THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P050 of 2018
CV 2017-03452

IN THE MATTER OF THE JUDICIAL REVIEW ACT CHAP 7:08

AND

IN THE MATTER OF AN APPLICATION BY FISHERMEN AND FRIENDS OF THE SEA, AN INCORPORATED BODY UNDER THE COMPANIES ACT, IN A REPRESENTATIVE CAPACITY PURSUANT TO SECTION 5(2)(b) OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT AUTHORITY DATED ON OR ABOUT THE 22ND DAY OF JUNE, 2017 TO ISSUE A CERTIFICATE OF ENVIRONMENTAL CLEARANCE TO THE MINISTRY OF WORKS AND TRANSPORT FOR THE SPECIFIC PURPOSE OF "THE ESTABLISHMENT OF A 5000 METRE HIGHWAY ALIGNMENT" COMMENCING AT A POINT 300 METRES EAST OF THE CUMUTO MAIN ROAD AND ENDING AT A POINT 600 METRES WEST OF GUAICO TRACE, SANGRE GRANDE

BETWEEN

FISHERMEN AND FRIENDS OF THE SEA
Appellant/Intended Claimant

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY
Respondent/Intended Defendant

AND

THE MINISTRY OF WORKS AND TRANSPORT
First Interested Party

AND

KALL COMPANY LIMITED also called KALLCO
Second Interested Party

PANEL:
G. SMITH JA
J. JONES JA
A. DES VIGNES JA

APPEARANCES:
Mr. A. Ramlogan SC, Ms. J. Lutchmedial,
Mr. A. Pariagsingh and Mr. G. Saroop instructed by Mr. R. Abdool-Mitchell
appeared on behalf of the Appellant

Ms. D. Peake SC, Mr. R. Heffes-Doon, Ms. A. Rahaman,
instructed by Ms. J. Partap and Ms. G. Landeau-Birmingham
appeared on behalf of the Respondent

Mr. I. Benjamin, Ms. T. Jorsling
instructed by Ms. S. Dass
appeared on behalf of the First Interested Party

Mr. D. Mendes SC, Mr. D. Maharaj
instructed by Ms. K. Bharath
appeared on behalf of the Second Interested Party

DATE DELIVERED: 26th March, 2018

JUDGMENT

Delivered by: G. Smith J.A.

INTRODUCTION

1. The Government of the Republic of Trinidad and Tobago plans to extend a major highway through mostly rural and undeveloped areas of Trinidad and Tobago. That major highway, the Churchill Roosevelt Highway, currently runs from just outside the capital city, Port of Spain, and stops at an area called Cumuto. The Highway Extension of some thirty-two point five (32.5) kilometres would run from Cumuto to Toco. The Government plans to build the Highway Extension in phases.

2. The Appellant, Fishermen and Friends of the Sea (FFOS) is a non-profit company that focuses on protecting the environment. The Respondent, the Environmental Management Authority (EMA) is the body entrusted by Parliament under the Environmental Management Act Ch. 35:05 (the Act) for protecting the environment and balancing competing development and other interests.

The First Interested Party, the Ministry of Works and Transport (MOWT) is the executing arm of the Government for the construction of the Highway Extension.

The Second Interested Party, Kall Company Limited (Kallco) has been awarded a contract by the MOWT for the construction of the first five (5) kilometre phase of the Highway Extension.

3. No construction work could have started on the Highway Extension without a Certificate of Environmental Clearance. After following the statutory process under the Act, a Certificate of Environmental Clearance was issued to the MOWT on 22nd June, 2017.

4. On 29th September, 2017, FFOS applied for leave to challenge the grant of Certificate of Environmental Clearance by way of judicial review.

5. On 6th February, 2018 Ramcharan J. (the trial judge), dismissed the application for leave. His decision was based on what I describe as two broad bases:

(A) there was undue delay in making the application; and

(B) lack of merits of the application for judicial review.

6. For the reasons that follow, I would uphold the decision to dismiss the application for judicial review on the ground of delay.

That being the case, the arguments on merits become academic. Nevertheless, in deference to the extensive arguments devoted to the issue of merits, I would consider the issue of merits in a summary form. In that event, I am of the view that two (2) out of the fourteen (14) grounds of challenge are arguable with some realistic prospect of success. However, I reiterate that these two (2) points are not such as to outweigh or contradict the dismissal of the application for leave on the ground of undue delay.

7. I will now discuss this appeal on the two grounds of:

(A) Undue Delay; and

(B) Merits.

SECTION (A): UNDUE DELAY

8. Before embarking on this discussion, I refer to two relevant matters. First, since delay is a factor of time and action, a statement of some chronologies would be necessary to get a full understanding of the issue.

Second, counsel for FFOS has stressed that consultation is at the heart of this matter.[1]

9. In this matter there were prescribed statutory procedural steps to follow before the grant of a Certificate of Environmental Clearance.

In summary, they were:

i. an application for the Certificate of Environmental Clearance;
ii. the preparation of draft Terms of Reference;
iii. the finalisation of the Terms of Reference;
iv. an Environmental Impact Assessment; and

[1] See Transcript of Proceedings in the Court of Appeal at page 24, lines 22 to 45.

v. the grant or refusal of the Certificate of Environmental Clearance or the grant of a Certificate of Environmental Clearance subject to conditions.

10. Consultation is provided for "where appropriate" at the draft Terms of Reference stage and if required by the Terms of Reference (as is usual) at the Environmental Impact Assessment stage.

11. In this matter:

i. the MOWT made the application for the Certificate of Environmental Clearance on 21st September, 2016.

ii. The EMA submitted a draft Terms of Reference to the MOWT on 11th November, 2016.

iii. A final Terms of Reference was issued on 12th December, 2016.

iv. NIDCO submitted a first draft of the Environmental Impact Assessment on 30th January, 2017.

This was not to the satisfaction of the EMA and NIDCO submitted a revised EIA on 23rd February, 2017. It was deemed acceptable by the EMA and NIDCO submitted requested copies to the EMA on 10th March, 2017.

v. On 22nd June, 2017, the Certificate of Environmental Clearance was issued subject to several conditions, one of which was a final approved Environmental Impact Assessment. The final approved Environmental Impact Assessment is dated 17th August, 2017.

12. By letter dated 24th November, 2016, the MOWT informed the EMA that it consulted only certain selected Government agencies on the draft Terms of Reference. On 16th December, 2016 and 13th January, 2017, NIDCO conducted public consultations on the Highway Extension. One hundred and seven (107) persons attended the public consultations in December, 2016 and one hundred and one (101) persons attended the public consultations in January, 2017.

13. Further, the EMA is required to keep an Administrative Record of the proposed project in accordance with the Act. Also, the EMA is required to keep a National Register of Certificates of Environmental Clearance in accordance with the Certificate of Environmental Clearance Rules. These documents are available to the public for inspection.

14. Some of the relevant documents would have been available to the public as early as December, 2016, namely, on 18th December, 2016 the EMA placed the draft Terms of Reference on the National Register and on 22nd December, 2016, placed the final Terms of Reference on the National Register. On 3rd July, 2017 the EMA placed the Certificate of Environmental Clearance with conditions on the National Register. The EMA made the Administrative Record for the application available for public comment during the period 27th March, 2017 to April, 2018.

15. On 1st September, 2017 Kallco received the letter of award for the work on the five (5) kilometre Highway Extension.

16. On 29th September, 2017 FFOS filed their application for leave to apply for judicial review.

17. After this, there was a directions hearing before the trial judge on 2nd November, 2017. At that hearing, the trial judge ordered that any applications to be dealt with by the court were to be filed and served on or before 16th November, 2017.

18. No applications were forthcoming from FFOS and the following actions were taken:

i. On 1st December, 2017 NIDCO published a notice in the press that work on the contract would start on 2nd January, 2018.
ii. On 8th December, 2017 NIDCO annexed this notice to the joint affidavit of Perkins Marshall and Navita Lyman-Mohan.
iii. On 20th December, 2017, the MOWT executed a formal contract with Kallco.
iv. On 5th January, 2018 NIDCO instructed Kallco to proceed to commence works.
v. On 8th January, 2018, work commenced.
vi. On 15th January 2018, FFOS sought an injunction. It was initially granted by the trial judge of his own motion, but was subsequently discharged on 6th February 2018.

The Law Re Delay:

19. Sections 11 (1) to (4) of the Judicial Review Act Ch. 7:08 make provision with respect to delay in applying for judicial review. They provide as follows:

> **"11.(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first**

arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.

(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."

Part 56.5 of the Civil Proceedings Rules (1998) (as amended) also makes provisions that essentially mirror section 11 of the Judicial Review Act. There is no conflict between the provisions of the Judicial Review Act and the Civil Proceedings Rules.[2]

20. In **Devant Maharaj v National Energy Corporation Civ. App. No. 115 of 2011**, Bereaux J.A. helpfully summarised the three (3) issues that a trial judge should consider as a result of these provisions in Judicial Review Act and the Civil Proceedings Rules. They are:

i. **"Whether the application was filed promptly.**
ii. **If the application was not prompt whether there is good reason to extend the time. If there is no good reason to extend the time, leave to apply for judicial review will be refused for lack of promptitude.**
iii. **If, however, there is good reason to extend the time, whether permission should still be refused on the ground that the grant of the remedy would likely cause substantial hardship or substantial prejudice to a third party, or would be detrimental to good administration."[3]**

[2] Per Bereaux J.A. in **Devant Maharaj v National Energy Corporation Civ. App. No. 115 of 2011** at paragraph 7.
[3] *ibid*

21. I accept the correctness of these factors. The trial judge also applied the factors above and concluded that (i) the application by FFOS was not prompt and (ii) there was no good reason to extend the time for filing the application. Accordingly, he dismissed the application for leave.

22. FFOS now contends on this appeal that the trial judge was plainly wrong to do so.

23. I disagree with the submission of FFOS. I find that this application for leave should be refused on the following grounds:

i. the application for leave was not prompt;
ii. there is no good reason to extend the time for the application for leave; and
iii. the grant of relief would substantially prejudice the rights of Kallco and/or would be detrimental to good administration.

24. *(i) The application for leave was not prompt*

The decision to grant the Certificate of Environmental Clearance was made on 22nd June, 2017. Pursuant to section 11(4) of the Judicial Review Act, the three (3) month period to challenge the grant of the Certificate of Environmental Clearance would run from this date.[4] Counsel for FFOS accepted this to be the position in law in his written submissions.[5] However, he sought to persuade us in oral submissions to vary this to the date when FFOS first knew of the grant of the CEC. Bearing in mind section 11(4) of the Judicial Review Act and the prior Court of Appeal decision in the **Dennis Graham** case[6], I see no reason to do so.

25. That being the case, FFOS should have brought this application for leave or before 22nd September, 2017.

The application was filed on 29th September, 2017, some seven (7) days after the three (3) month statutory period.

Admittedly, FFOS could not have been expected to know of this decision before it was placed on the administrative record. FFOS alleges that it only became aware of the grant of the Certificate of Environmental Clearance on 6th July, 2017.

[4] See paragraph 21 of the trial judge's decision citing with approval the Court of Appeal judgment in **Dennis Graham v The Police Service Commission and the AG Civ. App. No. 8 of 2008**.
[5] See paragraph 16 of the Appellant's written submissions dated 7th March, 2018.
[6] See footnote 3.

26. The trial judge found that in these circumstances, FFOS was not prompt. Although there is not much discussion in his reasons, I do not think that the decision of the trial judge was plainly wrong. I too find that FFOS was not prompt.

27. Promptness is a matter that varies with the particular facts of each case. Indeed, even proceeding within the three (3) month time limit may not be prompt in certain cases.

One has to examine the issue to see whether the applicant "**ought to have moved sooner in order to bring forward his real complaint in the proceedings. If the answer is that he could and should have done so, that would be a powerful reason for giving the proceedings their quietus**."[7]

28. Further, in public interest proceedings such as this one, the issue of promptness applies with particular force to a "**public interest plaintiff who must act as a friend of the court**."[8]

29. In the present matter, as counsel for FFOS has stressed, consultation is at the heart of this matter.

However, the alleged defects in the consultation process are alleged to have occurred since November and/or December, 2016. That is, from since the time that the MOWT failed to hold public consultation on the draft Terms of Reference. Further, the actual public consultations took place in December, 2016 and January, 2017.

Admittedly, FFOS was entitled to see if the entire process may have resulted in the refusal of a Certificate of Environmental Clearance (see **R (on the application of Burkett) v Hammersmith and Fulham London Borough Council [2002] UKHL 23**). However, when the Certificate of Environmental Clearance was granted, it became all the more imperative for FFOS to act promptly in respect of the alleged defects in consultation which occurred in 2016 and early 2017.

FFOS has admitted its experience in respect of environmental challenges.[9] In fact, one of the most prominent cases in respect of the grant or refusal of leave in Trinidad and Tobago involved FFOS in a challenge to a decision of the EMA all the way to the Privy Council.

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[7] Per Laws J in **R v Secretary of State for Trade and Industry ex parte Greenpeace [1998] Env LR** 415 at page 425

[8] *Ibid* at page 438

[9] See pages 5,6 and 7 of the affidavit of Gary Aboud filed on 29th September, 2017.

It could not be that FFOS did not know of the three (3) month time limit.

30. Further, as early as 7th August, 2017 FFOS could and should have been in a position to file this application for leave. It had all the information it needed.

In a letter of 7th August, 2017 to the EMA, MOWT, the Prime Minister and several other entities, FFOS stated:

> "*FFOS has undertaken a review and assessment of the process by which the EMA granted approval for the project. On our examination of all the relevant documents including the final Terms of Reference (TOR), the Environmental Impact Assessment (EIA), the Review and Assessment Report (RAR) issued by the technical team of the EMA, the submissions of NIDCO/Ministry of Works in support of its application and the terms and conditions of the CEC, we are deeply concerned that the process by which the EMA granted approval was irrational, procedurally irregular and shrouded in secrecy. It is clear to us that the public consultation process undertaken was not fair, that the EIA Report and other technical submissions were deficient, that no rational decision maker would have granted approval and that the EMA has attempted to deal with such deficiencies post facto in the CEC.*" (my emphasis)

31. There was no indication that the EMA was prepared to accede to the request of FFOS to postpone the commencement of work contained in the letter. In fact, the response to this letter dated 24th August, 2017 from the EMA was, in summary, that the EMA was acting properly and lawfully.

32. In deciding to delay the application to 29th September, 2017, FFOS did not act promptly.

33. Even further, on 12th September, 2017, FFOS sent a twenty-one (21) page pre-action protocol letter to the EMA, again complaining of *inter alia*, the consultation process (as well as other grounds).

34. By this time, and knowing of the three (3) month time bar, FFOS could and should have proceeded to make its application for leave. The decision to wait until seven (7) days after the time bar took effect is again, not acting promptly.

35. Consequently, I see no reason to disturb the trial judge's finding that FFOS did not act promptly.

(ii) *There was no good reason to extend the time for the application for leave*

36. Whether there is good reason for extending the time for bringing the application is fact specific.

37. The trial judge examined the procedural history and noted that there was no application to extend the time with an affidavit in support. In fact, FFOS had stated in the application for leave that it was filed within the three (3) month limit. This was not correct.

Nevertheless, the trial judge examined the reasons proffered by FFOS, namely that (a) this was an environmental issue and (b) "the chronology" of actions by FFOS. He found that neither of them was a good reason for extending the time for leave.

38. Before us, FFOS advances similar grounds. First, they rely on what a single appellate judge is alleged to have found in respect of this environmental issue in combination with other factors. However, the single judge of appeal did point out that his observations were not findings or reasons on the topic. At paragraph 23, he made it clear that the full panel would have to decide whether these were good reasons. It was arguable that they might be good reasons for the delay.

FFOS submits that the combination of factors as mentioned by the single appellate judge amount to good reasons for the delay. These factors are set out as:

i. the fact that the area was designated by law as environmentally sensitive;
ii. the fact that the CEC was placed on the National Register on July 3rd 2017;
iii. that the Appellant filed their claim on September 29th 2017 within three (3) months of that date;
iv. that the time frame from the actual grant of the CEC was exceeded by only seven (7) days;
v. that the Appellant is a non-profit organisation that is seeking to protect and uphold the environmental laws of this country in the public interest;
vi. the issue of prejudice to the Respondents specifically arising from any alleged delay in filing their application seven (7) days late; and

vii. the fact, *inter alia*, that the contract with the contractor was signed after the application for judicial review had been filed.

39. None of these factors, whether individually or collectively, constitute good reason for the delay.

40. Items (i) and (v) are merely an extension of the assertion that because environmental issues are involved the court should grant the extension of time.

Items (ii), (iii) and (iv) merely restate the background facts of delay without giving a reason for the same.

Item (vi), prejudice to the Respondent, is not a reason for the Appellant's delay. (The issue of prejudice to the Respondent will be dealt with later in this judgment.)

Item (vii), the signing of the contract, is not a reason for the Appellant's delay. (The issue of the signing of the contract will be dealt with later in this judgment.)

41. This assertion runs contrary to what I stated at paragraphs 27 and 28 above to be the duty of public interest litigants in public interest proceedings. Such litigation is to be conducted with all dispatch.

42. FFOS also states as a good reason:

> "*the complexity of the project and highly technical and voluminous nature of the material that needed to be gathered, processed and internalised not only by the Appellant organisation, which has the limited resources of an NGO, but by the persons tasked with evaluating and rendering advice to the Appellant on the proposed claim.*"

43. However, as stated above, FFOS was in a position to bring this application since 7th August, 2017. By that time they had examined the documents contained in the National Register and Administrative Record and had come to their conclusions with respect to the granting of approval for the project. Even further, by 12th September, 2017 when they issued a pre-action protocol letter of some twenty-one (21) pages, FFOS knew the case they were propounding, especially so, the consultation issue which is at the heart of the matter.

The alleged complexity of the project and highly voluminous materials were not a hindrance to FFOS on either 7th August or 12th September, 2017. It was not a good reason for delay.

44. The trial judge was not plainly wrong to conclude that there was no good reason to extend the time for bringing the application.

45. The position on this application is that FFOS was not prompt and they have not shown a good reason to obtain an extension of time for bringing the application for leave.

This application can proceed no further because it has failed to pass the discretionary bar of delay. As the majority of the Board of the Privy Council opined in the case **Sharma v Browne-Antoine and Others [2006] UKPC 57** at paragraph 14 (4):

> "**The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy**." (my emphasis)

46. Nevertheless, in deference to the extensive arguments, I go on to also consider whether leave should still be refused in any event, on the grounds provided in section 11(2) of the Judicial Review Act in the following section.

(iii) *The grant of leave would substantially prejudice the rights of Kallco or would be detrimental to good administration*

47. By the time the application for leave was heard, the following matters occurred.

48. On 1st September, 2017 Kallco was given a letter of award for the contract. However, no construction work could proceed on the Highway Extension until the conditions of the grant of the Certificate of Environmental Clearance had been met.

49. The matter came on for directions before the trial judge on 2nd November, 2017. On that day the trial judge directed *inter alia* that all applications which were to be dealt with by the court were to be filed before 16th November, 2017. The trial judge adjourned the matter to 22nd January,

2018. Further, the Court inquired whether "any headway" was going to be made in the works by the adjourned date in January. Counsel for Kallco could not answer that and could give no undertaking to that effect.

50. No applications were forthcoming, especially from FFOS and therefore the MOWT and NIDCO moved to fulfil the conditions such as the provision of Baseline Reports for air, flora, fauna, groundwater, surface water and noise; a Wildlife Underpass Plan; a Quality Assurance Project Plan and certain statutory approvals such as Town and Country Planning approval.

NIDCO moved openly and transparently and incurred expenditure of over three million dollars ($3,000,000.00).

51. Further, on 1st December, 2017, NIDCO published an advertisement in a daily newspaper of wide general circulation. This advertisement indicated that work on the 5 kilometre Highway Extension was to begin from 2nd January, 2018.

No applications to stop the work or otherwise were forthcoming from FFOS.

52. Kallco and the MOWT signed a formal contract for the works on 20th December, 2017. Kallco mobilised to start work which was estimated to be worth ten million dollars ($10,000,000.00) per week.

53. Kallco would now suffer serious prejudice by the grant of leave.

54. On 8th December, 2017, NIDCO filed an affidavit indicating all the activity being conducted and the general prejudice and delay being caused. Yet, FFOS filed no application until 15th January, 2018, namely for the grant of an injunction.

55. FFOS contends that the EMA and the Interested Parties were "stealing a march" by starting the work. But the facts do not bear this out. The Interested Parties waited until long after the deadline date for applications (16th November, 2017) and openly, and with notice to FFOS proceeded to satisfy the conditions of the Certificate of Environmental Clearance and to commence construction work on the Highway Extension.

FFOS stood by and allowed this to happen until the application for the injunction on 15th January, 2017.

56. Therefore, by the time the application for leave came on for hearing, Kallco, a third party, would suffer prejudice if the work was to be halted. In that event, leave should not be granted to apply for judicial review.

57. Further, at the time of consideration of the grant of leave, there was evidence that the Interested Parties had incurred significant time and expenditure in carrying the Certificate of Environmental Clearance process from application through to full compliance.

Also, there was the evidence that the national development and infrastructure plans of the Government were now going to be further delayed with resulting detriment to the economy.

Also, the valuable construction period of the dry season would be lost.[10]

All this, in relation to a matter that was grounded in consultation at its heart and related back to November and/or December, 2016.

To allow this application for leave would in my view be detrimental to good administration and is another ground for refusing leave to apply for judicial review.

58. Having determined that leave should not be granted because of the discretionary bar of delay, coupled with the detriment to third party rights and good administration, it is not strictly necessary to consider the merits of the challenge to the grant of the Certificate of Environmental Clearance. This is because while two aspects of the challenge might have been arguable with some prospects of success, such prospects of success are not in my view so strong as to outweigh the public policy considerations of promptitude, undue delay, prejudice to third party rights and good administration that are present in this case.

I will therefore consider this aspect of merits in a summary way.

SECTION B: MERITS

59. The trial judge considered the fourteen (14) grounds on which FFOS challenged the decision of the EMA to grant a Certificate of Environmental Clearance subject to conditions. After due examination he found that none of the grounds had a reasonable prospect of success. Hence this was further reason to dismiss the application for leave.

[10] See the joint affidavit of Perkins Marshall and Navita Lyman-Mohan filed 08th December, 2017 at paragraphs 77-87.

60. The trial judge correctly considered the test to be applied to determine whether there are merits in an application for judicial review. That test is stated in the majority decision of the Privy Council in **Sharma v Browne-Antoine and Others [2006] UKPC 57** at paragraph 14 (4) namely, "**The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success…**" The quote continues, "**But arguability cannot be judged without reference to the nature and gravity of the issue to be argued**."

61. There is no conflict between this test and the dicta of Kangaloo J.A. in the case **Ferguson v The Attorney General Civ. App. 207 of 2010** that "**The test of arguability must be applied contextually and cannot be divorced from the nature of the challenge which is raised by the litigant**."

Whether an argument has a realistic prospect of success is specific to the facts of the case under consideration.

62. I am of the view that in the present matter there are two (2) arguments that might have had some realistic prospect of success. They are the argument that (1) there ought to have been public consultation on the draft Terms of Reference and (2) the decision of the EMA to forego a Cumulative Impact Assessment at this stage might have been unreasonable.

Apart from these two (2) arguments, I accept the correctness of the trial judge's assessment that the other twelve (12) grounds had no realistic prospects of success.

(i) Public consultation on the draft Terms of Reference

63. Rule 5 (2) of the Certificate of Environmental Clearance Rules provides that:

> "**The Applicant shall, where appropriate, conduct consultations with relevant agencies, non-governmental organisations and other members of the public on the draft Terms of Reference and may, within twenty-eight days after notification under subrule (1)(c), submit written representations to the Authority requesting that the draft TOR be modified and setting out—**
>
> **(a) the manner in which he proposes that the TOR should be modified;**

(b) a reasoned justification for the proposed modifications; and

(c) a report of the consultations with relevant agencies, non-governmental organisations and other members of the public on the draft TOR." (my emphasis)

64. FFOS contends that the words "where appropriate" when given a purposive construction, cover a case when, as here, the EMA is alleged to have directed or requested the MOWT to conduct consultations on the draft Terms of Reference with Non-Governmental Organisations (NGOs) and the affected communities.

65. The MOWT admittedly only consulted with several state agencies on the draft Terms of Reference. There was no consultation on the draft Terms of Reference with NGOs or the affected communities.

66. The trial judge held that on a clear interpretation of Rule 5(2), consultation at the stage of the draft Terms of Reference was at the sole discretion of the MOWT.

67. The EMA and the Interested Party also contend that on a clear interpretation of Rule 5 (2), consultation on the draft Terms of Reference was required only if the MOWT wanted to modify the draft Terms of Reference. Since it is undisputed that the MOWT did not request modification of the draft Terms of Reference there was no need for any consultation and no breach of any duty to consult that can be challenged by judicial review.

68. In reply, FFOS contends that even if there was no statutory duty to consult, the request or direction of the EMA for public consultation on the draft Terms of Reference made this a case where it was unreasonable for the EMA to proceed with a draft Terms of Reference that was defective due to lack of proper consultation.

69. I am of the view that the Appellant's submissions with respect to this issue of the alleged failure to properly consult on the draft Terms of Reference might have been arguable with some realistic prospect of success. However, I am also of the view that the argument is not one which I feel is bound to succeed on the present facts. In any event, it certainly does not persuade me to disregard or to bypass the discretionary time bars, and/or the third party and good administration considerations that negate the case for leave.

(2) *The decision to forego a cumulative impact assessment at this state of the Highway Extension*

70. Cumulative impact assessment is defined in the Environmental Impact Assessment for the project as, "The impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable actions…"

71. The Terms of Reference requests a cumulative impact assessment to be performed with respect to "existing, approved and proposed projects in the area."

72. In the same section of the Environmental Impact Assessment where cumulative impact assessment is defined, is a table which lists the cumulative impact assessment in respect of this phase of the Highway Extension (Package 1). It also identifies cumulative impact assessments linked to Packages 2 and 3 (future development).

73. In the Environmental Impact Assessment, there were other references to a "cumulative impact assessment" of the proposed Package 1 but on closer examination, these alleged cumulative impact assessments appear to be limited only to the environmental impact of the project on Package 1 alone. In fact these alleged cumulative impact assessments in respect of Package 1 were repeated verbatim in the first two Environmental Impact Assessments submitted to the EMA and in the final Environmental Impact Assessment that was produced in August, 2017 as part of the conditions of the Certificate of Environmental Clearance.

The proponents of the Environmental Impact Assessment consistently indicated that they could not do a cumulative impact assessment that encompassed Packages 2 and 3 of the project.

74. In the Review and Assessment Report of the EMA, the EMA insisted upon a cumulative impact assessment that encompassed future extensions of the Highway. However, eventually the EMA was persuaded to forego this type of cumulative impact assessment for Package 1 of the Highway Extension and to have it done at any future extension into Package 2. The reason advanced was that it was not feasible to do a cumulative impact assessment for Package 1 until more details of the further extensions were ascertained.

75. FFOS contends that this decision to forego a true cumulative impact assessment at this stage is unreasonable especially given the allegation that Package 1 may have long term environmental effects on the other packages and vice versa.

76. The trial judge held that this package was a "**stand alone**" project that did not necessarily need to be connected to any other extension of the Highway. There was therefore no need to consider the cumulative effect of future phases. This ground of challenge was therefore one without a realistic prospect of success.

77. The EMA and the Interested Parties also contend that the decision to "forego" a true cumulative impact assessment at this stage was made under the purview of the decision-maker (the EMA). Further, the EMA considered all the relevant material in arriving at its decision so that in any event, the decision cannot be challenged as unreasonable.

Counsel for MOWT addressed the court at length in an effort to persuade us that NIDCO had done the required cumulative impact assessment. However, a closer examination of the documents suggest that NIDCO stuck to the original environmental impact assessment in respect of Package 1 alone and did not extend consideration to Packages 2 and 3. This was possibly because they were sticking to their position that such a cumulative impact assessment was impossible at this stage.

78. I am of the view that the EMA did request a true cumulative impact assessment in respect of the entire Highway Extension (packages 1, 2 and 3) in the Terms of Reference and Review and Assessment Report to the Environmental Impact Assessment. Their decision to forego the same ought to have been based on a "hard look" based on a proper quantitative and qualitative assessment. Whether the facts reveal such a "hard look" is open to question in this case. Hence there is a case with some realistic prospect of success based on the rationality of the decision of the EMA to forego a true cumulative impact assessment.

79. Nevertheless, as with the case of the consultation argument, I am of the view that this argument with respect to the decision to forego the cumulative impact assessment is not one which I feel is bound to succeed on the present facts. In any event, the merits of this argument do not persuade me to disregard or to bypass the discretionary time bars and/or the third party and good administration considerations that negate the case for leave.

Other Ancillary Issues:-

(a) A proposed amendment of the application for leave

80. FFOS has appealed a decision of the trial judge not to allow an amendment to the application for leave to apply for judicial review. That application to amend was filed on 19th January, 2018 and supported by an affidavit of one Gary Aboud. However, on the 22nd January, 2018 during the hearing of the application for leave, FFOS withdrew the draft amendment and purported to substitute another one in its place. The trial judge refused to consider such a late Application to Amend.

81. I find that the decision of the trial judge was a proper exercise of the trial judge's case management discretion.

In any event, as counsel for FFOS has admitted, the amendment raised no new facts. It was just a reformulation of the case and was not necessary for the ventilation of the case by FFOS. Further, FFOS has not shown that any "new" case was not actually advanced in argument. The amendment was unnecessary and was not shown to have affected the case in any material way.

(b) An application to admit fresh evidence on appeal

82. FFOS attempted to admit evidence of work done by Kallco which allegedly breached one of the terms of the Environmental Impact Assessment. This was an alleged extensive incursion into an accepted buffer zone between the contract works and the Environmentally Sensitive Area.

83. This evidence however has no effect on our decision primarily because it does not affect the discretionary delay bars and the third party and good administration considerations on which we dismissed the appeal.

Further, far from grounding a case against the EMA, it shows that the EMA was properly monitoring the contract works and actually stepped in to stop Kallco from improper incursion into the buffer zone.

This evidence may have been applicable to the grant of an injunction if we had overturned the decision of the trial judge and had granted leave to apply for judicial review. Having dismissed this application for leave, there is no need to consider this fresh evidence now.

CONCLUSION

84. The appeal is dismissed. We will hear the parties on costs.

……..

G.Smith

Justice of Appeal

Delivered by J. Jones, J.A.

85. I have read the decision of Smith JA and I agree with his determination that leave ought to be refused on the ground of undue delay. Both the **Judicial Review Act**[11] and **the Civil Proceedings Rules 1998 as amended** require an applicant for judicial review to approach the court promptly and in any event within three months of the decision challenged. In this case the appellant, Fishermen and Friends of the Sea (FFOS), was neither prompt nor did it approach the court within the three month period from the date the grounds of the application first arose.

86. FFOS has provided no good reason for extending the period for making the application. In addition by the time the application for leave was heard third party interests had already been engaged, work done and money spent. This therefore is not a case in which it was appropriate for the judge to extend the period for making the application.

87. Where I part company with the decision of my brother Smith JA is on his determination that, had it become necessary for this Court to consider the grounds of challenge to the decision, there are two grounds which were arguable in that they had a realistic prospect of success. Save as to his position on these two grounds I agree with his position on the merits of the challenge. In my opinion FFOS has not shown any prospect of success on the grounds adduced by them on their application for leave before the trial judge or before us.

[11] Chap 7:08

88. I also agree with my brother Smith JA on the position taken by him on the proposed amendments. The decision not to abridge the time for the service of the amendments was a decision taken by the judge in the management of the case and a decision entirely within his discretion as the trial judge. Further an examination of the amendments sought does not reveal that it would have allowed FFOS to make any submissions that were substantially different to those made by them before us. The amendments seem to relate more to form than substance.

89. Before us the FFOS limited its challenge to the issue of the Certificate of Environmental Clearance to four basic grounds:

(i) The Environmental Management Authority's (the Authority) duties of consultation with respect to the terms of reference (the TOR) and the environmental impact assessment (the EIA);

(ii) the failure to consider the cumulative impacts of the project on the environment;

(iii) the issue of a certificate of environmental clearance (CEC) by the Authority with conditions attached and

(iv) the failure of the Authority to include key documents in the administrative record.

90. My brother Smith JA concludes that both with respect to the consultations on the draft terms of reference and the failure to consider the cumulative impacts of the project on the environment the trial judge got it wrong. I disagree. In my opinion the trial judge's determination that none of the challenges raised by the FFOS amounted to an arguable ground having a realistic prospect of success was correct.

Duties of consultation with respect to the draft Terms of Reference

91. With respect to the consultation on the draft TOR the relevant grounds as set out in the application for leave are that in granting the CEC the Authority:

> "(i) Acted ultra vires and/or perversely in breach of its duties to consult under Rules 5(2) and 5(3) of the Certificate of Environmental Clearance Rules 2001 ("the Rules"), these decisions are unreasonable and/or irrational and/or illegal and/or constitute a procedural irregularity;" and

"(v) Acted ultra vires s. 16 of the EM Act and/or in breach of national policy and/or without accounting for material considerations by failing to supervise the Interested Party's purported consultation on the draft TOR with the Public, this action is unreasonable and/or irrational and/ or illegal and/or constitutes a procedural irregularity;".

92. Before us the FFOS makes no submission on ground (v). In any event from the interpretation placed by me on rule 5 of the Certificate of Environmental Clearance Rules it is clear that the supervision by the Authority of the Ministry of Works and Transport's (MOWT) consultations on the draft TOR does not arise pursuant to section 16 of the Act or at all.

93. With respect to its duties of consultation prior to the finalization of the TOR the trial judge found that: (a) neither rules 5(2) nor 5(3) imposed an obligation on the Authority to conduct consultations; and (b) the aim of any consultation undertaken by the Authority was geared toward assisting the applicant for the CEC, the MOWT, in properly considering the draft TOR.

94. The judge was of the view that the conduct of the consultation must be within the purview of the applicant for the CEC. According to the judge: "it would be bizarre in the extreme if the EMA were to be in a position to mandate who an applicant was to consult with where one of the purposes of giving the applicant the opportunity to consult is to critically examine the draft TOR, prepared by the EMA, to see if they should be modified in any way."

95. The FFOS makes two submissions in this regard. First, it says, that rules 5(2) and 5(3) must be given a purposive construction. It submits that it should be read in the context of section 4 of the Environmental Management Act (the Act) and should be interpreted in favor of mandatory public consultation in "appropriate" cases. It submits that it is for the Authority to determine when such consultation is appropriate and necessary. Alternatively FFOS submits that if it is wrong in its interpretation of rule 5 then the Authority of its own volition imposed consultation as a mandatory administrative requirement in the exercise of its undoubted discretion.

96. By way of background the legislative scheme for the management and conservation of the environment comprises the Act and a number of rules, including the Certificate of Environmental Clearance Rules, made by the Minister pursuant to section 26 of the Act. The Certificate of Environmental Clearance Rules (the Rules) are made pursuant to **section 26 (h) of the Act** which

provides for "the procedure to be followed by any person required to apply for and receive a certificate of environmental clearance and the standards for preparation and submission of any environmental impact assessment which may be made under sections 35 to 38 inclusive."[12]

97. **Section 28 of the Act** establishes the procedure to be followed by the Authority for obtaining public comment where required by a provision of the Act. **Section 30 of the Act** permits an appeal to the Environmental Commission by an interested person where it is alleged that the Authority has failed to comply with the requirement for public participation in accordance with section 28. By **section 30** "interested person" is defined as any person who submitted a written comment on the proposed action during the public comment period. In the case before us FFOS, not having participated in any of the public consultations and not having submitted any written comment during the public comment period, is not an interested person under the section.

98. **Section 35(5) of the Act** mandates that: "Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate[13] is issued by the Authority." This is the only section in the Act that specifically mandates public participation in accordance with section 28 on an application for a CEC.

99. **Section 36(1) of the Act** provides that after "considering all relevant matters, including comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures." The CEC issued by the Authority to MOWT was issued pursuant to this section.

100. The Rules identify the procedure to be followed by an applicant should the Authority determine that a CEC is required. In such a case the Authority may, as it did in this case, determine that an EIA is required in compliance with terms of reference.[14] In the TOR prepared by the Authority the Authority states that: "The purpose of the TOR is to guide the conduct of the EIA and the preparation of the EIA report which must describe the proposed project; identify and, where appropriate, quantify potential impacts and explain measures to be taken to mitigate any

[12] Section 26(h) of the Act
[13] defined under the section as meaning a CEC
[14] Rule 4 of the Rules

significantly negative impacts."[15] The TOR therefore simply determines what must be contained in and/or performed by or on behalf of the applicant in order to comply with the EIA requirement for the particular project.

101. The draft TOR submitted by the Authority made provision for, among other things, Stakeholder Consultations. These are consultations with stakeholders prior to the grant of the CEC. According to the draft this was for the purpose of assisting "in the identification of environmental issues, the maximisation of benefits and mitigation of impacts while preventing environmentally unacceptable development, controversy, confrontation and delay." Included in the stakeholder consultations recommended by the draft TOR were that there be at least two public meetings.

(a) The interpretation to be placed on Rule 5(2) and 5 (3)

102. Rule 5 of the Rules is relevant to the establishment of the TOR. It deals with the preparation and finalization of the terms of reference for the EIA required by the Authority. **Rule 5** states:

> "(1) Where the Authority determines that an EIA is required, the Authority shall within twenty-one working days after the date of the notification under rule 4(1)(d)-
>
> a. consult with the applicant on the preparation of the proposed TOR;
> b. prepare the draft TOR; and
> c. notify the applicant in writing that the draft TOR is ready for collection at the Authority's offices upon payment by the Applicant of the prescribed charge.
>
> (2) The applicant shall, where appropriate, conduct consultations with relevant agencies, non-governmental organisations and other members of the public on the draft TOR and may, within twenty-eight days after notification under subrule 1(c), submit written representations to the Authority requesting that the draft TOR be modified and setting out-
>
> (a) the manner in which he proposes that the TOR should be modified;
> (b) a reasoned justification for the proposed modifications; and

[15] draft TOR page 122 of the record.

(c) a report of the consultations with relevant agencies, non-governmental organisations and other members of the public on the draft TOR.

(3) The Authority shall consider any written representations and the prescribed information submitted by the applicant pursuant to subrule (2) and shall finalise the TOR as it sees fit and issue the final TOR to the applicant within ten working days after the expiry of the period specified for the submissions of written representations in subrule(2).”

By rule 5(1) therefore the Authority consults with the applicant on the preparation of a draft TOR and prepares and sends the draft to the applicant. Rule 5(1) need not trouble us any further.

103. **Rule 5(2)** is directed to the applicant. Applying a plain and literal interpretation to the rule it does two things: (i) it requires the applicant “where appropriate” to conduct consultations on the draft TOR with various persons and entities, that is, relevant agencies, non-governmental organisations and other members of the public; and (ii) advises the applicant that it may submit to the Authority written representations requesting that the draft TOR be modified and provides the procedure to do so. If the applicant requests a modification of the draft then it must, within 28 days, provide to the Authority (a) the modification sought; (b) a reasoned justification for the modification sought and (c) a report of the consultations on the draft TOR.

104. In the context of the rule the use of the words “where appropriate” clearly refers to a determination to be made by the applicant. The words suggest that it is for the applicant to establish whether or not a consultation is necessary and with whom to consult. Where however the applicant seeks to modify the draft TOR it must present the Authority, by way of written representations, the modification requested; a reasoned justification for the modifications and a report of the consultations made. This therefore suggests that if an applicant seeks to change the draft in any way it must engage in appropriate consultation. By this subrule therefore it is clear that the Authority only becomes concerned with the consultations made by the applicant if the applicant requests that the draft TOR be modified.

105. On the plain and natural construction of subrule (2) therefore it is for the applicant to determine whether consultations are appropriate and, if appropriate, the extent of those

consultations. If a modification is required by the applicant then there must be consultation in accordance with subrule (2) and the applicant must provide the Authority with the proposed modification, a reasoned justification for it and a report of the consultations. This makes perfect sense since the draft TOR has already been prepared by the Authority in consultation with the applicant and logically the applicant will need to justify any changes proposed.

106. As an aside it is only where the applicant considers consultation appropriate that the Sedley principle arises. If the applicant determines that consultations with anyone of the bodies or persons identified by the rule is appropriate then those consultations must be at a time when the proposals are still at the formative stage; there must be sufficient reasons given to permit an intelligent consideration of the proposals, adequate time must be given for consultation and finally the results of the consultation must be taken into account.

107. The FFOS however does not challenge the TOR on the basis of the Sedley principle nor do this principle arise on these facts. The basis of FFOS' challenge here is that there was no consultations with non governmental organisations and members of the public in accordance with the subrule. They submit that in these circumstances a mandatory statutory requirement was not fulfilled.

108. **Rule 5(3)** is directed to the Authority. It requires the Authority to: (i) consider any written representations and prescribed information sent to it by the applicant pursuant subrule(2); (ii) finalise the TOR as it sees fit; and (iii) issue the finalized TOR to the applicant within 10 days after the expiry of the 28 day period specified for the submission of written representations in subrule (2).

109. Rather than compute the time for the submission of the final TOR from the date of the written representations submitted by the applicant pursuant to subrule(2) the rule computes the time for submitting the final TOR from the expiry of the period for the submission of such written representations. This seems to confirm the position that the applicant is not bound in every case to submit the written representations pursuant to subrule (2). Since the consultations are only relevant to the written representations for modifications it follows that the applicant is not required in every case to engage in consultations.

110. On the plain and natural meaning of the rule therefore an applicant is not mandated to have consultations. If, however, it wishes to request modifications to the draft TOR consultations are necessary. A consideration of the consultations on the draft TOR by the applicant is only relevant to the Authority should the applicant wish to modify the draft. It provides support or further justification for any modifications to the draft prepared by the EMA in consultation with the applicant. In this case MOWT did not seek a modification of the draft TOR. Whatever consultations deemed appropriate or not appropriate by them were therefore irrelevant to the process of finalizing the TOR.

111. In any event the FFOS does not directly challenge the decision of MOWT to limit its consultations to governmental agencies its challenge is to the Authority's acceptance of the MOWT's limited consultation. Neither is there any challenge to the literal interpretation placed on the rule by the judge. The challenge is to the approach used by the judge in construing the rule. The FFOS submits that the judge should have adopted a purposive approach instead of a literal approach to the interpretation of the section.

112. The FFOS submits that the rule must be read in the context of section 4 of the Act. Reading the rule in that way, it submits, on a purposive construction of the rule it should be interpreted in favor of mandatory public consultation in appropriate cases. It submits that applying such a construction it is for the Authority to determine whether the consultations are appropriate and necessary. In support of its submission FFOS relies on what they submit was a finding by Dean-Armorer J., in **PURE v The EMA and Alutrint[16].** According to FFOS the judge held that although the obligation to consult was imposed on the developer the issue of whether the Authority acted reasonably in accepting that the applicant fulfilled its duty to consult is reviewable. They refer to statements made by the judge at paragraphs 55- 59 of the judgment.

113. In the PURE case, insofar as the judge made any determination as to the interpretation to be placed on rules 5(2) and 5(3), she concluded that on a plain reading the subrules suggest that no obligation is placed on the Authority to conduct consultations. Her determination that the consultation was flawed treated with the consultation at "the formative stage of the EIA process".

[16] CV 2007- 02263

114. The PURE case dealt with a slightly different factual scenario. In PURE the developer sought to modify the draft TOR. It therefore determined that wide public consultations were appropriate and advertised these public consultations. These advertisements included packages to 35 stakeholders, distribution of some 3,200 flyers to relevant communities and advertisement published advertisements in three national newspapers. Thereafter it submitted proposals for the modification of the draft in accordance with the rule 5(2).

115. In this context the judge says: "the rule places the method and the extent of pre-TOR consultation within the discretion of the developer. The EMA's actions become relevant in so far as it could be established that the decision of the EMA to accept the consultations was so unreasonable that no reasonable Authority would have accepted them. Recalling that the threshold for establishing irrationality is notoriously high, in my view the Authority could not be so faulted".

116. Her later statements at paragraphs 57 to 59 of the judgment, relied on by FFOS, are with respect to the conduct of the public consultations required by the Act to be conducted at, according to the judge, the formative stage of the EIA. These are the consultations which the judge determined, in accordance with the Sedley principle, were not properly undertaken and flawed. The consultations determined by the judge in PURE to be flawed were those consultations done after the finalization of the TOR and in pursuance of the EIA.

117. According to FFOS the import of the rule is that once the draft TOR is prepared and the Authority determines that having regard to the nature of the project and the possible environmental issues that are likely to arise it may deem the CEC application as one that is appropriate for public consultation. The Authority then advises /instructs the applicant that this application is one where public consultation is appropriate and necessary. In those circumstances the applicant must conduct such consultations as are required by and in accordance with rule 5(2).

118. Where the submission goes wrong is in its reference to rule 5. A determination by the Authority that the application for the CEC is one for public consultation is contained in the TOR. It is by the TOR that the Authority mandates public consultations by an applicant. By the TOR, in this case as in PURE, the Authority's responsibility to ensure that an applicant for a CEC has wide and meaningful consultation with the members of the public on the project is satisfied by the provisions for wide public participation under the requirement for stakeholder consultation and its

monitoring of such consultation. This is "the public comment period" referred to in section 36 (1) of the Act.

119. The FFOS seems to be confusing the requirement for the conduct of consultations if modifications of the draft TOR are requested by an applicant with the requirement for stakeholder consultations and public meetings in the conduct of the EIA. On the evidence before us these latter consultations were the consultations that took place in December 2016 and January 2017 and which, according to the evidence, were observed by the Authority. The purpose of rule 5 however is simply to establish terms of reference for the conduct of the EIA, give the applicant an opportunity to request modifications to the draft TOR; and to provide the procedure for requesting such modifications.

120. Even if it were open to the court to adopt a purposive approach to the interpretation of the rule therefore, and given the general rule with respect to ascertaining the intention of Parliament[17] I doubt that it is open to us to do so, such an approach accords with the literal interpretation of the rule. A purposive interpretation of rule 5 therefore would not assist the FFOS.

(b) did the EMA of its own initiative impose public consultation as a mandatory administrative requirement

121. By way of an alternative argument FFOS submits that by the terms of a letter dated 11th November 2016 (the letter) the Authority of its own volition imposed consultation with the public as a mandatory statutory requirement in the exercise of its undoubted discretion. At the oral hearing of the appeal they further submit that on the evidence of the Managing Director of the Authority, Hayden Romano (Romano), it is clear that the Authority themselves were of the opinion that public consultation was mandatory at this stage. At first blush this is an attractive argument but, unfortunately for FFOS, it does not stand up to close scrutiny.

122. By the letter the Authority submitted the draft TOR prepared by them to the MOWT. The letter also stated:

[17] See Nabie and another v The Law Association of Trinidad and Tobago and another Civil Appeal No. 72 of 2012 at paragraph 8.

> "Please note that Rule 5(2) makes provision for the applicant to conduct consultations with the public and, in particular affected communities within the project area, relevant agencies and non-governmental organizations on the draft TOR. Should modifications of the draft be required, the applicant is reminded that the request for such modifications to the draft must be supported by the following:
>
> i. The proposed manner in which the TOR should be modified;
>
> ii. A reasoned justification for the proposed modification; and
>
> iii. A report of the consultations on the draft TOR and any proposed modifications by the applicant with the relevant agencies, non-governmental organisations and other members of the public (in particular affected communities)."

123. The letter clearly refers MOWT to rule 5(2) of the Rules and purports to advise it on what is required by the Rule. Rule 5(2), as we have seen, does in fact provide for consultations, but not mandatory consultations, neither does it specifically refer to affected communities within the project area. Insofar as that is concerned therefore the letter incorrectly states the law. The letter also, accurately this time, reminds MOWT of what is required of it if it wants to seek modifications to the draft TOR.

124. Where the letter further departs from the rule is by not referring to the fact that, by the use of the words "where appropriate", it is for MOWT to determine whether consultations are in fact necessary. Taken on its own therefore it cannot be said that by referring MOWT to the relevant rule and incorrectly quoting parts of the rule to it the Authority was mandating MOWT to have consultations with affected communities. The letter was merely making incorrect assertions as to the requirements of the rule.

125. In his affidavit at paragraph 24 Romano refers to the letter, recites that part of it that refers to consultations and then states:

> "Annex GA 7 from pages 20 of 34 clearly articulated what was required of the MOWT in relation to stakeholders consultation in accordance with Rule 5(2) of the Rules.

> 25. The case for [FFOS] is misconceived as there is no positive duty on the [Authority] to consult in accordance with Rules 5(2) of the rules or to manage the stakeholder consultation process. Therefore the [Authority] could not be in breach of Rule 5(2) of the Rules. The duty is on the applicant, that is, the MOWT to satisfy that it has conducted stakeholder consultation as required by law."

126. The exhibit GA7 referred to by Romano is in fact the draft TOR and the reference to page 20 of 34 is a reference to that part of the draft TOR that requires the MOWT to conduct stakeholder consultation in the conduct of the EIA. It is clear therefore that insofar as these paragraphs were concerned Romano got it wrong. GA7 in fact dealt with what MOWT was required to do in the conduct of the EIA and the preparation of the EIA report and not with respect to the finalisation of the TOR. These were two separate consultations.

127. Romano incorrectly interpreted rule 5 (2) and referred to consultations which were to be conducted at a later stage of the process. What is made clear from this evidence is that there was no deliberate exercise by the Authority of any discretion to mandate consultation by the MOWT with affected communities at the TOR stage. Taken at its very highest this was simply a misstatement or misunderstanding of the law by the Authority.

128. In these circumstances it is difficult to conclude that the letter comprised a mandatory administrative requirement by the Authority, in the exercise of its undoubted discretion, for MOWT to conduct public consultations. MOWT in fact did not have public consultations it chose just to consult with government agencies. It is therefore clear that the letter was not taken by MOWT to have contained a directive to have public consultation. In addittion Rule 5 does not give the Authority the discretion to mandate such consultations at the TOR stage. FFOS has not referred us to, nor can I find, any section of the Act that permits the Authority to exercise a discretion which contradicts a rule legitimately made by the Minister in accordance with the Act. For the FFOS to suggest that the Authority had such a discretion is therefore incorrect.

129. At the end of the day the rule referred to and relied on by the Authority did not in fact impose a mandatory requirement for public consultation nor can it be said that on the evidence the Authority, of its own volition, purported to exercise a discretion independent of rule 5 of the Rules. Given my determination it is not necessary to treat with the submissions by the Authority and the second interested party, Kallco, that in any event the purported decision was a separate and discrete

decision and ought to have been the subject of a separate application for leave and to which there would have been delay considerations.

The failure by the Authority to consider the cumulative effect /impacts.

130. The relevant grounds of challenge are that the Authority:

> " (vi) failed to consider the cumulative effect of the constituent elements of the decision of the [MOWT] to issue a [CEC] dated 22nd June 2017 pursuant to section 36 of the [Act] to the [MOWT] for the "Establishment of a 5000 meter highway alignment commencing at a point 3000 meters east of the Cumuto Main Road and ending at a point 600 m west of Guaico Trace, Sangre Grande ……and thereby acted ultra vires Rule 10 of the Rules and/or failed to have regard to a material consideration;"
>
> "(ix) failed to consider the cumulative effect of the constituent elements of the proposed highway route and thereby acted ultra vires Rule 10 of the Rules and/or failed to have regard to a material consideration."

131. With respect to ground (vi) the judge determined that if the construction of phase one would not have made any sense without the construction of any of the future phases then it would clearly be irrational for the [Authority] to grant a CEC without considering the effects of the other phases upon which usability of phase one is dependent. He was however of the opinion that this was not the position. According to him this was not a highway to nowhere whose sole usefulness was dependent on the construction of the other phases in the larger project. Accordingly he found that there was no realistic prospect of success on this ground. The judge found that ground (ix) was a repetition of ground (vi), He dismissed both grounds as being unargueable and not having a realistic prospect of success.

132. The submissions of FFOS treat only with rule 10(e) of the Rules. FFOS submits that the judge failed (i) to appreciate and properly understand the scope of the project; and (ii) failed to analyse it in the context of it being phase one of the larger proposal and erred and was wrong in law in his finding that the project was a stand alone project that did not require consideration of

the cumulative impact. As a result it submits that the judge failed to consider whether the Authority acted ultra vires Rule 10 of the CEC rules when it granted the CEC in the absence of a proper assessment of the cumulative impact in the EIA.

133. FFOS submits that the assessment of cumulative impacts being one of the fundamental requirements of an EIA (particularly in projects being situated in industrial estates) under rule 10(e) of the CEC rules FFOS and the public would have had a legitimate expectation that the relevant documents would have been placed on the administrative record and that they would have been given an opportunity to comment on it.

134. Rule 10 of the Rules identifies the appropriate standards for the preparation of an EIA. In particular it provides that an EIA be carried out by persons with expertise and experience in the specific areas for which information is required "and may where appropriate include the following information:

> "(e) an identification and assessment of the main effects that the activity is likely to have on the components of the environment, including:
>
> i. human beings
> ii. fauna;
> iii. flora;
> iv. soil;
> v. water-surface and ground;
> vi. air;
> vii. the coast and sea;
> viii. weather and climate;
> ix. the landscape;
> x. the interaction between any of the foregoing;
> xi. material assets
> xii. cultural heritage;"

135. It is not suggested by FFOS that the EIA did not deal with the items found at (i) –(xii) of rule 10(e). Indeed from the EIA submitted it is clear that the EIA did deal with these aspects and, in accordance with the Authority's responsibility pursuant to section 28 of the Act, it did form a

part of the administrative record. The submission therefore that the Authority acted ultra vires section 10 of the Rules has no factual basis.

136. The real issue for determination here is whether, in the face of its request for information on the cumulative impacts of possible future additional phases of the highway on the area the Authority acted unreasonably in accepting the excuse proffered by MOWT for not addressing these issues.

137. An examination of the TOR reveals that included in the requirements for an analysis of the environmental impacts was a request that:

> "8.3 The description of impacts shall include an assessment of the cumulative environmental impacts that are likely to result from the proposed activities in combination with other existing, approved and proposed projects in the area that could reasonably be considered to have a combined effect.
>
> 8.4 The cumulative assessment must be based on an adequate understanding of the design and operation of the proposed highway as well as other existing, approved and proposed projects ……."

138. In its Review and Assessment Report of the EIA dated 22nd May 2017 the Authority noted:

> "Sections 8.3 and 8.4 page 24 of the Final TOR required an assessment of cumulative impacts. Page 110 of the EIA report, Table 22 identified potential cumulative impacts of the project in relation to other segments of the proposed project. However no assessment, discussion and analysis was submitted in support of this table.
>
> Furthermore, at page 152, Table 24, cumulative impacts were considered to be not applicable. However, the Background and Overview section of the document stated "This project is Package 1 of a larger project to establish an alternative route from the end of the Churchill-Roosevelt Highway." Given the nature of this proposed development and its context as a segment of a larger road network as well as being cognizant of other existing, approved and proposed projects in the wider area,

please revisit this statement, as well as the overall assessment of cumulative impacts."

139. It is clear therefore that the Authority did consider that the cumulative impact of the future extensions of the highway was a material consideration in determining whether a CEC should be granted for the project.

140. In response to the first query, MOWT, by its agent NIDCO, stated: "Future phases of the Churchill Roosevelt Highway Extension (CRHE) Project cannot be considered in terms of cumulative impacts because they are not yet approved. Furthermore, these future phases are currently in various stages of development (with the location of several future phases not yet finalized and design details not yet completely worked out). Cumulative impacts for the full CRHE project can only be considered throughout the course of future development phases when details such as these have been agreed."

141. With respect to the second query it states: "The EIA report, in Table 22 and preceding text on page 110, recognizes that there are likely to be cumulative impacts as other phases of the CRHE project are developed. It is beyond the scope of the current project to consider those future cumulative impacts as a part of the current EIA because the exact details (location, design etc.) for future phases have not yet been finalized or approved. All consideration of these cumulative impacts will be included in forthcoming discussions with the EMA on package 2 and future phases of the CRHE."

142. According to the Manager, Technical Services of the Authority, Wayne Rajkumar, "No other project was taking place simultaneously to assess cumulative impacts. There were no plans or design details in place in relation to possible future extensions to the highway so that it is highly speculative to predict impacts when the precise location and design are uncertain. It will also be highly speculative to calculate or forecast any cumulative impact of furture associated works." He was therefore satisfied that the response given by MOWT was therefore adequate and reasonable.

143. According to Romano, in the opinion of the Authority, the response was acceptable when viewed in the light of the uncertainties due to lack of adequate knowledge of the specific design and operation of any possible future packages concerning any extensions to the highway. The Authority found that it was appropriate, and not unreasonable, for MOWT to defer such an

assessment since the other stages were not approved and were in various stages of development with the locations of several not yet finalized and design details not as yet completely worked out.

144. The Authority considered the reasons put forward by MOWT for not addressing this aspect of the EIA and came to the conclusion that the reasons given were adequate and reasonable.

145. "It is for the courts, if the matter is brought before them to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223." [18]

146. According to Lord Hoffman in the same case:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision making process."[19]

147. In the instant case it is clear that the cumulative impact of the other phases of the highway was a material consideration. The Authority considered it was. It further had to determine what weight to put on this consideration in the light of the reasons supplied by the MOWT for its failure to address same. This was entirely within its mandate as the Authority responsible for the management and conservation of the environment and the issue of Certificates for Environmental Clearance.

[18] Per Lord Keith of Kinkel in Tesco Stores v Environment Secretary [1995] 1 WLR 759 at page 764 letters G-H.
[19] At page 780 of Tesco paragraph 13 letters F-G.

148. Having considered the necessity of such an impact assessment and having seen the MOWT's reasons for not being in a position to provide same it determined that the reasons given by MOWT for not addressing this were acceptable "when viewed in the light of the uncertainties due to lack of adequate knowledge of the specific design and operation of any possible future packages concerning any extensions to the highway".

149. Therefore, as it was entitled to do, the Authority placed no weight on a consideration of the cumulative impact of the other phases of the highway insofar as it related to the grant of the CEC for this project. The allegation that the Authority failed to have regard to a material consideration therefore is not supported by the facts. Further the FFOS has not demonstrated how this decision is '*Wednesbury*' unreasonable or at all irrational. In the circumstances its challenge also fails on this ground.

150. In my opinion therefore, even if the discretionary bar of delay was not applicable in this case, these two grounds of challenge to the issue of the CEC by the Authority, like the others made by the FFOS, have not been shown to be arguable grounds having a realistic prospect of success. In my opinion the judge was correct when he determined that the application for leave be dismissed both on the basis of delay and on the merits.

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J. Jones

Justice of Appeal

<u>Delivered by A. des Vignes J.A</u>

151. I have read the judgments of Justices of Appeal Smith and Jones and I agree with them that leave to apply for judicial review ought to be refused on the ground that FFOS was neither prompt

nor did it approach the Court within the 3 month period from the date of the decision of the EMA to grant the CEC.

152. I also agree that FFOS has not advanced any good reason for extending the period within which the application should be made. Further, I agree that the grant of leave would substantially prejudice the rights of Kallco and would be detrimental to good administration for the reasons given by Smith, JA.

153. With respect to the appeal against the refusal of the trial judge to entertain FFOS' application to amend, I am of the opinion that the trial judge's decision was a proper exercise of his discretion pursuant to his case management powers.

154. In relation to the merits of the application for judicial review, I am not persuaded that the trial judge was plainly wrong in his finding that FFOS failed to disclose any arguable grounds with a realistic prospect of success. Insofar as my brother Smith, JA has expressed his opinion that if the discretionary time bar did not apply, FFOS had disclosed arguable grounds, namely (a) breach of the Applicant's duty to consult with the public and NGO's with respect to the draft Terms of Reference [grounds (i) and (v)]; and (b) failure by the EMA to consider the cumulative effects/impacts [grounds (vi) and (ix)], I respectfully disagree with him and adopt the reasons and conclusions of Jones, JA that these grounds do not disclose arguable grounds with a realistic prospect of success.

155. On FFOS' application to admit fresh evidence, for the reasons given by Smith, JA, I also agree that there is no need for us to consider this application.

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A. des Vignes

Justice of Appeal