus was achieved with members of the community who were objecting to the location of the school. That objection was based on the consequential traffic issues likely to arise as a result of the location of the school in an already overloaded traffic system. The reality, however, seems to be that there is nowhere in Port of Spain where there is not traffic. The average commuter from San Fernando, for example, can take as much as two hours to return to Port of Spain on a morning, which the court has personal knowledge of. The Honourable Minister has not suggested that it would be impossible for the school to be located on the site for policy reasons i.e. as being contrary to the T & C planning policy for the area. The door has been left open by him for reconsideration once a resolution is reached between the defendant and the opposing residents. It may very well be that that planning policy would include issues of traffic and community objections through public consultation but a perusal of the Town and Country Planning Act clearly puts the decision-making in respect of the applicable policy squarely in the hands of the Honourable Minister who can obviously choose whether or not to allow a state of affairs to continue in his discretion despite community discontent[11]. However, as was mentioned before, this court is not acting as a prerogative court and therefore the reasonableness of the decision is not in issue and was not put in issue in light of the election to follow the process mentioned before.

79. On the other hand, we have 240 children and 35 teachers whose future would be in doubt if the injunction is continued. On top of that, it is highly probable that the school would be permanently shut-down as a result of any order restraining its opening and / or operation. It is difficult to see how the defendant would be able to fund its financial obligations, which Mr. Bernard has quantified in the sum of $1.5 million in liability, if it has no source of income as a result of the effective closure of the school by this court by reason of a

[11] See for example, similar expressions of discontent in the well-publicized instance of the Detention Centre in the outskirts of Santa Rosa Heights

continued injunction. One can readily see that if the schools are not allowed to open, children who would have followed a course of study along the bilingual program developed for the schools would now be forced to enter a different system of schooling with the consequent adaptation and teething problems. In any event, at this stage of the school term, it is questionable whether all of the children can still be placed. At the same time, these 35 teachers would initially be out of a job until they are absorbed into other positions in other schools which would also affect the viability of the defendant's schools. There is also the real issue of parents being unable to make alternative arrangements for their children at this late stage. The evidence before the court is that some of the families involved have had to take days off from work to remain at home with their children who would otherwise have been engaged in the schools. The non-availability of school options may therefore result in the possibility of work implications for working parents.

80. There is no doubt, however, that this crisis has arisen out of the defendant's failure to plan its affairs. In January 2012, it was clear that the defendant's representatives contemplated a change of location to a permanent site. It must have been foremost in their minds that this had to be done in sufficient time to meet not only their requirements but the requirements of the law. So that when the Honourable Minister indicated to Mr. Philip Hamel Smith that this was a crisis of the defendant's own making, that sentiment could readily be understood and accepted as true. The statement is further exacerbated by the fact that the defendant's officers and employees and representatives knew by 4 August 2014 that there was a serious issue in respect of the legitimacy of their occupation of this site and yet persisted. If these poor choices and planning affected the defendants alone, then the court may have adopted a different stance. Instead, many more persons are likely to be affected in the ways mentioned above and otherwise – persons who would have placed their faith, reliance and future in the defendant.

81. It is obviously highly desirable for court, in such an agonizing situation, to put into practice the principles gleaned from the several authorities relied upon by the parties.

82. Lord Hoffman in the case of ***National Commercial Bank Jamaica Limited v Olint Corp. Limited*** [2009] UKPC 16 said:

> *"17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be.* ***The basic principle is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other****. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*
>
> > *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*
>
> *18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may*

suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987) 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted.""

83. The dictum of Archie J (as he then was) in ***Venture Production (Trinidad) Limited v Atlantic LNG Co. of Trinidad and Tobago Ltd.*** (unreported, High Court) is also apposite:

"17. The law in Trinidad and Tobago has been established by the decision of the Court of Appeal in ***Jetpak and East Coast Drilling and Workover Services Ltd. v Petroleum Company of Trinidad and Tobago Ltd*** *(2000) 58 WIR 35. The plaintiff must first establish that there is a serious question to be tried. It used to be thought that the enquiry then proceeded sequentially through a consideration of whether the plaintiff would be adequately compensated by an award of damages; whether the defendant would be able to pay; whether if the plaintiff ultimately fails, the defendant would be adequately compensated under the plaintiff's undertaking; whether the plaintiff would be in a position to pay and finally an assessment of the balance of convenience.*

18. The new approach required a simultaneous consideration of all relevant factors and a degree of inter play between various factors. The plaintiff is not necessarily denied relief by the consideration of any single factor in isolation. The question, which must be posed, is ***where does the balance of justice lie****?*

19. ***An assessment of the balance of justice requires a comparative assessment of (i) the quantum of the risk involved in granting or refusing the injunction and (ii) the severity of the consequences that will flow from following either course.****"***

[Emphasis added]

84. Where would the risk of greater prejudice lie? Is the court satisfied to a high degree of assurance that at the trial it will appear that the injunction was rightly granted? Is the court satisfied at this interlocutory stage without having heard all of the evidence and without full disclosure and discovery and without hearing from T & C directly that the court's interpretation and inclination in respect of the breach of section 8 of the Town & Country Planning Act and sections 158 and 170 of the Municipal Corporations Act are unassailable enough to justify the possible irremediable prejudice to the defendant?

85. These, to me, are very real concerns. It seems quite likely that if the court were to continue the injunction at this stage, it may amount to a determination of the substantive issue in reality because of the practical deleterious effect that this injunction may have on the defendant.

86. In considering the overriding objective which guides the court in matters of discretion, it is clear that the concept of proportionality plays an important part. In this case, the claimants have the backing of the State with its far greater treasury of resources as opposed to the non-profit company which, on the evidence, is in substantial debt.

87. It seems to me that the greater risk of prejudice lies in continuing the injunction, notwithstanding the strengths alluded to by the court in its analysis of the claimants' prima facie case.

88. I am fortified in my reasoning by the decision of the House of Lords in ***South Bucks District Council v Porter, Chichester District Council v Searle, Wrexham County Borough Council v Berry*** [12] ("***the South Bucks case***").

The South Bucks case

89. This was a case involving the unlawful occupation of lands by Gipsies contrary to the UK equivalent of the Town and Country Planning Act. To restrain this breach, the local authorities relied on section 187 B of the UK legislation which provided:

> *"(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.*
>
> *"(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.*

90. The private persons involved, against whom the steps were taken by the local authorities, included Mr. Berry and Mrs. Porter. There was evidence before McCombe J at first instance that Mr Berry had a history of cardiac illness. He had had a severe heart attack in about 1997. He remained under the care of a consultant cardiologist. His symptoms of chest pain were largely controlled by medication, but occasional emergencies required his admission to hospital. There was no alternate site available for occupation by Mr Berry and his family

[12] [2003] UKHL 26, [2003] 2 AC 558, [2003] 3 All ER 1, [2003] 2 WLR 1547, [2003] LGR 449, [2003] 22 LS Gaz R 32, [2003] 23 EGCS 135, (2003) Times, 23 May, 146 Sol Jo LB 626, [2003] All ER (D) 312 (May)

within the local authority's area, except at Ruthin Road where Mr Berry and his family had previously had to leave as a result of violence towards them by other inhabitants of the site.

91. Mrs Porter was born in 1942. There was evidence before the trial judge that she suffered from chronic asthma, severe generalised osteo-arthritis and chronic urinary tract infection. Her mobility was poor as a result of her osteo-arthritis and asthma. She suffered from depression and was taking painkillers, antibiotics, antidepressants and medication for her asthma. Her general practitioner considered that eviction from the site would be detrimental to her health, which has worsened over the last few years. There were three residential Gipsy sites within the local authority's area, but all of them were full and had long waiting lists; there would be a delay of up to three years before a pitch was likely to become available.

92. Lord Scott, in the House of Lords, remarked:

> *"95. I respectfully agree that the jurisdiction exercised by the court on an application under section 187B is an original, as opposed to a supervisory, jurisdiction[13]. The section did not, however, confer a new jurisdiction. It had been settled law for many years that the court had jurisdiction to grant a civil law remedy by way of injunction in order to enforce the public law, except in cases where statute had expressly or by necessary implication removed the jurisdiction. In Attorney General v Chaudry [1971] 1 WLR 1614, 1624 Lord Denning MR said:*
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> > *"Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do."*
>
> *96. The principle was confirmed by this House in Gouriet v Union of Post Office Workers [1978] AC 435 but their Lordships emphasised that the jurisdiction was one "of great delicacy and ... to be used with caution" (Lord Wilberforce, at p 481).*
>
> *97. Absent some special statutory authorisation, an application for an injunction to enforce the public law has to be brought by the Attorney General. In Attorney General v Bastow [1957] 1 QB 514, 519 Devlin J described the Attorney General as "the only authority who has a right to bring a civil suit upon the infringement of public rights". This principle, too, was confirmed by the House in the Gouriet case.*

93. On all fronts, therefore, it seems that now that the Honourable Attorney General has been joined, the defendant's initial objection to the action being brought by the first named claimant alone, especially in light of the provisions of the Municipal Corporations Act and the manner in which property was vested in relation to the various Corporations, has been rendered otiose. Further, it is clear that this court has the established and recognized jurisdiction to deal with this action and the application before it for interim relief in the form of an interlocutory injunction.

[13] Their Lordships were all in agreement that this was an original rather than supervisory jurisdiction.

94. Lord Scott went on to say:

> *101. It does not, however, follow that once the planning situation is clear and apparently final it is not open to the court to take into account the personal circumstances of the defendant and the hardship that may be caused if the planning controls are enforced by an injunction. Planning controls are imposed as a matter of public law. The local planning authority in seeking to enforce those controls is not enforcing any private rights of its own. If a local authority mortgagee is seeking an order for possession against the mortgagor, or a local authority landlord is seeking an order for possession against a tenant, or a local authority landowner is seeking an order to remove squatters or to restrain trespass, the local authority is seeking an order to enforce its private property rights. It is as well entitled to do so as is a private mortgagee, landlord or landowner. The function of the court in civil litigation of that character is, in my opinion, to give effect to the private rights that the local authority claimant is seeking to enforce. But an application for an injunction under section 187B, or any other application for an injunction in aid of the public law is different. As Lord Wilberforce said in the Gouriet case, the jurisdiction to grant such injunctions is one of great delicacy and to be used with caution.*
>
> *102. I respectfully agree with the criticism expressed by my noble and learned friend, Lord Steyn, of the two Court of Appeal authorities particularly relied on by the appellant planning authorities (see paragraphs 55 to 57 of his opinion). The hardship likely to be caused to a defendant by the grant of an injunction to enforce the public law will always, in my opinion, be relevant to the court's decision whether or not to grant the injunction. In many, perhaps most, cases the hardship prayed in aid by the defendant will be of insufficient weight to counter balance a continued and persistent disobedience to the law. There is a strong general public interest that planning controls should be observed and, if not observed, enforced. But each case must depend upon its own circumstances."*

95. In his contribution, Lord Bingham noted as follows:

> *11. It is unnecessary for present purposes to do more than identify the rudiments of the current planning regime, now largely found in the Town and Country Planning Act 1990. The cornerstone of this regime, regulated by sections 55-106B in Part Ill of the Act, is the requirement in section 57(1) that planning permission be obtained for the carrying out of any development of land as defined in section 55. Applications are made to, and in the ordinary way determined in the first instance by, local planning authorities, which are local bodies democratically-elected and accountable.* ***The responsibility of the local community for managing its own environment is integral to the system. But the local planning authority's decision is not final. An appeal against its decision lies to the Secretary of State, on the merits, which will be investigated by an expert, independent inspector empowered to hold an inquiry at which evidence may be received and competing interests heard before advice is tendered to the Secretary of State. The final decision on the merits rests with the Secretary of State, a political office-holder answerable to Parliament****. The courts have no statutory role in the granting or refusing of planning permission unless, on purely legal grounds, it is sought to challenge an order made by the local planning authority or the Secretary of State: in such event section 288 of the Act grants a right of*

application to the High Court. In addition, there exists the general supervisory jurisdiction of the High Court, which may in this field as in others be invoked to control decisions which are made in bad faith, or perversely, or unfairly or otherwise unlawfully. But this is not a jurisdiction directed to the merits of the decision under review."

[Emphasis added]

96. In this context and at this juncture, it is worth considering Lord Steyn's words when he said:

> *"45. The setting of section 187B is as follows. By the 1980s it had become a notorious fact that determined individuals and enterprises could, by playing the system with the aid of lawyers, frustrate the implementation of valid planning decisions for many years. It was not only old people in caravans which caused the problem. More frequently flagrant and persistent breaches were perpetrated by entrepreneurs for commercial profit.*
>
> *…….*
>
> *There was nevertheless a strong perception that the planning system was systematically abused and that it required more effective enforcement.*
>
> *46. This led to the Report by Robert Carnwath QC, entitled "Enforcing Planning Control", which was published in February 1989."*

97. This report by Carnwath founded the basis for the introduction of this section 187B to increase the armoury and enforcement capabilities of the authorities statutorily.

98. Returning now to Lord Bingham, the learned Law Lord considered the reasoning employed by the Court of Appeal in the matter.

> *"20. The Court of Appeal's ruling on the approach to section 187B was expressed in five paragraphs of Simon Brown Ll's judgment, which I must quote in extenso:*
>
> *"The approach to section 187B*
>
> > *"38. I would unhesitatingly reject the more extreme submissions made on either side. It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion.* ***But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites.*** *I cannot accept that the consideration of those matters is, as Burton J suggested was the case in the pre-1998 Act era, 'entirely foreclosed' at the injunction stage.* ***Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history***

of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. *If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers.* ***Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control. Considerations of health and safety might arise.*** *Preventing a gipsy moving onto the site might, indeed, involve him in less hardship than moving him out after a long period of occupation.* ***Previous planning decisions will always be relevant; how relevant, however, will inevitably depend on a variety of matters, including not least how recent they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant had and properly took the opportunity to make his case for at least a temporary personal planning permission.***

"39. Relevant too will be the local authority's decision under section 187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.

"40. ***Whilst it is not for the court to question the correctness of the existing planning status of the land, the court in deciding whether or not to grant an injunction (and, if so, whether and for how long to suspend it) is bound to come to some broad view as to the degree of environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end. In this regard the court need not shut its mind to the possibility of the planning authority itself coming to reach a different planning judgment in the case.***

"41. True it is, as Mr McCracken points out, that, once the planning decision is taken as final, the legitimate aim of preserving the environment is only achievable by removing the gipsies from site. That is not to say, however, that the achievement of that aim must always be accepted by the court to outweigh whatever countervailing rights the gipsies may have, still less that the court is bound to grant injunctive (least of all immediate injunctive) relief. Rather I prefer the approach suggested by the 1991 Circular: the court's discretion is absolute and injunctive relief is unlikely unless properly thought to be 'commensurate—in today's language, proportionate. The approach in the Hambleton case [1995] 3 PLR 8 seems to me difficult to reconcile with that circular. However, whatever view one takes of the correctness of the Hambleton approach in the period prior to the coming into force of the Human Rights Act 1998, to my mind it cannot

be thought consistent with the court's duty under section 6(1) to act compatibly with convention rights. ***Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought--here the safeguarding of the environment--but also that it does not impose an excessive burden on the individual whose private interests--here the gipsys private life and home and the retention of his ethnic identity--are at stake****.*

"42. I do not pretend that it will always be easy in any particular case to strike the necessary balance between these competing interests, interests of so different a character that weighing one against the other must inevitably be problematic. This, however, is the task to be undertaken by the court and, provided it is undertaken in a structured and articulated way, the appropriate conclusion should emerge.""

[Emphasis added]

99. Lord Bingham went on to endorse[14] this approach at paragraph 38 as follows:

"38. The guidance given by the Court of Appeal in the judgment of Simon Brown LJ quoted in paragraph 20 above was in my opinion judicious and accurate in all essential respects and I would endorse it."

100. He continued discussing the way in which an application for an injunction ought to be considered by the court:

"28. ……. Underpinning the court's jurisdiction to grant an injunction is section 37(1) of the Supreme Court Act 1981, conferring power to do so "in all cases in which it appears to the court to be just and convenient to do so". ***Thus the court is not obliged to grant an injunction because a local authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction and so makes application to the court.***

29. The court's discretion to grant or withhold relief is not however unfettered (and by quoting the word "absolute" from the 1991 Circular in paragraph 41 of his judgment Simon Brown LI cannot have intended to suggest that it was). ***The discretion of the court under section 187B, like every other judicial discretion, must be exercised judicially. That means, in this context, that the power must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for****. Since the facts of different cases are infinitely various, no single test can be prescribed to distinguish cases in which the court's discretion should be exercised in favour of granting an injunction from those in which it should not.* ***Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will provide effective restraint (City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, 714), that will point strongly***

[14] Similar endorsements were made by all of their Lordships.

towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay*, although section 187B(1) makes plain that a local planning authority, in applying for an injunction, need not have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act. In cases such as these the task of the court may be relatively straightforward.* ***But in all cases the court must decide whether in all the circumstances it is just to grant the relief sought against the particular defendant.***

30 As shown above the 1990 Act, like its predecessors, allocates the control of development of land to democratically-accountable bodies, local planning authorities and the Secretary of State. Issues of planning policy and judgment are within their exclusive purview. As Lord Scarman pointed out in Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132, 141, "Parliament has provided a comprehensive code of planning control." In R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, paras 48, 60, 75, 129, 132, 139-140, 159 the limited role of the court in the planning field is made very clear. An application by a local planning authority under section 187B is not an invitation to the court to exercise functions allocated elsewhere. Thus it could never be appropriate for the court to hold that planning permission should not have been refused or that an appeal against an enforcement notice should have succeeded or (as in Hambleton [1995] 3 PLR 8) that a local authority should have had different spending priorities. ***But the court is not precluded from entertaining issues not related to planning policy or judgment, such as the visibility of a development from a given position or the width of a road. Nor need the court refuse to consider (pace Hambleton) the possibility that a pending or prospective application for planning permission may succeed, since there may be material to suggest that a party previously unsuccessful may yet succeed,*** *as the cases of Mr Berry and Mrs Porter show.* ***But all will depend on the particular facts, and the court must always, of course, act on evidence****. "*

[Emphasis added]

101. To my mind, in a case very similar to the facts which this court has to consider, the House of Lords has reiterated the considerations which any court considering an injunction must be in mind.

Conclusion

102. Clearly therefore, notwithstanding the strong allegation of breach by the claimants, this court needs to perform the appropriate balancing act to meet the justice of the case. That is not to say that the court is condoning a breach of the law if it were to discharge the injunction. Far from it. What is clear at present is that the defendant has applied for T & C permission which may be successful, providing a particular condition is met by the defendant in terms of garnering the support of the local residents. The defendant seems to have already begun that process by commissioning a traffic plan utilizing drone video taking technology to monitor and advise on an appropriate and workable traffic plan for the school.

103. Of concern, however, is the suitability of the building for the use for which it is intended. In that regard, while the T & C application is being reviewed and considered and fine-tuned, there is no reason why the first named defendant cannot conduct an inspection of the site pursuant to section 170 (1) of the Municipal Corporations Act. Whereas the established procedure is for the obtaining of T & C approval first, in light of the expressed concern of the first named defendant's officers and the particular circumstances of this case, the court can see no reason why that inspection process cannot be carried out in the meantime. Having regard to the fact that the safety of so many people, including children, is at stake, this court would require such an assessment and approval be done.

104. With respect to the registration under the Education Act, a review of the procedure and application forms revealed that any such registration would be stymied without T & C approval. Therefore, T & C approval is the most critical approval across the board as it impacts upon the other two categories of approvals under the Municipal Corporations Act and the Education Act. However, to my mind, there is nothing stopping the application being made. The court bears in mind that a T & C approval can have retrospective effect. In that regard, if such approval is granted, it may provide the foundation for any other approvals which are being considered. There is nothing to suggest that the defendant was a recalcitrant educator who must be punished. Instead, it is probably just a negligent one in relation to its responsibility to get its registration completed.

105. With respect to the failure to register under the Education Act, there is no doubt that the defendant has been operating under the nose of the Ministry of Education since 2008. To my mind, there ought not to be any substantial prejudice for the school to be registered at this time pending the approval of T & C since there is no suggestion of any unacceptable or unfavorable practices which may render the defendant a questionable educational institution.

106. To be clear, this court is of the view that the applications can be made and processed but is not imposing, whatsoever, any conditions or directives with respect to whether or not approval will or will not be granted. That is a decision for the respective authorities.

The Order

107. In the circumstances, the court makes the following orders and gives the following directions:

    107.1. That the defendant pursue its application lodged with the Town and Country Planning Division on 14 August 2014 which the court will note would be pursued without prejudice to its defence in these proceedings;

    107.2. That the defendant make an application to register Arbor and Rosewood under the Education Act, subject to the pending application to the Town and Country Planning Division, within 24 hours.

    107.3. That the defendant make an application under section 170 (1) of the Municipal Corporations Act for the approval of the first named claimant's Engineer as a school, subject to the pending application to the Town and Country Planning Division, within

24 hours. The court notes that this application will be without prejudice to its defence in these proceedings;

107.4. That the first named claimant's Engineer deal with the application as a matter of urgency and with due diligence;

107.5. In the event that approval is granted by the first named claimant's Engineer, subject as aforesaid, the injunction granted on 10 September 2014 will be discharged upon the condition that the defendant implements the traffic plan outlined in its affidavits in support in these proceedings. Otherwise, and in all other respects, the injunction will continue to trial or further order;

107.6. This matter will be deemed fit for an early trial and, in that regard, the court will arrange a schedule for the filing of pleadings, for disclosure and witness statements upon consultation with the parties on Tuesday, 30 September 2014 at 1 PM in POS 03.

107.7. The costs of this interim application are reserved to be dealt with at the end of the trial.

/s/ *Devindra Rampersad*

……..

Devindra Rampersad J