

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. No: 2012-3024

BETWEEN

~~INDARJIT SINGH~~

First Claimant

CONCERNED RESIDENTS OF CUNUPIA

Second Claimant

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY

Defendant

AND

RPN ENTERPRISES LIMITED

Interested Party

BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER

APPEARANCES

Mr. Ramesh Lawrence Maharaj S.C., Dr. Rajendra Ramlogan, Ms. Marina Narinesingh, Mr. Kingsley Walesby & Mr. Jonathan Jagessar, Attorneys-at-Law for the Claimants.

Mr. Russell Martineau S.C., Mr. Gerard Ramdeen, Attorney-at-Law for the Defendant.

Mr. Prakash Deonarine and Ms. Saajida Narine, Attorneys-at-Law for the Interested Party.

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JUDGMENT

Introduction

1. In this application for judicial review, the second claimant is a non-profit organization incorporated under *the Companies Act* 1995¹ in June, 2012.
2. The defendant is the Environmental Management Authority (EMA) established by the provisions of the *Environmental Management Act (“the Act”) No. 3 of 2000*².
3. The second claimant seeks judicial review of the decision of the defendant to enter into a consent agreement with the Interested Party in respect of the establishment of a concrete batching plant in violation of the provisions of *the Act*³.
4. In the course of this decision the Court considered the proper interpretation to be placed on Section 35, 36, 62 and 63 of *the Act*⁴ as well as the grounds of irrationality and procedural impropriety in relation to the EMA’s decision.
5. The Court also considered the discretionary bars which entitle the Court to exercise its discretion to refuse relief on an application for judicial review regardless of the merits of the application.

Procedural History

6. On the 26th July, 2012, an application was filed pursuant to Part 56:3 of the *Civil Proceedings Rules (CPR)*⁵ for leave to apply for judicial review.
7. Two (2) applicants were named in the rubric of the application, namely:

¹ Chapter 81:01

² Environmental Management Act, Ch. 35:05

³ Ibid

⁴ Ibid

⁵ Civil Proceedings Rules 1998 as amended

- Indarjit Singh
 - A non-profit organization registered under the *Companies Act 1995*⁶ as the Concerned Residents of Cunupia (CROC)
8. Many months later, on the 28th November, 2013, the Court granted permission to the first claimant, Mr. Indarjit Singh to withdraw from this matter. The Court also directed, by consent, that the affidavits which had been sworn by Indarjit Singh be removed from the record.
9. The name “Indarjit Singh” had however never been removed from the title to this action. In my view, as a consequence of directions given on the 28th November, 2013, it would now be appropriate to strike the name “Indarjit Singh” from the title of these proceedings and I now do so.
10. By their application for leave to apply for judicial review, the claimants sought the following items of relief:
- “1. *A declaration that the said decision of the intended defendant to permit the operation of the said concrete batching plant...is unlawful, null and void and of no effect.*
 2. *An injunction restraining the violator, its servants and or agents or anyone acting through it ...from operating the said concrete batching plant...*
 3. *An interim order staying the said decision and all further decision ...arising from the said decision...pending the hearing and determination of the claim...*

⁶ Chapter 81:01

4. *An order of Certiorari quashing the said decision dated the 30th April, 2012, by which it executed a consent agreement with the violator...*
 5. *An order of Mandamus directing the intended defendant to reconsider the said decision.”*
11. In their application for leave to apply for judicial review, the applicants relied on the following grounds:
- “(a) illegality*
 - (b) procedural impropriety*
 - (c) error of law*
 - (d) abdication of its statutory duties*
 - (e) irrationality*
 - (f) breach of natural justice*
 - (g) conflict with the policy of the Act*
 - (h) Breach of the legitimate expectation ”⁷*
12. The application was supported by a host of affidavits, sworn by members of CROC. On the 2nd August, 2012, the Court refused applications for interim relief, but granted leave to the claimants to apply for judicial review for declaratory orders as well as orders of *certiorari* and *mandamus*. The claimants were directed to file their fixed date claim form in accordance with Part 56.7 (1) of the **CPR** on or before the 17th August, 2012.
13. On the 8th November, 2012, the Court granted permission to RPN Enterprises to intervene as interested parties in this claim. On this occasion the Court also gave directions for the filing of affidavits by the parties as well as by the interested party.

⁷ Grounds set out at Paragraph C 2. of the Application for Leave to Apply for Judicial Review in accordance with CPR Part 56.3

14. In June, 2013, the Claimant sought the Court's permission to file and rely on an expert report. This was opposed by the defendant and by the interested party. This issue was resolved on the 28th November, 2013, when the Court entered an order by consent that:
 - the claimant rely on the expert reports of Dr. Mark Chernaik and Gary Teixeira.
 - the interested party be permitted to rely on expert reports of Mikhail Dookie, Mr. Rambachan and Victor Coombs.
15. Myriad extensions were granted to parties before all affidavits were placed by filing before the Court.
16. On the 1st April, 2014, the Court gave directions for the filing of written submissions with authorities. On the 5th November, 2014, the Court began hearing the supplemental submissions on behalf of the claimants, the defendant and the interested party.

The Evidence

17. The evidence in these proceedings was by way of affidavit only. All parties filed affidavits of facts, while the claimant and the interested party filed reports of experts in respect of which they had obtained the Court's permission.
18. The claimants filed two (2) sets of affidavits of fact. The first set was filed in support of the application of the claimants for leave to apply for Judicial Review. These affidavits were filed on the 26th July, 2012, and were approximately thirty-one (31) in number⁸.
19. Each deponent, in turn spoke of the idyllic nature of their residential dwelling, the incursion by RPN Enterprises, the interested party between June, 2011 and August, 2011 and the suffering wrought by the activity of the Interested Party.

⁸ Affidavits are set out in Schedule 1 hereto.

20. Following the grant of leave to apply for Judicial Review, the claimant filed another wave of affidavits.⁹ Most of these were filed in August, 2012 by the same deponents and contained the same allegations.
21. In opposition, the defendant filed one affidavit of Frances Mitchell Wanliss. This was filed on the 12th April, 2013.
22. The Interested Party also filed affidavits of fact. They were, respectively:
- The affidavit of Roopchand Ramhit
 - The affidavit of Abdel Khan
 - The affidavit of Ramdeo Ramnarine
- These affidavits were all filed on the 23rd January, 2013.
23. A number of the claimants swore and filed affidavits in reply. They were:
- Ramdath Ramcharitar
 - Ryan Lalsingh
 - Ramseshwar Maharaj
 - David Bissoon
 - Kevin Ramoutar and Ramratie Deosaran Thakurie
 - Horace Abraham
 - Wayne Sooknanan

Expert Evidence

24. Parties also relied on the reports of experts, report of Gary Texeira of ROSE Environmental Limited as well as the testimony of Dr. Mark Chernaik. Dr. Chernaik had

⁹ Set out at Schedule 2 hereto

originally sworn an affidavit in support of the claim.¹⁰ He also filed a reply to the affidavit of Frances Wanliss Mitchell, deponent for the defendant.¹¹ The evidence of Dr. Chernaik was however condensed into his expert report which was filed on the 15th January, 2014.

25. The following expert reports were filed on behalf of the interested party.

- Dr. Victor Coombs filed on the 15th January, 2014
- Mikail Dookie filed on the 15th January, 2014
- Vintee Ramdath filed on the 15th January, 2014

Application to Strike

26. The Court gave directions for the filing of evidential objections. On behalf of the claimant, objections were filed on the 21st October, 2013. Objections on behalf of the interested party were filed on the 18th October, 2013. These objections were extensive and attacked many paragraphs in the affidavits of:

- Indarjit Singh (since struck off the record)
- Rameshwar Maharaj
- Ramdath Ramcharitar
- Ryan Lalsingh
- David Bissoon
- Wayne Sooknanan
- Rajkumar Mahabir
- Horace Abraham

¹⁰ Affidavit of Lloyd Chernaik filed on the 17th August, 2012

¹¹ Affidavit of Lloyd Chernaik filed on the 3rd June, 2013 in reply to the affidavit of Frances Wanliss Mitchell

- Gloria Parris
- Koshal Dinanath
- Rene Ramdeo
- Nasser Mustapha
- Sylvester Ramsahai
- Joel Goberdhan
- Nigel Howard
- Carol Ann Lee Singh-Kaloo
- Glen Ramlogan
- Denaish Lalsingh
- Gloria Ramtahal
- Roslyn Besai
- William Garcia
- Dennis Lall
- Chandaye Beepath
- Christopher Khan
- Kenny Superville
- Rooplal Sinanan
- Robert Ramsahai
- Richee Poliah
- Balroop Senath
- Ramdath Ramcharitar

The interested party also objected to the following affidavits in reply, those of:

- Indarjit Singh
- Ryan Lalsingh
- Kevin Ramoutar and Ramratie Deosaran Thakurie
- Rameshwar Maharaj
- David Bissoon
- Horace Abraham

27. No submissions were made on behalf of the second claimant in support of their evidential objections¹². The second claimant also made no submission in opposition to those filed on behalf of the interested party. Learned Counsel, Mr. Deonarine, in the course of his written submission for the Interested Party referred to his evidential objections¹³ and made detailed submissions as to the affidavits filed on behalf of the second claimant.
28. In respect of affidavits in reply, Mr. Deonarine submitted that many paragraphs fell outside of what was permissible in an affidavit in reply.
29. Learned Counsel referred as well to the main affidavits of deponents for the second claimant and in respect of allegations of rashes, asthma attacks, severe bronchitis, learned Counsel made this submission:

“...in the instances where the deponents have made serious allegations of ill health, skin diseases...there is either a lack of any cogent and credible evidence or the allegations are largely based on scant medical reports which neither identified any nexus between the illness allegedly suffered and the operations of the batching plant

¹² Notice filed on the 21st October, 2013.

¹³ Notice filed on the 18th October, 2013.

nor has the makers of those medical reports deposed to an affidavit attesting same.”¹⁴

30. Learned Counsel also drew the Court’s attention to inconsistencies in the affidavits filed on behalf of CROC. One glaring example occurred where deponents David Bissoon and Ryan Lalsingh stated in their affidavits in reply that Royal Park experienced flash flooding on the Corpus Christi holiday on the 7th June, 2012. This was in apparent contradiction to the evidence of Mr. Ramcharitar in his main affidavit as to a barbeque fund-raiser on the Corpus Christi holiday in 2012¹⁵.
31. The Court has carefully considered the objections which have been made on behalf of both the Interested Party and the second claimant and has concluded that it would be counterproductive, in an application for judicial review, to engage in a minute examination of evidence to discern whether or not it is inadmissible. It is well established that in applications for judicial review, the Court is concerned with the validity of the decision-making process. In my view, it is for this reason that the Court ought not to be entwined in minute factual disputes. To engage in determining factual disputes, in the context of these proceedings will serve not only to distract the Court from the central issues but to risk usurping the fact finding functions of the administrative body whose decision making process is under examination. It was for these reasons that the Court decided against embarking on an exercise of striking inadmissible material. The Court will bear the objections in mind and will attach the appropriate weight in each circumstance.

¹⁴ See the Written Submission filed on behalf of the Interested Party on the 6th October, 2014 at paragraph 110.

¹⁵ See the affidavit of Ramdath Ramcharitar filed on the 17th August, 2012.

Facts

32. Royal Park and Chincuna Gardens, are two (2) residential communities in Cunupia. Close by, one finds a twenty-six (26) acre parcel of land more particularly known as LP 62, Chin Chin Road, Cunupia.¹⁶ This parcel of land (“LP 62”) belongs to RPN Enterprises Ltd., the Interested Party in these proceedings.
33. The Managing Director of the Interested Party, Roopchand Ramhit, is also the Managing Director of two (2) other companies namely Motilal Ramhit and Sons Contracting Limited (“MRSC Ltd.”) which is a company involved in civil construction since 1981 and Contech Limited, which owns the batching plant, the operation of which is the subject matter of these proceedings.
34. The lands at LP 62, Chin Chin Road, were not being utilized prior to 2005. In 2005, the Interested Party, as owner of the land, began developing it by building a mechanical garage, a fabrication garage, administration building, three (3) security booths, an office for automation process, a storage tank area, a fuel area, a muster point area, a stockpile area and parking facilities.¹⁷
35. It is the contention of the Interested Party that between 2005 and October, 2011, they received no complaints concerning dust, pollution or traffic congestion.¹⁸ Around August, 2011, the interested party purchased an electric concrete batching plant. The plant was transported to their lands between September and October, 2011. The batching plant was not commissioned until February, 2012 and became operational in October, 2012.¹⁹

¹⁶ Paragraph 6 of the affidavit of Roopchand Ramhit filed on the 23rd January, 2013.

¹⁷ Affidavit of Roopchand Ramhit filed on the 23rd January, 2013

¹⁸ Paragraph 15 – Affidavit of Roopchand Ramhit filed on the 23rd January, 2013

¹⁹ Paragraph 49 – Affidavit of Roopchand Ramhit filed on the 23rd January, 2013

36. It was however, between May and July, 2011, that a number of the residents of Royal Park and Chincuna Gardens became concerned about the user of the land at LP 62. They all alleged that they witnessed modifications to a watercourse on the land²⁰. The residents allege as well that silos were brought onto the land and that a conveyor belt was installed.
37. The residents of Royal Park and Chincuna Gardens began meeting to discuss problems which they were experiencing. A number of them formed themselves into a group under the name 'Concerned Residents of Cunupia' and were incorporated as a non-profit organization on the 8th July, 2012. In that capacity they applied for and obtained the Court's leave to make this application for judicial review.
38. In support of their application, they all complained of plagues of dust, unbearable noise and illness of family members raging from skin rashes to asthmatic attacks. Whereas the Court accepts that the deponents may have suffered these inconveniences, it is my view that the residents, in their non-expert capacity, are evidentially incapable of making a causal link between the presence of a concrete batching plant on LP 62 and the nuisances emanating from LP 62. Moreover the Court found it extremely curious and bordering on ludicrous that all members of CROC experienced identical issues: fine grey dust, instead of the coarse brown dust that covered their furniture before the advent of the concrete batching plant; health challenges caused by dust; the inability to use their outdoor facilities; diminution in the value of their property and the need to engage in more frequent cleaning and maintenance of their homes.
39. It was in December, 2011, that the residents began formal complaints against the user of the land. Thus on the 1st December, 2011, the EMA received a complaint from Horace

²⁰ Paragraph 34 of the affidavit of Roopchan Ramhit filed on the 17th August, 2012

Abraham, a resident of Royal Park and member of the second claimant. The complaint was sent to the EMA by e-mail, the full text of which is exhibited to the affidavit of Frances Mitchell Wanliss ²¹. In summary, Mr. Abraham complained of “*aggressive*” construction activities. Mr. Abraham complained that the operations generated dust, “*with the potential to increase with commercial operation of the batching plant...*”

40. Mr. Abraham enquired as to the “*kind of environmental clearance given to operate such a plant upstream of a residential area, and what controls were put in place to mitigate the impact.*”
41. The EMA responded by a letter dated the 7th December, 2011, and indicated that an investigating officer would be assigned to assess the validity of the claim.
42. The EMA also received complaints from other residents of Royal Park and replied by a letter dated the 12th December, 2011. Once more the EMA replied indicating that an investigating officer would be appointed to assess the validity of the complaint²².
43. The complaint of Mr. Abraham was followed by correspondence from other residents. Such correspondence was aimed at airing their grievances as to environmental issues arising from the user of LP 62.²³ In their formal complaint to the defendant, Rameshwar Maharaj, Ramdath Ramcharitar, Helene Wilkie and Chandaye Beepath identified air pollution, noise pollution, environmental degradation and flooding as the subject matter of their grievance.
44. The EMA responded by appointing Mr. Steve Lalbeharry as investigating officer. Mr. Lalbeharry attended a meeting of the residents on the 11th December, 2011 and explained

²¹ “FMW3”, exhibited to the affidavit sworn by Frances Mitchell Wanliss and filed herein on the 12th April, 2013

²² See exhibit “FMW5” (Ibid)

²³ See the affidavit of Ramdath Ramcharitar filed on the 17th August, 2012

to the residents the procedure used by the EMA in addressing breaches and violations. Thereafter there was an exchange of electronic correspondence between a number of residents and Mr. Lalbeharry. In one of his messages Mr. Lalbeharry explained the function of a consent agreement in the context of the work of the defendant.²⁴

45. On the 31st January, 2012, the EMA also received a complaint from Ryan Lalsingh, a member of the second claimant. Mr. Lalsingh advised the EMA that a concrete batching plant was being operated in Chin Chin Road Cunupia and that such posed “*a threat to human life*”. Mr. Lalsingh complained that Motilal Ramhit and Sons “*continued to work the plant on a daily basis since October, 2011*”²⁵.
46. On the 1st February, 2012, the Interested Party submitted an application for a CEC²⁶ for the regularization of an existing development being administrative offices, construction of vehicle parking and garages, a concrete batching pant, minor ancillary equipment, parks and open spaces, buffer zones and mechanical activities. Reference was made to the application for a CEC in a Notice dated the 5th March, 2012. 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

²⁴ See affidavit of Ramdath Ramcharitar filed on the 17th August, 2012 at paragraphs 51 to 53

²⁵ See exhibit “FMW6”

²⁶ Certificate of Environmental Clearance

*supporting structures of the plant that would usually be present if the plant was operational...*²⁷

Nonetheless, following the site visit, the Notice of Violation was prepared by the legal department of the EMA and dispatched to the interested party.

47. On the 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.”*²⁸

48. An exchange of correspondence followed, ending with the notice of refusal of permission to develop land. This notice was dated the 20th March, 2012, and was exhibited to these proceedings as “RR17”.

49. Meanwhile on the 15th March, 2012, the interested party received a Notice of Violation from the EMA. The Notice of Violation was exhibited to the affidavit of Roopchan Ramhit.²⁹ The salient portions of this notice are extracted below:

“TAKE NOTICE that the Environmental Management Authority (“the Authority”) reasonably believes that RPN Enterprises Ltd has violated the environmental requirement as stated in section 62(f) of the Environmental Management Act...being

²⁷ Affidavit of Frances Mitchell Wanliss at paragraph 31

²⁸ See RR 16, exhibited to the affidavit of Roopchan Ramhit filed on the 23rd January, 2013

²⁹ See RR 17, exhibited to the affidavit of Roopchan Ramhit filed on the 23rd January, 2013

the requirement to apply for and obtain a Certificate of Environmental Clearance pursuant to Section 35 (2) ...prior to carrying out Activity 18 (1)...”

50. The defendant, by its Notice of Violation referred to complaints, which had been received on the 8th December, 2011, regarding noise and dust from concrete batching plant. The notice referred to a visit by Environmental Inspectors on the 10th February, 2012, and listed their observations as follows:

- “1. Residents are located to the North and West of the Site. Approximately 30 meters East of the Site lies the Cunupia River and to the South is agricultural land. A school is located 400 meters Southwest of the Site.*
- 2. The general topography of the Site is flat.*
- 3. A concrete batching plant is located on the Eastern portion of the compound.*
- 4. To the East of the batching plant there is a control house/station for the concrete batching plant.*
- 5. An aggregate stockpile is located South of the concrete batching plant.*
- 6. Dust screens have been erected to the West of the stockpile...”*

51. The Notice of Violation identified the following information as received from Krishenchand Seunarine, Office Manager of RPN:

- “1. The property consists of 26 acres of the land is owned by RPN Enterprises Ltd.*
- 2. Both RPN Enterprises Ltd and Motilal Ramhit ...have been occupying the site since 2005.*
- 3. The concrete batching plant was mobilized on site during September, 2011. The concrete batching plant is a mobile unit...”*

52. The Notice of Violation specified that as of the date of inspection, 10th February, 2012, the RPN Enterprises Ltd. was not in possession of a Certificate of Environmental Clearance.

53. On the 20th March, 2012, Ms. Wanliss attended a meeting with the residents of Cunupia. As the representative of the EMA, Ms. Wanliss, at the meeting heard the complaints of residents. As a consequence, Ms. Wanliss visited the site on the 22nd March, 2012. Her observation was that the batching plant was not in operation. Ms. Wanliss' observation are set out at paragraph 35 of her affidavit and are quoted below:

*“On the 22nd March, 2012, a site visit was conducted. At the time, I observed the batching plant was not in operation. This was evidenced by the fact that the conveyor belts were clean. Immediate West of the batching operations and raw material storage was screened off. No dust was observed on the screens ...”*³⁰

54. Following a meeting with the representatives of the defendant, the interested party entered a consent agreement. The defendant also imposed on the interested party a penalty in the sum of sixty-one thousand, four hundred and eight dollars and eight cents (\$61,408.08).

55. The consent agreement was made between the defendant/EMA and the interested party, RPN Enterprises Ltd. as “*the Violator*”³¹. The agreement recited the reasonable belief of the EMA that RPN was in violation of the requirement to apply for a Certificate of Environmental Clearance. By the agreement, the violator undertook to engage in specific activities. They undertook:

- to designate a community relations officer who will be responsible for interacting within communities.
- to hold one community meeting per week.

³⁰ Paragraph 35 of the affidavit of Frances Mitchell Wanliss filed on the 12th April, 2013

³¹ Exhibited as “RR 19” to the affidavit of Roopchan Ramhit filed on the 23rd January, 2013

56. The violator (RPN) was required to ensure that mitigation measures are addressed. Specific measures were identified under the headings of: Air, Noise, and Water.
57. Other conditions were also specified. They were:
- the violator to ensure separation of at least 100 meters between the concrete batching plant and the nearest resident community
 - the violator to minimize the traveling distances of equipment and vehicles
 - the violator to design a lighting system to minimize adverse impacts to nearby residents
58. The violator (RPN) agreed in the consent agreement to pay the actual costs and damages in the sum of sixty-one thousand, four hundred and eight dollars and eight cents (\$61,408.08) upon execution of the agreement.
59. The consent agreement provided for modification of the agreement from time to time and for enforcement in the event of non-compliance.
60. On the 2nd May, 2012, the EMA issued a media release. By the media release, the defendant, EMA, advised the public of the Consent Agreement. In the course of the media release Dr. Joth Singh had this to say:

“Despite reports from some residents in the area of the plant emitting dust and noise on a regular basis, the EMA ascertained that the plant has up to this date not been operational...”³²

The plant became operational in October, 2012.

61. On the evidence before the Court, there were varied responses to the presence of the Interested Party and their concrete batching plant. Mr. Ramdeo Ramnarine swore an

³² The Media Release exhibited as “RR 33”

affidavit on the 22nd January, 2013 and this was filed in opposition to the claim on the 23rd January, 2013. By his affidavit, Mr. Ramnarine deposed that he was a farmer for most of his adult life, having operated seventy-eight (78) acres of farm land. For over fifty (50) years, Mr. Ramnarine had been cultivating lands adjacent to those occupied by the Interested Party³³.

62. At paragraph 6 of his affidavit, Mr. Ramnarine had this to say:

“Since the Ramhit brothers have started operating their business from the said lands, they have always kept their premises and its surroundings in a tidy and orderly manner...”

At paragraph 7, Mr. Ramnarine stated:

“Over the years, my crops or produce have never been affected by dust smoke or fumes...”

63. More significantly, there emerged varying views in the course of the consultation, which took place on the 10th May, 2012 between the owners of the batching plant and neighbouring residents. The minutes of this meeting are exhibited to the affidavit of Ryan Lalsingh, a member of CROC and forms part of a bundle which was exhibited as “RLA”³⁴.

64. The minutes record a comment by Counsellor Daniel Cerb, who was asked by his Member of Parliament to investigate complaints. Mr. Cerb had this to say to the meeting:

“What these people was [sic] trying to do was trying to get the children from the school to come and protest this night. They was telling lies and saying dust and so on.

³³ See paragraph 4 of the affidavit of Ramdeo Ramnarine.

³⁴ See exhibit “RL4” in the affidavit of Ryan Lalsingh filed herein on the 17th August, 2012

They went to the principal and ask him to bring the children to say that dust affecting them... ”³⁵

65. The minutes reflected a contribution by a Mr. Cardinez, a resident of Royal Park.³⁶ Mr. Cardinez spoke of the land prior to the occupation by the Ramhits. In particular, Mr. Cardinez spoke of a tall bull grass called “*lastro*”. Mr. Cardinez also spoke of a pond infested with alligators and an area of land overrun with snakes and rats and prone to bush fires.

66. Mr. Cardinez spoke of improvements in the area after the Ramhits took occupation, and is recorded as having said:

“And I was so glad when the Ramhits started occupation here...Look at the pond there that people talking about. That pond good with fishes...”

67. A positive observation was also made by Mr. Kalloo, who observed the absence of mosquitoes.

68. It is significant that a representative of the EMA was present at this meeting. Moreover, the documents which comprised “RL4”, of which the minutes were a part, were documents in the custody of the EMA, when the impugned decision was made.

Expert Evidence

69. The second claimant relied on the expert evidence of Dr. Mark Chernaik, whose Expert Report was filed on the 15th January, 2015. The expert report encapsulated two (2) earlier affidavits of Dr. Chernaik filed on the 17th August, 2012 and his affidavit in reply which was filed on the 3rd June, 2013.

³⁵ Exhibit as part of “RL4” at page 45

³⁶ See page 46 of the Minutes exhibited at RL4 to the affidavit of Ryan Lalsingh filed on the 17th August, 2012.

70. Dr. Chernaik exhibited his letter of instruction as appendix “B” to his report. The letter of instructions was dated the 21st June, 2012 and was prepared by attorney-at-law, Maria Narinesingh who, under the heading, “Your Instructions” wrote:

“Please carry out an assessment of

- (i) The potential impacts that may arise out of the construction and operations of a concrete batching plant and...*
- (ii) The consent agreement dated the 30th April, 2012 ...to determine whether it identifies all major impacts and proposes appropriate measures for mitigation and or monitoring...”*

71. At paragraph 4.0 of his report, Dr. Chernaik indicated that he had reviewed the following documents:

- The application of the Interested Party for a CEC dated the 24th January, 2012.
- Further information provided by RPN on the 17th February, 2012
- The consent agreement dated 30th April, 2012
- Three CECs which had been issued for concrete batching activities.

72. In his report, Dr. Chernaik refers to the US EPA “AP-42” report for concrete batching plants³⁷. According to Dr. Chernaik, the AP-42 states that all but one of the emission points are fugitive in nature. The AP-42 report also summarized types of mitigation measures. According to Dr. Chernaik, emissions of heavy trucks over unpaved or dusty surfaces can be controlled by good maintenance and wetting.

73. Dr. Chernaik referred as well to a World Bank Report. Dr. Chernaik relied on the World Bank Report to highlight that airborne dust was hazardous to health.

³⁷ See paragraph 5.0 of the Report

74. Mr. Chernaik referred as well to a report of the University of Southern California on the effect of exposure to traffic on lung development of children from 12 Southern California Communities.³⁸
75. This expert quoted the State Environment Report 2000 in respect of “Major author.” At page 9 of his report, Dr. Chernaik expressed this opinion:
- “...in my opinion before any activity which may result in the generation of particulate matter is permitted a proper assessment must be undertaken to identify at minimum levels of particulate matter sensitive receptors, mitigation and monitoring measures.”*
76. Dr. Chernaik addressed the need to protect riparian areas and quoted the Hunter-Central Rivers Catchment Management Authority of Australia listing the benefits of riparian vegetation.
77. At paragraph 5.2 of his report, Dr. Chernaik provided his opinion as to the environmental impact of the concrete batching facility. Dr. Chernaik accepted that the front portion was paved, that the stone and/or gravel road was constructed around the perimeter of the southern portion of the facility.
78. Dr. Chernaik criticized clause 9 of the Consent Agreement suggesting that it was too vague. He also recommended a separation distance of five hundred meters (500m.) between the facilities and residences.
79. Dr. Chernaik stated that he reviewed the Consent Agreement and made the following comments:
- In respect of the condition that addresses roads, Dr. Chernaik expressed the view that this condition was inadequate.

³⁸ See page 8 of the Report of Dr. Chernaik

- In respect of the stipulated separation of one hundred meters (100m.), Dr. Chernaik expressed the view that the one hundred meters (100m.) should be one hundred meters (100m.) from the emitter's end³⁹. Dr. Chernaik's opinion was based on a google earth photo, and not on measurements taken from a visit to the site.

80. At page 5.3, Dr. Chernaik listed further deficiencies in the Consent Agreement, and expressed the opinions that the consent agreement:

- Failed to adequately mitigate emissions;
- Failed to mitigate diesel emissions;
- The recommended use of dust screens or other vegetative barriers would not protect residential communities;
- Failed to address flooding;
- The separation distance cannot be met;
- Fails to address emissions of dust and spillage of material;
- Fails to address emissions associated with malfunctions;
- Fails to address the release of toxic substances like hazardous waste;
- Fails to address the contamination of land by soil waste, or decline in the structural integrity of the roads.

Affidavit of Vintee Ramdath

81. An affidavit was filed herein by Vintee Ramdath on behalf of the Interested Party. Mrs. Ramdath, at that time, was an Application Specialist of R.O.S.E Environmental Limited.

³⁹ Page 15 of the Report

R.O.S.E was retained by Mootilal and Sons Contracting Limited to carry out air quality and noise monitoring and testing at LP #62 Chin Chin Main Road, Cunupia (the premises).

82. In her affidavit Mrs. Ramdath stated that monitoring and testing were conducted at the premises between 28th -29th June 2012. In a report attached to Mrs. Ramdath's affidavit with markings V.R. 1 and dated the 28th &29th of June , 2012, Mrs. Ramdath arrives at the following conclusions⁴⁰:

- a) *The Ambient Air Quality study conducted at the three (3) AAQ Stations measured PM 2.5, PM 10 and TSP concentration levels below the limits published by the EMA Draft Air Pollution Rules, 2009*
- b) *The LEQ values did not exceed the Maximum Permissible levels for LEQ in industrial Areas-Zone 1 as outlined in the EMA Noise Pollution Rules, 2001 at any of the three locations monitored*
- c) *The Instantaneous sound pressure level (L-peak) logged at the three (3) Noise Points sampled were less than the stipulated Maximum Permissible level for Industrial Areas- Zone 1 as outlined in the EMA Noise Pollution Rules, 2001.*

Affidavit of Mikaiel Dookie

83. Mr. Mikaiel Dookie is the Operations Manager of the EcoTox Environmental Services Limited. According to Mr. Dookie, around April or May 2013, EcoTox was contacted by one Mr. Krishenchand Seunarine of Mootilal Ramhit and Sons Contracting Limited to investigate the quality of the particulate matter in the air around the concrete batching plant

⁴⁰ See page 16 of the Report marked V.R.1 attached to the affidavit of Mr. Vintee Ramdath

and also to investigate the noise levels from the facility and its effects on the surrounding environment.⁴¹

84. In or around the 13th -16th of May, 2013, EcoTox conducted monitoring and testing on air quality and noise levels in accordance with the terms and conditions of the Consent Agreement dated 30th of April, 2012.

85. An Air Quality Monitoring Report was prepared by Mr. Dookie on the 6th of June, 2013. An amendment to this report was made and also dated the 6th of June 2013 and marked *M.D.2* in the affidavit filed on the 15th of January, 2014. In the amended report, Mr. Dookie concluded that:

- Mootilal Ramhit and Sons Contracting Limited facility produces particulate matter (PM) PM 2.5 and PM 10 at their work environment from current mixing operations, from associated storage of materials on site and from other activities on the site inclusive of routine washing and normal movement of vehicles
- The PM 2.5 levels were below the *Trinidad and Tobago Air pollution Rules* (draft) 2005, maximum permissible levels(twenty four hour period) in ambient air of 75 ug/m
- Any PM 10 levels spikes that were over the maximum permissible limits were due to short terms mixing of cement, washing of vehicles and vehicular traffic
- Of the three locations monitored, Location # 1 (the Guard Hut) which is situated closet to the Chin Chin Road, dust created were due to the vehicular movement on the main road, especially during peak times of the day.

⁴¹ See para 15,page 5 of the Affidavit of Mr. Mikaiel Dookie filed on the January 15th, 2014

- Sampling and testing was conducted during the dry season. During this time, dust would be more loosely bound and easily dispersed by the wind at the site. During the period of testing, mostly dry and sunny conditions were observed.⁴²

Submissions

Written Submissions of the Claimant

86. By his written submission filed on the 25th July, 2014, learned Senior Counsel, Mr. Maharaj identified the contention of the second claimant in this way:

*“The second claimant contends inter-alia that the decision of the defendant to enter into a Consent Agreement and the process by which such execution was reached with RPN ...for the ...designated activity in lieu of a CEC...should be quashed on the grounds that it is illegal and/or unlawful and or procedurally unfair and/or ultra vires...the Environmental Management Act.”*⁴³

87. By reference to Section 35 of the ***Environmental Management Act***⁴⁴ (“***the Act***”), learned Senior Counsel argued that ***the Act*** and ***the Certificate of Environmental Clearance Rules 2001 (CEC Rules)*** provide a mandatory process for impugned activities to obtain environmental clearance.

88. Learned Senior Counsel argued that by entering the consent order the defendant dispensed with the statutory requirement for the grant of the CEC.⁴⁵

89. By reference to Section 35(2) and Section 63 (2) of ***the Act*** and Activity 18 of ***CEC Rules***, learned Senior called upon the Court to consider the sections in their grammatical and

⁴² See page 16-17, Report of Mikaiel Dookie filed on the 15th January, 2014

⁴³ Written Submission of the Second Claimant filed on the 25th July, 2014 paragraph 3

⁴⁴ Environmental Management Act, Ch. 35:05

⁴⁵ Written Submission for the claimant at paragraph 56

ordinary meaning to determine whether designated activities require that the Interested Party obtain a CEC or whether a consent agreement may purport to govern designated activities⁴⁶ which have an environmental impact.

90. The claimant contended that the operation of the facility is to be treated differently from its establishment and modification.⁴⁷
91. At paragraph 76, learned Senior Counsel, Mr. Maharaj argued that Section 63 of *the Act* may resolve past, but not future breaches.⁴⁸
92. At paragraph 78, Mr. Maharaj, S.C. listed the environmental requirements identified at Section 62 of *the Act* and argued that the requirement of obtaining a CEC, which may be found at Section 62(f) stands in stark contrast to the others, and that no measure taken under Section 63(1)(a) could bring it into conformity with Section 62(f). The only option open to the defendant would mean a “...cessation of the violation activity outright...”⁴⁹
93. Learned Senior Counsel, Mr. Maharaj supplemented his Written Submission by oral submissions. Learned Senior also filed a speaking note for the Court’s assistance. The core question was again identified by learned Senior Counsel for the second claimant. At paragraph 1 of his Speaking Note learned Senior Counsel stated the issue in this way:

*“...whether the defendant has the power under the Act to permit the Interested Party to operate the concrete batching plant at its premises at Cunupia without requiring the Interested Party to comply with the requirements of Section 35 (2) of the Environmental Management Act 2001.”*⁵⁰

⁴⁶ Written Submission for the claimant at paragraph 63

⁴⁷ Written Submission for the claimant at paragraph 68

⁴⁸ Written Submission for the claimant at paragraph 76

⁴⁹ Written Submission of the claimant at paragraph 78

⁵⁰ See the claimant’s speaking note filed on the 6th November, 2014 at paragraph 1

94. Learned Senior Counsel, Mr. Maharaj argued that Section 35 to 38 of *the Act* applied to Section 63 (2) and that Parliament intended that Part VI of *the Act* and in particular Section 63 to be subject to Sections 35 to 38.
95. Mr. Maharaj S.C. argued that the defendant could not under the guise of a consent agreement pursuant to Section 63 (2) grant permission to the Interested Party to operate a concrete batching plant. Argued learned Senior, the defendant acted ultra vires *the Act* and its decision to grant permission to operate the plant was illegal null and void and of no effect.⁵¹
96. Learned Senior built his submission on the right of the citizen to be fully informed of environmental decisions relating to the CEC. Thus, argued Senior Counsel:
- “Even where the CEC statutory process does not require an Environmental Impact Assessment the public is entitled to get access to all the relevant environmental information...”*⁵²
97. The second question presented by Mr. Maharaj S.C. for the second claimant was whether the operation of the concrete batching plant was a designated activity under Item 18 of the *Designated Activity Order*.⁵³
98. It was the contention of learned Senior for the claimant that the literal interpretation of the *Designated Activity Order* employed by the defendant led to manifest absurdity.
99. The third question as identified by learned Senior Counsel, Mr. Maharaj was:
- “Whether the defendant was right to have decided that because the Interested Party established the Concrete Batching Plant without a CEC it was too late to apply for it.”*

⁵¹ Page 6 of the claimant’s speaking note filed on the 6th November, 2014

⁵² Page 6 of the claimant’s speaking note filed on the 6th November, 2014

⁵³ Page 11 of the claimant’s speaking note filed on the 6th November, 2014

100. Learned Senior cited *Gillespie v. First Secretary of State*⁵⁴, and the reliance of the Court of Appeal in that case on the words of Lord Hoffman in *Berkley v. Secretary of State for the Environment* [2001] 2 A.C. 603. On the basis of Lord Hoffman’s words, learned Senior, Mr. Maharaj submitted:

*“...that it was reasonable to hold that an EIA was required and that it was essential in the circumstances for the defendant to order that an EIA be prepared and considered before environmental clearance could have been given for the operation of the plant...”*⁵⁵

101. At paragraph 21 of his Speaking Note, learned Senior Counsel, Mr. Maharaj argued that the legality of the impugned decision is not to be tested against the fact that the operation of the plant had not been cited in the notice of violation, but against whether the defendant had the powers under Section 63 (2) to give permission for the operation of the concrete batching plant.

102. In this regard learned Senior contended that Section 63 (2) was filtered by Section 35 to 38 of *the Act*.

103. Learned Senior Counsel reiterated his submission that permission:

“...for the operation of a concrete batching plant could only have been given after the statutory process for the grant of the CEC had been followed...”

104. Learned Senior Counsel argued that the defendant was trying indirectly through Section 63 (2) to achieve what it could not through Section 36.

⁵⁴ *Gillespie v. First Secretary of State* [2003] EWCA 400

⁵⁵ Paragraph 20 of the Speaking Note on behalf of the Second Claimant.

105. Learned Senior Counsel argued that the impugned decision effectively deprived the claimants of their right to the protection of the law at Section 4 (b) of *the Constitution* by depriving them of their right to institute a private party action before the Commission.
106. Learned Senior Counsel contended further that it was irrational for the defendant to decide that the physical construction of the plant fell with the meaning of the designated activity, but the operation of the plant was not a designated activity required by the CEC.
107. Learned Senior reiterated his submission that it was irrational for the defendant to decide that a CEC could not be used to regulate the environmental impact caused by the plant was almost complete. It was the submission of learned Senior Counsel that any reasonable authority would have required the Interested Party to make fresh application for a CEC.⁵⁶
108. Senior Counsel also argued that the defendant failed to consult the public and therefore acted unfairly according to the principles laid down in: *Rev. North and East Devon Health Authority exp. Coughlan* [2001] QB 213.
109. In the course of this oral submissions learned Senior Counsel, Mr. Maharaj took the Court through *the Act* noting that where parliament intended that Sections 35 to 38 should not apply it expressly said so. Learned Senior referred to Section 44 of *the Act*.
110. The speaking note was supplemented by the *viva voce* submissions of the learned Senior Counsel, Mr. Maharaj, who argued that the defendant/EMA should have taken steps to stop the violation and should have directed that the Interested Part make a new application for a CEC. Learned Senior argued that whether or not there was a breach, Sections 35 and 36 applied.

⁵⁶ See paragraph 23 of the Speaking Note.

111. Learned Senior Counsel argued that the defendant did not consider the environmental impact of the plant but made it clear that he was not disputing the power of the Authority to enter the Consent Agreement. His attack was on the decision of the Authority to exercise its power in disregard for Sections 36 to 38 of *the Act*. Learned Senior emphasized that the defendant was required to exercise its power subject to Sections 35 to 38 of *the Act*.
112. Senior Counsel clarified his submission insisting that an application for a CEC should have been made for both the plant and operations of the concrete batching plant.
113. Senior Counsel described as absurd, the interpretation of *the Act* that a CEC should be required for the establishment of the physical plant and not its operation. This, according to Senior Counsel was not only absurd, but frustrated the objects of *the Act*.

Submissions for the Defendant

114. The defendant relied on written submissions filed on the 15th October, 2014. Learned Senior Counsel, Mr. Martineau identified this as the central issue:
- “...on a true construction of the Environmental Management Act Ch. 35:05...did the defendant in deciding to enter into a consent agreement with the Interested Party ...err in law by failing to require the Interested Party to apply for and obtain a CEC under Section 35(2)...”*
115. The defendant asserted that this submission is unfounded.
116. By his submission, Mr. Martineau S.C. for the defendant pointed out that the Interested Party had applied for a CEC, that the CEC had been refused and that the defendant had issued a Notice of Violation. In this context, the defendant argued:

“In those circumstances where the application for the CEC is refused and the activity continues, the defendant followed the procedure laid down by the Act in the circumstances where the designated activity continues without a CEC...”⁵⁷

117. Mr. Martineau S.C. argued that the procedure for granting the CEC has no application to the enforcement process where the defendant takes action against a person for breaching the requirement to obtain a CEC.⁵⁸ Learned Senior Counsel submitted that the defendant correctly interpreted the extent of its powers by limiting itself to its enforcement provisions under *the Act*.

118. At paragraph 10 of his Written Submission, learned Senior, Mr. Martineau argued:

“...the defendant followed the procedure set out in the Act before making a determination that entering into the consent agreement was the most appropriate enforcement mechanism...”

119. The defendant reminded the Court that the defendant consulted the claimants and that evidence of this may be found at paragraph 34 of the affidavit of Francis Wanliss and paragraph 65 of the affidavit of Ramdath Ramcharitar.⁵⁹

120. At paragraph B of his Written Submission, learned Senior addressed the Court on the proper interpretation to be placed on the meaning of the relevant section. At paragraph 16(3) learned Senior Counsel submitted:

“In the case of a breach of Section 35(2) Part VI gives the defendant no power...to grant a retrospective CEC...”

⁵⁷ Written Submissions for the defendant at paragraph 5

⁵⁸ Written Submissions for the defendant at paragraph 6

⁵⁹ Written Submissions for the defendant at paragraph 9

121. Learned Senior argued that the purpose of Section 35(2) was to impose a pre-clearance requirement. Learned Senior Counsel continued in this way:

“Once that section has been breached the breach cannot be undone. Instead the defendant must take enforcement action.”

122. Learned Senior Counsel, Mr. Martineau, argued that the interpretation which the claimant placed on Section 63 goes against the policy of *the Act*. Referring to the interpretation suggested by the claimants that the Section 63 (2) reveals that a consent agreement is specifically referable to matters specified in the Notice of Violation but nothing more, Mr. Martineau submitted that such interpretation was not contemplated by *the Act*.

123. Learned Senior Counsel, Mr. Martineau argued at paragraph 19:

“The process for determining a CEC application in Section 35 and 36 ...had no application to a decision to enter a consent agreement...”

Senior Counsel submitted further:

“The defendant acted within the powers conferred on it by the Act and in those circumstances there could be no complaint under judicial review...”

124. Addressing each of the claimants’ grounds for judicial review learned Senior, Mr. Martineau agreed with the claimants’ submission that the establishment of a concrete batching facility does not include the word “operation” and contended that the term “operation” did not fall under the Order as a designated activity. As such, no CEC is required for the operation of an already established plant.

125. Learned Senior Counsel, Mr. Martineau argued that it was a false premise to regard Section 36 as a mandatory requirement.

126. Learned Senior Counsel, Mr. Martineau answered the claimants' submission as to the doctrine of legitimate expectation and argued that it makes no sense to speak of a statute creating a legitimate expectation.

Written Submissions of the Interested Party

127. Learned Counsel, Mr. Deonarine responded to the submissions which had been made on behalf of the second claimant that the Consent Agreement does not contain provisions which are similar to the unique and defined process as set out in the CEC Rules. Learned Counsel argued however that the absence of such similarity in the consent order does not amount to a breach of natural justice, irrationality or unreasonableness.

128. Learned Counsel, Mr. Deonarine pointed to Clause 2:1 of the Consent Agreement and to the requirement for ongoing public consultation and set out in detail the factual progression of the case beginning with the complaints of the members of the second claimant and ending with reference to post-Consent Agreement consultations and monitoring⁶⁰.

Learned Counsel made this submission:

“In so far as considering all relevant matters as prescribed by the second claimant ...the evidence suggests that the defendant took every consideration stipulated above into account...and those considerations were relevant in coming to its decision on the Consent Agreement...”

Learned Counsel continued in this way:

⁶⁰ See paragraph 144, pages 64 to 73 of the Written Submissions on behalf of the Interested Party dated the 6th October, 2014.

“The Court should therefore find that the defendant did more than was required of a responsible public authority faced with complaints which were unsubstantiated and it also ascribed to its functions under Section 16”

129. At paragraph 148, of his written submissions, learned Counsel, Mr. Deonarine addressed cases on public participation and consultation. Learned Counsel, Mr. Deonarine, identified authorities cited by learned Senior Counsel for the second claimant and sought to distinguish those cases on the basis that those cases considered situations where:

“statutory provisions were enshrined into domestic legislation mandating public participation or an EIA to conducted in a certain manner and form...”

130. Learned Counsel, Mr. Deonarine, addressed the question of whether Section 35(2) and 62 were “*mandatory*” or “*directory*”. Referring to the decision of the Privy Council in ***Herbert Charles v. JLSC***⁶¹, learned Counsel identified three (3) questions for the Court’s consideration:

- (i) What was the intention of Parliament
- (ii) What is the effect of failure to observe Section 62(f); and
- (iii) Would failure to adhere result in total failure of the statute.

131. At paragraph 229 of his submission, learned Counsel submitted that it did not appear that the dichotomy between “*mandatory*” and “*directory*” has relevance. Learned Counsel submitted further that the difference between the CEC and the Consent Agreement was in form rather than in substance.

132. Addressing the claimant’s interpretation of Activity 18 of the ***Designated Activity Order***, learned Counsel submitted that the operation of the concrete batching plant was the natural

⁶¹ Herbert Charles v. JLSC [2002] UK PC 3424

consequence of the establishment of the plant and could not be regarded as a change or modification.

133. At paragraph 254, learned Counsel argued that Section 35 and 62 ought to be interpreted strictly, while Activity 18(c) and Section 63 ought to be read purposively.
134. In addressing the expert evidence for the second claimant, the Interested Party relied on the affidavit of Mr. Ramhit in support of their contention that the terms of reference provided to Dr. Chernaik were deficient. Learned Counsel referred as well to the concession of Dr. Chernaik at paragraph 5.3 of his Expert Report.
135. Mr. Deonarine referred to the words of Lord Diplock in *O'Reilly v. Mackman*⁶² and to Fordham, *Handbook on Judicial Review*⁶³ in support of his submission that any direct conflict of evidence was wholly unsuitable to judicial review proceedings.
136. Learned Counsel, Mr. Deonarine relied on the authority of *Fisherman and Friends of the Sea*⁶⁴ where Stollmeyer J. (as he then was) had this to say:

“Courts only intervene to overturn the agency’s findings if they are arbitrary and capricious...”

137. In addressing the Court on the evidence of the second claimant, learned Counsel, Mr. Deonarine castigated the members of the second claimant for lifting portions out of one affidavit and pasting them into all other affidavits. Counsel referred to the decision of Master Sobion in *Jamal Sambury v. the AG*⁶⁵ and submitted that the claimants had abused the Court’s process. Learned Counsel also argued that the Court should find that the

⁶² O'Reilly v. Mackman [1982] 3 AER 1124

⁶³ Michael Fordham, Judicial Review Handbook (4th Edition) RP 337-338

⁶⁴ HCA 2148 of 2003 Fisherman and Friends of the Sea v. EMA

⁶⁵ CV 2011-2720 Jamal Sambury v. The AG

second claimant had failed to make full and fair disclosure and that the Court should dismiss the application.

Law

Environmental Management Act, 2000⁶⁶. Part V. Assessment of Environmental Impacts.

Certificate of environmental clearance

138. Sections 35 to 40 are set out below:

“35. (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) An application made under this section shall be made in accordance with the manner prescribed.

(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.

⁶⁶ Ch. 35:05

(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.”

“Issue or refusal of Certificate

36. (1) After considering all relevant matters, including the comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures.

(2) Where the Authority refuses to issue a Certificate, it shall provide to the applicant in writing its reasons for such action.”

“Monitoring

37. The Authority shall monitor the performance of the activity to ensure compliance with any conditions in the Certificate, and to confirm that the performance of the activity is consistent with –

(a) the description provided in the application for a Certificate; and

(b) the information provided in any environmental impact assessment.”

“Relationship with other governmental entities

“38 (1) Where an activity designated under subsection 35 (1) constitutes a development requiring the express grant of permission under the Town and Country Planning Act, the developer shall deal directly with the entity

responsible for town and country planning with respect to the application for a Certificate and any environmental impact assessment which may be required.

- (2) If the approval of any other entity is required under a written law with respect to the proposed activity, the issue of a Certificate shall not affect in any way the requirement to obtain such other approval before the proposed activity may proceed.*
- (3) In any instance where the Authority determines that an environmental impact assessment is required for an activity at any location, no other entity shall grant any permit, licence, or other documentary authorisation with respect to such activity, until a Certificate has been issued by the Authority.”*

“Exceptions

- 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.”*

“Appeals

40. *Any final decision by the Authority to refuse issuance of a Certificate or to issue a certificate with conditions may be appealed to the Commission by the person seeking such Certificate.”*

Environmental Management Act, 2000⁶⁷. Part VI. Compliance and Enforcement.

Environmental requirements

139. Sections 62 to 68 are set out below:

62. *For the purposes of this Part and Part VIII, “environmental requirement” means the requirement upon a person to –*
- (a) comply with the procedures for the registration of sources from which pollutants may be released into the environment;*
 - (b) comply with the procedures and standards with respect to permits or licences required for any person to install or operate any process or source from which pollutants will be or may continue to be released into the environment;*
 - (c) provide in a timely manner complete and accurate information in any required submission to or communication with the Authority or in response to any inspection or request for information by the Authority;*
 - (d) refrain from any unauthorised activities impacting on the environment in a “environmentally sensitive area” or with respect to an “environmentally sensitive species”;*

⁶⁷ Ch. 35:05

- (e) comply with the performance standards, procedures, licensing or permitting requirements established for the handling of hazardous substances;*
- (f) apply for and obtain a Certificate of Environmental Clearance;***
- (g) comply with the conditions and mitigation measures in any such certificate;*
- (h) comply with the procedures and standards with respecting to the periodic or continual monitoring of pollution or releases of pollutants or conditions required under a permit or licence;*
- (i) provide timely and accurate notification with respect to an accidental or unauthorised release of a pollutant, or other incident with respect to a hazardous substance;*
- (j) control the release of pollutants in such a manner as to comply with any permit or licence granted under section 50(1), 53(1), 57(1) or 60(1);*
- (k) submit timely payment of required fees or charges payable to the Authority; and*
- (l) comply with all other procedures, standards, programmes and requirements in such a manner as may be prescribed by rule or regulation.”*

“Notice of violation

- 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.”

“Issue of Administrative Order

64. The Authority may issue an Administrative Order under section 65 where the person –

(a) fails to make representation to the Authority within the time specified in the Notice; or

(b) is unable to resolve with the Authority all matters specified in the Notice.”

“Administrative Orders

65. (1) An administrative Order served by the Authority shall, where appropriate –

- (a) specify details of the violation of one or more environmental requirements;*
- (b) direct the person to immediately cease and desist from the violation or specify a date for coming into compliance;*
- (c) direct the person to immediately remedy any environmental conditions or damages to the environment arising out of the violation or specify a date by which such remedial activities shall be completed;*
- (d) direct the person to undertake an investigation regarding any environmental circumstances or conditions within such person’s responsibility or control, including any release of a pollutant into the environment or the handling of any hazardous substance;*
- (e) direct the person to perform any monitoring or record keeping activities which may be required under section 47;*
- (f) include a proposed administrative civil assessment made by the Authority;*
- (g) direct a person to comply with any other requirement under this Act.*

(2) Directives contained in an Administrative Order served upon a person shall be deemed final and conclusive after the expiry of twenty-eight days, unless within such period the person –

- (a) appeals the Administrative Order to the Commission;*

- (b) reaches an agreement with the Authority which is reduced in writing into a Consent Agreement; or*
 - (c) obtains an extension of time from the Authority which is confirmed in writing.*
- (3) Any Administrative Order shall contain a notice advising of the matters in subsection (2).*

“Administrative civil assessment

66. (1) For the purposes of sections 65 and 81(5)(d), the Authority or the Commission may make an administrative civil assessment of –

- (a) compensation for actual costs incurred by the Authority to respond to environmental conditions or other circumstances arising out of the violation referenced in the Administrative Order;*
- (b) compensation for damages to the environment associated with public lands or holdings which arise out of the violation referenced in the Administrative Order;*
- (c) damages for any economic benefit or amount saved by a person through failure to comply with applicable environmental requirements;
and*
- (d) damages for the failure of a person to comply with applicable environmental requirements, in an amount determined pursuant to subsections (2) and (3).*

- (2) *In determining the amount of any damages to be assessed under subsections (1)(c) and (d), the Authority or the Commission shall take into account –*
- (a) *the nature, circumstances, extent and gravity of the violation;*
 - (b) *any history of prior violations; and*
 - (c) *the degree of willfulness or culpability in committing the violation and any good faith efforts to co-operate with the Authority.*
- (3) *The total amount of any damages under subsection (1) (d), shall not exceed –*
- (a) *for an individual, five thousand dollars for each violation and, in the case of continuing or recurrent violation, one thousand dollars per day for each such instance until the violation is remedied or abated; or*
 - (b) *for a person other than an individual, ten thousand dollars for each violation and, in the case of continuing or recurrent violations, five thousand dollars per day for each such instance until the violation is remedied or abated.”*

“Application for enforcement

67. (1) *The Authority may file any Consent Agreement for final Administrative Order and an application for enforcement with the Commission.*
- (2) *Where an Administrative Order contains a proposed administrative civil assessment, that assessment is not enforceable until such time as the Commission makes an Order determining the amount of such assessment.”*

“Other actions by the Authority”

68. *Whenever the Authority reasonably believes that any person is currently in violation of any environmental requirement, or is engaged in any activity which is likely to result in a violation of any environmental requirement, the Authority may in addition to, or in lieu of, other actions authorised under this Act –*

(a) seek a restraining order or other injunctive or equitable relief, to prohibit the continued violation or prevent the activity which will likely lead to a violation;

(b) seek an order for the closure of any facility or a prohibition against the continued operation of any processes or equipment at such facility in order to halt or prevent any violation; or

(c) pursue any other remedy which may be provided by law.”

140. ***Certificate of Environmental Clearance (Designated Activities) Order*** made under section 35(1). The relevant provisions are set out below:

1. *This Order may be cited as the Certificate of Environmental Clearance (Designated Activities) Order.*

2. *The activities listed in the Schedule are designated activities requiring a Certificate of Environmental Clearance, The grant of which signifies approval of the activity solely in terms of the environmental impact.*

(Designated Activities) – Continued

18. *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.*

141. ***The Certificate of Environmental Clearance Rules, 2001***

3. *In these Rules –*

“Certificate” means a certificate of environmental clearance issued under section 36(1) of the Act;

“designated activity” means an activity listed in the Schedule to the Certificate of Environmental Clearance (Designated Activities) Order, 2001;

8. (1) *The Authority shall establish a National Register of Certificates of Environmental Clearance.*

9. (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.*

(2) *An extract from the Register shall be supplied at the request of any person on payment of the prescribed fee.*

Law: Discretionary Bars

Material Disclosure

142. The law as to the effect of material non-disclosure is set out in ***Brinks Mat Ltd. v. Elcombe***⁶⁸ which was an *ex parte* application for a mareva injunction. In that case, Ralph Gibson L.J. set out the principles which should guide the Court in determining whether there has been material non-disclosure. Ralph Gibson L.J. had this to say:

“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:

- (i) The duty of the applicant is to make a full and fair disclosure of all the material facts “See **Rv. Kensington Income Tax Commissioners ex p Princess Edmond de Polignac** [1917] 1 KB 486.*
- (ii) 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:*
- (iii) The applicant must make proper enquiries before making the application ...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 made such enquiries*
- (iv) The extent of the inquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case...*

⁶⁸ *Brinks Mat Ltd. V. Elcombe* [1988] 1WLR 1350

- (v) *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.*
- (vi) *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 facts to the issue to be decided by the judge on the application.*
- (vii) *...It is not for every omission that the injunction will be discharged ...The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the discharge of the ex parte order nevertheless to continue the order or to make a new order on terms.*

143. The principles expounded by Ralph Gibson L.J. have long been recognized as being applicable to the *ex parte* application for leave to apply for judicial review. Myriad are the cases decided in the 1980's and 1990's, where the Court, having found the presence of material non-disclosure, concluded that the applicant had broken its contract with the Court⁶⁹ and that application for judicial review ought to be dismissed on its merits. Accordingly, the authority of *Vitamin & Herbal Cabinet Ltd. v. The Chief Chemist/Director of Food and Drugs*⁷⁰ as cited by learned Counsel, Mr. Deonarine is but one instance of the application of the principle to judicial review proceedings.

144. The duty to make full and frank disclosure also extends to the attorney-at-law who represents the applicant. See *Coosals Quarry Ltd. v. Teamwork Trinidad Ltd.* [1985] 37 WLR 417. Sharma J. (as he then was) had this to say:

⁶⁹ Rv. Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac (Ibid) [1917] 1 KB 486

⁷⁰ Vitamin and Herbal Cabinet Ltd. v. The Chief Chemist/Director of Food and Drugs CV 2011-1394

“The duty of Counsel for the plaintiff is to state fairly the points the defendant is making against it. He is under a duty to disclose to the Court all matters within his knowledge which are material to the proceedings and which tend to support the absent defendant...”

Detriment to Good Administration and detriment to third parties.

145. Part 56.5(3) of the ***CPR 1998*** provides:

“(3) When considering whether to refuse leave or to grant relief because of delay, the judge must consider whether the granting of leave...would be likely to

(a) Cause substantial hardship or substantially prejudice the rights of any person or

(b) Be detrimental to good administration

Conduct of the Claimant

146. The Court hearing an application for judicial review may exercise its discretion against granting relief having regard to the conduct of the claimant.

147. A manifestation of an abuse of process and a lack of candour with the Court is the replication of evidential material from one affidavit to another. A precedent for conduct of this kind was found in CV 2011-2720 ***Jamal Sambury v. the AG***, where Master Sobion considered the lifting of material from one witness statement to another to be an attempt to mislead the Court. Master Sobion had this to say:

“Accordingly the conduct of the litigation by the claimant was found to be

dishonest and an abuse of the process of the Court... ”⁷¹

148. It is however significant that Master Sobion who received the endorsement of the Court of Appeal in that case, decided against striking out the claim and found it appropriate to penalize the claimants in costs.⁷²

Law

Illegality

149. In *CCSU v. Minister for the Service*⁷³, Lord Dipock defined illegality in this way:

“By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it... ”⁷⁴

Rules of Statutory Interpretation

150. The learned Authors of *Cross on Statutory Interpretation* (3rd Edition 1995) identify the following as the key rules of statutory interpretation⁷⁵:

1. The judge must give effect to the grammatical and ordinary or where, appropriate, the technical meaning of the words in the general context of the statute; he must also determine the extent of general words with reference to that context.

⁷¹ CV 2011-2720 Jamal Sambury v. the AG at paragraph 8

⁷² Ibid at paragraph 10

⁷³ *CCSU v. Minister for the Civil Service* [1984] 3 AER 935

⁷⁴ Ibid at page 411

⁷⁵ See *Statutory Interpretation* by the late Sir Rupert Cross (3rd Bell and Engle edition.)

2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.
3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.
4. In *Maunsell v. Olins*⁷⁶ Lord Simon of Glaisdale expressed this opinion:

“...in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfill the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art).”

151. *Furlonge v. The Permanent Secretary Ministry of Health HCA CV 2098 of 2003*, was an authority relied on by Learned Senior Counsel for the second claimant. In that case, the applicant, Colin Furlonge, a medical doctor, brought judicial review proceedings against the decision of the Permanent Secretary in the Ministry of Health to by-pass him on two

⁷⁶ [1975] AC 373 at 391

(2) occasions and to appoint an officer below his range to the post of acting Medical Chief of Staff. The applicant claimed that the respondent acted contrary to the provisions of Public Service Regulations.

152. Jamadar J. (as he then was) found in favour of the applicant and held that the decision to by-pass him was *ultra vires* the Public Service Commission Regulations.

153. At page 10 of 19 of his decision, Jamadar J. (as he then was) considered whether the Regulations were mandatory or directory. The learned Judge referred to the words of Lord Woolf, M.R. in *Exp Jeyanthan*⁷⁷, where the learned Master of the Rolls formulates the following guidelines for deciding whether or not a provision was mandatory or directory.

“I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.

- 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
- 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.)*
- 3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)*

⁷⁷ Exp. Jeyanthan [1993] 3 AER 231

Which questions arise will depend upon the facts of the case and the nature of the particular requirement.”

154. ***Herbert Charles v. JLSC***⁷⁸ This was an authority relied on by Mr. Deonarine, learned Counsel for the Interested Party. In that case, extensively referred to by this Court in ***PURE v. EMA***⁷⁹, Justice Tipping quoted these words of Lord Slynn in ***Wang v. Commissioner of Inland Revenue***

“...their Lordships considered that when a question like the present one arises...its is simpler and better to avoid these two (2) words “mandatory” and “directory” and to ask two (2) questions. The first is whether the legislation intended the person making the determination to comply with the time provision...secondly if so, did the legislation intend that a failure to comply... would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void...”

Law

Legitimate Expectation

155. A legitimate expectation does not amount to an enforceable legal right and is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way. See ***Rv. Secretary of State for the Home Dept. Exp. Behluli***⁸⁰. The legitimate doctrine of legitimate expectation continues to be embedded in fairness and depends on evidence of an express

⁷⁸ P.C. Appeal No. 26 of 2001

⁷⁹ CV 2007-2263

⁸⁰ [1998] Imm. A.R. 407

promise or regular practice. See *Behluli*⁸¹, where Lord Justice Beldam referred to *Chundawadra v. Immigration Appeal Tribunal* [1998] Imm. A.R. 161 and quoted these words of Slade L.J.

*“...it is axiomatic that there must indeed exist a legitimate or reasonable expectation if the principle is to be successfully invoked. I say nothing about the position that would have arisen in the present case if there was before us any evidence of any relevant express promise or regular practice on the part of the Secretary of State. In default of such promise or practice...I do not see how the doctrine of legitimate expectation can avail the appellant...”*⁸²

156. The doctrine of legitimate expectation was considered by the House of Lords in *Rv. DPP Exp. Kebeline and Others*⁸³. In that case, Lord Steyn formulated one of the issues before the Court in this way:

“(2) Whether pending the coming into force of its central provisions, the Human Rights Act of 1998 gives rise to a legitimate expectation that the DPP will exercise his discretion to consent to a prosecution in accordance with Article 6 (2) of the convention...”

157. Of this submission, Lord Steyn had this to say:

“Issue 2: Legitimate Expectations

... in their Case the Respondents submitted that in the light of section 22 (4) read in the context of the Act of 1989, the Respondents have a legitimate expectation that pending the coming into force of the central provisions of the Act of 1998, the DPP would not

⁸¹ Ibid [1998] Imm A. R. 407

⁸² Behluli [1998] Imm A.R. 407

⁸³ Rv. DPP exp. Kebeline and Others [2000] 2 A.C. 326

give his consent to a prosecution to which would violate Article 6. In cogently expressed reasoning the Divisional Court rejected this submission. In a carefully structured oral argument Lord Lester of Herne Hill Q.C., who appeared of the Respondents, did not press this argument. There is a clear statutory intent to postpone the coming into effect of central provisions of the Act. A legitimate expectation which treats inoperative statutory provisions as having immediate effect is contradicted by the language of the statute.”

Issues

158. The following issues arose for the Court’s determination:

- (i) Whether the defendant acted illegally by acting in breach of Section 35 (5) of the Act by entering into a consent agreement with the Interested Party.
- (ii) Whether the defendant acted illegally in omitting to require the Interested Party to apply for and obtain a CEC for the operation of the concrete batching plant.
- (iii) Whether the defendant acted irrationally and in breach of the legitimate expectations of the second claimant.
- (iv) Whether the claim ought to be dismissed on the ground of material non-disclosure.

The fourth issue will be considered first.

Reasoning and Decision

Discretionary Bars

159. In these proceedings, the second claimant approaches the Court for relief under the ***Judicial Review Act***⁸⁴. In granting relief in judicial review, the Court exercises a discretionary jurisdiction⁸⁵ and may withhold relief on discretionary grounds including the failure of the applicant to make full and fair disclosure⁸⁶. In these proceedings, the Interested Party has identified four (4) grounds upon which the Court should exercise its discretion to withhold relief. They are: detriment to good administration, detriment to the third party, abuse of process and material non-disclosure.
160. The claimant's obligation to make full and fair disclosure is one that is shared by every litigant who approaches the Court for an *ex parte* order. A failure to make full and fair disclosure breaks the claimant's contract with the Court and the Court is entitled to dismiss the claim without examining its merits⁸⁷.
161. In ***Brinks Mat Ltd. v. Elcombe***⁸⁸, Ralph Gibson LJ identified the principles which should guide the Court in determining whether there has been material non-disclosure and whether, as a consequence, the claim should be dismissed without an examination of its merits⁸⁹.
162. The sixth principle enunciated by Ralph Gibson LJ considers the circumstances in which the Court will find the non-disclosure to have been of sufficient materiality to justify or

⁸⁴ Judicial Review Act 2000, Ch. 35:05

⁸⁵ See Clive Lewis *Judicial Remedies in Public Law*

⁸⁶ *Ibid* at paragraph 11 - 008

⁸⁷ *Rv. Kensington Income Tax Commissioners ex p. Princess Edmond de Polignac* [1917] 1 KB 486

⁸⁸ *Brinks Mat Ltd. v. Elcombe* [1988] 1 WLR 1350

⁸⁹ The principles have been set out at paragraph 139 *Supra*

require immediate discharge of the order⁹⁰. Ralph Gibson LJ expressed the view that the answer to this question:

“...depends on the importance of the fact to the issues which were to be decided by the judge on the application...”⁹¹

163. 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.

164. It was the contention of learned counsel for the Interested Party that the second claimant misrepresented that the concrete batching plant had been the cause of their suffering between August and December, 2011.

165. In considering this contention, the Court examined the affidavits of the deponents who testified on behalf of the second claimant. They were all members of the second claimant.

⁹⁰ See *Brinks Mat Ltd. v. Elcombe* [1988] 1 WLR 1350

⁹¹ *Ibid* at page 1357 D.

Each in turn deposed that between June and August, 2011, they observed activities on the lands of the Interested Party⁹².

166. They each, in turn, deposed that up until November, 2011, their communities of Royal Park and Chincuna Gardens had been quiet residential communities. According to the deponents, their difficulties began in early November, 2011, when the members of the community observed large equipment being constructed on LP 62. At paragraph 24, David Bissoon deposed 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...”

167. At paragraph 26, 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...”

What followed was a litany of sufferings including homes being covered by grayish-black dust.

168. Similar evidence was adduced through other deponents. It is my view that the thirty-one (31) 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.

⁹² For example, see the affidavit of David Bissoon filed on the 26th July, 2012 at paragraph 17

169. After the grant of leave to apply for judicial review, it emerged that the plant had not become operational until October, 2012. This was stated in the evidence of Mr. Roopchand Ramhit, at paragraph 31. Mr. Ramhit was not cross-examined, I therefore accept his evidence as unchallenged. Moreover this evidence was 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. It was also impliedly accepted by Dr. Mark Chernaik in his Expert Report filed on the 15th January, 2014⁹³.
170. The Court therefore accepts as a matter of fact that the concrete batching plant was not operational until October, 2012. By inference, I therefore find that the many deponents for the second claimant misrepresented that the operation of the batching plant was, in November, 2011, the source of their ailments. I now proceed therefore to consider whether the misrepresentation or non-disclosure was sufficiently important to the issue which engaged my attention when I granted leave to the claimants to apply for judicial review.
171. In their application pursuant to Section 6 of the *Judicial Review Act*⁹⁴ to apply for leave to apply for judicial review, the claimants (at the time two (2) claimants) impugned the decision of the EMA to enter into a consent agreement on the ground that the decision was illegal, irrational and in breach of the principles of natural justice. At that stage, the claimants were required to surmount a low threshold in satisfying the Court that a prima facie case existed for the granting relief in judicial review.
172. In considering the importance of the non-disclosure to the issues, I tested it by considering whether leave would have been granted had the claimants disclosed that the batching plant, at the date of their application was not operational, at the date of their application.

⁹³ Expert Report of Dr. Mark Chernaik at page 11.

⁹⁴ Judicial Review Act 2000 Ch. 7:08

173. 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.
174. Even the ground of illegality was based ultimately on the right of the public to be consulted before a developer could embark on projects which caused a negative environmental impact.
175. Had the deponents disclosed that the batching plant was non-operational, at the time of the application for leave, the Court would undoubtedly have enquired whether the batching plant and by extension the decision of the defendant was the cause of sufferings of the claimants. The Court would have enquired whether it may have been rather the use of the land for stockpiling of aggregate that gave rise to the problems encountered by the claimants. The use of land for the stock piling of aggregate is not an activity requiring a CEC and would have been regarded as unrelated to the impugned decision of the defendant. The Court would have enquired whether an action in nuisance might have better met the needs of the claimants, and whether the claimants' action ought to have been directed to the RPN Enterprises Limited rather than at the defendant.
176. It is therefore my view that the Court would have treated with the application for leave very differently, had the claimants disclosed that at the critical time the concrete batching plant, though present on the land was not operational. On the principles expounded in *Brinks Mat*, the claimants have not been frank with the Court. It is therefore my view that their non-disclosure would have affected the Court's view of the issues which engaged its

attention at the application for leave to apply for judicial review. The Court is therefore of the view that on that ground the application ought to be dismissed.

177. Learned Counsel for the Interested Party has also canvassed other grounds upon which, by his submission, the Court should exercise its discretion to refuse relief. The Interested Party alluded to the delay throughout the claim. It is to be noted at the outset, that there was no delay in approaching the Court for relief. The consent agreement was dated the 30th April, 2012 and the application for leave was made in July, 2012. There was however, severe delay in the course of the proceedings and many were the occasions when the Court reminded the parties that we were engaged in judicial review proceedings which should be heard and determined with dispatch. It is not my view however, that the leisurely pace of the proceedings could be laid solely at the feet of the claimants. For that reason, it would be wrong to refuse relief to the claimant on the ground of detriment to good administration by delay.

178. Learned counsel, Mr. Deonarine referred to the decision of *Jamal Sambury v. the AG*⁹⁵. He submitted that it was clear in these proceedings as in *Sambury* that the deponents for the claimant simply lifted portions out of one affidavit and placed them in all the others. It has not escaped the attention of the Court that many portions of the affidavits for the claimant are identical and it bordered on ludicrous that all the deponents could have described their woes with the same impassioned language. However, an accusation of an abuse of process is a serious one. In this case, the deponents did not repeat typographical errors as did the various claimants referred to by the learned Master in *Sambury* and although the Court has entertained its doubts as to the ingenuity of deponents for the

⁹⁵ Jamal Sambury v. AG of Trinidad & Tobago CV2011-2720

second claimant, I would be prepared, in the absence of cross-examination to give them the benefit of the doubt.

The Ground of Illegality

179. In the event that I am wrong on the issue of material non-disclosure and because of the public importance of the interpretation of *the Act*⁹⁶, I will proceed to consider the grounds of illegality, irrationality and the alleged breach of a legitimate expectation.
180. The central issue presented in these proceedings was one of the proper interpretation to be placed on the *Act*. Learned counsel for all parties accepted the principles of statutory interpretation which have been set out above. In summary, the Court is required to adopt a purposive approach to the construction of environmental legislation and to give effect to the plain ordinary meaning of the statute, in the absence of ambiguity.
181. In respect of the dichotomy between the mandatory or the directory effect of a provision, the Court is required as guided by the authority of *Herbert Charles v. JLSC*⁹⁷ to look at the subject matter of the provision, to consider the importance of the provision that has been disregarded and to consider the relationship between that provision and to the general object intended to be secured by *the Act*.
182. Armed with the authoritatively stated principles of statutory interpretation, the Court proceeded to consider the apparent conflict between Section 35(2) and 36 with Section 62 and Sections 63(2) of *the Act* and to consider whether the defendant acted illegally in placing a literal interpretation on Section 63(2)(b) to the apparent exclusion of Section 35(2), and Section 36.

⁹⁶ Environmental Management Act No. 3 of 2000

⁹⁷ *Herbert Charles v. JLSC* [2002] UKPC 3424 per Tipping J

183. It was the undisputed fact in this case that the defendant found the Interested Party to have violated *the Act* by failing to obtain a CEC. This finding led the defendant to issue a Notice of Violation under Section 63(1) of *the Act*. Having issued a Notice of Violation, the defendant proceeded to exercise its power under Section 63(2) to resolve the issue by entering into a consent agreement.
184. The Court considered whether this in the context of the statute, was incorrect and whether Part VI, under the rubric “Compliance and Enforcement” ought to be read as subject to Part V under the rubric “Environmental Management”.
185. Having considered all four (4) provisions of *the Act*, it is my view that the sections do not contradict each other and ought to be read sequentially. Part V provides for environmental management generally. The principal method which Parliament has provided for environmental management is through the Certificate of Environmental Clearance. This is achieved at the outset by itemizing, by way of the *CEC (Designated Activities) Order 2001*, those developmental activities which require a Certificate of Environmental Clearance. Developmental activities may require the developer to obtain a CEC at different stages of development. Certificates may therefore be required at the commencement of the project, (“a new activity”), or when the project is significantly modified. It is common ground in these proceedings that the establishment of a concrete batching plant was listed as item no. 18 of *the Designated Activities Order* and therefore required a CEC.
186. Section 35(2) prohibits anyone from proceeding with a designated activity unless they apply for and receive a CEC. This provision is clear and is addressed to the potential

developer. Should the developer violate Section 35(2), the consequence of violation is prescribed at Part VI, under the heading *Compliance and Enforcement*.

187. *The Act* proceeds to provide for the manner in which a developer may apply for a CEC. This is done through *Certificate of Environmental Clearance Rules* 2001, following which the EMA may request further information including the preparation of the Environmental Impact Assessment.
188. In my view, it is clear that *the Act* contemplates different degrees to which a developmental project may exert an impact on the environment. At the lowest level, there are activities which require no certificate of environmental clearance. Those activities would not appear at all in the *Certificate of Environmental Clearance (Designated Activities Order)*.
189. At the next level, there are activities which are listed in the *Certificate of Environmental Clearance (Designated Activities Order)* but which do not require the preparation of an Environmental Impact Assessment (EIA).
190. Where the developer has made an application as prescribed by the *Certificate of Environmental Clearance Rules* 2001, the EMA is empowered to seek further information including the preparation of the EIA. This is required to be done within the time prescribed by the Rules. The power to decide whether or not an activity requires an EIA has been invested by Parliament in the EMA by virtue of Section 35(4) of *the Act*. It does not fall within the Court's jurisdiction in the absence of irrationality, to dictate to the EMA when an EIA is required.
191. The highest degree of activities exerting an environmental impact are found in projects in respect of which the EMA has required the preparation of the EIA.

192. The requirement for the preparation of the EIA ushers in a whole new menu of obligations to be met by the potential developer. The application is required by Section 35(5) to be submitted for public comment. Where an EIA is required the applicant is mandated by Rule 5 of the *CEC Rules* 2001 to consult with the EMA for the preparation of a Terms of Reference (TOR).
193. In my view, the varying degrees of the environmental impact, as contemplated by *the Act* are reflected in the *CEC Rules* where at Rule 4, the Rules prescribed three (3) possible responses by the EMA to an application for a CEC. At the lowest level, the EMA notifies the applicant that no CEC is required. See Rule 4(1)(c). At Rule 4(1)(c), the EMA notifies the applicant that a CEC is required but that an EIA is not required. At the highest level of potential environmental impact, the EMA requires the preparation of an EIA, with the TOR. It is in respect of the project with the greatest impact that *the Act* requires the greatest public consultation in accordance with Section 35(5) and Section 28 of *the Act*.
194. In my view, many of the lofty authorities such as *Berkley*⁹⁸ and *FFOS*⁹⁹ relied on by learned Senior Counsel, Mr. Maharaj related to the last category, where an EIA is required and as such are not applicable to the proceedings before me.
195. In the proceedings before this Court, before refusing the application of the Interested Party, the EMA indicated that no EIA was required. In my view, the direct result of this was that Section 35(5) of *the Act* was not activated in respect of this project and it was not required to be submitted for public comment.
196. The EMA then exercised its powers at Section 36 of *the Act*. At this stage the EMA refused the application for the CEC. In this regard, one encounters a problem of statutory

⁹⁸ *Berkley v. Secretary of State for the Environment* [2001] 2 AC 603

⁹⁹ *Fisherman and Friends of the Sea v. EMA* [2005] 66 WIR 358

interpretation, in that the EMA in considering all relevant matters, as required by Section 36, could not consider any public comments, as there were none. In my view, it is at this Section that the Court ought to proceed to employ the purposive interpretation to avoid an absurd result.

197. The stated purpose of *the Act* is sustainable development, which is the balance between environmental protection and economic development. *The Act* does not require the EMA to employ the big stick on every developer, but is required to respond to the application for a CEC according to the environmental impact of the proposed activity. As stated above, the application with the least environmental impact requires no CEC at all. The application with the greatest impact requires a CEC and an EIA. If Section 36(1) of *the Act* is seen through this lens, it must be interpreted as permitting the EMA to consider comments and representations only where they have been required by Section 35(4).
198. In the event that I am wrong however, it is my view that the application of Section 36 is not relevant to these proceedings since the EMA refused the application of RPN Enterprises Limited for a CEC.
199. The question which arises is whether the EMA acted illegally by employing Section 63 (2) to resolve the issue which arose with RPN Enterprises Limited as a violator.
200. Having studied *the Act*, it was my view that there is no real conflict between Section 35(2), Section 36 and Section 62 and Section 63 and that these sections work in tandem. Part V, of which Section 35 and 36 are a part, provide for environmental management. The developer is enjoined against proceeding with designated activities without a CEC. No prohibition is effective unless consequences are prescribed to follow acts of violation. Accordingly, the consequence, of disobedience are provided for at Part VI under the

heading “Compliance and Enforcement”. In my view, it is for this reason that Section 62(f) echoes the provisions of Section 35(2) and includes, as an environmental requirement, the obligation to apply for and obtain a CEC. In breach of that requirement and indeed in breach of all environmental requirements, consequences of enforcement will follow.

201. It is accepted that the EMA refused the application of the Interested Party and found that they had violated *the Act*¹⁰⁰. The EMA then proceeded to exercise the very clear power granted to them at Section 63(2) to enter into an agreed resolution reduced into writing. In my view, such is the very clear intention of Parliament. The very clear power invested in the EMA is to act according to its discretion as prescribed by Section 63(b). Accordingly, I find that the ground of illegality in this respect ought to fail.
202. In respect of the second limb of the argument on illegality learned Senior Counsel for the second claimant has argued that following the establishment of the concrete batching plant a fresh application for a CEC ought to be made for its operation. In this respect, I respectfully agree with learned Senior Counsel, Mr. Martineau, that the operation of the plant is not listed in the *Designated Activities Order* and accordingly no separate CEC is required.
203. I turn now to consider the grounds of the breach of legitimate expectation and irrationality.
204. Learned Senior Counsel, Mr. Maharaj argued very convincingly that the apparent lack of consultation which preceded the formation of the Consent Agreement was contrary to the *National Environmental Policy* and that a breach thereof operated to frustrate the

¹⁰⁰ See the Notice of Violation exhibited as “RR18” to the affidavit of Roopchan Ramhit

legitimate expectations of the claimants that they would be consulted and would be permitted to make representations.

205. In this respect, I agree with learned Senior Counsel, Mr. Martineau, that a legitimate expectation cannot be founded on a statutory right. See early authorities on legitimate expectation such as the learning of Lord Diplock in *O'Reilly v. Mackman*¹⁰¹ and *CCSU v. Minister for the Civil Service*¹⁰². It can be seen from those authorities that a legitimate expectation arises where the impugned decision does not affect the enforceable rights of the claimant. (See Lord Diplock in *CCSU* at page 951(j). A legitimate expectation arises therefore, where enforceable rights have ended.
206. Section 31 of the Act requires the EMA to conduct its operation in accordance with the National Environmental Policy (NEP). In this way, the claimants enjoy a statutory right to insist that the defendant comply with the NEP.
207. I therefore respectfully agree with learned Senior Counsel for the defendant that the claimants could not conceive a legitimate expectation on the basis of the clear statutory right which they enjoy by virtue of Section 31 of *the Act*¹⁰³.
208. I turn now to consider the ground of irrationality. It is well established that an irrational decision is one which is so outrageous in its defiance of logic and acceptable moral standards that no sensible person who had applied his mind to the question could have arrived at¹⁰⁴.

¹⁰¹ *O'Reilly v. Mackman* [1982] 3 All ER 1124

¹⁰² *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935

¹⁰³ Environmental Management Act, Ch. 35:05

¹⁰⁴ See *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935

209. The ground of irrationality has been argued on behalf of the second claimant at different levels. The argument is based principally on the evidence of the expert Dr. Mark Chernaik, who provided expert comments on the Consent Agreement.
210. It was my view however, that by the Consent Agreement the EMA reserved for itself, the power to control defects on the part of the developer. Accordingly, the consent agreement contains monitoring provisions. Dr. Chernaik has commented that the monitoring provisions are vague. In my view, the vagueness of the provisions increases their ambit and the power of the EMA to implement them.
211. More importantly in my view, by the Consent Agreement, the EMA has reserved to itself the power to review the agreement. Thus assuming that all that was observed by Dr. Chernaik was accurate, the EMA has reserved to itself the power to make appropriate amendments.
212. It follows then that it is my view that the decision of the EMA to enter the consent agreement is far removed from the extremely high test of irrationality. In my view this ground also fails.
213. In summary it is my view that in its decision to enter into a consent agreement with the Interested Party, the EMA acted within its discretion as conferred by *the Act*. Its actions fell short of the definition of unreasonableness and the impugned decision could not be described as one which was so unreasonable that no reasonable authority would make.
214. One ground remains for the Court's consideration. Learned Senior Counsel for the claimant, argued that the decision of the defendant was contrary to the policy of *the Act*¹⁰⁵ in that it compromises the right of the public to be consulted.

¹⁰⁵ Environmental Management Act No. 3 of 2000

215. In this regard, it is clear that the Consent Agreement differs from a fresh application for a CEC in that it is not required to be placed on the National Register as required by Rule 8 of the *CEC Rules of 2001*.
216. In this way, it is my view that the decision of the EMA to avoid requiring a new CEC and to enter instead into a Consent Agreement with the Interested Party compromises the policy of the public participation, which is reflected in *the Act* and enshrined in the National Environmental Policy. It is therefore my view and I hold that the impugned decision, though otherwise flawless, was one that was in conflict with the general policy of *the Act*.
217. This of course is of little consequence having regard to my earlier finding at the outset that the claimants had committed material non-disclosure and the Court would exercise its discretion to withhold relief. It follows that it is my view that the claim should fail and that the claimant should be ordered to pay the costs of the defendant.

Dated this 7th day of August, 2015.

M. Dean-Armorer
Judge¹⁰⁶

¹⁰⁶ Ms. Joezel Williams, Judicial Research Assistant