THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal S-231/2014
Civil Appeal S-244/2014

BETWEEN

The Minister of Energy and Energy Affairs

Appellant

AND

Adesh Maharaj and Prakash Maharaj

Respondents

PANEL: I. Archie, Chief Justice
P. Jamadar, Justice of Appeal
N. Bereaux, Justice of Appeal

APPEARANCES:

Mr. Russell Martineau SC, Mr. K. Ramkissoon instructed by Mrs. Zelica Haynes-Soo Hon for the appellant

Mr. Ramesh Lawrence Maharaj SC, Ms. V. Maharaj instructed by Mr. Rajiv Katwaroo for the respondents

DATE DELIVERED: 3rd November, 2017

JUDGMENT

Delivered by I. Archie, Chief Justice

Nature of the Proceedings

1. The Ministry of Energy and Energy Affairs (hereinafter called "the MEEA") has appealed the whole of the decision of the trial judge dated 25 July 2014 wherein it was held that:

   i. the decision of the MEEA to suspend and effectively revoke the licences of the respondents was illegal, null and void and of no effect and an order is granted quashing the said decisions;
   ii. the respondents are entitled to the resumption of their operations under the de facto licences which were in existence - until 28 November 2012 for Prakash Maharaj and 1 December 2012 for Adesh Maharaj;
   iii. the service of the non-compliance notice was procedurally unfair and in breach of the legitimate expectation of the respondents that they would have been allowed sufficient notice and opportunity to address matters identified in the said noncompliance notice before suspension or revocation of their licences;
   iv. the respondents are entitled to damages to be assessed by a Master sitting in Chambers; and
   v. the appellant to pay the respondents' costs fit for two Counsel to be assessed by the Court.

2. The MEEA has asked that the Court of Appeal reverse the declarations and orders of the learned trial judge and that the respondents pay the costs of the appeal.

Factual Background

3. Although the hearing of both matters raised similar issues at trial and on the appeal, the circumstances giving rise to the application for judicial review on behalf of the respondents are not identical. The cases for both respondents are set out below.

Adesh Maharaj

4. The respondents are the sons of the late Batton Maharaj who died on 6 March 2007. In the 1960s, Batton Maharaj was a dealer who owned and operated a 'National Petroleum' petrol station at King's Wharf, San Fernando. A licence was issued by the MEEA in his name, S. Batton Maharaj, pursuant to Section 6 of the Petroleum Act Chapter 62.01. Their father died in 2007 and Adesh Maharaj ("Adesh") assumed control of the operations of the King's Wharf Service Station. He did not have a licence in his name and there was no formal assignment of his father's licence.

5. Adesh stated that the National Petroleum Company (hereafter called 'NP') was informed of his father's death and a company official indicated that they were prepared to treat with him as the licence holder once he was willing. The documents and application for the marketing licence were completed and NP undertook to submit same to the MEEA. This was not denied by any official of NP at the trial.

6. Adesh alleged that an official of the MEEA named James subsequently visited him at the King's Wharf Station and informed him that he was there to get current information to facilitate the process of granting a licence to him subject to the satisfaction of all the necessary criteria. He contends that since the necessary paperwork was submitted, his continued paying of the annual renewal fee and NP's regular inspection of the facility meant that the granting of a licence was a mere formality.

7. Adesh stated that inspectors from NP visited his station on 29 November 2012, conducted what he thought was a routine inspection and subsequently informed him that the station passed inspection. On 1 December 2012, officials of the MEEA visited the station again and informed him of their suspicion that there was an unauthorized line running from the station to the sea. At 5pm on the same day, a Mr. Ramdahin, Chief Mechanical Engineer closed the station for inspection by the Environmental Management Authority (hereafter called the 'EMA') and the Fire Department. The station has been closed since that date and Adesh contends that his requests to be present when samples and tests were conducted were pointedly ignored.

Prakash Maharaj

8. Prakash Maharaj ("Prakash") received a retail licence in the year 2001 on the recommendation of NP. The petrol station was located at Guapo/Fyzabad Main Road on lands owned by both respondents and their parents, Sookdeo Batton Maharaj and Kalootie Maharaj. Prakash continued to receive renewal licences up until the year 2010 and thereafter received receipts for the years 2011 and 2012 as the MEEA had stopped giving renewal licences pending a review of the licensing regime.

9. Prakash stated that officials of the MEEA along with security personnel from NP and police officers made an unannounced visit to his petrol station on 28 November 2012 and carried out an inspection. At the back of the building, the officials found tanks which contained 'condensate': a mix of petrol and water. He stated that he had been having a problem with water seeping into the underground storage tanks and collected and stored the condensate mixture at the back of the station for disposal. After this inspection, the MEEA officials ordered the closure of the station and installed security officers on the compound.

10. Prakash stated that he has not been allowed access to the station and was only served with a notice of non-compliance on 7 January 2013, at which time there was nothing he could have done to remedy the situation.

The Ministry of Energy & Energy Affairs

The MEEA's position at trial with regard to both respondents is detailed below:

Adesh Maharaj

11. On 28 November 2012, Mr. Ramdahin together with officials from NP and MEEA, visited a location linked to this respondent (Twister's Compound, 48 South Oropouche, Otaheite) and found that there was an unauthorized petroleum and redistribution operation. On 1 December 2012, the mentioned officials conducted an impromptu inspection on the King's Wharf Service Station and observed several breaches of the Petroleum Act, namely:

a. unauthorized modification to service station to create a warehouse for storage of hydrocarbon in unapproved storages;
b. indiscriminate dumping of a petroleum product that would have resulted in pollution;
c. presence of hydrocarbon vapor, lack of proper ventilation and electrical ignition sources which created a hazardous environment with a high potential for fire outbreak;
d. sub-leasing of NP's service station to a fruit stall without prior authorization;
e. continuous ingress of water into fill hatches and failure of the respondent to report same.

12. The station was closed subsequently due to the pollution and imminent threat to public safety. Adesh was advised of same and of the assessments that had to be done before the station could re-open. By letter dated 21 February 2013, the MEEA issued a Notice of Non-Compliance, which cited the following:
    a. unauthorized warehouse;
    b. unapproved petroleum storage;
    c. unacceptable health and safety risk management policies;
    d. questionable ability to manage the King's Wharf Service Station.

13. A report was subsequently filed and forwarded to the police for a criminal investigation.

Prakash Maharaj

14. On 28 November 2012, Mr. Ramdahin together with Mr. Edward Fraser, Petroleum Inspector II and members of NP's technical and security team conducted an inspection at the station operated by this respondent. They found several breaches and subsequently suspended operations at the station. These breaches were:
    a. Damage to NP's reputation due to the sale of bad fuels;
    b. possibility of fire and explosion at the station, which would cause widespread destruction and casualties;
    c. spillage of products as a result of unauthorized storage;

d. tampered fuel not having the required octane rating. This would cause engine overheating, engine damage due to excessive vibration and the possibility of the vehicle bursting into flames;
e. exposure of workers to harmful carcinogenic vapors;
f. possible use of fuel in terrorist activities;
g. absence of fire trails;
h. sub-standard electrical fixtures;
i. pollution and environmental degradation.

15. By letter dated 18 December 2012, the respondent was issued a notice of non-compliance, which cited the following:
    a. unauthorized warehouse;
    b. unapproved petroleum storages;
    c. unsafe conditions at the station;
    d. unapproved modifications at the station;
    e. unauthorized petroleum fluids found at service station.

16. On 29 April 2013, the MEEA forwarded their file to the police for commencement of a criminal investigation.

Matters for Consideration on Appeal:

Validity of the licence

17. The judge found that the respondents had valid 'de facto' licences as both parties had paid their renewal fees and were issued receipts by the MEEA. The MEEA's position was that neither party had a valid licence, and they could not rely on the Petroleum Act or any provision of what appeared to be a standard licence. Since 2010, no retail marketing licences were renewed as the MEEA had determined that the terms and conditions of the retail marketing licences were inadequate to properly regulate the retail of petroleum products. Consequently, all licences were withheld pending the review exercise and the

revised licences were submitted to Cabinet for approval in June 2013. The trial judge found this argument to be untenable as the MEEA:

a. created the present situation and could not rely upon it to say that retailers were operating outside of the law;
b. could not place reliance on §24 Regulations as the section provides that the right of the applicant to a licence survives where the delay is due to no fault on their part;
c. continued to collect renewal fees and issued receipts.

18. The judge found that the respondent, Prakash Maharaj had a legitimate expectation that he would receive a licence and the MEEA was estopped from relying on the strict letter of the statute.

19. With regard to Adesh Maharaj, the judge found that he was entitled to a licence as he was treated as a licensee by both MEEA and NP. The judge relied on the assumption that both parties must have had a close working relationship and the documentation that passed between Adesh Maharaj and either NP or MEEA would have come to the other party's attention. Further, the tenor of the documentation indicated that Adesh was treated as a licensee and the notice of non-compliance could only arise if the person was already being treated as such.

Illegality

20. The judge found the action of suspending the operations of the petrol stations to be ultra vires and void. The MEEA could not rely on §§17(1), (2c), (3), (6) and (7) Petroleum Act and Regulation 23 Petroleum Regulations since a standard form licence contains no sanctions or provision for revocation for breaches of any term and the MEEA's power to suspend or revoke a licence could only arise upon such express terms. She did not accept the MEEA's contention that it had a general power under Regulation 42 or an implied power under Section 45(3) (b) of the Interpretation Act to suspend or revoke licences.

Procedural Fairness

21. The judge recognized that the MEEA is charged with combating the illegal bunkering and sale of diesel, which is contrary to Section 17(1) of The Petroleum Production Levy and Subsidy Act. The judge noted that in this matter, the MEEA was not acting pursuant to information gathered concerning the illegal bunkering and sale of diesel but it arose out of routine inspections of the stations in question. As a result, it could not avail itself of any implied power to suspend the operations of these stations.

22. The judge also found that there was an established practice whereby station operators were given time to rectify any breaches before renewal of licences. She disagreed with the MEEA's contention that even if the appellants were entitled to the benefit of notice and time for correction, the circumstances encountered required urgent attention and this trumped any procedural expectation.

Grounds of Appeal

23. The MEEA has filed 41 grounds of appeal in respect of the Adesh appeal which, for the purposes of discussion, are condensed to the following heads: the validity of the licence; the MEEA's regulatory role; illegality; legitimate expectation; procedural unfairness; unreasonableness and estoppel.

24. In respect of the Prakash appeal case the MEEA filed 24 grounds of appeal which are condensed to estoppel, legitimate expectation; implied powers; procedural unfairness. The submissions and my findings will be consolidated as far as possible.

Validity of the licence

25. The MEEA submitted that Adesh's non-disclosure of crucial information regarding the non-existence of a valid licence in his name meant that he did not come to the court with clean hands and further, he committed an offence and continued to do same for every day he operated the service station contrary to the provisions of Section 6(2) of the Petroleum Act. Ergo, he could not have had a legitimate expectation to be treated as a licence holder. The MEEA relied on the following cases:

Matrix Securities Limited v IRC [1994]1 All ER 769 @ 787 (court dismissed the applicant's judicial review application because he failed to disclose all the material facts)

Ministry of Agriculture, Fisheries and Food ex parte Hamble [1995] 2 All ER 714 (to bind public authorities to unlawful representations would have the dual effect of unlawfully extending their statutory powers and endorsing the unlawful act)

Southend-on-Sea Corporation v Hodgson (1962) 1 QB 416
Western Fish Products Limited v Penwith DC [1981] 2 All ER 204 (the actions of an agent of a public body cannot bind the public body as Principal where both are bound by the governing statutory provision).

26. The MEEA submitted that the judge at paragraph [40] of the judgment was wrong to say that Adesh was entitled to the benefit of any legitimate expectation because:
    - ➢ There was nothing more than an ordinary expectation: *Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 755 @ para 46;
    - ➢ Legitimate expectation fails because to enforce it would require the Minister to act contrary to the Act. The respondents cannot be treated as licensees when they have no licence and in the case of Adesh he has not applied for a licence: *R v Secretary of State of Education ex parte Begbie* [2000] 1 WLR 1115@1115G AND 1125 B-D
27. The MEEA contended that Adesh never had a valid licence and failed to produce any evidence to show that he submitted the relevant paperwork to the MEEA, it therefore followed that he never had a licence that could have been revoked. With regard to Prakash, the MEEA contended that he did not have a licence as the Ministry was in the process of reviewing all the licences. Further, under Section 6 of the Petroleum Act, it was not open to the Minister to relax the technical requirements for the issuance of a paper or executed form of licence. To construe the present circumstances of stations being allowed to operate without a licence as a relaxing of technical requirement, amounts to saying that the MEEA is not bound to follow its own governing legislation.

28. The MEEA argued that the judge could not estop the MEEA from relying on or applying the statute [they pointed to paragraph [32] of the judgment] and that the application of 'estoppel' in this context has the effect of enjoining the MEEA to act in a way that would be ultra vires. A power or jurisdiction is not lost by disuse or non-enforcement even in circumstances that would in private law give rise to estoppel: see ***Redbridge v Jaques*** [1971] 1 All ER 260.

29. The respondents counter that they both had valid licences and are entitled to statutory protection as:
    a. There is evidence of the MEEA taking renewal fees
    b. Service station owners were knowingly allowed to continue operating
    c. No new terms and conditions were agreed so operators were deemed to be operating on the same terms.

    They submitted that a public body could be deemed by conduct to have taken a decision to exercise its statutory power even when it has not expressly said so: ***R v Coventry City Council*** [2009] EWHC 34 (Admin) @ para 66, and there is nothing in the Act or Regulations which says that there is no renewal of a licence until an actual piece of paper is issued.
30. They further contended that the MEEA's reliance on Regulation 25 is misguided since the Regulations provide that an applicant's right to a licence survives where the delay in execution is not his fault. They argued that the MEEA's position is logically untenable since it would mean that every operator in the country is doing so illegally.

    On the issue of estoppel in public law, they contended that a public body is estopped from relying on technicalities to deny an applicant: ***Wells v Minister of Housing*** [1967] 1WLR 100 @107. The judge was merely employing that principle to prevent the MEEA from denying that the dealers had the permission of the MEEA to operate.

Discussion

31. The MEEA's first point can be disposed of summarily. Section 6 (1) Petroleum Act states:

Subject to this Act, no person shall engage in petroleum operations on land or in a submarine area, unless he first obtains a licence as provided for in this Act or the Regulations.

The statute is clear: a person wishing to engage in petroleum operations must obtain a licence from the Minister and in the particular case of retail operations, a marketing licence (Regulation 3(1) (h)). The uncontroverted facts are that:

a. Prakash had a licence in his name;
b. in 2010, the MEEA sought to review the licence scheme and did not issue any renewal licences;
c. Prakash paid his renewal fee and was issued a receipt by the MEEA for the years 2011 and 2012.

32. The argument that Prakash did not have a licence and was operating illegally is a difficult proposition to defend. While he did not have a hand written document, the evidence is that the MEEA continued to receive monies for renewals and issued receipts for same and this would have created the expectation that he was able to continue in lieu of the physical document and on the same terms that pertained in 2010. Additionally, one must consider Regulation 24 of the Petroleum Regulations, which states:

"If a licence is not executed within one hundred and eighty days of the approval of the application, the right of the applicant to such a license shall be deemed to have lapsed, unless the delay is not due to the fault of the applicant"

33. In this case, it was the MEEA that created the unfortunate situation by the protracted review of the licensing regime and there is no evidence that the respondent was guilty of any delay in the renewal process. The MEEA's reliance on ***London Borough of Redbridge v Jaques*** is misplaced as, in that case, the respondent operated his fruit stall on a service road in contravention of the Highways Act. In the present case, Prakash did not seek to operate without a licence but it was due to the actions of the MEEA that the situation came into existence.
34. In the case of Adesh Maharaj, the unchallenged evidence was that he sought a licence in his own name after his father's death. The argument advanced by the appellant is that this respondent cannot avail himself of a legitimate expectation to have a licence as he

did not come to court with clean hands, due to the fact that he did not disclose that he never held a license in his own name.

Based on the forgoing, the MEEA cannot rely on the argument that both respondents did not have a licence.

The MEEA Regulatory Role- Implied Power

35. The tenor of this argument is that the MEEA as regulator of the petroleum industry has an implied power to suspend operations. The MEEA submitted that, although the licences do not contain an express power to suspend, the judge was wrong to hold that the nature of the implied power to suspend the licence was not subsumed in the power to grant or create the licence and point to Section 45(3) (b) Interpretation Act.

36. The MEEA submitted that the Petroleum Act is to be construed in accordance with its object and purpose and the regulatory role of the Minister; the Minister can take the appropriate steps to stabilize an energy asset where serious breaches are detected and must be entitled to suspend operations pending investigation; if there is no power to suspend, this would lead to an absurdity in interpretation and an impractical application of the Act as it would be illogical for the Minister not to intervene when life and property are endangered; Regulations 42(k) and (m) underscore that the Minister has a responsibility for the protection of the public interest.

37. Concomitant with the power to grant the licence must be the implied power to suspend and this must be done by the MEEA as regulator: *R v Gambling Commission* [2007] All ER (D) 392. They posited that the judge erred in restricting the discussion to Sections 17-19 and not considering as well Section 6; ergo, the judge failed to ask whether the implied power to revoke may properly and reasonably be regarded as incidental to the relevant express power to grant licences under S6.

38. If the MEEA were to limit itself to only revoking or suspending a licence upon the terms of the licence, it would unlawfully fetter its statutory power. The licence, while

governing the relationship between the MEEA and individual must be subject to the overarching responsibility of the regulator under its general powers of administration.

The respondents submitted that the judge was correct in finding that the MEEA had no power to revoke or suspend licences and there was no need to resort to the Interpretation Act. They argued that the reliance on the Interpretation Act was misplaced as an implied power must give way to the express or implied terms of statute.

Discussion

39. According to Section 17(1) of the Petroleum Act, a licence must contain appropriate sanctions including the revocation of the licence if the licensee fails to fulfill his obligations. The judge, at paragraph 49, referred to a standard licence and the fact that there are no express provisions for sanction or revocation of the licence. While it is unfortunate that no sanctions have been incorporated into the standard form licence, it does not follow that the MEEA does not have the power to suspend a licence. Where the Respondents' argument breaks down is in the implicit assumption that a 'de facto' licence must be a standard form licence. That argument fails to recognise the fact that the only reason reliance has to be placed on the notion of a 'de facto' is because NO LICENCE [whether standard form or otherwise] has in fact been issued. The relevant question to be asked therefore is what terms are to be implied in a 'de facto' licence.

40. The general scheme of the Petroleum Act is for the Minister/MEEA to regulate the petroleum industry. While it is true that sections 17(2)-(6) of the Act outline situations for revocation/suspension, it does not follow that if a situation does not fall within one of the stipulations, the MEEA cannot act. The reliance on section 45(3) Interpretation Act is not misplaced. The only limitation is that any implied power can only be exercised where it is incidental to the express power.

Illegality

41. The MEEA submitted the following arguments under this head:
    a. The Petroleum Act is to be construed in accordance with its object and purpose and the regulatory role of the Minister [sections 5, 6-9, 30]. They argued that the

instant matter is different from that contemplated at section 17(6) as the respondent never had a licence.

b. The Minister is responsible for the general administration and this includes responsibility to ensure safe operations and the sale of products within the proper specifications.
c. If there is no power to suspend the operation of an asset when circumstances necessitate, this would lead to an absurdity and an impractical application of the Act as it would mean that the Minister has no power to intervene and protect the public interest and property where they are endangered by the operation of a service station.
d. Under Regulations 42 (k) and (m), the licensee's general obligations include the requirement to comply with all instructions of the Minister to secure the health, safety and welfare of persons employed and to have regard to the conduct of operations in the public interest.

42. They posited that the action to suspend the operations of the petrol station was not disproportionate. They argued that, because the respondent never had a licence, he cannot be treated as a licensee under the Act and as a result cannot avail himself of any protection afforded to a licensee.

Discussion

43. Having regard to the finding earlier in this judgment in respect of the existence of a 'de-facto' licence, the first point is no longer tenable. However the remaining three submissions have considerable force. If, as has been found, there is an implied power under the Interpretation Act, it must be exercised in accordance with the general scheme and purposes of the Petroleum Act and the question of reasonableness/proportionality must underlie any consideration of legality and procedural unfairness.

Procedural Unfairness

44. The MEEA pointed out that in this case, the decision concerned issues of safety and emergency regarding the public interest. The MEEA is charged with general administration under Section 5 of the Petroleum Act and the respondent was invited to

make representations and was given a copy of the investigative report. They argued that the respondents were there when samples were taken and when the surveys of the stations were conducted. Urgent steps in the public interest had to be taken based on the following: slippery floors, strong scent of hydrocarbon vapours, pollution, hydrocarbon based fluids in unauthorized containers, grave and great risk of fire, evidence pointing to fuel delivered not being accounted for and unauthorized alterations.

45. They also contended that the position taken was a justifiable one, when there is a grave risk to lives and limb and highly technical research and scientific data must be undertaken before any decision can be taken. The opportunity to afford a person any further right to be heard would not have been applicable in instances of grave danger and urgency.

46. The Respondents argued that the rules of natural justice should not be sacrificed upon the altar of urgency and expediency. They said that the MEEA did not afford them an opportunity to participate in the enquiry nor were they given an opportunity to give any reasons to challenge any of the Ministry's recommendations or findings, which may have been properly considered before the recommendation was made to revoke their licences.

Cases

R v Secretary of State for Transport ex parte Pegasus Holidays (London) Limited & Anor [1989] 2 All ER 481.

Century National Merchant Bank v Davies (1998) 52 WIR 361

Unreasonableness

47. The MEEA's position is that the standard of review upon which the Court should embark in this matter is one that permits the MEEA to act within the 'range of reasonable responses'. They argued that the court should be careful not to substitute its own judgment for that of the Minister but it is only if the decision is so outrageous, perverse or arbitrary that the court ought to intervene. They posited that the seriousness of the apparent breaches necessitated a proportionate response in the public interest, that the response was justified and that there was no less intrusive measure that could have been deployed without significantly compromising the legislative and regulatory aims.

48. In Prakash's case, the MEEA maintained that there was no revocation of his licence. The suspension of the operations of the station was taken as a stop-gap measure to maintain the status quo while the investigation was being completed. The actions of the MEEA could not be considered a revocation of the retail licence: *Lewis v Heffer* [1978] 3 All ER 354@ 364; *R v Secretary of State for Transport ex parte Pegasus Holidays (London) Limited & Ano* [1989] 2 All ER 481; *Kioa v West* (1985) 159 CLR 550 @ page 615; *R v Home Secretary ex parte Doody* [1993] 3 WLR 154@ 168.

49. Counsel for the MEEA argued that the MEEA was required to conduct its work and research into the non-compliances before coming to conclusions and that the judge failed to address her mind to these issues. Her analysis hinged on the flawed reliance on the exercise of a non-existent power rather than the exercise of an implied power in the circumstances where the health and safety of the public are paramount.

Legitimate Expectation

50. The MEEA disputed Adesh's assertion that he had a legitimate expectation of a procedural benefit that the MEEA would inform him of any alleged violations and give him an opportunity to put them right before they took decisions to suspend his operations. The MEEA submitted that there is no clear evidence or a clear or settled practice in relation to that and even if it was a practice, it was not one that carried a legitimate expectation. The MEEA must act in the public interest and given what was faced at the service station, the urgency and necessity of action trumped any obligation to a procedural or substantive benefit. They relied on:

    R (Davies) v Revenue and Customs Commissioners [2011] UKSC 47 (in determining whether there was a settled practice, a party needed evidence beyond the generalized anecdotal understanding of their witnesses).

51. In respect of Prakash, the MEEA also submitted that he appeared to rely upon an implied or procedural benefit based on past conduct but there is no evidence of a past conduct or course of dealings by which the MEEA identifies breaches and calls upon the respondent to take corrective action before the licence could be renewed. Counsel argued that for an expectation to be legitimate, it must be founded upon a promise or practice by the public

authority which it is bound to fulfil. Therefore, a statement by the Minister cannot found an expectation that an independent officer will act in a particular way: *R v DPP ex parte Kebilene* [1999] 3 WLR 972. NP operates independently of the MEEA and they are the marketing and distribution body for fuels and product and their conduct and practice cannot bind the MEEA.

52. The MEEA contended that the judge failed to properly consider the factors and considerations that can give rise to legitimate expectation: *R v Newham London Borough Council* [2002] 1 WLR 237; *Re Findlay* [1985] AC 318@ 338 and in the instant matter, there is no evidence capable of founding a legitimate expectation. The failure to issue a licence does not give enforceable rights in the manner stated by the judge. Further, the judge did not take into account that the MEEA clearly stated that there was no such practice of the MEEA permitting licensees to correct non-conformance as a precursor to renewing their licence.

Discussion

53. I begin from an acceptance of the MEEA's assertion that the taking of money/fees for the renewal of licences cannot give rise to the irresistible presumption that the respondents were entitled to operate with impunity or would have given rise to the expectation that licences would have been issued in their favour if breaches of the relevant regulations were found to be existing. Any right to continue in operation could only have been contingent upon compliance with the relevant regulatory provisions. Where there is a clear and imminent danger to public health and safety, the MEEA must be able to act swiftly to protect the public interest. The court cannot substitute its own judgment in this regard nor can it be said that, on the basis of the available evidence, the actions of the MEEA were so disproportionate as to render them illegal or unreasonable.

54. The fact that letters may have been issued to others in the past is not conclusive of anything. It still begs the question of an evaluation of the urgency or danger posed in the particular circumstances. What is lacking is any clear evidence of any existing practice or representation that would have given rise to the legitimate expectation of the right to the

procedural benefit claimed by the respondents in these particular circumstances. The learned judge therefore fell into error with respect to her findings on these issues.

55. I have considered the approach of the minority on this issue insofar as what was "reasonable and proportionate" in the circumstances. It appears to be based on the assumption that most of the breaches complained of were remediable "within an ascertainable and certain timeframe". In my respectful view there are two flaws in that approach. Firstly, we are not told what that timeframe is, so that it begs the question of whether the potential threat to public safety (as a matter of proportionality) is overridden. Secondly, and in any event, there is no evidence that the alleged breaches were remediable before the expiration of the then current licences, which were subject to annual renewal. Permitting the respondents to continue operation until the expiration of their then current licences, would effectively negate the MEEA's acknowledged power to intervene in the public interest.

56. Once the licences had expired, it would have been the responsibility of the licensees to put themselves in compliance before being entitled to favourable consideration for the grant of new licences. A licence is not property and there would be no obligation on the MEEA to tell an applicant when they should be ready because they were not being deprived of anything to which they were entitled as a matter of right or legitimate expectation. The fact that successive licences (explicit or implied) had been granted in the past provides no basis for any legitimate expectation because the MEEA would not have been aware of the breaches before November 2012. The learned trial judge therefore fell into error in granting a "Renewal" of the licences in the absence of any evidence that justified same.

57. Further, the conclusion that the citations lacked sufficient particularity for a meaningful response with respect to either explanation or remedy is unwarranted. There is a danger in the Court, which does not possess specialist knowledge, substituting its own judgment as to what would have satisfied those requirements for someone with knowledge and experience of the relevant industry. I am not prepared to second-guess the MEEA in that

regard and, in any event, if the Respondents were unclear then it was open to them to seek clarification.

Damages

58. In light of the above findings the respondents could not have been entitled to any damages. However, in the interest of completeness, it may be useful to reiterate the applicable principles for future guidance of trial courts. Simply put, the award of substantial damages must be predicated on adequate pleading and proof of actual pecuniary loss. While the inference of loss may not be difficult to draw in certain circumstances, the quantification of damages has to proceed on the basis of evidence.

59. The MEEA submitted that the judge fell into error when she held that the respondents gave sufficient information in support of their claim for damages. She failed to take into account the principles in *Josephine Millette v Sherman Mc Nicolls CA No.155 of 1995*. Further, there was no parallel remedy under which the respondents could have been awarded damages, in light of the fact that their case is bereft of the necessary particulars of damages. The mere annexure of newspaper articles to show the closure of the station is insufficient to ground a claim for damages.

60. The respondents contended that their cases gave rise to damages as the MEEA's action infringed their right to enjoyment of property under §4(a) Constitution, since the licence amounted to property within the meaning of §4(a) and the withdrawal of the licence affected their business and the use of the service station from which they ran their business.

61. The trial judge cited the authorities of *Gulf Insurance v Central Bank of Trinidad and Tobago [2005] UKPC 10* and *Dennis Graham v PSC [2011] UKPC 46*, in support of her decision to grant damages in favour of the respondents. Although, she accepted at paragraph 74 of her judgment that neither the claimants nor the court sufficiently considered the claim for damages and how it would be dealt with, she nevertheless saw it fit in those circumstances to make a finding that sufficient information had been adduced

by the respondents in support of their claim. There is no doubt that damages may be obtained in judicial review proceedings, as Chief Justice De la Bastide, noted in *Josephine Millette v Sherman Mc Nicolls.* However, in these particular circumstances damages could not have been awarded by the trial judge.

62. The cases upon which the trial judge relied in support of the order for damages, in particular, *Gulf City v Central Bank of Trinidad and Tobago*, concerned very narrow and different points. The question which arose for determination before the Board in *Gulf City v Central Bank* was whether the Central Bank had immunity by virtue of section 44H of the relevant Act from liability to pay damages. Lord Hoffman, delivering the judgment of the Board, acknowledged Nelson J.A.'s concern that the claim for damages was not adequately pleaded. His Lordship noted however, that in that case it was clear that the complaint was that the Central Bank unlawfully disposed of the assets and undertaking of the company. That accordingly, in those circumstances, was a sufficient pleading to support a claim of damages. Lord Hoffman then indicated that a comparison had to be made between *Gulf City* and *Millette v Mc Nicolls*. The case of *Dennis Graham v PSC*, the second case upon which the trial judge relied, does not assist the respondents in this matter. In that case, the Privy Council simply discussed the procedure to be employed when a claimant had already laid the ground work by leading evidence of damage.

63. It remains a settled principle that any successful claim for damages in judicial review proceedings ought strictly to satisfy the three conditions set out in the case of *Millette v Mc Nicolls*. In a nutshell, requirement three demands that liability for damages in judicial review rests on the same requirements as claims in private law actions. Accordingly, mere failure of a public authority, and/or actions that are contrary to the principles of natural justice, do not automatically entitle a claimant to an award of damages. In this regard, the learned authors of *De Smith's Judicial Review 7th edn para. 19-032***,** have observed that:

> *"In order to recover damages in public law arena, the aggrieved person will have to show that the procedural impropriety or other unlawful administrative*

action constituted an actionable breach of statutory duty, misfeasance in public office or other recognized civil wrongs."

64. The respondents' claims are bereft of any evidence which shows that they were entitled to an order for damages in a judicial review proceedings or otherwise. The trial judge accepted in the judgment that she did not sufficiently consider the claim for damages but nevertheless made an order for such. The absence of such evidence negates any order for an award.

Resumption of Operations

65. Finally, as indicated at paragraph 56 above, I am of the view that the trial judge also erred in ordering the resumption of operations as she thereby usurped the function of the MEEA. The court should only be concerned with the decision making process and not the merits of the decision: *Pierson v Secretary of State* [1997] 3 All ER 577 HL; *R v Wandsworth London Borough Council* [2005] EWHC 536; *R v Secretary of State for the Home Department ex parte Lauder* [1997] 1 WLR 839.

66. Having regard to all of the findings set out above, the judgments and orders of the trial judge must be set aside. The delay in the delivery of this judgment is regretted.

I. Archie
Chief Justice

Delivered by Bereaux, J.A.

67. I agree with Archie CJ that these appeals should be allowed for the reasons he gives.

68. As the trial judge noted in her judgment at paragraph 60, the sale of diesel fuel in Trinidad and Tobago was at that time heavily subsidized. Such subsidization was at a significant cost to the Trinidad and Tobago taxpayer. It is also a matter of notoriety that the subsidization of diesel in Trinidad and Tobago rendered it the cheapest in the entire Caribbean such that its sale by underground operators to persons in other Caribbean countries produced a healthy profit to sellers and, ultimately, to the buyers as well. The discovery of this illegal practice prompted much public outrage because it meant that the Trinidad and Tobago taxpayer was also subsidizing the sale of diesel fuel to non-nationals as well.

69. At paragraph 61 of her judgment the judge noted that the spectre of such illegal activity no doubt loomed large in the decision of the MEEA to search and inspect the gas stations of both respondents. She was scathing in her observations that no criminal charge had been brought against either respondent "*[s]ome 20 months after the summary closure of the Claimants' businesses*". She went on to state at paragraph 62 that:

> *"This Court has not had to make findings as to whether the suspicions as to the involvement of either Claimant are well founded or not. I have had to consider whether the MEEA acted within the statutory limits of its power…"*

70. With that latter statement I agree entirely. But any consideration of the MEEA decision to suspend the licences must be done against the facts which were presented to the MEEA officials at the time the decisions were taken. The respondents decided to challenge the suspension of the licences on 15th March 2013 three and a half months after the decisions were made. The decision to suspend the licences was based on circumstances then existing and on issues then exercising the minds of MEEA officials. The fact that no criminal charge has yet been formulated against the respondents (or that one may ultimately be brought) is utterly irrelevant.

71. The trial judge concluded at paragraph 71 "*that there was indeed a settled practice*" of the service of notices for non-compliance and an allowance of reasonable time to take corrective action. Even if that assessment of the evidence is correct, such a settled practice could play no part in any decision to suspend or revoke the licences in this case. This is because what the MEEA officials purported to discover fell well outside the purport of matters for which there was a settled practice of allowing time for compliance. What was involved could not be solved by routine corrections. These were substantial infractions of the conditions of the licences, some of which may have involved criminal activity. The officials were then required to decide on what action was necessary. Corrective action in the short term was out of the question. The judge fell into error and was plainly wrong as she did not take this into account.

72. Moreover, the decision to suspend the licences was made against the backdrop of apparent uncooperative attitudes of both respondents, as demonstrated by their hesitation in providing the keys to facilitate the inspection of the gas stations, and the concerns of the MEEA for public safety and the degradation of the environment. In Adesh's case, the existence of empty storage tanks hidden from view would have added to suspicion that they were used for illegal sale of diesel to persons unknown. In the case of Prakash the existence of an unapproved storage facility would also have heightened such suspicions. If the familial connection between the respondents was considered this would have been reasonable in light of all that was discovered. The subsequent fuel reconciliation assessment reports in respect of both gas stations would have justified all those suspicions.

73. The respondents of course sought to rebut this evidence. It is an area of substantial dispute, on which there was no cross-examination. That they joined issue with the findings of the MEEA officials demonstrates that any engagement of the respondents in respect of those findings before suspending the licences would have required long and protracted discussion when quick action was required.

74. The judge took the view that the merits of the MEEA's allegations were not for her to consider. To the extent that it may have involved a question of guilt, innocence or fault she was correct. But to the extent that they excited concerns of the MEEA officials about breaches of the criminal law, public safety and environmental destruction, sufficient to warrant suspension of the licences, they were very relevant. Time was thereafter required to verify whether their concerns were well founded.

75. In the meantime, public health and safety concerns would have dictated that decisive action be taken with respect to the operations of the gas stations in question. The illegal sale of taxpayer subsidized diesel fuel to foreign nationals was a matter of national concern. The health and safety of the public were also paramount. So too the preservation of the environment. We live in a country that is only now becoming sensitive to the negative impact of hydrocarbon pollution on the environment after more than a century of oil exploitation with the attendant pollution hazards. But there continues to be a *laissez-faire* approach to environmental degradation in Trinidad and Tobago and to issues of public safety in the use of hydrocarbons and, if only for these reasons, the concerns of the MEEA officials are not to be lightly dismissed or second-guessed.

Nolan P.G. Bereaux
Justice of Appeal