REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIV. APP. NO. : P195 of 2015
CLAIM NO.: CV 2012-03024

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

AND

IN THE MATTER OF A CLAIM BY THE CONCERNED RESIDENTS OF CUNUPIA AN INCORPORATED BODY UNDER THE COMPANIES ACT FOR JUDICIAL REVIEW

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 ENVIRONMENTAL MANAGEMENT AUTHORITY TO GRANT A CONSENT AGREEMENT PURSUANT TO SECTION 63(2) (B) OF THE ENVIRONMENTAL MANAGEMENT ACT CHAPTER 35:05

BETWEEN

CONCERNED RESIDENTS OF CUNUPIA
APPELLANT/SECOND CLAIMANT

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY
RESPONDENT/DEFENDANT

AND

RPN ENTERPRISES LIMITED
INTERESTED PARTY

PANEL:
N. Bereaux, J.A.
P. Rajkumar, J.A.
C. Pemberton, J.A.

APPEARANCES:
Mr. R. L. Maharaj, S.C. instructed by Ms. M. Narinesingh for the Appellant
Mr. S. Singh instructed by Ms. A. Jardine for the Respondent

DATE OF DELIVERY: November 17th 2017

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JUDGMENT

Delivered by: P. Rajkumar J.A.

Background

1. The appellant, (Concerned Residents of Cunupia or CRC), is an entity incorporated by a group of concerned citizens. It sought to challenge the establishment in September 2011 in their community by a company, RPN Enterprises Limited (RPN), of a concrete batching plant, (the plant), and other associated infrastructure.

2. RPN did so without first obtaining a Certificate of Environmental Clearance (CEC). RPN later applied for a CEC on February 1st 2012 which was refused. On March 5th 2012 the Environmental Management Agency (EMA) issued a Notice of Violation to RPN.

3. Thereafter on April 30th 2012 RPN and the EMA entered into a Consent Agreement which permitted the operation of the plant, subject to compliance with various conditions, notwithstanding that RPN had not obtained a CEC.

4. The High Court granted leave for judicial review of the decision by the EMA to enter into the Consent Agreement and permit the operation of the plant without a CEC having first been obtained. However, it ultimately refused relief on the basis that the EMA did not act illegally when it purported to enter into the Consent Agreement without first requiring RPN to obtain a CEC.

5. The court also indicated that in any event it would have refused relief on the basis of alleged non-disclosure by the appellants. The appellants were ordered to pay the costs of the application for judicial review[1].

6. I have read in draft the judgment of Pemberton JA, and I agree with the conclusion at which she has arrived. I have done so for somewhat different reasons which I set out in this judgment.

[1] RPN intervened in those proceedings before the High Court but has since relocated its plant and not participated in this appeal. However, it is contended that the issues in this appeal remain relevant.

Issues

7.

a. Whether the appellants were guilty of material non-disclosure.

b. If so, whether the exercise of discretion by the trial judge to refuse relief on the basis of non-disclosure would have been justified.

c. Whether the EMA's decision to enter into a Consent Agreement without requiring that a CEC be obtained was illegal. This depends on:

(i) Whether the **operation** of a concrete batching plant, (as distinct from its **establishment**), is a **Designated** Activity under Activity 18 of the Certificate of Environmental Clearance (Designated Activities) Order, such that it requires a CEC.

(ii) If so, whether s. 35 (2) of the Environmental Management Act (EM Act) establishes as a precondition before proceeding with a Designated Activity that a CEC be obtained.

(iii) Whether, even if it does establish such a precondition, that a CEC be obtained, such pre-condition can be overridden or dispensed with by the exercise by the EMA of compliance and enforcement powers to enter into a Consent Agreement under s. 63(2)(b) of the EM Act.

Conclusion

8. a. There was no **factual** basis for a finding of material non-disclosure on the part of the appellants.

b. However, even if there had been the nondisclosure alleged, it would **not**, as a matter of law, have been sufficiently **material** in the context of this case to justify the exercise of discretion to deny relief on that basis.

c. The EMA's decision to enter into a Consent Agreement without requiring that a CEC be obtained was based upon an incorrect construction of the Environmental Management Act and was therefore illegal because:-

i. the **establishment** of a concrete batching plant is a **Designated Activity** under Activity 18 of the Certificate of Environmental Clearance (Designated Activities) Order, and therefore requires a CEC;

ii. the **operation** of a concrete batching plant must be read as included in the definition of a **Designated Activity** under Activity 18 of the Certificate of Environmental Clearance (Designated Activities) Order, and therefore requires a CEC;

iii. s. 35 (2) of the Environmental Management Act, (the EM Act), establishes that a CEC must be obtained as a mandatory precondition before proceeding with a **Designated Activity.**

iv. The EMA has no power, statutory or otherwise, to dispense with that mandatory precondition by entering into a Consent Agreement under s. 63(2) (b) of the EM Act.

Disposition

9. It is noted that RPN, having failed to obtain planning approval, relocated the concrete batching plant. As to the order of Mandamus requested this relief is now of academic interest only. However, the orders sought for a declaration and for certiorari would not be academic even now, as they are the natural consequence of the determination by this court that the interpretation by the EMA, of its powers under Section 63(2) (b) of the EM Act, was erroneous.

10. Its actions consequent upon that erroneous interpretation were therefore illegal. It remains the case therefore that the decision of the respondent to have permitted the operation of the concrete batching plant was unlawful, null and void, and of no effect. There remains the need for certainty with respect to the legality of its action in entering into the Consent Agreement. There remains the need for statutory interpretation with respect to this issue. It also remains necessary to quash that decision, rather than letting it stand as a precedent that may in future be relied upon by the EMA. The relocation of RPN's plant does not affect any of these issues. Further, the CRC was entitled to have succeeded in the High Court and any orders for costs against it must be reversed.

11. I would allow the appeal and order that the EMA pay to the appellants their costs incurred in this appeal and in the court below. I would also have granted the orders set out below.

Orders

12.

a) The appellant's appeal is allowed.
b) A declaration is granted that the decision of the respondent dated April 30th, 2012 to permit the operation of the concrete batching plant at Light Pole 62 Chin Chin Road, Cunupia, owned and operated by RPN Enterprises Limited, is unlawful, null and void, and of no effect, and,
c) An order of certiorari is granted quashing the decision of the respondent by which it executed a Consent Agreement dated April 30th, 2012 with RPN.

d) The respondent is to pay to the appellants (i) the costs of the proceedings before the High Court to be assessed by the Registrar of the Supreme Court or her designate and (ii) the costs of the appeal, being two thirds of the assessed costs of the proceedings before the High Court.

Analysis

Chronology

13. The following chronology is reproduced from the written submissions of the appellants, with appropriate modifications.

i. On 1st February, 2012 the EMA received from RPN an application for a CEC for the **regularization** or retention of existing development - administrative offices, construction vehicle parking/garaging, a **concrete batching plant**, minor ancillary equipment, parks and open spaces, buffer zones and mechanical activities on the said parcel. The project's operating capacity was stated as 150 cubic meters / day ready mix concrete. Its intended commencement date was March 2012. The expected life span of the project was stated to be permanent.

ii. On the 5th March 2012, the EMA issued a Notice of Refusal to issue a CEC for the establishment of the activities requested by RPN.

iii. On the12th March 2012 the Chaguanas Borough Corporation issued a notice to RPN to show cause why their concrete batching plant should not be removed which, though unfortunately worded, appeared to state that the Interested Party had commenced and completed the construction of a batching plant which was now in operation[2].

iv. On the15th March, 2012 the EMA issued a Notice of Violation to RPN for being in breach of Section 62(f) of the EM Act by failing to obtain a CEC for the above activities.

v. On the 30th April, 2012 the EMA and RPN entered into a Consent Agreement which purported to resolve the Notice of Violation, and in effect permitted the operation of the concrete batching plant on the said parcel on certain terms and conditions. The Consent Agreement was purportedly entered pursuant to Section 63(2) (b) of the EM Act.

[2] On 2nd February 2012, the interested party applied for Town and Country Planning Permission. On the 12th March, 2012, however they received a notice from the Chaguanas Borough Corporation to show cause why their batching plant should not be removed. By this letter, the Chief Executive Officer of the Chaguanas Borough Corporation made this observation:
"However your client commenced the construction completed the construction and is now operation [sic] the batching plant within the Chaguanas Borough Corporation."

Issue 1 - Whether the appellants were guilty of material non-disclosure

Misrepresentation / Non-disclosure

14. The trial judge at paragraph 46 of the judgement correctly considered the case of ***Brinks Mat Ltd. v. Elcombe*** **[1988] 1 WLR 1350** which dealt with an *ex parte* application for a Mareva injunction. Ralph Gibson L.J. set out principles relevant to material non-disclosure as follows (all emphasis added):

> *In considering whether there has been **relevant** non-disclosure and what **consequence** the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
> *(1) The duty of the applicant is to make "a full and fair disclosure of all the **material** facts:" see **Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac** [1917] 1 K.B. 486, 514, per Scrutton L.J.*
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.*
> *(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
> *(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92–93.*
> *(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is **deprived of any advantage he may have derived by that breach** of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.*

(6) Whether the fact not disclosed is of ***sufficient materiality*** *to justify or require immediate discharge of the order without examination of the merits* ***depends on the importance of the fact to the issues*** *which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*

(7) Finally, ***it "is not for every omission that the injunction will be automatically discharged****. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90.* ***The court has a discretion, notwithstanding proof of material non-disclosure*** *which justifies or requires the immediate discharge of the ex parte order,* ***nevertheless to continue the order, or to make a new order on terms.***

"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H–1344A.

15. It is the application of those principles in the judgment as outlined below which is challenged. The trial court held:-

167. Accordingly, in considering whether the Court ought to dismiss the instant claim on the ground on material non-disclosure, it is, in my view, necessary to consider the following issues: Whether the concrete batching plant, which is owned by the Interested Party was ***not operational*** *until October, 2012.*

Whether in its ***application for leave*** *to apply for judicial review, the second claimant* ***represented to the Court that in late 2011****, the concrete batching plant had been the source of their many* ***ailments****.*

If so, ***whether the misrepresented fact was important to the issues*** *which were to be decided by this Court on an application for leave to apply for judicial review.*

Alternatively, would the Court have withheld leave to apply for judicial review if the Court had been aware that the concrete batching plant ***had not been operational*** *when the* ***ailments*** *were allegedly contracted.*

The Alleged Non-Disclosure

16. The trial court found that the batching plant was not operational until October 2012. (See paragraph 174 of the judgment). The trial court also found that the many deponents on behalf of the appellant misrepresented that the **operation** of the plant and other activity at the time for the application for leave was the source of their ailments. It considered that to be a misrepresentation or non-disclosure.

17. The trial court based its conclusion that there had been non-disclosure upon, inter alia, paragraph 24 of the affidavit of David Bissoon filed on July 26th 2012. At paragraph 170 of the judgment the relevant extract was set out as follows: "*The **operation** of the plant generated noise, dust and fumes which affected various members of the Royal Park community including myself and my family"*

18. At paragraph 171 the court noted-" at paragraph 26 of his affidavit, David Bissoon places the events in a time context and had this to say: "*since mid-November 2011 I and my family members have become **stressed, anxious, and fearful** at the various health problems, **noise** and **other impacts** caused by the **construction, testing**, and **associated** activities of the said concrete batching plant*".

19. The reasoning at paragraph 172 of the judgment was as follows: *It is my view that the thirty one affidavits which were filed in support of the application for leave were designed to create an impression of looming tragedy covering the residents of Royal Park and Chincuna Gardens including **ill health, noise**, **dust** and confinement to the interior of their homes. The evidence linked all of this to the **operation** and **other activities associated** with the concrete batching plant*."

20. In fact however David Bissoon's evidence set out in paragraph 171 of the judgment made it clear that their **stress, anxiety** and fear were in relation not just to health problems, but to **noise** and **other impacts**. Further, these were caused **not only by** the **operation** of the plant, but also by its **construction**, **testing** and **associated activities**. These are all matters which relate to the **establishment** of the plant.

Whether the evidence justified the conclusion that the plant was operating in November 2011

21. The trial judge accepted the evidence of Mr. Ramhit (at paragraph 31 of his affidavit filed on January 23rd 2013) that the plant was not operational until mid-October 2012. It concluded that as Mr. Ramhit was not cross-examined it considered his evidence as unchallenged.

22. However, although Mr. Ramhit's evidence on behalf of RPN was not subject to cross-examination, acceptance of his evidence as unchallenged in the context of conflicting evidence (including his own – e.g. that there were **testing** activities), was not justified. Further that testimony, accepting as it did that there were **testing** activities, could not justify a finding of non-disclosure by the appellants and its deponents with regard to the date of **operation** of the plant.

23. At paragraph 47 of the judgment the trial judge noted (all emphasis added):-

> On the 10th February, 2012, Ms. Wanliss accompanied by officers of the Compliance Unit visited the site, in respect of which the complaint had been made. Ms. Wanliss described her findings in this way: *"The concrete batching plant was not in operation* ***at the time of the visit****. There was no evidence of* ***dust*** *on the* ***newly erectly*** *screens. Also observed was a* ***raw material stockpile****. There was* ***no evidence found that the plant was operating on a continuous basis****. There were clean conveyor belts. There was* ***no evidence of material*** *on the supporting structures of the plant* ***that would usually be present if the plant was operational…"***

24. The court considered Mr. Ramhit's evidence to be "*supported by Ms.Frances Mitchell-Wanliss, who testified on behalf of the defendant that during her visit in February 2012 the batching plant was* ***not operational".*** (See Paragraph 173 of the judgment). Similarly, with respect to her visit on March 22nd 2012 - see paragraph 35 of her affidavit).

25. In fact, Ms. Wanliss testified that the plant was not in operation **during her visits,** although she observed a stockpile of raw material. She testified that *there was* ***no evidence*** *found that the plant was operating on a* ***continuous*** *basis, and* ***no*** *evidence of* ***material on the supporting structures*** *of the plant that would usually be present if the plant were operational*. This is not the same thing as a categorical finding or conclusion by Ms. Wanliss that the plant was definitely not operational. However, the court treated it as such and did not pay regard to the other evidence including that of Mr. Ramhit.

26. In fact there is conflicting evidence as to whether the plant was operational before October 2012, namely :

a. the evidence of Ms. Wanliss as to two site visits, (in February 2012 and March 2012) (and one in April 2012 to monitor noise compliance) during which she did not observe the plant **in operation** on those particular days,

b. the evidence, as recorded in the Notice of Violation, that the office manager of RPN Mr. Seunarine had indicated to the EMA that the plant had been mobilized on site in September 2011. (page 1292 – Core Bundle Volume 2),
c. the evidence of the rejection letter from the Chaguanas Borough Corporation dated March 12th 2012 which appeared to refer to the plant being in operation and which could have been so construed - ("*and is now (sic) operation"*),
d. the internally contradictory affidavit of Roopchand Ramhit filed on 23rd January 2013, i. which at paragraph 47 refers to the plant being assembled in September to October 2011) and ii. which at paragraph 101 of the same affidavit refers to the plant being assembled in November – December 2011, and iii. which at paragraph 102 refers to the plant being commissioned in February 2012, and iv. also acknowledged that the mechanical components of the concrete batching plant were **tested** for a few days at various intervals.

27. The court also stated at paragraph 173 that Dr. Chernaik in his expert report filed on January 15th **2014** impliedly accepted this. In fact, Dr. Chernaik's first letter of instructions was issued June 21st 2012, (**after** November 2011).

28. The court concluded at paragraph 174 of the judgment- *'Having accepted that the Concrete Batching Plant was not **operational** until October 2012 and that the many deponents misrepresented that the **operation** of the plant was in November 2011 the source of their ailments I now proceed…".*

29. However the categorical finding that the plant was not operational, which was the basis of denying relief to the claimant / appellant, was not justified in light of the conflicting and untested evidence.

Whether the alleged misrepresentation – re operation of the plant – was relevant at all to the issues before the court -Materiality

30. At paragraph 39 of the affidavit of Mr. Ramhit he deposed that between August to December 2011 RPN had prepared the lands in relation to the batching plant. This it did by **carrying out various works** including:-

a) excavation of a pond,

b) compaction of a blue metal crusher run stone road approximately 300 feet in length and laying a pitch run gravel road around the perimeter of the lands,

c) concreting two and a half acres of lands where vehicles were parked and where the concrete batching plant was operated.

31. It is clear therefore that these were all activities that would fall within the complaints of the appellants that they were adversely affected by **construction**, **testing** and associated activities of the concrete batching plant. It would not be fair to characterize their complaints as relating **solely** to the **operation** of the plant. Neither would it be fair to characterize their complaints about its operation on their health as being **solely** in relation to their **health** or other ailments.

32. Their complaints were in relation to:

i. the broader spectrum of **activities** concerning the establishment of that plant and
ii. a broader range of **effects** upon them including fear and anxiety, in relation to the impact of the **construction**, testing and **associated activities** of the said plant.

33. The Appellant's/Claimant's affidavit evidence did make reference to noise ,dust and fumes, and adverse effects which continued to be suffered by the deponents and their families due to the alleged **operation** of the concrete batching plant since November 2011. However, in the context of the entirety of that evidence the issue as to whether the concrete batching plant was in operation in November 2011 or at all was not crucial, as their complaints were not confined to allegations of ill health caused by the operation of the plant. They were in fact wider in scope. They related to activities surrounding the establishment of the facility and associated works – its **construction** and **testing**.

34. At Paragraph 177 of the judgment the trial court stated,

> *"At that early stage, the Court had before it, a complaint of* ***irrationality*** *against the Defendant in respect of its permitting the* ***establishment*** *of the concrete batching plant without requiring its owners to* ***first obtain a CEC****. The complaint was built upon an evidential edifice of* ***severe suffering*** *caused by a concrete batching plant that had serious negative environmental impacts and was also* ***detrimental to human health****."*

35. The Court fell into error therefore in considering that the issue of whether or not the plant was operational:

a. was one which had to be resolved at all, given that they were also complaining about the effects on them of **construction**, **testing** and **associated activities** of the plant, (all matters independent of whether the plan was fully operational),

b. was one which could properly be resolved against the appellants on the untested and contradictory evidence, including internally contradictory evidence of RPN - given that there was indisputably a concrete batching plant on the land in September/ October 2011[3], which was in fact being tested, whether or not it were not fully operational,

c. was a matter which was sufficiently **material** to the **issue** as to constitute a **misrepresentation** or non- disclosure by the appellants,

d. was one which was sufficiently material to the **issue** as to justify the **exercise of any discretion to deny relief** to them in the context where:

i. the substantive claim to relief was based on **illegality** and breach by the EMA of the EM Act in entering into a Consent Agreement with RPN without requiring it to obtain a CEC, and,

ii. no interim relief had even been granted.

36. Their contention was that the establishment and operation of that plant in those circumstances should not be permitted. In fact the Appellant's claim was against the Respondent for judicial review of its **decision** dated the 30th April, 2012 to **execute a consent agreement** pursuant to Section 63(2)(b) of the Environmental Management Act No. 3 of 2000 to **permit the operation** of a concrete batching plant at Light Pole 62 Chin Chin Road, Cunupia which is owned and operated by the Interested Party/RPN Enterprises Limited. The issue of illegality did not require a determination as to whether the appellant or the deponents were then adversely affected by the plant's operations.

37. The trial court had dismissed as non-expert evidence by the appellants any causal link between their complaints of ill health and the establishment of the plant, (see paragraph 39 of the judgment). However, apart from allegations of ill health the court had before it, but failed to take into account, evidence of concerns relating to noise, and dust, actual and anticipated, both from (i) the operation of the plant and (ii) from activities relating to its **construction, testing**, and establishment of associated infrastructure. Whether the plant was, in November 2011, soon to be operational, partially operational,

[3] paragraph 47 of Ramhit affidavit) (at1097 of volume 2 core bundle ROA

or fully operational was irrelevant to this claim. Their complaints of ill health because of the **operation** of the plant were **merely one aspect of the entirety** of their complaints.

38. In any event the issue of whether the plant was operational or not was not relevant given that:-
(a) it had been **established** since September 2011 - October 2011 ; (see affidavit of Mr. Ramhit),
(b) it is clearly admitted that significant **construction** works had taken place surrounding its establishment and the preparation of the site for its establishment in August to December 2011 see (paragraph 39 of his same affidavit); and
(c) that the issue of law was whether or not such a plant could have been **allowed** to become operational, (whether or not it was at the time of the application operational), in the absence of a Certificate of Environmental Clearance.

39. In the instant case whether the plant was operational or not was not **material** to the issue of whether or not its operation, either current or in future, required as a mandatory pre-condition to its **establishment** and **operation** , the issuance to it of a CEC.

Whether the exercise of discretion by the trial judge to refuse relief on the basis of non-disclosure would have been justified

40. In **Peerless Limited v Gambling Regulatory Authority & Ors PCA No. 0049 of 2014** the Judicial Committee of the Privy Council referred to the **Brink's Mat** case at Paragraph 21 of its judgment as follows:-

> ***[21]*** *The duty of candour in judicial review proceedings applies throughout the proceedings. It applies most rigorously in particular in relation to ex parte proceedings where the court does not have the advantage of hearing from the opposing party and where the court must rely on the moving party's good faith in presenting his case fully, honestly and accurately.* In Brink's Mat Ltd v Elcombe *[1988] 3 All ER 188, [1988] 1 WLR 1350 Balcombe LJ stated the purpose of the ex parte principle thus, at p 1358:*
>
> *"The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained . . . . But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty.* ***Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice."***

As the final sentence makes clear the court must not lose sight of the need to ensure that justice is done. An overly rigid application of the principle may result in unfairness to a party depending on all the circumstances. Disregarding the merits of the claim may result in injustice. (All emphasis added)

41. According to the order granting leave for judicial review the trial judge apparently granted leave on the basis of the affidavits of Mr. Singh and Mr. Ramcharitar filed on July 26th 2012. This may have been an error in the order as the judge refers in the judgment to 31 affidavits of the appellants filed on July 26th 2012, including those of Mr. Bissoon, as the basis on which it granted leave. No interim relief was granted. No advantage was therefore obtained by the appellants, apart from the grant of leave itself, by any statements made by Mr. Bissoon.

42. When the evidence is examined in its context and in its entirety, I am satisfied that as a matter of both fact and law there was no **material** non-disclosure by the appellants, and no basis for such a finding by the trial court.

Conclusion on non-disclosure

43. In relation to non-disclosure, the trial court misconstrued the evidence and its context in relation to the operation of the concrete batching plant.

44. In fact:-

a. the trial court failed to consider the other evidence relating to whether the concrete batching plant was actually operational prior to October 2012.

i. In so far as the trial court made findings that the evidence of Ms. Wanliss was that the plant was **definitely** not in operation in November 2011, this related solely to the days of her visits, February 10th 2012, and March 22nd and April 2012.

ii. Even however if the plant were not fully in operation, the evidence of RPN itself clearly acknowledged that there had been **testing** of the operations of that plant, and that it had been commissioned in February 2012.

iii. In these circumstances, such a serious finding as one of misrepresentation and non-disclosure could not possibly be justified on the evidence before the court as it related to the operation of the plant.

b. Further in considering whether this amounted to material non-disclosure and exercising a discretion to refuse relief as a result, the trial court failed to appreciate that whether the plant was actually in **operation** in November 2011 was simply one matter, in the context of the totality of complaints. The complaints concerned, apart from the **operation** of the plant itself, **testing**, **preparation for construction**, **construction** and associated activities. These were all designated activities requiring a CEC as they related to the **establishment** of the plant and/or associated works.

c. The court's reasoning was that had it been aware that the plant was not operational, it would have considered the stock piling of aggregate to have been relevant as a possible cause of the problems of the appellants, remediable by a private law claim in nuisance. However, this would not have been relevant to the **issue** of **illegality** of the **decision of the EMA** to enter into a Consent Agreement raised by the appellants at the stage of application for leave.

45. A possible claim in nuisance by the Appellant against the Interested Party would not have had the effect of quashing the decision of the Respondent to enter into a Consent Agreement with the Interested Party, permitting its operation without a CEC.

Statutory context

46. Environmental Management Act Chapter 35:05 (all emphasis added)

Section 35 of the EM Act provides:

> *"(1) For the **purpose of determining the environmental impact** which might arise out of any **new** or significantly **modified construction**, **process**, **works** or other **activity**, the Minister may by Order subject to negative resolution of Parliament designate a **list** of **activities** requiring a certificate of environmental clearance (hereinafter called "Certificate").*
>
> *(2) **No person shall proceed** with any **activity** which the Minister has **designated as requiring a Certificate** unless such person **applies** for and **receives** a **Certificate** from the Authority.*
>
> *(3)*
>
> *(4) The Authority in considering the application may ask for further information including, if required, an **environmental impact assessment**, in accordance with the procedure prescribed.*

*(5) Any application which requires the preparation of an **environment impact assessment** shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority."*

47. Section 2 of the EM Act defines a **process** as,

*"any activity associated with any premises or vehicle which is **capable of releasing a pollutant** or hazardous substance into the environment;"*

A Designated Activity therefore requires a CEC.

Designated Activities Order -Whether the Establishment and Operation of a concrete batching plant is a Designated Activity

48. **The Certificate of Environmental Clearance (Designated Activities) Order 2001** (the 2001 Order) provides a list of activities that require a Certificate of Environmental Clearance.

49. The **establishment** of a concrete batching facility falls within the Designated Activities Order **as a Designated Activity**. It is listed at Activity 18 in the 2001 Designated Activities Order. It therefore requires a CEC.

Establishment of facility

50. **Activity 18 of the Order** provides (all emphasis added):

"Establishment of a facility for materials used in construction

*(a) The **establishment**, modification, expansion, decommissioning, or abandonment **(inclusive of associated works)** of a plant for the **manufacture** of raw materials or products **used in construction**.*

*(b) The **establishment**, modification, expansion, **decommissioning** or abandonment **(inclusive of associated works**) of a facility for the **packaging**/containment of asphalt and **cement**."*

Operation

51. Activity 18, which refers to establishment, also covers stages, through the life of the plant from its inception, (establishment), including the intermediate stages of any modification or expansion, and ultimately to its termination, (decommissioning or abandonment). It must also logically refer to the intermediate stage of its operation.

52. The operational stage of the activity, (which necessarily must ordinarily precede the decommissioning stage), must therefore be relevant to the definition of *activity*, and must be included in it.

53. This is reinforced by the **Certificate of Environmental Clearance Rules 2001** which stipulate **the information required** for a CEC application. This includes information relating to **operation** of a facility. Such information would not be relevant if the operation of a plant were not required to be subject to a CEC.

Information required for a CEC application

54. The Certificate of Environmental Clearance Rules 2001, though subsidiary legislation, and not determinative of the construction, illustrates that an application for a CEC for an activity requires submission of information that relates not only to the establishment phase of a plant or facility but also to its **operation**. Information required for a CEC is set out under **Rule 3(4) and (5) of the CEC Rules**: (all emphasis added)

> *"(4) The application shall contain –*
>
> *(a)*
>
> *(b) an identification of the **designated activity** as set out in the Schedule to the Order; and*
>
> *(c) the location of the proposed activity.*
>
> (5) The following information shall be supplied by the applicant in support of his application:
>
> *(a) the **purpose** and **objectives** of the activity;*
>
> *(b) a description of the site and the **areas likely to be affected by the proposed activity**;*
>
> ***(c) the size and scale of the activity including capacity, throughput, land space and covered areas;***
>
> *(d) a description of the activity explaining—*
>
> *(i) the types of **processes** and equipment or machinery to be involved;*

*(ii) the **type**, **quantity** and sources of **input** materials;*

*(iii) the **quantity** and destination of any **by-products**, including any waste;*

*(iv) the modes of **transportation** that will be used **to carry out the proposed activity** and the potential **effects of such transportation**;*

*(v) the volume of **intermediate** and **final products**; and*

(vi) the frequency or rate of extraction with respect to use of natural resources;

*(e) the **expected life** of the activity;*

(f) the proposed schedule of actions from preparatory work to start-up and <u>operation</u>;

(g) --."

55. This information required does not only concern the physical construction for the facility. It includes, *inter alia*:

a. the **purpose and objectives** of the activity;
b. ***areas likely to be affected by the proposed activity***. (This must include areas affected during both construction and thereafter, during its **operational** stage).
c. the scale of the activity including the **capacity** and **throughput**;
d. the description of the activity including the **<u>processes</u>** involved;
e. **the type, quantity and sources of <u>input materials</u>** in respect of the activity to be carried out;
f. the **quantity** and destination of any **by-products**,
g. the volume of **intermediate** and **final** products;
h. the modes of **transportation** that will be used **to carry out the proposed activity** and the potential **effects of such transportation;**
i. the expected **life expectancy** of the activity; and
j. proposed schedule of actions from preparatory work to start-up and **operation**.

56. The ***process*** for which a CEC was required, namely an ***activity*** that could result in the release of pollutants into the environment, cannot rationally be confined to the **establishment** of the facility during its construction. Such an activity, capable of releasing pollutants, must logically extend to its operation. Such activities do not end upon the **establishment** of the facility. Such activities are clearly capable of continuing during its **operation**. The definition of "process" and the description of the "designated activity" therefore could not exclude the operational phase of the facility.

57. The information highlighted above required to be submitted for a CEC is relevant to the operational stage of a facility. There would be little point in requiring such information if the CEC to be granted were not to cover the **operational** phase also of a facility.

58. The contention that the jurisdiction to issue a CEC is somehow terminated once the activity has commenced and the facility becomes **operational** because a different regulatory regime applies – (that is enforcement and compliance provisions under s. 62 et seq), is misconceived. The failure to obtain a CEC means that a developer does not obtain statutory authorisation to proceed with the designated activity in the first place.

59. By way of illustration, for example, if an application submitted for a CEC were to have stated that it was anticipated that ten tons of dust per day were to be emitted as a byproduct of its operations, this is a matter that would be directly relevant to whether a CEC is even granted in the first place. This would be so regardless of whether or not such excessive dust emissions could be subsequently regulated under s. 63, or under separate rules relating to dust pollution.

Certificate of Environmental Clearance Rules 2001

Whether s. 35 (2) of the Environmental Management Act (EM Act) establishes a mandatory precondition for the commencement of a designated activity

60. Activity 18, under which the establishment of a concrete batching facility falls, is a Designated Activity.

61. When considered in the entirety of the statutory context, that is s. 2, s.35 and the CEC Rules, Activity 18 also includes the **operation** of that facility.

62. Section 35 of the Environmental Management Act provides in clear, express, and unambiguous language for the requirement to obtain a CEC to conduct an activity **designated** as one which requires a certificate.

63. It also provides within it the sanction for failure to comply with s. 35 and obtain such a CEC- see s. 35(2)

35 (2) <u>No person shall proceed</u> with any activity which the Minister has designated as requiring a Certificate <u>unless</u> such person applies for and <u>receives</u> a Certificate from the Authority.

It could hardly be any clearer.

64. Any construction that requires s. 35 (1) to be read subject to s. 63 (2) (b) must therefore be compelling. No such compelling argument has been adduced.

PART VI
COMPLIANCE AND ENFORCEMENT (all emphasis added)
62. *For the purposes of this Part and Part VIII, "**environmental requirement**" means the requirement upon a person to—*

*(f) apply for and **obtain** a Certificate of Environmental Clearance;*
(g) comply with the conditions and mitigation measures in any such certificate;

Section **63 of the EM Act**
63. *(1) Where the Authority reasonably believes that a person is in violation of an **environmental requirement**, the Authority shall serve a written notice of violation (hereinafter called "Notice") on such person in a form determined by the Board, which shall include—*
(a) a request that the person make such modifications to the activity within a specified time, as may be required to allow the continuation of the activity; or
(b) an invitation to the person to make representations to the Authority concerning the matters specified in the Notice within a specified time.
*(2) Where a matter specified in the Notice may be satisfactorily explained or **otherwise resolved** between the person and the Authority—*
(a) the Authority may cancel the Notice or dismiss the matters specified in the Notice; or
*(b) an **agreed resolution** may be **reduced in writing** into a **Consent Agreement**.*

65. Under Section 62(f) of the EM Act, it is an environmental requirement to first apply for <u>and obtain</u> a CEC. This environmental requirement is linked to Section 35(2) of the EM Act which creates a statutory prohibition, namely, that **no person shall proceed** with any **designated activity <u>unless</u>** such person **applies** for and **<u>receives</u>** a CEC from the Authority.

66. A Consent Agreement was entered into between the EMA and RPN Limited. The agreement, as stated in the judgment at paragraph 57, "*recited the reasonable belief of the EMA that RPN was in violation of the requirement to apply for a certificate of environmental clearance*". The Notice of Violation recited (at page 1292 –Volume 2 Core Bundle) that the EMA proceeded on the basis the EMA reasonably believes that (RPN) the violator, was in contravention of an environmental requirement as described in s. 62(f) of the Act. This is the requirement to apply for **and obtain** a CEC.

Yet in the Consent Agreement the EMA absolved RPN from the requirement to obtain such a CEC for the **establishment** of the plant.

67. Instead, it purported to impose a requirement to apply for and obtain a CEC prior to conducting activities "*where the violator intends to **modify**, **expand**, **decommission**, or **abandon** (inclusive of associated works), a plant for the manufacture of raw materials or products used in construction*". (at1304 –Volume 2 Core Bundle)

68. In fact, the application for a CEC for the establishment of a concrete batching plant dated February 1st 2012 had been refused on March 5th 2012.

69. Section 63 (2) refers to a matter specified in the notice being "*satisfactorily explained or otherwise resolved*" as the basis for an agreed resolution being reduced in writing to a Consent Agreement. As a matter of statutory interpretation the plain and literal meaning of these words does not permit the mandatory requirement in section 35(2) of the EM Act, for a CEC to be obtained for the **establishment of the plant,** to be overridden or ignored once it commences **operation**. It does not expressly so provide, as it must, in order to override the express provision of s. 35 (2).

70. There is no basis on the evidence for considering that RPN could have satisfactorily explained the matter, specified in the notice, of its failure to obtain a CEC for the **establishment** of the plant. In fact, the Notice of Violation recites that it had been refused due to the commencement, continuation, and substantial completion of the works, prior to receipt of the CEC application by the Authority. (Core Bundle Volume 2 at page1292 – Notice of Violation).

71. Neither is there any statutory justification for considering that the failure to obtain a CEC for the **establishment of the plant** can be "*otherwise resolved*" by conditions in a Consent Agreement. Nothing in Section 63 permits the EMA to override or dispense with the requirement in Section 35 to **obtain** a CEC for the **establishment and operation of the plant**. This is especially so therefore when the application for a CEC for the **establishment of the plant** had **not been granted**.

72. Exceptions to the application of specific provisions of the EM Act are expressly provided in the Act. If it were the intention of Parliament that **Sections 35-38** not apply to Part VI of the EM Act, including **Section 63,** it would not have been difficult for Parliament to have used the same formula to effect such intention as it did do in relation to other provisions within the same Act. For example, it

did expressly make provision for partially dis-applying **Sections 35-38** by so stating at **Section 39**[4]. See also section 44[5], which dis-applies 41 to 43 in defined circumstances.

73. Curiously, the EMA is now contending that operation of a concrete batching plant is not a Designated Activity under Activity 18 of the Order requiring a CEC, although its establishment was. This despite the fact that it issued a Notice of Violation on this basis, and referred to RPN as the violator in the Consent Agreement. If it intended that the violation referred solely to RPN's breach in **establishing** the concrete batching plant, but not to its **operation,** this finds little support in the statute and rules themselves.

74. This position produces the curious result of the Environmental Management Authority arguing **for a construction of its enabling statute which would limit** its jurisdiction to require a CEC for the establishment of a plant, **after operation** of such a plant **has commenced**, while the Concerned Residents argue in **support** of the EMA's powers to require a CEC for its **establishment**, even after it commenced operation without obtaining one.

75. The trial court was correct in concluding at paragraph 204 of the Judgment "*the Developer is enjoined against proceeding with designated activities without a CEC*" and also correct in concluding that "*no prohibition is effective in the absence of prescribed consequences*". The error is in concluding, "*accordingly the consequence of disobedience is provided for at Part VI*".

76. If a Developer is **enjoined** from proceeding with a designated activity without a CEC that prohibition constitutes the prescribed consequence for failure to comply with Section 35(2).

77. It is not therefore necessary to look to Part VI of the EM Act to ascertain what are the consequences of proceeding with a **Designated** Activity without a CEC. Even if:

(i) Section 62(f) echoes the requirement upon a person to apply for and obtain a Certificate of Environmental Clearance, and even if,

[4] **39.** Sections 35 to 38 inclusive shall not apply to—
(a) any activity with respect to which, prior to the date on which review under this section first became applicable, all final approvals necessary to proceed already had been obtained from all other governmental entities requiring such approvals; and
(b) any activity with respect to which, prior to the effective date on which review under this section first became applicable, outline planning permission or full planning permission under the Town and Country Planning Act had already been obtained.

[5] **44.** Sections 41 to 43 shall not apply to any activity with respect to which, prior to the date of designation of an "environmentally sensitive area" or "environmentally sensitive species", all final approvals necessary to proceed had already been obtained from or for which application had been made to all governmental entities requiring such approvals.

(ii) Section 63(1) of the Environmental Management Act provides, as it does, for the issue of a Notice of Violation in respect of violation of an environmental requirement,
there is nothing in Section 63 which negates or avoids the literal construction of Section 35(2) of the Act that "**no person shall proceed**" with a (designated activity) unless that person applies for and received a certificate from the Authority.

78. The prohibition against proceeding with any designated activity is expressly stipulated in Section 35(2) of the Act. There are no words in section 63 which provide that section 63 is not subject to the general prohibition in section 35(2). It is not ameliorated or modified by anything in the language of Section 63 of the Act.

79. As provided by section 63(2) nothing prevents the Authority from cancelling the Notice, or dismissing the matter specified in the Notice, or entering into an agreed resolution, which is reduced in writing into a Consent Agreement. However, in the absence of clear and unambiguous language within the statute itself, it cannot do so in relation to a failure to obtain a Certificate of Environmental Clearance where required for a Designated Activity, unless a Certificate of Environmental Clearance has been applied for and **obtained**. It is in that circumstance that the Authority may then cancel the Notice or dismiss the matter specified in the Notice. But nothing in s. 63 dis-applies the requirement in section 35(2) to obtain a CEC for the establishment of the facility.

80. Alternatively, the recognition that an applicant must proceed to **obtain** the CEC for the **establishment** of the plant may form part of the agreed resolution to be reduced into writing in a Consent Agreement. In fact it could readily have been introduced into the instant Consent Agreement, simply by the insertion of the words at Clause 2 (1) of the Consent Agreement,– after the word "*EMA"* - such as "*for the **establishment** and **operation** of the plant as well as*" before the words "*prior* to *conducting activities*". (See page 1304 of the Record of Appeal Core Bundle Volume 2). The EMA's belief that it was empowered to resolve the Notice of Violation by requiring a CEC only in respect of future conduct "*where the violator intends to modify, expand, decommission, or abandon (inclusive of associated works), a plant for the manufacture of raw materials or products used in construction* , (while monitoring the operations at the site), cannot be justified.

81. Nothing in the language of Section 63 is inconsistent with Section 35(2) when it is so read. These Sections are to be read together. What is not permissible however is the reading into those

Sections of an artificial conflict, such that Section 63 is to be read as constraining, modifying and in effect overriding, the requirement under s. 35(2) of the Act to obtain a CEC for the establishment of the plant/facility.

82. The Respondent contended that there is no power to award a retrospective CEC. An examination of the provisions governing CECs does not bear this out. This is nowhere expressed in the Act. In any event however, there is no middle route through the legislation. It cannot be contended on the basis of the statutory language that if a party commences an activity subject to a CEC but without applying for or obtaining one, he nevertheless escapes for all time the requirement to obtain one, and becomes subject solely to the enforcement provisions of the Act.

83. The legislation is clear. Under s. 35(2), he simply cannot proceed with that activity. The enforcement and compliance provisions do not permit that requirement for a CEC to be waived. If the EMA is correct that the **operation** of a concrete batching plant is not a Designated Activity requiring a CEC, and that a CEC for its **establishment** cannot be granted retrospectively, then RPN would simply not have been able to continue the operation of the plant.

84. Given :-

(i) my interpretation of s. 35 that the requirement of a CEC for the establishment of the plant cannot be waived, and

(ii) the EMA's view that it cannot grant a CEC once the plant / facility has commenced operations, if the EMA's construction is carried to its logical conclusion RPN, or a party in its position who had commenced operations without a CEC, could not ever hope to obtain a CEC from the EMA.

85. The EMA's suggested construction would not permit the possibility of obtaining a CEC for either the **establishment** of the plant, or its **operation,** once it had commenced operation. Therefore the EMA's suggested construction of the Designated Activities Order would be more draconian than one which recognized at least the possibility of an application for a CEC for the **establishment** of a plant, **after** the **operation** of a plant had been commenced without a CEC, with the possibility of permission for future operation being granted subject to conditions.

86. It is the Appellant's contention that:

a. The Respondent cannot dispense with the statutory prohibition set out in Section 35(2). If it were otherwise any exceptions could have been expressly provided in the Act itself. In fact, exceptions have been specifically provided for, (for example under Section 39 and under Section 44 of the EM Act, which are however inapplicable in this case).

b. The decision fails to remedy the mischief, which Section 35 seeks to eliminate, of persons proceeding with a designated activity without first obtaining the requisite approval by CEC.

c. The decision fails to serve the public interest as it permits a person to circumvent a statutory procedure designed to promote openness, transparency, fairness and public participation, and instead favours a closed, private transaction.

These are in fact the conclusions arrived at as a result of the foregoing analysis, and these contentions must therefore be upheld.

Conclusion

Whether, even if s. 35(2) b of the EM Act does establish such a mandatory precondition, such pre condition, that a CEC be obtained, can be subject to the exercise by the EMA of compliance and enforcement powers to enter into a Consent Agreement under s. 63(2)b of that Act

87. **Section 63(2) (b) of t**he EM Act does not authorize the EMA to override the provisions of Section 35(2) of that Act. The EMA therefore had no power to waive the application of Section 35(2), whether by entering into a Consent Agreement under Section 63 or otherwise. Its powers were to be exercised within the confines of the enabling statute. By entering into a Consent Agreement with RPN, without requiring RPN to first apply for and **obtain** a CEC for the operation of the concrete batching plant, as mandated by Section 35(2), the EMA acted without jurisdiction, and therefore illegally.

88. It was submitted that the consequences of the EMA's construction of s. 63(2)(b) of the EM Act would be as follows:

i. If a developer establishes or substantially constructs facilities associated with **Activity 18** without first obtaining a CEC, it would not be issued a CEC. Instead, the Respondent may issue a negotiated Consent Agreement, not required to be placed on the National Register and therefore not being subject to any public scrutiny;

ii. No relevant environmental information, including operational information and mitigation measures, in relation to designated activities subject to a Consent Agreement, would be publicly accessible via the National Register;[6]

iii. Violators of **Section 35** could potentially benefit by expediting construction of a facility for a Designated Activity in order to avoid delays and bureaucracy of the CEC process;

iv. It is also apparent that if no application is ever made for a CEC, in cases where otherwise an EIA might have been required, there would be a deprivation of the possibility of a right of public participation in environmental decision-making.

v. It was contended that the consequences of the Appellant's proposed construction identified by the Appellant would include the following:

a. There will remain one major statutory regime for the regulation of significant environmental impacts in Trinidad and Tobago - CECs will regulate impacts accruing from pre-construction to abandonment/decommissioning;

b. While Consent Agreements may be used to, inter alia, implement preventative and mitigatory measures commensurate with the environmental impact associated with establishing a facility for a Designated Activity without a CEC, they would still require applying for a CEC in respect of the establishment and operational phases of the designated activity; (All relevant environmental information, including operational information and mitigation measures, in relation to Designated Activities subject to CECs will be publicly accessible via the National Register);

c. Relevant environmental information would be open to public scrutiny if it affects the public, as such information would be contained in a CEC application in respect of a Designated Activity;

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[6] **National Register**
Section 8 of the CEC Rules *states that,*
"(1) The Authority shall establish a National Register of Certificates of Environmental Clearance.
(2) Subject to subrule (3), the Authority shall enter in the Register the details and status of every—
(a) ***application****,* ***including the information supplied under rule 3(5);***
(b) -
(c) ***Certificate****, including the appropriate mitigation measures, other* ***terms and conditions subject to which it is issued*** *and transfers approved by the Authority under rule 11;*
(d) ***refusal to issue a Certificate and the reasons for refusal****; and*
(e) -
Section 9 of the CEC Rules *states that,*
"(1) The Register shall be open to examination by members of the public at such place or places and during such times as the Authority may notify from time to time in the Gazette and in one or more daily newspaper of general circulation

d. All developers engaging in Designated Activities, whether in violation of **Section 35** or not, would be treated equally by the Respondent in fulfilling its legislative mandate.

Having analyzed the statutory context above, this in fact would be the case, and the appellant's submissions in this regard are accepted.

Conclusion

89.

a. There was no **factual** basis for a finding of material non-disclosure on the part of the appellants.

b. However, even if there had been the nondisclosure alleged, it would **not**, as a matter of law, have been sufficiently **material** in the context of this case to justify the exercise of discretion to deny relief on that basis.

c. The EMA's decision to enter into a Consent Agreement without requiring that a CEC be obtained was based upon an incorrect construction of the Environmental Management Act and was therefore illegal because:-

d. The **establishment** of a concrete batching plant is a **Designated Activity** under Activity 18 of the Certificate of Environmental Clearance (Designated Activities) Order, and therefore requires a CEC;

e. The **operation** of a concrete batching plant must be read as included in the definition of a **Designated Activity** under Activity 18 of the Certificate of Environmental Clearance (Designated Activities) Order, and it therefore requires a CEC;

f. Section 35 (2) of the Environmental Management Act, (the EM Act), establishes that a CEC must be obtained as a mandatory precondition before proceeding with a **Designated Activity.**

g. The EMA has no power, statutory or otherwise, to dispense with that mandatory precondition by entering into a Consent Agreement under s. 63(2) (b) of the EM Act.

Disposition

90. It is noted that RPN, having failed to obtain planning approval relocated the concrete batching plant. As to the order of Mandamus requested this relief is now of academic interest only. However, the orders sought for a declaration and for certiorari would not be academic even now, as they are the natural consequence of the determination by this court that the interpretation by of its powers under Section 63(2) (b) of the EM Act was erroneous.

91. The EMA's actions consequent upon that erroneous interpretation were therefore illegal. It remains the case therefore that the decision of the respondent to have permitted the operation of the concrete batching plant was unlawful, null and void, and of no effect. There remains the need for certainty with respect to the legality of its action in entering into the Consent Agreement. There remains the need for statutory construction with respect to this issue. It also remains necessary to quash that decision rather than letting it stand as a precedent that may in future be relied upon by the EMA. The relocation of RPN's plant does not affect any of these issues. Further, the CRC was entitled to have succeeded in the High Court and any orders for costs against it must be reversed.

92. I would allow the appeal and order that the EMA pay to the appellants their costs incurred in this appeal and in the court below. I would also have granted the orders set out below.

Orders

93.

a) The appellant's appeal is allowed.

b) A declaration is granted that the decision of the respondent to permit the operation of the concrete batching plant at light pole 62 Chin Chin Road, Cunupia, owned and operated by RPN Limited, dated April 30th, 2012 was unlawful, null and void and of no effect, and:

c) An order of certiorari is granted quashing the decision of the respondent by which it executed a consent agreement dated April 30th, 2012 with RPN as the violator.

d) The respondent is to pay to the appellants (i) the costs of the proceedings before the High Court to be assessed by the Registrar of the Supreme Court or her designate and (ii) the costs of the appeal, being two thirds of the costs assessed for proceedings before the High Court.

Peter A. Rajkumar

Justice of Appeal