THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL
PORT OF SPAIN

CA NO. P050 2018
CLAIM NO. C 2017. 03452

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

And

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

And

IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT AUTHORITY ("EMA") DATED ON OR ABOUT THE 2ND DAY OF JUNE, 2017, TO ISSUE A CERTIFICATE OF ENVIRONMENTAL CLEARANCE ("CEC") TO THE MIISTRY OF WORKS AND TRANSPORT ("MOWT") FOR THE SPECIFIC PURPOSE OF "THE ESTABLISHMENT OF A 5000 METER HIGHWAY ALIGNMENT" COMMENCING AT A POINT 300 METERS EAST OF THE CUMUTO MAIN ROAD AND ENDING AT A POINT 600 METERS WEST OF GUAICO TRACE, SANGRE GRANDE

BETWEEN

FISHERMEN AND FRIENDS OF THE SEA

Appellant/Intended Claimant

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY

Respondent/Intended Defendant

AND

THE MINISTRY OF WORKS AND TRANSPOT

First Interested Party

AND

KALL COMPANY LIMITED also called KALLCO

Second Interested Party

Appearances

Mr. A. Ramlogan SC, Ms. J. Lutchmedial, Mr. A. Pariagsingh, Mr. G. Saroop, Mr. R. Abdool on behalf of the Appellant

Ms. D. Peake SC, Mr. R. Heffes-Doon, Ms. A Rahaman, Ms. Giselle Landeau-Birmingham, Ms. J. Partap on behalf of the Respondent

Mr. I. Benjamin Ms. S. Dass Ms. T. Jorsung on behalf of the First Interested Party

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

Oral decision delivered by Rajkumar J.A. on February 9th 2018

1. The Aripo Savannas have been designated an environmentally sensitive area (ESA)[1]. The appellants are a non-profit company focussed on protecting the environment. The Environmental Management Authority (EMA) is a body entrusted by Parliament, with, inter alia, administering the statutory regime established by the Environmental Management Act, (the "EM Act" or "the Act") for protecting the environment and balancing competing interests.

2. The Ministry of Works via its agent NIDCO awarded a contract to Kallco on September 1st 2018- Package 1A- for the construction of a 5 km stretch of highway. That highway is planned to run alongside the environmentally sensitive area.

3. On **June 22nd 2017** a Certificate of Environmental Clearance (CEC) was granted by the EMA for the construction of the highway with a 100-meter buffer zone subject to certain conditions. It was placed on the National Register on July 3rd 2017. Those conditions have now been fulfilled.

4. On September 29th 2017 the appellants filed an application for judicial review. There were various hearings including one on November 2nd 2017. As at that date, the conditions attached by the EMA to the Certificate of Environmental Clearance (CEC) had not been fulfilled and work had not commenced.

5. i. On or around December 1st 2017 notice was published and circulated that it was intended that work on the contract would commence on January 2nd 2018.

[1] Legal Notice 152 of 2007

ii. On December 20th 2017, the contract with Kallco was signed.

iii. On January 5th 2018 NIDCO instructed Kallco to proceed to commence works.

iv. On January 8th 2018 work commenced.

v. On January 15th 2018, the appellants sought an injunction. It was initially granted by the trial judge of his own motion, but was subsequently discharged on 6th February 2018, when he concluded that the application for judicial review was filed out of time and that all the grounds filed in support of the application had no reasonable prospect of success in any event.

6. The appellant has filed an appeal and an application for interim relief pending the hearing of its appeal against the decision of the trial judge wherein he dismissed the application for leave to apply for judicial review of the decision of the EMA to grant a CEC.

7. That appeal will be heard before a panel of judges of the Court of Appeal. The issue for their consideration would include an assessment of whether the trial judge was plainly wrong in refusing to grant leave.

8. The issue before this court is whether a case has been established for the grant of interim relief and specifically for the grant of an injunction.

9. This court needs to consider therefore whether the factors referred to at paragraph 31 in the judgement in **The Chief Fire Officer v Public Service Commission v Elizabeth Felix Phillip and 37 others Civ. App No. 49 of 2013** per the Honourable Bereaux JA, (delivered 7th October 2013), when properly considered, weigh in favour of, or against, the grant of an injunction.

10. As the first of those factors is whether there existed a serious issue to be tried, it would be necessary to examine:-

a. the grounds of the application, and the manner in which each was dealt with by the trial judge in arriving at his conclusion that there were no grounds with a reasonable prospect of success;

b. whether in his assessment of the issue of any delay by the appellants, and in the exercise of his **discretion** not to extend any time frame applicable for the filing of the application for judicial review, he could have been said to be *plainly wrong*.

(The test for reviewing or setting aside the exercise of a trial judge's discretion is well known. See ***Christianne Kelsick (An infant suing by her father and next of kin, Rawle Kelsick) v Dr. Ajit Kuruvilla Civil Appeal No. P 277 of 2012)***[2]

11. According to **Chief Fire Officer** the grant of leave is not synonymous with the grant of an injunction or interim relief. (see Paragraph 48 per the Honourable Bereaux JA[3])

[2] ***Appellate Role***
5. The role of an appellate court in reviewing the exercise of a trial judge's discretion is well known. The decision of the trial judge must be shown to be plainly wrong. A decision is plainly wrong, not only if a judge is shown to have erred in principle, by disregarding relevant considerations or taking in consideration irrelevant ones, or because the decision is against the weight of or cannot be supported by the evidence; but also when a judge is required to balance multiple considerations and the approach to and/or result of this balancing exercise is plainly wrong.

[3] *The judge in assessing the balance of justice correctly referred to the Cyanamid guidelines and the manner of their application in public law but thereafter she fell into error. The judge considered that it was sufficient that the applicants has established an arguable case. But the grant of permission to seek judicial review does not necessarily equate with the entitlement to an injunction when the Cyanamid guidelines are applied. In this regard the judge appeared to conflate the fact that the applicants had established that their case was arguable (which entitled them to permission to file for judicial review) with their entitlement to an interim injunction. These are separate considerations. She ought to have considered as a separate question, whether, having regard to the Cyanamid guidelines, she should then grant the injunction. There was* ***no examination of the Cyanamid guidelines*** *....*

12. The test for whether leave should be granted for judicial review is also well known and derives from the case of **Sharma v Brown-Antoine and others - [2007] 1 WLR 780** as follows:

> *The ordinary rule now is that the court will not grant leave to apply for judicial review unless satisfied that there is an* ***arguable ground for*** judicial review *having* ***a realistic prospect of success.***

13. In this case the issue of whether there is a serious issue to be tried involves a consideration as to whether leave could have been granted in the first place. However it would be necessary to consider further whether, if the appellant, having surmounted that hurdle, could also surmount the hurdle of establishing on its application that the other **Cyanamid** requirements are satisfied. It is only after surmounting those thresholds that the issue would arise as to whether interim relief may be granted in this case.

14. The issue of whether there was sufficient material upon which to even grant leave was addressed by the trial judge in an item-by-item examination of the grounds.

15. It is not necessary at this stage to address all of the grounds, once some, or even one, satisfies the test for leave.

16. At this stage it is not necessary to decide the issues that a fuller panel of the Court of Appeal will be called upon to decide, namely, i) whether the trial judge was actually plainly wrong in deciding that the application was filed out of time, and that time for the application should not be extended and ii) whether, as a matter of law, the grounds were each unarguable, with no realistic prospect of success.

17. However it is necessary to consider these issues to the extent that if they are each unarguable on appeal there would be no basis for granting interim relief. Interim relief would not be available in respect of a claim for judicial review for which the appellant is not even entitled to leave. Such a claim would, by definition, have little prospect of success. It is only if there are grounds that are arguable with a **realistic prospect of success** that the court can consider whether, or conclude that, there are serious issues to be tried. (A determination that there are in fact serious issues to be tried is a preliminary threshold to be overcome before considering whether to grant interim relief).

18. The first issue to be considered is that of delay, and whether it is arguable that the trial judge was plainly wrong in not exercising his discretion to extend time for the application for leave, given that the outer limit of 3 months from the date of the CEC was exceeded.

19. The appellants would have had less than 3 months to file the application from the date that they could have become aware of the decision – July 3rd 2017 - the date of placing the CEC on the National Register. However they did not sit idly by within that time while the clock was ticking. They filed a Freedom of Information Act (FOI) request in August 2017 and engaged in correspondence. While these steps were not effective to extend the time for filing their application, they were matters that could have been taken into account in the exercise of discretion to extend time.

20. The trial court considered that it had no evidence on affidavit of an application to do so. (See paragraph 36 of the trial judge's judgement). However, it did have evidence of the date of placing the CEC on the National Register, as it referred to the chronology at paragraphs 11 and 37 of the judgement.

Whether it is arguable that trial court was plainly wrong in the exercise of discretion not to extend time

21. It considered the importance of the Environmentally Sensitive Area (ESA) at paragraph 38, and considered the chronology at paragraph 39. It found that the fact that the area was an Environmentally Sensitive Area **on its own** could not justify extending time.

22. The court does not appear to have considered the **combination** of:-

(i) the fact that the area was designated by **law** as environmentally sensitive, **and**

(ii) the fact that the CEC was placed on the National Register on July 3rd 2017, **and**,

(iii) that the appellants filed their claim on September 29th 2017 within 3 months of that date, **and**

(iv) that the time frame from the actual grant of the CEC was exceeded by only 7 days, **and**

(v) that the appellant is a non-profit organisation that is seeking to protect and uphold the environmental laws of this country in the public interest, **and**

(vi) the issue of prejudice to the respondents specifically arising from any alleged delay in filing their application 7 days late[4], **and**

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

as being matters that ,**in combination,** may have justified a discretion to consider extending time.

[4] itself arguable, both as a matter of fact and as a matter of law, given paragraph 20 of the **Abzal Mohammed** v **PSC** Civ App No. 53 of 2009, and its subsequent treatment by a recent Court of Appeal in the judgment of the Honourable Jamadar J.A. especially paragraphs 49 et seq.

23. Whether the trial court was plainly wrong in not taking these or any other combination of matters into account, is a matter to be determined by the panel deciding the appeal. However, I find that it is arguable that these and other matters needed to have been taken into account, and that that is sufficient at this stage when the issue of interim relief is being considered. I do not consider that, at this stage, the case for review of the exercise of the trial judge's discretion not to extend the time frame for judicial review, can be described as unarguable.

24. While I am satisfied that the trial judge had been addressed on the need for promptness even within the outer 3 month period referred to in the Judicial Review Act, he did not address this in his written reasons as a default position that he would have relied upon in refusing leave. This is not a criticism - he did not need to, given that he relied on the applicant's exceeding the outer 3 month period. However, it cannot be said in those circumstances that the trial judge **considered** it unarguable that the appellant further needed, **in this case,** to have acted **promptly** within the 3-month period. There is no such finding that can be read into those reasons. At this interlocutory stage, it is only necessary to consider whether it is arguable that the appellant acted **promptly** apart from the 3-month period. In the circumstances whether the appellant was in breach of a duty to act, or was required to act, more promptly within the outer 3-month period, cannot be said to be unarguable.

25. I do not consider either the issue of delay, or review of the trial judge's discretion not to extend time for the application for judicial review, to be unarguable. It is therefore necessary to turn to the grounds and assess whether an appeal of the trial judge's treatment of any of them can be said to be arguable such that it could be demonstrated on appeal there could exist a serious issue to be tried or an ***arguable ground for judicial review*** *having* ***a realistic prospect of success.***

26. Some of the grounds are more cogent than others. For example, the ground that the time period for consultation of 33 days was insufficient, though it exceeded the 30 day time period provided for in the EM Act, does appear unarguable, and was not pursued in argument before this court[5]. (paragraph 51 of the judgement)

27. Given time constraints, I must omit consideration of some grounds, for example (vi), and (ix). Their consideration is unnecessary as it is only necessary to consider whether **any** of the grounds raised would have entitled the appellant to leave, so as to then lead to the further consideration as to whether an interim injunction could be granted.

28. Further I do not propose to address grounds such as (ii), (iii), (iv), (vii), and (viii), as their arguablity appears questionable on the material before me, though I recognise that their eventual arguablity is for determination by the panel hearing the appeal.

29. I will therefore focus on grounds (i), and (xi).

30. The trial judge addressed ground (i) as follows: "*Looking at the first ground , it is clear that neither rule 5(2) or 5(3) impose any obligation on the EMA to conduct any consultations , so this ground clearly has no realistic prospect of success".(*paragraph 46 of the judgment*)*

31. Rules 5 (2) and 5(3) of the CEC rules are as follows: (all emphasis added)

> 5. ……..
> *(2)* ***The applicant shall****,* ***<u>where appropriate</u>****, conduct consultations with relevant agencies, non-governmental organizations and other members of the public on the*

[5] The grounds are set out in the record of appeal – volume 1 page 6

draft TOR, and may, within twenty-eight days after notification under subrule (1)(c), submit written representations to the Authority requesting that the draft TOR be modified and setting out—

(a) the manner in which he proposes that the TOR should be modified;

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

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

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

32. At first reading rules 5 (2) and 5(3) of the CEC rules do not appear to envision a role for the EMA with respect to consultation on the terms of the terms of reference. Further, they appear to leave to the discretion of the applicant for the CEC whether to have consultations with the public, by the insertion of the words, "*where appropriate"*. The contentions by the EMA in summary are that:-

a. they have no duty to consult;

b. that in so far as the duty to consult exists it is on the applicant, who in any event can dispense with that requirement, as it is only required to consult with members of the public "*where appropriate*";

c. that such consultation on the terms of reference for the Environmental Impact Assessment (EIA) is not necessary where, as in this case, no modification is sought by the applicant to the draft terms of reference.

33. The EMA contends that this ground is therefore unarguable.

34. The appellant contends that the rule must be construed purposively, in effect (my paraphrasing of my understanding of extensive submissions on this issue),

a. that the EMA cannot abdicate its role in overseeing the process of consultation, in that it must be satisfied that there has been effective consultation, and

b. that such effective consultation must include consultation with members of the public, who otherwise would not have the input envisaged by the rules in the finalisation of the terms of reference for the Environmental Impact Assessment,

c. that there could not be an exception to that process of consultation with the public simply because the applicant for the CEC and the EMA were at idem on the terms of the draft terms of reference after their own consultation, under rule 5 (1) a, and,

d. that the failure to have the input of the public via the necessary consultation resulted in inadequate Terms of Reference and therefore an inadequate Environmental Impact Assessment leading to a challengeable CEC.

35. Senior Counsel for the contractor contends that if that were so then the appellant would be even more out of time as the challengeable decision would have arisen far earlier, (possibly from the date of the EIA or even the date of the final terms of reference). Senior Counsel for the appellant contends that were it to have challenged the decision at that point, in that case the appellant would then have been met with a claim that their challenge was premature. Further, there was no guarantee that the process would even result eventually in a CEC, (or, I might add, far less a CEC that the appellant found unacceptable such as the one under challenge).

36. I set out the arguments and counter-arguments to demonstrate that what at first sight may not have appeared arguable, does, on closer examination, appear to raise arguable issues. In fact, significant portions of the two days of hearing that were engaged in this application were devoted to arguing this allegedly unarguable issue.

37. Similarly, ground (v) by itself appears at first sight to give rise to no arguable issue. However, when read together with ground (i) it becomes a coherent part of the argument as to the construction of Rules 5 (2) and (3) of the CEC Rules. The mandate of the EMA, in resolution of any environmental concerns by participation, consensus, and alternative dispute resolution is recognised by s. 16 (2) of the Act, and is consistent with an inclusionary process of public participation. Whether that translates to a construction of Rules 5 (2) and (3) as contended by the Appellant is a matter for final determination at the hearing of the appeal, especially given the authorities referred to in **People United Respecting the Environment and Rights Action Group v EMA, Alutrint and The AG CV 2007-02263** on fair consultation in administrative law at page 181 et seq, and **FFOS v EMA and BP PCA No. 30 of 2004** – Privy Council -paragraphs 28 to 30 – (per Lord Walker- importance of consultation).

38. If the trial judge failed to fully consider these matters in rejecting grounds (i) and (v) as unarguable then this could be an arguable matter on appeal. At paragraph 46 of his judgement the argument on ground i. was dismissed summarily as follows:

> "*looking at the first ground it is clear that neither rule 5 (2) or (3) impose any obligation on the EMA to conduct any consultations, so this ground clearly has no realistic prospect of success."*

39. A literal construction of that rule may support that construction, but the argument is that a purposive and contextual interpretation would not. Whatever the eventual resolution of this issue it is sufficient in my view to raise the argument of an ***arguable ground for Judicial Review*** *having* ***a realistic prospect of success,*** and, in this case, an arguable case to engage the attention of the Court of Appeal.

Ground xi.

40. Ground (xi) was dealt with by the trial court from paragraph 66 of the judgement. The court referred to two (2) internal documents from the EMA, (at volume 2D Record Of Appeal page 2466, and 2474), wherein members of technical staff of the CEC Clearance Unit expressed strong disagreement with, inter alia, the issue of a CEC, with attached conditions to be complied with subsequently, as distinct from not granting a CEC until those conditions had been satisfied. They also took issue with the lack of public review (see page 2466 volume 2D ROA). Further the instructions from the managing director requested review by Tuesday 20th lunchtime and concluded "*I expect I will have a CEC for signature by Thursday 22nd (sic) 2017"*)

41. It was contended by the EMA that a. ultimately the decision maker was the managing director of the EMA, b. that while he could solicit the views of his technical team he was not bound by them, c. that another member of the EMA had also deposed that he agreed with the decision to issue the CEC, d. that the managing director of the EMA had explained why he chose to not follow the recommendations of those dissenting members of the technical team, e. that he had justified the decision to grant a CEC subject to compliance with subsequent conditions, and f. that in those circumstances it could not be said that no reasonable decision maker could have made the decision to issue the CEC, with conditions to be complied with

subsequently which could be monitored for compliance by the EMA. Further, that there was no duty to follow previous procedure to meet with the technical team and try to find common ground.

42. It is for the decision maker to make the decision, and for the court to be careful not to second-guess the substance of the decision maker's decision by substituting its own views, especially in a specialised area. However the issue of unreasonableness in the light of those documents was a matter properly raised for consideration. The area in dispute is designated an **environmentally sensitive area** by law. The fact that several technical staff at the EMA - specialists - were sufficiently concerned that a CEC should not have been granted, is a matter that a court dealing with the substantive matter may wish to consider- or it may not - preferring to accept the contention that the decision maker at the EMA is not required, in effect, to delegate his jurisdiction. The consideration at this stage is simply whether the issue of unreasonableness is arguable with a realistic prospect of success.

43. The process, time frame, and circumstances in which the CEC was granted, as revealed by those documents, was a matter that was arguable. Whatever the merits of the arguments, given the volume of conflicting evidence it is at least arguable that the discretion to dismiss the application without granting leave is challengeable.

44. Accordingly, I consider that there would be sufficient reason to consider that the appeal from the decision of the trial judge not to grant leave for judicial review is arguable. It certainly cannot be dismissed at this stage as entirely unarguable without a realistic prospect of success. The issue therefore becomes whether the appellant has satisfied the requirements for the grant of interim relief.

45. These were considered, together with supporting authorities, in the case of **Chief Fire Officer.**

Whether there a serious question to be tried

46. I note **paragraph 49** of that judgement as follows, on what this actually means. It is described as an amorphous concept in the following terms.

> **Paragraph 49**
>
> *This has always been a very fluid and amorphous question. The learning of the 1999 Supreme Court Practice Volume 1 at page 566 paragraph 29/L/4 is instructive. The question is posed thus:*
>
> *"What then is the American Cyanamid threshold test? Lord Diplock said it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious"? is there "a serious question to be tried"?, is there "a real prospect that he will succeed in his claim for a permanent injunction at trial"?...The prospects of the plaintiff's success are to be investigated to a limited extent. All that has to be seen is whether he has prospects of success which, in substance and reality, exist. Odds against success do not defeat him, unless that (*they*?) are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects are so small that they lack substance and reality, then he fails; for he can point to no question to be tried which can be called "serious" and no prospects of such success which can be called "real."*

47. In particular, it may be noted that odds against success do not defeat him, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects are so small that they lack substance and reality then he fails.

48. From the above discussion of the selected grounds it is clear that it cannot be said at this stage that the appellant's prospects are so small that they lack substance and reality. The issues referred to above could require "*deeper consideration at the substantive hearing*" (paragraph 49 ibid).

Adequacy of Damages

Would Damages be an Adequate Remedy

49. The challenge is based on apprehension of damage to the environment under the terms of a CEC, allegedly the end product of a process of inadequate consultation, with a buffer zone which does not provide sufficient protections. Those fears may be misplaced, but if it turns out that the appellant's challenge were to succeed, then any damage to the ESA may be irreversible.

50. It was contended that there is no work authorised or being conducted within the ESA. That is not the point however. The concern is that work outside the ESA, even with the buffer zone provided for, may yet have an impact within the ESA. If that were to result from a CEC which was the product of a successful challenge then damages may be insufficient to rectify such damage. In any event who would such damages be paid to? The damage would be to the environment, and indirectly the general public, for whose benefit the area was designated an ESA. The appellant is raising a challenge in the public interest but payment of damages to it could not be adequate to remedy damage either to the environment or the general public

resulting from adverse environmental impacts. Damages could not therefore be an adequate remedy in this case.

Balance of Justice

Prejudice to the Appellants if an Interim Injunction is not Granted

51. The apprehension is that if the injunction is not granted that work will continue which may adversely impact the ESA, perhaps irreversibly, given the unique and sensitive species described in the Legal notice so designating the area. According to paragraph 15 of the affidavit of Perkins Marshall of NIDCO, filed on January 19th 2018 on behalf of the Respondent Ministry of Works (page 91 ROA injunction), temporary access was created through the buffer zone to access the construction zone. The obligation in the CEC is **to *maintain*** *a vegetated buffer of 100 meters* and "*the MOWT has allocated funds to re-vegetate and reforest this area* ***once the works are completed".*** The interpretation of the CEC therefore is that the 100-meter buffer zone in the CEC **can be encroached upon** once the area is **subsequently** re-vegetated and reforested.

Prejudice to the Respondents if an Interim Injunction is Granted

52. The primary prejudice if an interim injunction is granted is that works commenced on January 5th 2018 pursuant to the instruction to the contractor to proceed would be stopped. There are works on the construction of a site office further away from the buffer zone that would not be affected, and are the subject of a variation to the original injunction granted by the trial court. However, the actual construction of the highway could not commence. It is contended, inter alia, a. that there would also be prejudice to i. general members of the public who would be entitled to use such a highway, ii. to the members of the communities in the East, who would be deprived of 1.the use of such a highway, and 2. the multiplier effect of

investment and expenditure in the area, c. that employees of the contractor would be deprived of employment if the works were to be halted, d. that the contractor's investment to date on this contract would be unusable while an injunction was in effect, and e. that valuable construction time would be lost in the dry season. Further, the contractor would not be able to be paid for completion of the segments of the highway in accordance with his anticipated schedule of $40 million of completed work per month.

53. These are all significant matters and cannot be summarily discounted, despite many of them being general inferences, and despite the claimed loss being a general estimate. While it is accepted that there will be prejudice to third parties from an interim injunction being granted I take into account that the contract was actually signed in December, while the matter was before the court, and that the instruction to proceed was not deferred in recognition of the fact that the matter was before the High court. Rather the instruction to proceed with Package 1A was actually issued on January 5th 2018.

54. The haste that is attendant upon this matter arises directly from the commencement of construction pursuant to the signing of the contract in December 2018 and the instruction to the contractor to proceed on January 5th 2018. In fact, according to the affidavit of), the project manager of NIDCO Perkins Marshall filed on January 24th 2018(at page 237 ROA injunction bundle at paragraph 6, "*excavation and road project works"* were *"not carded to commence until six weeks after the commencement date"*.

Undertaking in Damages

55. The appellants are a public interest organisation. They are not in a position to offer a cross undertaking in damages. If such an undertaking in damages were to be required by a non-

profit organisation challenging environmental decisions then this could be a deterrent to such organisations willingness to question environmental decisions and seek an injunction to prevent perceived environmental damage. However, according to the case of **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (BACONGO) [2004] 1 LRC 630** detriment, and third party rights acquired as a result of a grant of a CEC, and financial implications, cannot be ignored.

56. The indirect evidence is of expenditure of $3.4 million by the contractor and $40 million of work foregone per month. These must be taken into account as well as the context of this evidence. However the court has a wide discretion (See paragraph 39 BACONGO). In this case it must be noted that the work sought to be enjoined commenced **after** this application had been filed. The **contract** was actually **signed after** this action had been commenced. The letter to the contractor authorising it to proceed with the works was issued on January 5th 2018, while the matter was engaging the attention of the High court. In those circumstances an undertaking in damages may be dispensed with.

Strength of respective cases

57. **Paragraph 52 – Chief Fire Officer**

One of the considerations in measuring the balance of justice is consideration of the strengths of each party's case moreso, where the scales are, as in this case, evenly balanced. In considering each party's case, I make no final pronouncement on the merits because we have not had full argument. I bear in mind Lord Diplock's counsel that we are not to embark on a mini trial or make findings which may embarrass the trial judge. Be that as it may, judicial review proceedings however are decided primarily on affidavit evidence usually without cross examination unless there are factual issues in contention. The matters which concern groups

one, two and eight – the primary beneficiaries of the interim injunctive relief (as Mr. Maharaj conceded) – involve issues of law rather than fact. The proceedings are thus in final form, so to speak. As such, any comment on the strengths can in fact wrought some embarrassment. I am satisfied however that the trial judge will ultimately have the benefit of further arguments on which to come to an informed decision.

58. It is a legitimate consideration, especially where the scales of the balance of justice are evenly balanced, to consider the strength of each party's case. Given that

a. that very matter will be the subject of determination shortly on an urgent and expedited hearing, and

b. that I have found that the grounds of the appellants raise arguable issues, which satisfy the test of a serious issue to be tried, and

c. that the balance of justice actually weighs in favour of giving recognition and effect to the protected status of the ESA, (given that the risk of irremediable damage, and consequential injustice, would be greater if the injunction is not granted),

it would not be necessary, or appropriate to go further and express a view on the relative strengths of the party's respective cases.

Public Interest

59. I note the argument that the public interest in environmental matters is entrusted by statute to the EMA. However this cannot mean that it is the sole defender of the public environmental interest, or that an organisation like the appellant would be precluded from launching its own challenge in appropriate circumstances.

60. The potential irreversibility of damage caused by construction weighs in favour of the grant of an interim injunction. Even if the conditions of the CEC are overseen by the EMA there is a danger that this occurs **after damage** from construction may have occurred, or is discovered. The designation of an area as an ESA must be significant. If there is a challenge to a CEC being granted by allegations of concerns surrounding the process of its issue, or even its reasonableness, then it would be futile to be debating these while damage could be occurring. The appeal would be rendered nugatory. The designation of the area as an ESA and the protection of species therein would be eviscerated by such an approach. The balance of justice is in favour of the appellant.

61. Having regard to the impact on all concerned I would be prepared to grant the injunction sought, with the variations initially ordered by the trial judge and deem the appeal urgent with appropriate directions to effect an early hearing in the week commencing February 26th 2018.

Peter A. Rajkumar

Justice of Appeal