REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 240 of 2012
H.C.C. No. CV2008-04593

BETWEEN

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

AND

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

AND

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

BETWEEN

THE MINISTER OF PLANNING, HOUSING AND THE ENVIRONMENT

Appellant

AND

FISHERMEN AND FRIENDS OF THE SEA

Respondent

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY

Interested Party

PANEL: **N. BEREAUX, J.A.**
G. SMITH, J.A.
M. MOHAMMED, J.A.

APPEARANCES: **M. Daly SC, R. Rajcoomar and A. Alleyne for the Appellant**
F. Hosein SC, R. Dass and M. Narinesingh for the Respondent
S. Jairam SC and G. Ramdeen for the Interested Party

DATE DELIVERED: 16th July 2015

I have read in draft the judgment of Bereaux J.A. I agree with it and do not wish to add anything.

G. Smith
Justice of Appeal

I too agree.

M. Mohammed
Justice of Appeal

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This is an appeal from a decision of the High Court delivered on 18th October 2012. At the heart of the appeal is the question whether the then Minister of Planning, Housing and the Environment (the appellant) in prescribing the annual permit fees for the Water Pollution (Fees) (Amendment) Regulations 2006, failed to consider the polluter pays principle and therefore acted contrary to the National Environmental Policy (the NEP), the Environmental Management Act Chap. 35:05, the policy of the Environmental Authority, customary international law and treaties to which Trinidad and Tobago is a signatory, as well as contrary to the respondent's legitimate expectation.

[2] The respondent is a non-governmental organization which actively promotes the protection of the environment. It boasts of over twenty thousand (20,000) members throughout Trinidad and Tobago. It brought this application

for judicial review as a public interest application under section 5(2)(b) of the Judicial Review Act Chap 7:08. The appellant has not disputed the respondent's locus standi to bring this application.

[3] The polluter pays principle (I shall henceforth refer to it either as the PPP or the Principle) is a doctrine now well established in the realm of water pollution control. The essence of the Principle is that *"the cost of preventing pollution or of minimizing environmental damage due to pollution should be borne by those responsible for pollution"* (see section 2.3 of the National Environmental Policy 2006).

[4] The respondent has challenged the introduction, through subsidiary legislation, of a permitting system by which a permit is granted to the polluter, upon payment of a prescribed fee of ten thousand dollars ($10,000.00). The permit allows the polluter to release pollutants into the environment, subject to conditions set out in the permit by the Environmental Management Authority (henceforth referred as the EMA or the Authority).

[5] The legislative regime consists of the Water Pollution Rules 2001 as amended by the Water Pollution (Amendment) Rules 2006 and the Water Pollution (Fees) Regulations 2001, as amended by the Water Pollution (Fees) (Amendment) Regulations 2006. The Water Pollution Rules 2001 and the subsequent amendment were passed pursuant to sections 26 and 48 of the Environmental Management Act (the Act). The Water Pollution (Fees) Regulations 2001 and the Water Pollution (Fees) (Amendment) Regulations 2006 were passed pursuant to section 96(2) of the Act. The relevant rule for the purposes of this appeal is rule 8 of the Water Pollution Rules 2001. Rule 8 introduces the requirement of a permit for a person releasing a water pollutant into the environment which is beyond permissible levels and which is likely to cause harm to human health or to the environment. The ten thousand dollar ($10,000.00) fee is prescribed in the schedule to the Water Pollution (Fees) (Amendment) Regulations 2006.

[6] The flat fee system implemented by the regulations reflects a model of water pollution control known as the Egalitarian Approach. It is one of six models considered by the EMA, as part of its research, when formulating a programme for water pollution management in Trinidad and Tobago. The Water Pollution Management Programme (I shall refer to it as the WPMP) is mandated by section 52(3) of the Act. The EMA in formulating the WPMP, had recommended that model 6 (known as the Pollution Load Approach) be implemented. But the then Minister, Reeza Mohammed, choose model 2 which used the flat fee structure. The six models are set out in the WPMP at section 6.4.2.8 and are referred to in greater detail at paragraph 21 below.

[7] The respondent alleged that the fixing of a flat annual fee of ten thousand dollars ($10,000.00) is contrary to the PPP. It contended that the NEP, the Act and EMA policy have adopted the PPP. It also contended that Trinidad and Tobago, through certain international treaties, has adopted it. The respondent further contends that consequent upon the adoption of the Principle, the regime through which water pollution controls are effected in Trinidad and Tobago, is obliged to follow the principle. The challenge is both to the manner of calculation of the annual permit fees and to the use of a fixed fee structure under the Water Pollution (Fees) (Amendment) Regulations 2006.

[8] It is beyond dispute that the PPP has been adopted as part of the NEP. Section 2.3 of the NEP 2006 states that the Government's environmental policy will be guided by the PPP, which is described as a *"basic principle".* By section 31 of the Act, the EMA and all other Government entities are mandated to conduct their operations and programmes in accordance with the NEP. The PPP has always informed the NEP. When the NEP was originally conceived in 1998, it adopted the PPP by section 4.1. Since the NEP has in fact adopted the principle and the EMA and other government entities are obliged by the Act to follow it, any failure to do so is in fact a breach of the NEP and of the Act. The Principle has also been adopted by the Rio Declaration on the Environment and Development 1992 and by the Revised Treaty of Chaguaramas. Trinidad and Tobago is a signatory to both.

[9] The appellant contends that the use of the flat fee structure in the granting of permits is in fact an application of the PPP. Thus the simple question in this appeal is whether the flat fee structure is in fact an application of the PPP. If it is, then the respondent's case fails in its entirety.

[10] However while the judge found that the use of a flat fee structure was illegal, he made no finding that it was a breach of the PPP. He declared the Water Pollution (Fees) (Amendment) Regulations 2006 to be *ultra vires* the NEP, the Act, the policy of the Authority and customary international law and treaties to which Trinidad and Tobago is a party.

Summary of the decision in this appeal

[11] The court finds that the Water Pollution (Fees) (Amendment) Regulations 2006 are an application of the PPP and consequently are *intra vires* the NEP, the Act, the WPMP and international law. Also, it also does not breach the respondent's legitimate expectation. The trial judge made several errors, the first of which was to question the soundness of the EMA's research, from which the flat fee structure was chosen, when there was no such challenge by the respondent. The consequence was that he directed his mind to the wrong question and failed to address, at all, whether the use of a flat fee structure was an application of the PPP. A further consequence of his error was that he failed to assess Mr. Goddard's evidence which was that the flat fee structure was a proper application of the PPP. A more fulsome analysis of the judge's decision is set out at paragraph 32 below.

The legislative framework

[12] It is necessary to examine (at some length) the legislative framework, the environmental policy and programme which govern the business of water pollution management in Trinidad and Tobago.

[13] An examination of the Act reveals that the permitting system is central to

the business of water pollution control. The Act was enacted in 1995. It established the EMA. Section 53 of the Act enables the Authority to require and issue permits to *"authorize any process releasing water pollutants on such terms and conditions as it sees fit".* Inherent in the permitting system is a recognition (if not an acceptance) that water pollutants will be released into the environment.

[14] By section 26 of the Act, the relevant Minister is empowered to make rules, inter alia, for procedures and standards for permits and licences required for the installation or operation of *"any process or other source from which pollutants will be or may continue to be released into the environment".* A registry of water pollutants is also mandated by section 52(2).

[15] By section 48(1) of the Act, the Authority is empowered to request further information in dealing with an application for a permit, including the provision of the results of research and analysis to be undertaken by the applicant. The Authority is also empowered by subsection (2) to prescribe rules for the revocation, suspension, variation or cancellation of any provision in a permit or licence where it determines such action is necessary.

[16] An important part of water pollution control in Trinidad and Tobago is the creation of a national environment policy, the NEP. The EMA is mandated by section 18(1) of the Act to make a recommendation for a comprehensive national environmental policy, within two years of the coming into force of the Act. The importance of that policy is highlighted by the provision in section 31 that the EMA and *"all other governmental entities must conduct their operations and programmes in accordance with the national environmental policy"*. Section 54 prohibits the release of any water pollutant which is in violation of *"any applicable standards, conditions or permit requirements"*. By section 52(3) the EMA is also mandated to develop and implement a programme for the management of water pollution. Section 96(1) thereafter empowers the relevant Minster in his discretion to make regulations *"prescribing matters required or permitted by this Act to be necessary or convenient for carrying out or giving effect to the Act."*

[17] The NEP was initially developed in September 1998. It was revised in 2006 by the then Minister, the Honourable Penelope Beckles. The NEP adopts the PPP as a key principle of pollution control. The PPP was initially adopted by article 4.1 of the NEP 1998. It is reproduced in Article 2.3 of the NEP 2006 which provides:

"Polluter Pays Principle

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

(a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and

(b) Money collected will be used to correct environmental damage.

…"

[18] Article 3.7 of the NEP 2006 thereafter expresses the Government's intention:

(i) to create a registry of all facilities which are sources of the release of water pollutants

(ii) to control water pollution through a permitting system for facilities which are sources of the release of water pollutants, utilizing the PPP

(iii) inter alia, to ensure that, in permitting any new point source or non point source of water pollution which will adversely affect water quality in any area, the party responsible *"shall establish and use at least the most cost effective and reasonable environmental management practices to address such pollution."*

[19] The WPMP (as mandated by section 52(3)) was developed by the EMA in February 2005. Article 6.3 of the WPMP quotes the NEP's adoption of the PPP and its statement that pollution control will be enforced through a permitting

system. It is evident therefore that the PPP is a major part of Trinidad and Tobago's water pollution control policy and that it was intended to be enforced using a permitting system.

[20] Section 6.4.2.8 sets out the EMA's research into the types of permitting models by which water pollution controls have been effected in the USA and what principles should govern their introduction in Trinidad and Tobago. The EMA noted that:

> ***"Research has revealed the use of several mechanisms to calculate permitting fees with respect to the discharge of liquid effluents. Permitting is more a feature of the legal environment regime of the United States and research activities were centred on the different mechanisms employed by various states. In terms of the needs of Trinidad and Tobago, certain basic parameters were established and these are as follows:***
>
> ***1. The system should be relatively simple and easy to administer.***
>
> ***2. The permitting system should generate adequate revenue to cover the costs of the permit programme.***
>
> ***3. It should be equitable both in terms of ability to pay and actual levels of pollution***
>
> ***4. Permitting fees should not only reflect the cost of granting the permit but also the impact on the environment. Basically there should be consideration of the polluter pays principle so as to achieve ultimately a more responsible attitude towards the discharge of liquid effluents."***

[21] At section 6.4.2.8.3, the EMA undertook an assessment of the various permit models to *"ascertain which model will be best suited for use in developing the permits for the control of water pollution in Trinidad and Tobago".* Six permitting models were considered. They were the Actual Cost Model, the Egalitarian Approach, the Equitable/Egalitarian Approach, the Equitable/Pollution Load/Egalitarian Approach, Volume Intake Discharge and the Pollution Load Approach. All six models adopted the PPP. (per Mr. Goddard at paragraphs 15 to 18 of his affidavit). In concluding its assessment of the models the Authority noted that:

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

[22] The *"pollution load approach"* was thus the choice of the Authority as the best permit fee model to be applied in Trinidad and Tobago. However, the Egalitarian Approach (the flat fee structure) was in fact the model adopted by the then Minister, Reeza Mohammed. At section 6.4.2.8.2, the Authority described this model as follows:

> ***"This model suggests an identification of the total permitting cost on a yearly basis and an estimate of the number of permits that the EMA anticipates will be issued. The total permitting cost is divided by the anticipated number of permits and the resulting figure is deemed to be the permitting cost.***
>
> ***This is a simple model that will be quite easy to administer. However, it suffers from several inherent deficiencies such as the failure to distinguish between ability to pay; lack of consideration of pollution profile and load profile; and impact of pollutant on the environment."***

Evidence of the respondent

[23] Mr. Gary Aboud deposed, by affidavit, that the Water Pollution (Fees) (Amendment) Regulations 2006 are contrary to the PPP, (as advised by his attorney at law.) He alleges the annual flat fee structure is incompatible with the PPP. He documents the exchange of correspondence between the respondent and the appellant as well as attempts by the respondent, pre-trial, to persuade the Ministry of Public Utilities and the Environment (MPUE) to *"rectify the illegality".*

[24] One such letter dated 2nd April 2007, from the respondent, indicated that the Water Pollution (Fees) (Amendment) Regulations 2006 and more particularly, the fees set pursuant to rule 8(2), of the Water Pollution Rules, were unlawful because they failed to consider the PPP. The respondent requested the withdrawal of the Water Pollution (Fees) (Amendment) Regulations 2006. Minister Beckles replied by letter dated 16th April 2007 by which she reaffirmed the PPP as one of the key principles of this country's pollution control policy.

Evidence on behalf of the appellant

[25] Mr. Goddard, the Manager, Technical Services at the EMA, was intimately involved with the WPMP. He deposed that he prepared the WPMP jointly with his subordinate Mr. Wayne Rajkumar. Mr. Rajkumar completed it under his supervision. Mr. Goddard's evidence bears reproduction. Extracts are taken from paragraphs 9 to 16 of his affidavit. He refers to the Water Pollution Rules 2001, the Water Pollution (Amendment) Rules 2006, the Water Pollution (Fees) Regulations and the Water Pollution (Fees) (Amendment) Regulations 2006 collectively, as "the WPR". He said:

(9) "The WPR were first settled in 2000 and amended in 2006. The Authority has been implementing the WPR since February 2007. The Programme is an evolving process. The WPR is one of the mechanisms by which the objectives of the Programme are being

achieved. Reference to the Programme will show the various other means by which the goals of the Programme are being or will be achieved, such as developing national water quality standard … The Programme is a living document. The mechanisms for achieving its overall objectives will be re-visited and revised from time to time."

(10) ***"… it is important to note that the Programme … contemplates that the polluter pays principle (hereinafter called "the PPP") may be reflected in permit fees … The fees payable to the Authority by virtue of the Water Pollution (Fees) Regulations 2001 (annexure "GA4" to the first and second Aboud affidavits) and the Water Pollution (Fees) (Amendment) Regulations 2006 (annexure "GA6" to the first and second Aboud affidavits) are intended to make the Programme self sufficient and sustainable and for that purpose to recover the cost of operating the programme from those who discharge pollutants into the country's water resources. Those users may also be polluters and by virtue of section 34(2) of the Act and under the scheme of the Regulations, the Authority may require them to pay a prescribed permit fee if such a user is releasing a water pollutant that is outside the limits of Second Schedule of the Water Pollution Rules 2001. The quantum of fees collected from those users operating beyond the permissible levels contained in the Second Schedule pursuant to the Fees Regulations is therefore, (contrary to the grounds relied upon by the Claimant, in its Part 56 Statement and paragraphs 36 and 46 of the first and second Aboud affidavits respectively), consistent with the National Environment Policy ("NEP"), with the Act and with the PPP and takes them all into consideration.***

(11) ***… As deposed to above, the permit fees are authorised by the Act and prescribed by the WPR. The permit fees are intended to***

cover the costs of administering the management of water pollution and include the PPP. They stand as one standard fee, which only polluters exceeding the permissible levels contained in the Second Schedule of the WPR may be required by the Authority to pay. A policy of permit fees is contemplated by the Act. See sections 34(2) and 96(2).

(12) ***…***

(13) ***… The discharge of pollutants is controlled by the terms and conditions of the permit. The discharge of pollutants is not unqualified because a permit contains monitoring and reporting requirements and interim targets with which the permittee must comply. The permits will contain several terms and conditions different from each other to meet the conditions of the particular operation to which it relates.***

(14) ***In addition to the permit fees to be paid to the Authority each permittee will have to incur substantial costs associated with the implementation of the terms and conditions specified in the permit.***

(15) ***The PPP was first defined and recognized as an internationally agreed principle by the Organization for Economic Cooperation and Development in 1972. It is a principle whereby the polluter should bear the expenses of carrying the pollution and prevention control decided by public authorities to ensure that the environment is in an acceptable state. The principle can be promoted and implemented by various means, one of which is the levying of permit fees as contemplated by sections 34 and 96 of the Act and as is done in the WPR.***

(16) ***The permit fees method of implementing the PPP is a well***

recognized means of doing so. I made recommendation to the then CEO of the Authority, Dr. Dave McIntosh, concerning what model might be used in Trinidad and Tobago for permit fees. I am informed by … Dr. McIntosh and verily believe that he then communicated with the then Minister of the Environment Dr. Reeza Mohammed to receive directions concerning permit fees and proposed WPR. Sometime after that communication I received instructions from Dr. McIntosh that the model that was the simplest to administer should be the model used for the WPR. The eventual result was that the policy of which model of permit fees to be used was set."

[26] At paragraph 17 of his affidavit Mr. Goddard added that:

"The different permit fees models are set out in the Programme at pages 31 to 35. Despite its deficiencies model 2 is a model easy to operate. It is also reasonable for the state of institutional development of Trinidad and Tobago. It incorporates the basic tenet of the PPP and more complex models, such as model 6, the Pollution Load Approach require extensive field studies of the operations of the proposed permittees and as a result a long lead time to establish. In the course of the research done on or around the time of the preparation of the Programme after a study of 25 states, I found that the models most commonly used in the states of the United States of America were like Models 2 or 5. The United States is far more mature in its industrialization and regulatory regime than Trinidad and Tobago and at that time only the states of Wisconsin, New Jersey and Maine had adopted Model 6. California had advanced further in the evolving process, but there were other states at that time whose regulatory regimes were less developed than what was proposed for Trinidad and Tobago."

Mr. Goddard stated that he was instructed to implement the WPR *"in accordance with the model simplest to administer"*. He added at paragraph 18 of his affidavit that *"the annual permit fee in the fees regulations is a reflection and application of the Act and the PPP. The fees regulations provide a full cost recovery of the processing, administration and auditing of the WPR".*

[27] Dr. Reeza Mohammed in his evidence deposed that at the time of the implementation of the WPR, he was the relevant Minister. As Minister, he *"was of the firm view that, having regard to the state of economic development and the level of institutional development of the country, ... the most appropriate model for WPR would be the model that was user friendly and the simplest to administer."* He accordingly directed Dr. Mc Intosh, the then Chief Executive Officer of the Authority *"that the model which was user friendly and simplest to operate should be the model used for the WPR".*

[28] In answer, Mr. Aboud denied Mr. Goddard's contention, that the quantum of fees collected from a person required to pay a prescribed permit fee, is consistent with the PPP. He also denied that the use of a single, standard fee, for polluters who exceed the permissible levels of pollution, is a proper application of the principle. He alleged that the cost of administering the management of water pollution, in accordance with the PPP cannot be fixed but should vary according to a number of factors, including but not limited to:

(i) the complexity of the permit required to be prepared;
(ii) the amount and composition of water pollutants being released;
(iii) the number of discharge points;
(iv) the type of activity; and
(v) the receiving environment.

[29] He added that the costs to be recovered, pursuant to the Principle, are not only the administrative costs of sustaining the programme but also the full environmental costs. These would include, for example, the costs associated with environmental harm caused by the pollutant and the costs of remedying contamination. Further, the purpose of a permit is to allow a person to lawfully

release a pollutant into the environment above maximum permissible levels set out in schedule 2 to the Rules. Where a person releases a pollutant above the maximum permissible levels, he must pay for the full environmental cost of releasing such a pollutant and not only those which are immediately tangible.

Further Evidence

[30] During the hearing of submissions on 9th March 2012, the judge, came to the conclusion that more evidence of the basis for the decision to implement the flat fee structure was required. He ordered that the appellant file a further affidavit giving greater details of the six permitting models referred to at section 6.4.2.8.3 of the WPMP and *"particularising the authors and the academic or other sources of the models and providing whatever research or other material is available relative to the models or each of them, verifying or criticizing the acceptance of the same in the relevant field, so as to establish whether the models are accepted industry standards and are academically accepted in the relevant field."*

[31] Mr. Wayne Rajkumar filed an affidavit on behalf of the appellant. In relation to the models Mr. Rajkumar's evidence at paragraph 4 of his affidavit was that:

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

At paragraph 5 of his affidavit he added that he was not privy to the specific references which would have informed Dr. Ramlogan's research. Neither was he privy to Mr. Goddard's reference to the assessment of the six permit fee models. Mr. Goddard had also left the EMA's employ and the academic research which informed the conclusions in respect of that aspect of the WPMP, could not be located.

Summary of the findings of the trial judge

[32] The judge's decision to strike down the Water Pollution (Fees) (Amendment) Regulations 2006 was based primarily on a lack of evidence. He found as follows:

(a) Mr. Rajkumar's assertion that he did not know the specific terms of reference of Dr. Ramlogan's consultancy and the fact that those terms of reference were not provided raised serious doubts about the applicability of the models referred to in the WPMP.

(b) There was no evidence of the basis upon which the policy was introduced in July 2001. Since the initial policy was instituted by a Government which had later demitted office, the relevant minister of the succeeding government (Minister Beckles) should have deposed to an affidavit confirming the continuation of the policy initiated by Dr. Mohammed, and should have confirmed the consideration of the findings of the WPMP and the NEP for the years 2005 and 2006. Further, there is nothing to suggest that the research and the recommendation referred to in the WPMP (that model 6 be implemented) was considered by the Minister at the time, or at any time prior to the 2006 amendments.

(c) The employment of the flat fee structure seemed arbitrary and irrational because:

(i) there was no evidence of how the fee structure was determined or how it met the requirement of the PPP.

(ii) the absence of this evidence was compounded by the dubious status of the research about the WPMP and the lack of evidence that the WPMP was even considered. The status of the research was dubious because no one had been able to verify its scholarship.

(iii) There was serious doubt as to how it was possible for the WPMP to be self sufficient and sustainable and as to whether the permit fee structure was able to recover the cost of operating the programme from polluters of the country's water resources. This was because evidence of the basis of the WPMP's self sufficiency or sustainability was never produced. Neither was evidence produced of how the fee structure would recover the cost of operations.

(iv) To limit the policy to one which was user friendly and simplest to operate without regard to the exigencies and *"other factors which proper research and reporting would have identified"* and without regard to the WPMP, could not be a rational exercise of the Minister's discretion.

The approach of the Court of Appeal

[33] Judicial review applications sometimes involve the exercise of a discretion by the judge of first instance, where, for example, the decision of the judge is whether or not to grant relief, or on the issue of delay.

[34] In this case however the judge's decision was on the merits of the respondent's application for judicial review. After an examination and analysis of the evidence and arguments, he exercised his own judgment and found the Water Pollution (Fees) (Amendment) Regulations 2006 to be illegal.

[35] This case, therefore, did not involve the exercise of any *"discretion"*. Neither does it involve any findings of fact or assessment of witnesses to which deference must be given by the Court of Appeal. We are entitled to exercise our

own judgment in considering whether the judge's decision was *"wrong"*. See Michael Fordham QC, **Judicial Review Handbook 6th Edition** page 263 at paragraph 23.3:

> ***"Certain judicial review questions, for example whether to extend time or refuse a remedy, have been described as matters for the Administrative Court's "discretion". However, although judicial review is described as a "discretionary" jurisdiction, it is best seen as involving the context-specific exercise of "judgment" … there is little that can (or should) stand in the way of the Court of Appeal who, seized of a judicial review case, consider that the Administrative Court's conclusion on a relevant feature of the case was "wrong". Especially since judicial review generally operates on documents and submissions, with rarely any factual appraisal of live witnesses to which special respect would be required of the appellate court."***

See also **R. v. Restormel Borough Council, ex parte Corbett [2001] EWCA Civ 330** at paragraphs 20 and 29.

Conclusions

[36] I shall say from the outset that the judge never addressed whether the flat fee structure was in fact an application of the PPP. Rather, in finding the Water Pollution (Fees) (Amendment) Regulations 2006 to be illegal and *ultra vires*, he questioned the basis of the appellant's research leading up to the selection of the Egalitarian Approach (the flat fee structure) as the model upon which Trinidad and Tobago's water pollution control would be based. The judge also found that the decision to use the flat fee structure was arbitrary and irrational. My approach will be to demonstrate how the judge fell into error and then to address frontally whether the flat fee structure applies the PPP. I shall then consider two further issues; (1) rationality and (2) whether it was necessary to provide evidence of the policy behind the continuation of the flat fee structure in 2006.

Errors of the judge

[37] The judge failed to properly assess the evidence of the appellant and particularly that of Mr. Goddard. Mr. Goddard's evidence was that the flat fee structure was an application of the principle. Mr. Goddard's evidence at paragraphs 9 to 18 of his affidavit is that the Water Pollution Rules and the Water Pollution (Fees) Regulations were first settled in 2000. He deposed that the fees payable to the Authority under the 2001 regulations were intended to make the WPMP *"self sufficient and sustainable"* and for that purpose, to recover the cost of operating the programme from those whose discharge pollutants into the country's water resources.

[38] Mr. Daly submitted that the judge made no finding on Mr. Goddard's evidence. He said that one was left to conclude either that the judge omitted to consider, or impliedly, that the evidence was rejected. In my judgment it was an omission. Not only was there no finding in respect of Mr. Goddard's evidence but the judge also made no finding on whether the Water Pollution (Fees) (Amendment) Regulations 2006, contravened the PPP. This occurred because the judge focused on the purported need to justify the choice of the six models rather than whether the flat fee structure did in fact apply the PPP: His omission is reflected in the fact that the respondent has now sought by its cross appeal, a declaration that the flat fee structure did not apply the PPP. This is the very relief it had sought in the first place. There was ample evidence from Mr. Goddard that the application of a flat fee was an application of the principle. I shall consider his evidence when I address the substantive issue later at paragraph 47.

[39] The judge's failure to address whether the Water Pollution (Fees) (Amendment) Regulations 2006 applied the PPP (the sole question in the application) was a direct consequence of his having directed his mind to the wrong question. He found that the fact that Dr. Ramlogan's terms of reference were not provided, raised serious doubts about the applicability of the models referred to in the WPMP. He cast doubt on the legitimacy of the models used in the WPMP. In questioning the basis on which the six models were chosen, the

judge heavily criticised the failure of Dr. Ramlogan to give evidence in this application.

[40] The judge noted that Dr. Ramlogan was named as an advocate in these proceedings but has never appeared. He stated that he had *"absolutely no idea of Dr. Ramlogan's expertise to generate the models referred to in the Management Programme"*. He noted that *"no recognised scientific basis has been established"* for the models. He then asked *"how is this court to reach to a conclusion that the models upon which the system seems to have been based was a reasonable approach to have been adopted and that proper consideration was given to all of the factors in the right balance and with appropriate weight to enable a fully informed decision".*

[41] In my judgment that was the wrong question for the purposes of the application. As Mr. Daly stated in his written submissions, the respondent exhibited the WPMP as part of its case. It offered no criticism of the research upon which the WPMP was based. Neither did it question whether the policy of the old Government had been continued by the succeeding Government. Its quarrel was that the flat fee structure (model 2) does not apply the PPP.

[42] At paragraph 13 of his affidavit in reply filed on 23 October 2009, Mr. Aboud asserted that either model 5 or model 1 as set out in section 6.4.2.8.3 of the WPMP should have been applied. He did not question the research which led to the consideration of the six models.

[43] The judge thus misdirected himself by questioning the soundness of the appellant's research. This misdirection led him to overestimate the quality of evidence which the appellant was required to produce to defend the application. It then led him, in further error, to conclude that the additional evidence was necessary to buttress the basis upon which the six models were chosen for analysis. Given the lack of challenge by the respondent to the appellant's research and, indeed, the adoption of this research by the respondent, it was not necessary to produce additional evidence to support the decision to consider the six models

set out in the WPMP. Evidence from Dr. Ramlogan or any other source justifying the choice of the six models was therefore unnecessary.

[44] But even if his evidence were necessary, Dr. Ramlogan, prima facie, was compromised. Having previously advised the EMA and provided the research on the six models, the appearance of his name on the record for the respondent in its challenge to the appellant's use of the flat fee structure, seriously prejudiced the ability of the appellant to comply with the judge's order.

[45] As consultant to the EMA from 1998 to 2001, Dr. Ramlogan provided research and advice to the EMA on the WPMP. His firm of Narinesingh, Ramlogan and Company appeared on the record of the High Court as instructing attorneys for the respondent. His name appeared on record, in the high court, as an advocate for the respondent. In his capacity as consultant to the EMA, which is an interested party in this appeal and which provided advice to the Minister in respect of the six models, Dr. Ramlogan would have been intimately aware of the EMA's research into the WPMP including the six suggested models. This apparent conflict of interest adversely affected the appellant when called upon by the trial judge to provide evidence of the research which led to the choice of the six models. The appellant could not comply with the order with direct evidence from Dr. Ramlogan. The judge's error thus left the appellant in an invidious position and it sought to provide the best evidence it could through Mr. Rajkumar.

[46] In light of the errors of the judge the Court of Appeal is entitled to look at the matter afresh. In doing so, I shall also consider the respondent's cross appeal which is in effect that there was a failure to apply the PPP in establishing the permit fees.

Is the flat fee structure *ultra vires* for failing to apply the PPP

[47] The question in effect is whether the Water Pollution (Fees) (Amendment) Regulations 2006 apply the PPP. This requires an examination of how the flat fee structure works and having regard to the meaning of the PPP, whether it applies

the PPP. There are two contending views. Mr. Aboud says that the Regulations do not apply the PPP; Mr. Goddard says they do. I have found this question a quite difficult one. The PPP has been effectively enacted into law in Trinidad and Tobago by virtue of section 31 of the Act and Sections 2.3 and 3.7 of the NEP 2006. Sections 2.3 and 3.7 contemplate:

(a) the control of pollution through a system of permits by which water pollution limits or standards would be set

(b) the cost of preventing pollution or of minimizing environmental damage due to pollution will be borne by those responsible for pollution

(c) charges are levied as a processing fee in respect of a licence permit which entitles the holder to generate specific quantities of pollution

(d) The money collected will be used to correct environmental damage.

[48] Mr. Goddard deposed at paragraph 15 of his affidavit that the PPP can be promoted by various means one of which was the levying of permit fees per sections 34 and 96 of the Act. At paragraph 10 of his affidavit, Mr. Goddard noted that the WPMP contemplated that the PPP may be reflected in permit fees. He said that the fees payable to the Water Pollution (Fees) (Amendment) Regulations 2006 were intended to make the WPMP self sufficient and sustainable and for that purpose, to recover the cost of operating the programme from those who discharge pollutants into the country's water resources.

[49] He added at paragraph 11 that the fees were intended to cover the costs of administering water pollution management and include the PPP. They stand as one standard fee which only polluters *"exceeding the permissible levels"* may be required by the Authority to pay. The discharge of pollutants is not unqualified because a permit *"contains monitoring and reporting requirements and interim targets with which the permit must comply".* Terms and conditions will vary from permit to permit to meet the operational conditions of the particular permittee and

the use of permit fees for implementing the PPP *"is a well recognised means of doing so"*.

[50] Mr. Aboud denied Mr. Goddard's contention that the use of a single, standard fee for polluters who exceed the permissible levels of pollution, is a proper application of the PPP. He contended that the cost of administration of water pollution control in accordance with the PPP cannot be fixed but should vary according to a number of factors including the complexity of the permit required, the amount and composition of the pollutants and the type of activity. Further, counsel submitted that the flat fee structure treats as equals persons who are *"differently circumscribed"*. He submitted that a permittee pays the same fee regardless of the quantity or type of pollutant emitted into the environment. He submitted further that if, as Mr. Goddard contends, the cost of administrative damage can be recovered through the administrative fees, it has the result of a permittee being penalised for releasing a water pollutant which he is lawfully entitled to do. But in my judgment that is precisely the point. The permitting system proceeds on the basis that pollutants will be released into the environment. It is a question of control and minimisation, the cost of which is to be borne by the polluter. No doubt this is a shortcoming of the model chosen. The court's task, having regard to the respondent's pleaded case, is simply to consider whether the PPP has been applied. Whether the model chosen most efficiently applies the Principle is not the question.

[51] It is still a difficult question. I am faced with two contending views as to whether the PPP is in fact applied. I have not had the benefit of cross-examination. In the absence of such, Mr. Goddard's evidence is to be preferred. See **Lewis on Judicial Remedies in Public Law (2000) Ed** at page 302:

> ***"In practice, the view that the courts take of the nature of judicial review means that cross-examination will be rare. The courts act as supervisory bodies only and leave the findings of fact to the decision-maker. The courts will usually only determine whether, given the facts as found, the decision-maker***

has made a reviewable error, such as taking into account irrelevant factors or erring in law. There are occasions when factual disputes arise and where cross-examination may be appropriate. If a clear conflict of fact arises on the affidavits of the applicant and respondent, as to what procedure was followed at a hearing, or what factors were actually taken into account, or what the real purpose of the decision-maker was, then cross-examination to resolve that conflict may be appropriate. Even here, the courts may refuse cross-examination and may rely on the contemporaneous documents which should be exhibited to affidavits … Questions of jurisdictional fact may also arise. Even these may be decided on the basis of affidavit evidence alone, although if there were clear conflicts of evidence, then cross-examination may be necessary to resolve these … If there is a dispute of fact and no cross-examination is allowed, the courts will proceed on the basis of the affidavit evidence presented by the person who does not have the onus of proof. As the onus is on the applicant to make out his case for judicial review, this means that in cases of conflict, the courts will proceed on the basis of the respondent's affidavit."

Moreover I am not persuaded that cross-examination was even necessary in this case. None of the respondent's witnesses purports to have any expertise on the subject. Mr. Aboud puts forward his opinion but does not pretend to be an authority on the subject. In contrast, Mr. Goddard worked on the WPMP and on the rules and regulations from its embryonic stages.

[52] The question is then whether the flat fee structure applies the PPP. I am persuaded by Mr. Goddard's evidence that the PPP is indeed applied by the application of the flat fee structure. The use of a permitting system is consistent with section 53 of the Act. Further, the application of the Principle can in fact be found in the Water Pollution (Amendment) Rules 2006 and the Water Pollution (Fees) (Amendment) Regulations 2006. Rule 8 is directed at any person who

releases or intends to release a water pollutant which is likely to cause harm to human health or to the environment. Under rule 8 (i.e. in cases in which the discharge is outside permissible levels) he or she must apply for a permit and pay the prescribed fee ($10,000.00), submitting the relevant information required by rule 10. The fees payable are set out in the Water Pollution (Fees) (Amendment) Regulations 2006. Section 6.4.2.8.2 of the WPMP sets out that the calculation is made by identification of the total annual permitting cost and an estimate of the number of permits that the EMA anticipates will be issued. The total permit cost is then divided by the anticipated number of permits and the *"resulting figure is deemed the permitting costs".*

[53] Further Mr. Goddard in his affidavit at paragraph 11 noted that the permit fees *"are intended to cover the costs of administering the management of water pollution".* To that extent then the Principle is complied with (albeit very simplistically). Additionally by rule 15, the EMA sets out the conditions of operation of the permittee including the following requirements,

(a) that the permittee shall take all reasonable steps to -

(i) avoid all adverse environmental impacts which could result from the activity;

(ii) minimize the adverse environmental impact where the avoidance is impractical;

(iii) mitigate the impact where the impact cannot be avoided;

These are consistent with the PPP. Breach of the permit conditions will trigger the enforcement provisions at sections 62 to 66 of the Act (see section 62 in particular subsection (2)). Sections 63 to 66 provide the EMA with significant powers to enforce the provisions of the Act at the polluter's cost. I do not consider it necessary to spell out these provisions. Rule 15 also provides for monitoring and reporting requirements by the permittee and may set interim targets costs with which there must be compliance.

[54] These permit conditions constitute provisions for the correction or minimization of environmental damage which may result from the release of

pollutants which are authorised by the permit. To the extent that the permittee is required to take steps to avoid, minimize or mitigate, he bears the *"costs of pollution prevention."* The PPP seeks not only to prevent pollution but to minimize it. Minimization is relative. It is a function of the state of economic development of any given country and of the resources available to it to manage pollution control.

[55] Similarly, to the extent that the Water Pollution (Fees) (Amendment) Regulations 2006 prescribe a fee for the issue of permits, they are consistent with section 96(2) (a) of the Act which empower the relevant Minister to prescribe *"the amount of charges and fees payable to the Authority for ... applications, licences, permits ... provided by the Authority to any person."* The requirement of a fee to release a water pollutant per rule 8 subject to conditions of the permit satisfies, however simplistically, the requirement that the polluter pays.

[56] Mr. Goddard concedes that there are deficiencies in the model but has emphasized that pollution management in Trinidad and Tobago is a work in progress; *"a living document"*, as he describes it, which will be reviewed and adjusted over time. It is my hope that such a review is in fact ongoing and that adjustments will be made. Mr. Goddard however accepts the validity of the model as a means of managing, minimising and monitoring water pollution. The court must defer to the views of the officials of the EMA and suppress its own misgivings about the unsophisticated nature of the model chosen. Mr. Aboud has validly criticised the model but, other than his opinion, has not himself provided any significant research to undermine the choice of model.

[57] I find that the Water Pollution (Fees) (Amendment) Regulations 2006 were legal and *intra vires* the Act and the NEP.

Whether choice of a flat fee structure was irrational

[58] The trial judge found that the employment of a flat fee structure was arbitrary and irrational because:

(i) there was no evidence of how the fee was determined or how it met the requirements of the PPP

(ii) this was compounded by the dubious nature of the research about the models in the WPMP

(iii) the basis of the WPMP's self sufficiency was not put into evidence, thus casting serious doubt on how it was possible for the WPMP to be self sufficient and sustainable

(iv) user friendliness and simplicity of operation without regard to the exigencies and *"other factors which proper research and reporting would have identified"* could not be a rational exercise of the Minister's discretion.

[59] Irrationality was raised by the respondent in the grounds of its application. The challenge however was that the *"failure"* to apply the PPP was irrational. It did not allege that the choice of the flat fee structure was irrational. In my judgment there is a significant difference. The flat fee structure may apply the PPP but the decision to adopt it over the other five models, or for any other reason, may be irrational. This is different from a decision which is irrational because it adopts a model which does not apply the PPP at all. The latter is the respondent's pleaded case. The judge's finding was that the decision to choose the flat fee structure was irrational. He did not address whether or not the flat fee structure applied the PPP; or that it was irrational for failing to do so.

[60] Mr. Hosein at the hearing of the appeal however, sought to defend the judge's decision and to mount a challenge to the choice of the flat fee structure on the basis of irrationality or *Wednesbury* unreasonableness. But this was not his pleaded case. The finding of the judge was off the point. But I shall address the matter because Mr. Daly challenged the finding in his oral and written submissions.

I have already found that, there having been no challenge by the respondent to the research of the appellant or to models considered, the judge exceeded his remit when he questioned the basis upon which the six models were included in the

WPMP, so it is unnecessary to address item (ii). I shall consider items (i) and (iii) together.

(i) - No evidence as to how fee structure was determined
(iii) - No evidence of self sufficiency and sustainability of the WPMP

[61] The question is whether the judge was right to find as he did. I do not consider that he was. Section 6.4.2.8.2 of the WPMP (which is exhibited by Mr. Aboud in his principal affidavit) stated that the fees are calculated by:

> ***"an identification of the total permitting cost on a yearly basis and an estimate of the number of permits that the EMA anticipates will be issued. The total permitting cost is divided by the anticipated number of permits and the resulting figure is deemed to be the permitting costs."***

Mr. Goddard at paragraph 10 of his affidavit spells out that the fees payable to the Authority by virtue of the Water Pollution (Fees) (Amendment) Regulations *"are intended to make the programme self sufficient and sustainable and for that purpose to recover the cost of operating the programme from those who discharge pollutants into the country's water resources."* The evidence therefore, is that the overall cost of the programme has been worked into the fees charged. There was no cross-examination of Mr. Goddard on whether the basis of that calculation was sound or not. There is thus no basis for questioning Mr. Goddard's evidence. As his exhibit illustrates, the initial cost to the polluter of setting up the pollution monitoring system can in some cases require quite a considerable outlay of cash and capital.

Item (iv) - user friendliness and simplicity

[62] The judge found that the flat fee model was adopted on the limited policy basis that it was user friendly and the simplest of the models to operate. The evidence of Minister Mohammed and Mr. Goddard was that simplicity and user

friendliness were considered in the context of the state of economic and institutional development of Trinidad and Tobago. The appellant contended that the judge erred in failing to properly consider that the respondent never raised these issues as a ground of irrationality or otherwise. In my judgment it was open to the judge to make such a finding on the appellant's evidence, if such evidence and the pleading justified it. But I do not find that, at minimum, the evidence (or far less the pleading) justified it.

[63] The decision to introduce the flat fee system was made in 2001. The WPMP, with its recommendation of model 6, was not conceived until 2005. By this time the flat fee structure was already in place and Minister Beckles was the relevant Minister. In so far as the initial implementation of the flat fee structure is concerned, it was entirely within Minister Mohammed's discretion, for him to consider the pros and cons of the flat fee structure (model 2) and to accept or reject the model. The decision was his alone. The court cannot substitute its view for that of the Minister. Neither should it hold an administrative decision to be irrational because it would not have come to that decision. The question is whether a reasonable Minister, properly directing himself, would have chosen model 2.

[64] Whether the flat fee structure applied the PPP was of course a very pertinent consideration for the Minister. The evidence of Mr. Goddard was that the model does apply the PPP. Minister Mohammed would no doubt have been so advised by the EMA. Minister Mohammed in deciding to choose the flat fee structure was also entitled to consider the model, its advantages and deficiencies. He was also entitled to look at the state of Trinidad and Tobago's economic and institutional development.

[65] The application of the PPP in water pollution prevention or minimization will always depend for its success on the availability of resources. It was a necessary consideration for the Minister that, in applying the PPP, the model chosen for the management and control of water pollution must be one which is compatible with our economic and institutional capabilities. That was a

consideration for Minister Mohammed in his executive capacity. It is a matter to which the courts must defer. What weight he chose to give to each of these considerations was a matter for him. See **Tesco Stores Ltd. v. Secretary of State for the Environment [1995] 1 WLR 759**. Any decision to strike down an administrative decision on grounds of irrationality or *Wednesbury* unreasonableness, involves an element of judicial subjectivity with the attendant risk of the judge substituting his own decision for that of the decision maker. It is temptation which must be resisted. In judicial review applications the court's role is supervisory. Once the decision maker stays within the parameters of his powers, the court must be scrupulous to uphold the decision and also must be careful not to substitute its own view. See Lord Ackner in **Brind & Ors. v. Secretary of State for the Home Department 1991 1 ALL E.R. 720 at 731(d).** In discussing *Wednesbury* unreasonableness he noted as follows:

> ***"This standard of unreasonableness, often referred to as 'the irrationality test', has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to***

adjudicate as if Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary."

[66] The issue for the judge (if it were an issue at all) was whether a reasonable Minister properly directing himself, would have come to that decision. There is a clear basis on the evidence to find that a reasonable Minister could come to the same decision as Minister Mohammed.

[67] Additionally, the judge found that in the absence of evidence from Minister Beckles confirming (i) that the NEP principles had been continued and considered in the passing of the Water Pollution (Fees) (Amendment) Regulations and (ii) that the WPMP recommendation of model 6 had been also considered, there was nothing to suggest that she considered the findings of the research and the recommendation of model 6. He concluded that in those circumstances the full extent and purport of the research (of which he was sceptical in any event) seemed to have been lost in the decision making process. Mr. Hosein in his submissions in effect supported the judge's findings.

[68] In my judgment, the judge erred in three material respects because:

(i) The continuation of the policy was clearly to be implied having regard to the evidence

(ii) In any event, whether or not it was continued was not in issue.

(iii) Minister Beckles is to be presumed to have acted regularly.

(i) Continuation of the Policy

The continuation of the policy is to be inferred from the letter dated 16th April 2007 from Minister Beckles to the respondent's attorney at law. Further, it is implicit in the passage of the Water Pollution (Fees) (Amendment) Regulations 2006 which retained the flat fee structure, introduced in 2001, that the EMA's recommendation of model 6 was considered and rejected.

[69] The letter of 16th April 2007 when fully read shows that the flat fee approach set out in the 2001 Water Pollution Rules and the Water Pollution (Fees) Regulations continued to be the model of choice. The WPMP was introduced in 2005 and the NEP was revised in 2006. Both continued to apply the PPP. The letter is clear in its response and, in so far as it is relevant, bears reproduction.

> ***"… the polluter pays principle is one of the key principles of the nation's pollution control policy as stated in both the National Environmental Policy 1998 and the Revised National Environmental Policy 2006. In essence, the cost of preventing pollution or of minimising environmental damage due to pollution should be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources by, inter alia, the levy of charges as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants.***
>
> ***This has been further enunciated in the preamble of the Environmental Management Act 2000, which states that 'sustainable development should be encouraged through the use of economic and non-economic incentives and polluters should be held responsible for the costs of their polluting activities.'***
>
> ***In this regard I am informed by the Environmental Management Authority and verily believe same to be true, that a full cost recovery analysis was utilised by the EMA in the determination of the fee structure for the registration and permitting system developed for water pollution in keeping with the polluter pays principle. This can be evidenced in that charges are levied for the processing of such applications as well as sampling and analysis of effluent…***

(ii) Continuation not in issue

[70] But in any event, whether the WPMP was continued after the change of government was not in issue. The respondent did not seek in any way to challenge the policy (whether in 2001 or 2006), nor the data upon which the policy was based. Consistent with its pleaded case, the respondent's pre-action letter questioned whether the flat fee structure applied the PPP. It is that question which Minister Beckles sought to answer in her reply by letter of 16th April 2007.

(iii) Minister to be presumed to acted regularly

[71] But even if the judge were correct that there is no evidence that Minister Beckles decided to continue the policy, the absence of such evidence is not fatal. Indeed it is understandable. The challenge was never to the policy but to whether the model chosen applied the PPP. In those circumstances, the appellant produced evidence which answered that question, pursuant to the respondent's pleaded case. Thus, in so far as there may be no express evidence, either way, that Minister Beckles considered the recommendation of model 6, she is to be presumed to have acted regularly and to have taken it into account. See Lord Carswell in **Mohanlal Bhagwandeen v. The Attorney General of Trinidad and Tobago, [2004] UKPC (17 May 2004),** at paragraph 22. He stated:

> ***"The presumption of regularity comes into play … when there is no evidence either way whether a public authority or official has taken into account the correct considerations in reaching an administrative decision. In such case the decider is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account."***

[72] Minister Beckles is also to be presumed to have continued the policy. As the letter of 16th April 2007 illustrated, she was being advised by the EMA on the implementation of the flat fee structure. It is inferential from that relationship that

the Minister would have been guided in 2006 by the EMA's advice, given that it was the EMA which developed the WPMP. The *"practical realities"* which exist in the day to day functioning of government ministries cannot be ignored. See Lord Diplock in **Bushell & Anor. v. Secretary of State for the Environment [1980] 2 ALL E.R. 608 at 613 B to D**:

> ***"To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred on a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the minister' own knowledge, his own expertise. It is they who in reality will have prepared the draft scheme for his approval."***

There can be no gainsaying the fact that the Minister and the EMA enjoy an almost symbiotic relationship under the Act. (See for example sections 14 and 18 of the Act.)

[73] In closing there is one matter on which arose in argument on which I find it necessary to comment. Mr. Daly in his oral submissions heavily criticised the judge's use of a variety of non legal sources on the question of water preservation, to wit:

- Lenntech.com – Water Trivia Facts
- McGraw Hill Encyclopedia of Environmental Science
- United Nations Report on Water Quality 2012
- United Nations Environment Programme (UNEP) – **"**Clearing the Waters: A focus on water Quality Solutions" [delivered in Nairobi - March 2010]
- Achim Steiner – 18th Forum of Ministers of Environment of Latin America and the Caribbean – "Rio+ 20 A Paradigm Shift Towards a Sustainable Century" [delivered at Quito – February 2, 2012]
- "National Report on Integrating The Management of Watersheds and Coastal Areas in Trinidad and Tobago" [March 2001]

It does not appear on the face of his judgment that the judge's references to these sources directly affected his decision. But I am uncomfortable with the judge's reference to non legal sources on which neither counsel had an opportunity to comment. I cannot say whether these sources may have put a different complexion on the judge's approach in respect of the evidence but to the extent that they may have, both sides should have been afforded the opportunity to consider the material and address the court on their authoritativeness and applicability.

[74] The appeal is allowed and the cross appeal is dismissed. We will hear the parties on costs.

Nolan P.G. Bereaux
Justice of Appeal