IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CONSTITUTIONAL DIVISION

CLAIM NO. 2017 HCV 01798

BEFORE: THE HON. MS JUSTICE JENNIFER STRAW
THE HON. MRS JUSTICE LORNA SHELLY-WILLIAMS
THE HON. MRS JUSTICE SONIA BERTRAM-LINTON

IN THE MATTER OF an Application for Judicial Review

IN THE MATTER OF sections 13(3)(g), 13(3)(h), 13(3)(j)(ii), 13(3)(l) and 13(3)(q) of the Constitution of Jamaica

BETWEEN	**ASHTON EVELYN PITT**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**THE WESTMORELAND MUNICIPAL CORPORATION**	**2ND DEFENDANT**
AND	**THE NATIONAL ENVIRONMENTAL AND PLANNING AGENCY**	**3RD DEFENDANT**
AND	**THE NATURAL RESOURCES CONSERVATION AUTHORITY**	**4TH DEFENDANT**
AND	**THE TOWN AND COUNTRY PLANNING AUTHORITY**	**5TH DEFENDANT**
AND	**HUBERT WILLIAMS**	**6TH DEFENDANT**
AND	**ANDREW WILLIAMS**	**7TH DEFENDANT**

IN OPEN COURT

Mr Ian G. Wilkinson QC and Mr Lenroy Stewart instructed by Wilkinson Law for the Claimant

Ms Althea Jarrett and Mr André Moulton instructed by the Director of State Proceedings for the 1st, 3rd, 4th and 5th Defendants

Ms Mojorn Wallock and Ms Deborah Lee-Shung watching proceedings on behalf of the 3rd, 4th and 5th Defendants

Mr Canute Brown instructed by Brown, Godfrey & Morgan for the 2nd Defendant

Mrs Jeneive Sabdul-Williams for the 6th and 7th Defendants

Heard: 9, 10, 11, 12, 13, 16, 17 and 19 April and 17 December 2018

Straw and Shelly-Williams JJ (majority decision)

Background

[1] The claimant, Mr Ashton Pitt, seeks to challenge the decisions made by the 4th and 5th defendants on the 15th of March 2016. The 4th defendant, the Natural Resources Conservation Authority ('NRCA') approved Environmental Permits 2015-10017-EP00217 and 2016-10017-EP00012 in favour of the 7th defendant, Mr Andrew Williams, which would allow him to construct and operate a petroleum storage and dispensing facility as well as a block manufacturing facility. The 5th defendant, the Town and Country Planning Authority ('TCPA'), approved Planning Permit 2015-10010-BA00159 which was in reference to general industry {use class 7}.

[2] It should be noted that all three of these permits were granted with stipulated conditions and were issued on the 6th of March 2017, almost a year after the decisions were taken.

The Parties

[3] The claimant, Mr Pitt, is a resident in the community of Farm Pen, Llandilo which is located in the parish of Westmoreland. He is the registered proprietor of three parcels of land which adjoin the 6th defendant's property where the proposed development will take place.

[4] The 1st defendant, the Attorney-General, is the legal advisor to the Government of Jamaica and is joined pursuant to the **Crown Proceedings Act** and also having regard to the fact that the instant matter raises constitutional issues.

[5] The 2nd defendant, the Westmoreland Municipal Corporation ('WMC') is a statutory body of elected Councillors and is the local authority having responsibility for the parish of Westmoreland with, among other things, the authority to consider and grant development applications.

[6] The 3rd defendant, the National Environmental Planning Agency ('NEPA'), an Executive Agency of the Government established under the **Executive Agencies Act** to provide technical and administrative support to three statutory bodies including the 4th and 5th defendants, the Natural Resources Conservation Authority and the Town and Country Planning Authority, respectively. NEPA is not an incorporated body.

[7] The 4th defendant, the Natural Resources Conservation Authority ('NRCA'), is the statutory body, established under the **Natural Resources Conservation Authority Act**. The NRCA is empowered to *inter alia* grant environmental permits and licences for enterprise, construction or development in prescribed areas.

[8] The 5th defendant, the Town and Country Planning Authority ('TCPA') is the statutory body established under the **Town and Country Planning Act**. The TCPA is empowered to *inter alia* take decisions, grant approvals and make recommendations for orderly development and planning permission.

[9] The 6th defendant, Mr Hubert Williams, is the owner of land by virtue of a Deed of Indenture dated the 3rd of July 1970, in respect of the property for which the permits were granted and issued. The 7th defendant, Mr Andrew Williams, is the son of Mr Hubert Williams and is the person who made the applications for the environmental and planning permits to pursue and implement the development.

The Farm Pen Community

[10] The Farm Pen community where the properties concerned are located, is described by the claimant as a primarily residential and farming community. The claimant's contention is supported by restrictions contained in the relevant Certificates of Title/registered Deeds of Indenture and encumbrances which restrict the use of the lands to residential use and the use and enjoyment of land for the benefit of other lands. It is stated in the second schedule of Mr Hubert Williams' Deed, at paragraph 2, that:

> *"No school house, chapel, meeting house, or tenement house and no shop or other place for the carrying on of any trade or business of whatsoever nature or kind is to be erected on the said Lot or any part thereof".*

A similar statement is contained as an incumbrance on the claimant's titles.

[11] It is however noted that development is guided by the **Town and Country Planning (Westmoreland Parish) Development Order (Confirmed)**, 1978[1]. Based on this Order, NEPA (through its unit, the Development Assistance Committee) took the view that the proposed site for the development was not zoned for any specific use and as such there were no zoning restrictions on the

[1] It is noted that the Town and Country Planning (Westmoreland Area) Provisional Development Order, 2018 was gazetted on 1 February 2018 which revokes the Town and Country Planning Westmoreland Parish Development Order, 1978 and the Town and Country Planning Petrol filling station – Westmoreland Parish Development Order, 1978. Permission granted pursuant to the revoked Orders continue to have effect unless revoked. (see: paragraphs 25 and 26).

type of development that could be allowed. Pursuant to the said Order[2], applications for developments in unzoned areas are to be given individual considerations.

The Development

[12] Mr Andrew Williams' development is classified as general industry (use class 7) and will operate as a LPG refilling station and Block Factory (per 2015-10010-BA00159 Planning Permission).

[13] The development is considered to be a light industry by the officers of NEPA. Light industry is defined in NEPA's Development and Investment Manual as follows:

> *"These are industries in which the process carried on is not detrimental to the amenity of an area by reason of noise, fumes, smell, traffic generation. Light industrial use involves the manufacture of food, beverages, printing and publishing, electronic equipment, optical equipment, watches, clocks and jewellery. Development for warehousing have similar development standards as for light industry under which land use category it falls."*

Chronology

[14] For clarity and ease of comprehension, the series of events, over a four-year period, which gave rise to the case at bar are set out and annexed to this judgment.

Relief being sought

[15] The claimant is seeking the following:

I. A Declaration that the Second, Third, Fourth and Fifth Defendants, or either of them, acted irrationally and improperly in issuing the said permits to the Seventh Defendant to operate one LPG refilling station and a block factory at, or on, land located at part of Llandilo, Westmoreland;

---

[2] See: Table under Statements, subheading 'Zones'

II. A Declaration that in issuing the relevant permits the Second, Third, Fourth and Fifth Defendants, or either of them, breached the Claimant's rights to which he is entitled pursuant to sections 13(3)(g); 13(3)(h); 13(3)(j)(ii); 13(3)(l) and 13(3)(q), respectively, of Chapter III of the Jamaican Constitution;

III. A Declaration that the Second, Third, Fourth and Fifth Defendants, or either of them, acted ***ultra vires*** in issuing the said permits to the Seventh Defendant in breach of the relevant development order for Savanna-la-Mar in the parish of Westmoreland;

IV. A Declaration that in issuing the said permits the Second, Third, Fourth and Fifth Defendants, or either of them, acted in breach of Policy UE5 of the Emerging Order in respect of Savanna-la-Mar in the parish of Westmoreland;

V. A Declaration that in issuing the said permits the Second, Third, Fourth and Fifth Defendants, or either of them, acted in breach of Policy UE7 of the Emerging Order in respect of Savanna-la-Mar in the parish of Westmoreland;

VI. A Declaration that in failing to provide an avenue by which a person other than the applicant for planning permission aggrieved by the decision of the second Defendant or the Fifth Defendant may appeal, the Town and Country Planning Act breached the unconstitutional [sic];

VII. A Declaration that the Second, Third, Fourth and Fifth Defendants took into account irrelevant considerations, or failed to take into account relevant considerations in issuing the said permits to the Seventh Defendant;

VIII. A Declaration that in the instant case, the Second, Third, Fourth and Fifth Defendants, erred in the application of the law in relation to the issuing of the relevant permits to the Seventh Defendant;

IX. A Declaration that the failure of the Second Defendant, or either of the Third, Fourth and Fifth Defendants, to respond to the Claimant's letter of objection

resulted in a breach of the Claimant's right to fair and humane treatment by a public authority;

X. A Declaration that the Second, Third, Fourth and Fifth Defendants, erred in failing to give the Claimant an opportunity to be heard in respect of the issuing of the relevant permits after they were made aware of the Claimant's letter of objection;

XI. A Declaration that the Second, Third, Fourth and Fifth Defendants, erred in failing to request an environmental impact assessment from the Seventh Defendant;

XII. A Declaration that the Second, Third, Fourth and Fifth Defendants, in making their decision, failed to take into consideration the relevant covenants contained in the Certificate of Title for ALL THAT parcel of land Part of LLANDILO PEN in the parish of Westmoreland containing by survey One Acre Two Roads Twelve Perches and Seven – tenths of a perch and being all the land comprised in Certificate of Title registered at Volume 1256 Folio 329 of the Register Book of Titles; ALL THAT parcel of land part of LLANDILO PEN in the parish of WESTMORELAND containing by survey One Thousand and Thirty nine Square metres and being all the land comprised in Certificate of Title registered at Volume 1404 Folio 910 of the Register Book of Titles and ALL THAT parcel of land part of LLANDILO PEN in the parish of WESTMORELAND containing by survey Nine Hundred and Ninety–three square metres and being all the land comprised in Certificate of Title registered at Volume 1404 Folio 908 of the Register Book of Titles and Deed of Indenture dated [sic] to Hubert Williams dated the 3rd of July 1970;

XIII. An order of certiorari quashing the decision of the Second, Third, Fourth and Fifth Defendants to issue the said permits to the Seventh Defendant;

XIV. An injunction restraining the Sixth and Seventh Defendants, their agents, assigns and/or servants directly or howsoeverwise [sic], from taking any steps to act pursuant to the said permits and operate any LPG Storage, Stockpiling and Dispensing Facility and a Diesel Tank and block factory located at part of Llandilo, Westmoreland; and

XV. Damages and constitutional damages.

The Grounds

[16] The grounds on which the orders are being sought by the claimant are:

1. The Second, Third, Fourth and Fifth Defendants, or either of them, have acted in breach of the claimant's constitutional rights in issuing the said permits to the Seventh Defendant;

2. The Second, Third, Fourth and Fifth Defendants, or either of them, in issuing the said permits failed to have any or any adequate regard to the Emerging Order in respect of Savanna-la-Mar in the parish of Westmoreland;

3. The Second, Third, Fourth and Fifth Defendants, or either of them, in issuing the said permits failed to have any or any sufficient regard to the Development Order for the parish of Westmoreland;

4. The Second, Third, Fourth and Fifth Defendants, or either of them, in issuing the said permits failed to have regard to the adverse implications of having the relevant facility so close to the Claimant's properties;

5. The Second, Third, Fourth and Fifth Defendants, or either of them, in issuing the said permits have acted in breach of the restrictive covenants in respect of the relevant Certificates of Title and Deed of Indenture for the relevant properties;

6. The Second, Third, Fourth and Fifth Defendants, or either of them, failed to give the claimant an opportunity to be heard in respect of the issuing of the relevant permits to the Seventh Defendant;

7. The Second, Third, Fourth and Fifth Defendants, or either of them, failed to have any or any sufficient regard to the claimant's rights in issuing the said permits; and

8. The Second, Third, Fourth and Fifth Defendants, or either of them, failed to have any or any sufficient regard to their responsibility to treat the Claimant equitably and humanely in issuing the said permits.

The issues to be resolved

[17] These are the issues that fall to be determined:

1) Whether the grant of the Environmental and Planning Permits were irrational;

2) Whether there was a failure by the defendants to have regard to material considerations and/or whether regard was had to immaterial considerations – (objection letter and restrictive covenants);

3) Whether there was a breach of the **Town and Country Planning (Westmoreland Parish) Provisional Development Order** and Emerging Orders;

4) Whether the claimant's constitutional rights were breached;

5) Whether the failure to give the claimant an opportunity to be heard amounts to a breach of natural justice;

6) Whether the **Town and Country Planning Act** is unconstitutional, insofar that it fails to provide an avenue for third parties to be heard;

7) Whether an Environmental Impact Assessment ought to have been conducted/required by the NRCA;

8) Whether damages (constitutional and general) should be awarded to the claimant; and

9) Whether costs should be awarded to the claimant.

Issue 1: Whether the grant of the Environmental and Planning Permits were irrational

Issue 2: Whether there was a failure by the defendants to have regard to material considerations and/or whether regard was had to immaterial considerations

[18] Both issues one and two will be considered together.

[19] The claimant is seeking the following two Declarations. The first declaration is:

> *that the Second, Third, Fourth and Fifth Defendants, or either of them, acted irrationally and improperly in issuing the said permits to the Seventh Defendant to operate one LPG refilling station and a block factory at, or on, land located at part of Llandilo, Westmoreland;*

The second is:

> *A Declaration that the Second, Third, Fourth and Fifth Defendants took into account irrelevant considerations, or failed to take into account relevant considerations in issuing the said permits to the Seventh Defendant;*

[20] In considering these issues, the test to be applied is whether the 2nd, 3rd, 4th and 5th defendants acted unreasonably in granting the three permits in question. The test for reasonableness was laid down in the case of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**.[3] Lord Greene at page 229 said:

> *"a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably".*

---

[3] [1948] 1 KB 223

[21] Mr Andrew Williams submitted his proposal to NEPA, and a pre-consultation meeting was held at their Development Assistance Centre ('DAC'). Mr Miguel Nelson, technical officer of the DAC discussed with Mr Andrew Williams a potential conflict with establishing the development in the area that appeared to be predominantly residential. Following that meeting, the Director of the DAC wrote to Mr Andrew Williams confirming the potential conflict and further indicated that the formal applications were to be made to the WMC and NEPA in accordance with a Technical Information Document provided. Mr Andrew Williams wrote to the WMC requesting a no objection letter which was sent to NEPA. That letter contained a recommendation that Mr Andrew Williams consult with the community surrounding the proposed location. On receipt of the letter, the Director of the DAC wrote to Mr Andrew Williams indicating that a community consultation was required and provided a Draft Terms of Reference for Community Survey. It was also indicated that the results of the survey should be submitted with the applications for both the Planning and Environmental Permits.

[22] There was another survey undertaken in this matter, this time by NEPA on the 18th of February 2016. That survey captured the views of nine persons from the Farm Pen community.

[23] There are a number of steps that were undertaken, or not undertaken by the defendants, that led to the decision to grant the two types of permits that were called into question by the claimant. These include whether the said surveys conducted adequately captured the views of the community, the discharge/modification of the restrictive covenant and the objection letter of the claimant. This objection letter of the claimant was written on the 12th of February 2016 to WMC when he became aware of the proposed development.

What are the perimeters of the permits?

[24] Before commencing a discussion into the issues to the grant of these permits we wish to note that there appears to be an anomaly in this case. This anomaly is

that each party appears to have a different understanding as to the area that the permits affect and involve. The permit of itself does not assist, as it speaks only vaguely to Lots A and B, Llandilo, Savanna-la-mar, Westmoreland which is on the 6th Defendant's property. It does not assist in defining the perimeters of the community surrounding the property.

[25] The various descriptions given by each party are:-

a. In relation to the claimant, he seemed to be of the view that the permits affected a large portion of either Llandilo or the Farm Pen area. The claimant was asked in cross examination to indicate what he refers to as Farm Pen and he outlined a large expanse of land and population including an informal settlement in front of his and Mr Hubert Williams' property.

b. The witnesses for the WMC did not express a view as to the area in question and no specific questions were asked of the witnesses about Farm Pen.

c. The evidence about the Farm Pen area/relevant area on behalf of the NEPA, NRCA and TCPA came from Mr Tennison Dixon. He described Farm Pen from the main road, to the claimant's and Mr Hubert Williams' property. He also included in his description the informal settlement in front of Mr Hubert Williams' property. From his observation of the area, it led him to describe the area as mixed.

d. Mr Andrew Williams gave evidence that he caused a survey to be done that covered 75% of the persons in Farm Pen. He was asked to point out the Farm Pen area and he pointed to a small area surrounding Mr Hubert Williams' property.

The Surveys

[26] The fact that there was no meeting of the minds of the parties about what encompasses the Farm Pen area, affects a number of issues. It affects the survey of Mr Andrew Williams that was mandated by NEPA. It also affects the verification survey conducted by NEPA. Although it was indicated by a number of witnesses including Mr Peter Knight, the CEO of NEPA, that the survey from them would only be a sample, it would have to be, at the least, representative. Mr Tennison Dixon who conducted the verification survey on behalf of NEPA indicated that only a small number of persons i.e. nine, residents of the informal settlement which is situated in front of the proposed development were surveyed. Are the nine persons that were surveyed enough as to be a proper sample of the area?

Was the verification survey by NEPA properly conducted?

[27] Mr Dixon indicated that he went to the Farm Pen area and conducted a verification survey (at the request of the Technical Review Committee) to ascertain whether or not there were objections to the proposed permits. Any survey that is conducted should, as Mr Knight indicated, give a good appreciation of the thinking of the community members. This particular survey was conducted:-

a. without advance notice to any person in the community;

b. without any contact information being left in the community for residents to contact NEPA with their views or objections;

c. in the middle of the day i.e. at 10:50 a.m.;

d. with nine persons from the area within the context of the claimant's evidence that the informal community included about 150 residents. Mr Dixon estimated that in the area that he walked, there were about 20 houses; and

e. with no contact whatsoever with the immediate neighbour of Mr Hubert Williams who would have been the claimant.

[28] The court finds it remarkable that a survey could be conducted by representatives of NEPA, about whether or not there would be objections to these permits, and no one contacted the neighbour nearest to the proposed development site for an opinion to be voiced on the matter.

[29] Although the survey is supposed to be just a sample, it is required to be a true representation of the persons in the potentially affected area. As previously indicated, it was based on parameters of the area impacted which is ill defined. There is no defined percentage that must be achieved in this survey but it should be grounded on reason.

[30] The fact that the extent of the Farm Pen community was not definitively described impacts the cogency of the surveys leading to the granting of the permits.

Survey of the 7th Defendant

[31] There was a Terms of Reference for the community report which was provided to Mr Andrew Williams as a guide as to how to conduct his survey of the community. It suggested that he was to survey 75% of the community and only one representative of each household should be interviewed. It is unclear whether there was a genuine misunderstanding of the perimeters of the Farm Pen area by Mr Andrew Williams, or if it was deliberate, but what is clear is that the persons who were included in the survey could not be said to be 75% of the Farm Pen community. We make this finding also based on the evidence of Mr Dixon who made a site visit. While giving evidence in court he pointed out NEPA's understanding of the Farm Pen area by reference to aerial photographs.

[32] All the parties agree that there is an informal community located in front of the claimant's and Mr Hubert Williams' property which has at least 150 houses. The parties also agree that there are a number of properties on the main road as one travels towards the entrance road leading to the claimant's property. There are also a number of neighbours that surround those properties. The survey in

question covered only a few persons i.e. seven (7) persons, which surely would not amount to the recommended 75% of the community.

[33] This survey, considering what might be the perimeters of the Farm Pen area, would have been inadequate and would have to be properly conducted. Without a proper/comprehensive survey, as required, by Mr Andrew Williams and indeed by NEPA, the granting of the permits would be premature in light of our findings of the ill-defined parameters. In light of this, the permits should be withdrawn and the surveys redone as there was, in our opinion, a failure to properly take into account all the material considerations.

The Restrictive Covenant

The Claimant's submissions

[34] Counsel for the claimant, Mr Wilkinson QC, submitted that the WMC, NEPA, NRCA and the TCPA acted irrationally and unreasonably when they granted the environmental permits and made their planning decision, insofar that they acted in breach of or otherwise failed to consider the restrictive covenants in respect of the relevant Certificates of Title and Deed of Indenture for the relevant properties.

Submissions on behalf of NEPA, NRCA and TCPA

[35] Ms Jarrett, counsel for the 3rd to 5th defendants, submitted that the claimant's contention is without merit as the evidence is clear that consideration was given by the NRCA and TCPA to the restrictive covenants on the land of Mr Hubert Williams. She contends that Mr Andrew Williams was advised at an early stage that it was his responsibility to seek to modify or discharge the restrictive covenants on Mr Hubert Williams' land. She submitted that the importance of this was underscored in the very planning permission that was granted. She further contended that there is a marked distinction between the modification of restrictive covenants on the one hand and planning permissions on the other. The latter does not trump or supersede the former, both are two separate and distinct regimes.

[36] In her oral submissions, Ms Jarrett contended that the issue of restrictive covenants brings home the principle that planning is nuanced. She submitted that in ***Graham v Easington District Council***[4], it was emphasised that it is the duty of the permittee to seek to discharge restrictive covenants where they exist. She further submitted that the authorities may highlight this duty to a permittee but it cannot be made a part of the condition, as the authorities were not concerned with this aspect.

The 7th Defendant's submissions

[37] Counsel for Mr Andrew Williams, Mrs Sabdul-Williams, submitted that the approval of the permits in no way amounted to a breach of the restrictive covenants and she similarly cited the case of ***Graham v Easington District Council***.

Analysis

[38] The claimant is seeking a Declaration that:-

> *the Second, Third, Fourth and Fifth Defendants, in making their decision, failed to take into consideration the relevant covenants contained in the Certificate of Title for ALL THAT parcel of land Part of LLANDILO PEN in the parish of Westmoreland containing by survey One Acre Two Roads Twelve Perches and Seven – tenths of a perch and being all the land comprised in Certificate of Title registered at Volume 1256 Folio 329 of the Register Book of Titles; ALL THAT parcel of land part of LLANDILO PEN in the parish of WESTMORELAND containing by survey One Thousand and Thirty nine Square metres and being all the land comprised in Certificate of Title registered at Volume 1404 Folio 910 of the Register Book of Titles and ALL THAT parcel of land part of LLANDILO PEN in the parish of WESTMORELAND containing by survey Nine Hundred and Ninety – three square metres and being all the land comprised in Certificate of Title registered at Volume 1404 Folio 908 of the Register Book of Titles and Deed of Indenture dated [sic] to Hubert Williams dated the 3rd of July 1970;*

[39] The restrictive covenant in question as described in Mr Hubert Williams' Deed has already been set out at paragraph [10] of this judgment.

---

[4] [2008] EWCA Civ 1503

[40] Section 3 of the **Restrictive Covenants (Discharge and Modification) Act** states that:-

> *(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied –*
>
> *(a) That by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete: or*
>
> *(b) That the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or*
>
> *(c) That the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether om respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or*
>
> *(d) That the proposed discharge or modification will not injure the persons entitle to the benefit of the restriction:*
>
> *Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss.*
>
> *(2) The Judge shall, before making any order under this section, direct such enquiries as he may think fit to be made of the Town and Country Planning Authority and any local authority, and such notices as he may think fit, whether by way of advertisement or otherwise, to be given to the Town and Country Planning Authority and any persons who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with.*

[41] One of the mandates of NEPA (through the TCPA) is to regulate and to make decisions concerning the use of land in particular areas. Restrictive covenants dictate the home user's use of his/her land. In this case, Mr Andrew Williams was

applying to the TCPA to establish two businesses on the land of Mr Hubert Williams. Procedurally, the time to apply for the modification and/or discharge of restrictive covenants would be after permits are approved by TCPA and the NRCA. Mr Andrew Williams would utilise the grant of the permit as the basis for the modification or discharge of the restrictive covenant. Included in the permit granted by the TCPA was an informative that Mr Andrew Williams was not relieved from seeking to comply with other statutory obligations which included the modification or discharge of the restrictive covenant. The question is whether or not this reference to the restrictive covenant satisfied the duty of the TCPA?

[42] It is clear that the TCPA is under no duty to assist in relation to the amendment to the restrictive covenant. The fact is that the permit cannot be executed without the restrictive covenant being discharged or modified. In light of this, the TCPA has an obligation to indicate to the applicant in clear language that this is the position. The wording on the permit was that:-

> *"This approval does not relieve the applicant from complying for [sic] other statutory obligations or from apply [sic] for and obtaining any other permission, certifications, permits and licences. These include, but not exclusive to, Advertisement Consent and Modification/Discharge of Restrictive Covenant."*

This wording does not amount to clear and unambiguous language. Mr Andrew Williams may be left in doubt as to whether he can proceed to utilise the permit without the modification or discharge of the restrictive covenant. This, however, does not amount to a dereliction of duty that could lead to the granting of the Declaration as set out in paragraph [38].

The Objection Letter

[43] The evidence reveals that the WMC received the claimant's letter of objection in February of 2016. In this letter, he raised issues relating to the fact that the lands were either farm or residential lands and complained that any permit granted for heavy commercialization would have a legal challenge. He complained also about heavy trucks traversing in and out of what he describes as a 'single marl pitched

access road'. He complained also of the cumulative effects of the squatting already taking place in the area, the warehouse erected by an entity he refers to as AlexDel, and in particular the issue of flooding, stagnant water settlement and the potential for further breeding sites for mosquitoes. In particular, he asked that careful consideration be had to the introduction of commercial activities in Farm Pen, which he called a '100% residential' community.

[44] The WMC admits that they received the claimant's letter and also that they did not forward the letter to NEPA, nor did they update their previous letter dated the 22nd of July 2015 wherein it was indicated that there was no objection to the proposed development. Mrs Grace Whittley, Director of Planning in the WMC, indicated that their response was to investigate and thereafter serve notices.

[45] In response to the claimant's Letter, the Secretary of the WMC requested that the Superintendent of Roads and Works investigate the complaints. The claimant's complaints were also reported at the WMC meeting in April 2016. As a result, the Chairman of the WMC instructed officers to visit the location to ascertain whether building was taking place without the WMC's approval and to issue enforcement notices where necessary. This was done by Mr Jermaine Medley, a Building Officer in the WMC's Roads and Works Department, who gave evidence in this matter.

[46] Mr Medley stated that the application for the building permit by Mr Andrew Williams for the described enterprise was referred to his department and on the 30th of October 2015, he carried out the initial site inspection. Mr Medley recalls that the land was in its natural state and in his view had adequate space to accommodate the proposed structures which included four LPG fuel tanks with 2,000-gallon capacity each as well as two single floor reinforced concrete buildings for office space and restroom facilities.

[47] Mr Medley stated that save for the month of August, the WMC holds monthly meetings. At the April 2016 Committee meeting, it was reported that work had

commenced on the development. He then conducted another site investigation and observed that four fuel tanks had been installed without the requisite approval. He was then directed to serve an enforcement notice which he did on Mr Andrew Williams on the 28th of April 2016.

[48] About eight months later, the WMC responded to the claimant's letter on the 11th of November 2016. Under the hand of Mrs Grace Whittley, it was indicated to the claimant that the WMC had received no comments from NEPA and that Mr Andrew Williams' application had not been approved.

[49] Mr Peter Knight gave evidence that the claimant's objection letter was never brought to the attention of NEPA, NRCA or the TCPA. He indicated that he only became aware of the claimant's concerns on the 3rd of May 2016 when a reporter reached out to him with questions relating to the permits. As such, the application review process had been completed without considering the claimant's letter. In cross-examination, Mr Knight candidly stated that *'It would have been important that all the relevant matters, including this letter (the claimant's letter), be taken into consideration.'* He went on to say, *'It may or may not have made a difference but it should have been taken into consideration.'*

[50] Further, Mr Knight explained the role of the WMC in the application review process. He agreed that the WMC had a significant role, not only for the building permit but since it was a TCPA matter (i.e. it had to be referred for a TCPA decision) it was the WMC's responsibility when it sent the application, to provide all the supporting documentation. Mr Knight emphasised that it was important for the WMC to do this as it has *'hands on and on the ground familiarity'* and that the WMC's comments are important for the TCPA's consideration.

Submissions by the WMC

[51] The submissions of counsel for the WMC, Mr Canute Brown is that they are not the authority who grant the environmental and planning permits. He argued that

their remit was to forward the application to NEPA as well as to indicate if they objected to the application proceeding. Mr Brown argued, that the WMC was basically not under a duty to forward the objection letter from the claimant to the relevant authorities.

Discussion

[52] It is clear from the evidence of Mr Knight that the claimant's letter would have been a material consideration for the TCPA in its review of Mr Andrew Williams' application for the Planning Permission, and that it should have been considered.

[53] Similar to Mr Knight, this Court is unable to say whether the claimant's letter would have made a difference in the outcome. However, it cannot be ignored that at the time that the decision was made to grant the Planning Permission, the relevant decision maker (the TCPA) failed to have regard to a material consideration (the claimant's letter). This failure is compounded by a number of factors.

[54] Firstly, the TCPA would have relied on the representation of the WMC that there were no objections to the proposed development and that this representation was made in the absence of the project brief. Mrs Whittley stated in cross-examination that the WMC's letter was based on Mr Andrew William's letter to the WMC in which he indicated his concept of siting an LPG and block making facility at that location. She acknowledged that the said letter stated no details of the proposal.

[55] Secondly, in light of our findings in relation to the surveys conducted, it appears that there was inadequate public consultation.

[56] Reasonableness requires the lawful exercise of a discretion. This was already detailed above in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[5].

[57] Based on the foregoing, and in particular the evidence of Mr Knight, it may be concluded that the TCPA, in making its decision, relied on the WMC to provide *"all the supporting documentation"* which would include the letter. Given this collaborative approach, the WMC's failure to forward the claimant's letter or to update its prior representation that there were no objections would have caused the TCPA to make its decision to grant the planning permission without having regard to a material consideration.

[58] We would agree that WMC is not the entity that would have ultimately granted the permits being requested by Mr Andrew Williams. The WMC's importance, however, cannot be understated, as without their no objection letter the applications would not have proceeded. Since the WMC was an integral part of the whole process, we are of the opinion that they had the responsibility to bring the claimant's objection letter to the attention of the other relevant defendants.

[59] This dereliction of duty on the part of WMC led to the permits being granted in the first instance, without NEPA having all the relevant information to make an informed recommendation to NRCA and TCPA. As a result, any decision made by these authorities would have failed to have regard to all relevant factors. This finding also buttresses our conclusion that NRCA and TCPA failed to take into account all material considerations.

---

[5] [1948] 1 K.B. 223

Issue 3: Whether there was a breach of the Town and Country Planning (Westmoreland Parish) Provisional Development Order and Emerging Orders

Emerging Orders

[60] The next issue to be considered is whether there were breaches of the Emerging Orders and Development Orders. There are two Emerging Orders in question namely: -

> *Policy S UE5 – Development proposals for any use which would result in a significant number of people living or working in proximity of any hazardous industry or storage site will not be permitted.*
>
> *Policy S UE7 – Proposal involving the change of use of premises and sites with established use for industry will be considered having regard to the suitability of the land for the purpose, the availability of industrial premises of equivalent quality and the compatibility with surrounding uses.*

[61] There is also the **Town and Country (Westmoreland Parish) Provisional Development Order**, 1977 ('WPDO') which was confirmed on the 15th of June 1978 by the then Minister of Finance and Planning, by virtue of the **Town and Country (Westmoreland Parish) Provisional Development Order (Confirmation) Notification**, 1978.

[62] The **WPDO** was issued subject to section 7(2) of the **Town and Country Planning Act** which states that:-

> *Where the Minister is satisfied that the implementation of any provisional development order is likely to be in the public interest he may by notification published in the Gazette confirm it with or without modification and thereupon such order which with or without modification shall come into operation as a confirmed development order.*

[63] The procedure for granting planning permission is stated in paragraph 8(1)(c) of the **WPDO** which states that:

> *8.(1) Before granting planning permission for development or granting any approval in respect of matters reserved in a permission granted on an outline application under clause 6(3) in any of the following cases, whether unconditionally or subject to conditions, a local planning authority shall consult with the following authorities or persons, namely:-*

> *(c) where the development involves the change of use of any land exceeding five acres in area used or previously used or capable of being used for agriculture other than land specified for some other purpose in a development plan, with Ministry of Agriculture and the Land Development Utilization Commission or any other government agency exercising such functions;*

[64] Further, it is noted in the **WPDO** (under the heading of Statements and the subheading of 'Zones') that development should be in accordance with zoning proposals indicated on the Map that was attached. That Map detailed the different zoned and unzoned areas. On perusal of the Map, the Llandilo area, is labelled as unzoned.

[65] These orders give guidance as to how development in Westmoreland is undertaken by a number of entities including NEPA. Mr Wilkinson submits that in granting the permits and planning permission to Mr Andrew Williams, no regard or no proper regard was had by the WMC, NEPA, NRCA and the TCPA to Policies UE5 and 7 of the Emerging Orders. He contends that NEPA, NRCA and the TCPA did not take into account the location of the claimant's property in relation to the proposed development. Reference was made to the claimant's evidence that the development is immediately adjacent to his property. It shares a boundary with the property on which his home is located. The claimant stated that the LPG tanks are situated less than 60 feet away from the fence line of his home. He also gave evidence that there were other residential and farming land in the area, in particular he spoke of an informal settlement which is directly in front of the development. In his evidence in amplification, the claimant spoke of several residential homes in close proximity to the development. These were identified to the court, as stated previously, by reference to aerial photographs of the area which were put in evidence by consent. In particular, the claimant stated in reference to picture 4, that the structures in front of the development were his neighbours and that except for one or two, they were board homes/simple board structures.

[66] In his oral submissions, Mr Wilkinson argued that it was not being contended that that residential means it is an oasis. He submitted that it is normal that business

would be there to serve the community. He, however, emphasised that all of the legal businesses were off the main road.

[67] Counsel, Ms Jarrett, submitted that NEPA is not a statutory body and as such it made no planning decisions nor granted permits relative to Mr Andrew Williams. Further, NEPA had no duty in its capacity as the executive agency, which provides technical and administrative support to NRCA and TCPA, to have regard the **WPDO**.

[68] With regard to NRCA and TCPA, Ms Jarrett submitted that proper and sufficient regard was had to the **WPDO**[6]. She contends that the claimant has failed to provide credible/substantive evidence to support his allegation and the evidence indicates otherwise.

[69] With regard to the Emerging Orders for Savanna-la-Mar, Ms Jarrett contends that regard was had to them but in any event, Policies UE5 and UE7 of the said Emerging Orders are not binding on the NRCA or the TCPA.

[70] Further Ms Jarrett submitted that even if they were binding, there is no evidence to support a contention that there was a breach of the said Policies. As it relates to Policy UE5, she submitted that there is no evidence of a significant number of persons living in close proximity to Mr Andrew Williams' development site. As it relates to Policy UE7, counsel submitted that this policy would not be engaged since the development site is not zoned for any particular type of activity.

[71] Mr Brown, in his oral submissions, made the point that there was consultation when the Development Order was being crafted. He contends that the law imposes

---

[6] It was agreed that the Westmoreland Development Order is the development order relevant to lands in Llandilo, Westmoreland. It was issued on 15 June 1978, pursuant to section 7(2) of the Town and Country Planning Act, by the then Minister of Finance and Planning and confirms the Town and Country Planning (Westmoreland Parish) Provisional Development Order, 1977 – see: paragraph 25 of the 1st, 3rd, 4th and 5th Defendants' Skeleton Submissions

a duty on the local authority to consult but nothing has been done since 1977. Reference was also made to the **Town and Country Planning Act** (TCPA) which Mr Brown submitted imposes a duty on them to develop/craft or promulgate a development order for the parish. Mr Brown stressed that one has not been done to replace the 1977 one, hence the reference to emerging orders or other policy guidelines by the state.

[72] Counsel submitted also that the WMC cannot be the subject of any order for certiorari and/or injunction as they made no decisions in relation to the granting of the relevant permits. The submission is that their involvement in relation to the impugned permits, was to issue a no objection letter. That letter, he submitted, merely indicated that the WMC had no objection to the permit being granted, but it does not indicate they are part of the decision making process of NEPA.

[73] Counsel, Mrs Sabdul-Williams, submitted that in processing Mr Andrew Williams' application the relevant decision makers consulted and adhered to the relevant legislation, Development Orders and Policies. With regards to zoning, she submitted that there was no impediment to the proposed development.

[74] Mrs Sabdul-Williams further submitted that the policies outlined within the Emerging Westmoreland Provisional Order were also consulted. These, she argued, did not present a bar to approval however, having regard to the **WPDO** in effect at the material time, use of lands in the locality, the compatibility of the proposed development with the Development Lands, and the general multiagency consensus that the development should be approved.

Discussion

[75] The starting point is whether or not the issue concerning the Emerging Orders and the **WPDO** applies to all the defendants. Ms Jarrett argued that NEPA is not a statutory body and it made no planning decisions relative to Mr Andrew Williams. NEPA, from the evidence of Mr Knight, provides technical and administrative

support to the NRCA and TCPA. NEPA is relevant to dictate the correct procedures and to indicate the requisite documentation to be submitted by an applicant to receive a permit. It is the support system for the NRCA and TCPA, however it makes no decisions in relation to the grant of the permits. As such NEPA cannot be the subject of on order for Certiorari, a declaration, or an injunction in the relation to the decision concerning the permits.

[76] Section 4A of the **Town and Country Planning Act** states that:

4A. (1) The Minister may, after consultation with a local authority, make an order to be known as interim development order in respect of any land which is not the subject of a confirmed development order, other than land to which a Town and Country Planning (Filling Station) Development Order relates.

(2) An interim development order shall state-

(a) the description of the area of land to which the order relates;

(b) the parish in which the land is situated;

(c) the type of development which may take place within that area without formal planning permission and the conditions, if any, applicable to such development;

(d) the time when such development may commence;

(e) the functions of the local planning authority under the order;

(f) the section 10 (1) (c) shall apply mutatis mutandis to an interim development order as it applies to a development order with the modification that the words "paragraphs (a) to (e) "be substituted for the words "paragraph (b)",

(g) that the order is effective until a confirmed development order comes into operation pursuant to section 7 (2).

(3) An interim development order shall be made without prejudice to any other order relating to development under any other enactment.

(4) For the purposes of subsection (2) (d) the Minister may specify different times for different development.

[77] The actual procedure for the Planning Permit to be granted is detailed in sections 11 and 12 of the **Town and Country Planning Act**.

[78] Policies S UE5 and S UE7 have already been set out at paragraph [60]. There were submissions that these orders are not binding on the relevant defendants as they were not passed into law. Although they were not verified and passed into law by any entity, they are orders that should be considered by these defendants in relation to proposed developments in Westmoreland.

[79] Whether or not the business relating to the LPG refilling station was a hazardous, heavy duty or a light industry, occupied most of the hearing for the Judicial Review. There was evidence of Dr Kerrine Senior, NEPA's Manager of Pollution Prevention and Control Branch, that, although they had no policy guidelines about the LPG storage, stockpiling and dispensing facility such as the one Mr Andrew Williams intends to operate, this enterprise would amount to a light industry. This was also true for the proposed Block Factory to be erected and operated by Mr Andrew Williams. She agreed that she has no specific training in relation to the management of LPG, however she does have training and expertise in relation to environmental biology and chemicals (specifically the management of polychlorinated biphenyl wastes).

[80] She gave evidence that although NEPA had not formulated their own guidelines, there were other guidelines that she was able to rely upon in relation to these applications. These guidelines included the one formulated by the National Works Agency ('NWA') for the Proper Siting and Design of Petrol and Oil Filling Stations, 2015. There were aspects of the guidelines which applied to the permits granted to Mr Andrew Williams and some that did not. Her evidence was that with proper safeguards, which the permit stipulates, both the LPG Facility and the Block Factory could be operated with little or no impact to the claimant.

[81] There were a number of contradictions between the evidence of Dr Kerrine Senior and other witnesses called on behalf of NEPA, concerning the NWA Guidelines.

These concerned the applicability of various provisions of the Guidelines to the proposed enterprise/development. These inconsistencies will be addressed further later in this judgment. The claimant however did not present any independent evidence to support the submissions that this particular facility, if it is approved and established beside his residence would be hazardous in the context of Policy S UE5.

[82] In light of this there is no proper basis to challenge the evidence of the witnesses from NEPA that the permits relate to light industries, which could safely be installed at Mr Hubert Williams' premises. The first Emerging Order would then not apply.

[83] The second Emerging Order Policy S UE7 raises three issues for our consideration:-

a. the suitability of the land for the purpose;

b. the availability of industrial premises and of equivalent quality; and

c. the compatibility with surrounding uses.

[84] The suitability of the land for the purpose would come under the rubric of the Environmental Impact Assessment i.e. whether one was necessary and how important it was. There was some evidence given by the claimant that the Farm Pen area had a history of flooding during certain months of the year. This, he argued, necessitated the commissioning of an EIA before the LPG facility and the Block Factory are established.

[85] The evidence from representatives from NEPA was that the EIA was not required. The issue of the EIA will be explored fully later in the judgment.

[86] The position of NEPA was supported by the report from the NWA which indicated that the applicant would need to undertake some concrete and drainage work as a prerequisite to the businesses being established. The NWA would be aware of the environment in Westmoreland and what would be required for safety reasons.

[87] The next issue was the availability of industrial premises of equivalent quality and compatibility of the surrounding area. The evidence of the claimant is that:-

a. His premises is in close proximity to the proposed site. There are some cylinders already on the said premises and it clearly shows the proposed danger to his premises if there is any accident.

b. The road leading to Mr Hubert Williams' premises is quite narrow and is unpaved.

c. There is a large residential area (squatter community) in front of the said premises that would be in danger if there was some mishap.

[88] There was no evidence given by any of the parties about availability of industrial premises of equivalent quality, except for Mr Andrew Williams. He sought to install the LPG dispensing station and the block making factory at these facilities to capitalise on the potential market and indicated that there are no other dispensers in the immediate area.

[89] Ms Jarrett submitted in relation to the compatibility of the land, that there are precautions that could be put in place to defuse and counter whatever issue that could be raised in relation to safety issues.

Discussion

[90] Although the claimant has raised concerns about these issues, he has not presented any alternate expert views to contradict the evidence that once these precautions are adhered to, the businesses can be safely installed. We also find that there is no industrial facility of equivalent quality and it is for the relevant authorities to consider this factor along with the proper safety measures that are to be put in place. The claimant has therefore not satisfied the court that there has been any breach of any of these Emerging Orders.

Westmoreland Parish Provisional Development Order

[91] Section 7(2) of the **Town and Country Planning Act** as set out paragraph [62] gives the Minister the power to confirm any provisional development order with or without modification if he is satisfied that the implementation is likely to be in the public interest.

[92] Paragraph 8(1)(c) of the **WPDO** which is also set out at paragraph [63] states what is to be taken into consideration prior to the granting of any planning permission.

[93] Further it is noted (under the heading of Statements and the subheading of 'Zones') that *'Development should be in accordance with zoning proposals indicated on Map I hereunto annexed.'* A table is provided which indicates types of entities which are normally permitted (which is indicated with a '1'); permitted in certain cases (indicated with a '2'); and not normally permitted (indicated with a '3'). The table refers to "main communities" and "open space and natural conservation areas". It is specified that applications relating to "unzoned areas" are to be given individual consideration. This area in question was in fact an unzoned area.

[94] In considering whether or not the relevant defendants acted in accordance with the **WPDO**, we took into consideration the duty that they would be under. We considered the dicta of Cooke J in **Stringer v Minister of Housing and Local Government**[7]: -

> *"In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within the broad class is material in any case will depend on the circumstances. However, it seems to me that in considering an appeal the Minister is entitled to ask himself whether the proposed development is compatible with the proper and desirable use of other land in the area. For example, if permission is sought to erect an explosives factory adjacent to a*

[7] [1971] 1 All ER 65 at 77

school, the Minister must surely be entitled and bound to consider the questions of safety. That plainly is not an amenity consideration."

[95] The court in this case is to ascertain whether the TCPA (which is the entity concerned with the granting of the planning permit) gave due consideration to all the issues touching and concerning the issuance of the permit. Once the relevant defendants have shown this, then the court ought not to interfere in the decision making process. The purpose of the Judicial Review is not to arrive at an alternative conclusion from the decision making entity with the same facts. The court is to ascertain whether there were any breaches of the process itself. In relation to the **WPDO** it is clear that the relevant defendants had made an informed decision as to the relevant use of the land. The area had previously been unzoned. NEPA had consulted with the WMC who indicated that they had no objections. They then made a decision, after a site visit, and input from other entities such as NWA as to safety concerns. They exercised the authority vested in them to consider and approve the application before them. As such, the court would not grant any relief as the TCPA would have acted within their remit to consider individual applications in the unzoned area. The claimant has therefore failed to establish any breach of the **WPDO**.

Issue 4: Whether The claimant's constitutional rights were breached

[96] The claimant is alleging that the WMC, NEPA, NRCA and TCPA or either of them breached several of his constitutional rights to which he is entitled. These are the rights to (1) equality before the law; (2) equitable and humane treatment by any public authority in the exercise of any function; (3) respect for and protection of private and family life, and privacy of the home; and (4) enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.

[97] The relevant constitutional provisions, sections 13(2)(b), 13(3)(g), 13(3)(h), 13(3)(j)(ii) and 13(3)(l) are set out below:

13(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

(a) …

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

13(3) The rights and freedoms referred to in subsection (2) are as follows –

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) the right to equality before the law;

(h) the right to equitable and humane treatment by any public authority in the exercise of any function;

(i) …

(j) the right of everyone to –

(i) …

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) …

(k) …

(l) The right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;

Submissions of the claimant

[98] Mr Wilkinson submitted that the above-named defendants breached the claimant's constitutional rights by issuing the relevant permits. In particular, he submitted that the failure to respond or consider the claimant's letter of objection, would be a breach of his right to equality before the law and the right to equitable and humane

treatment by a public authority in the exercise of any function. Additionally, if as alleged the WMC did not submit the said letter to the other authorities, this in itself is a breach of the right to equality and the right to equitable and humane treatment.

[99] In relation to the right to a healthy and productive environment, Mr Wilkinson has submitted that the evidence of this is based on the deleterious effects of the development to date as well as the threatened effects stated by the claimant. These effects include noise and dust nuisance, flooding, stagnant water and the breeding of mosquitoes

Submissions of NEPA, NRCA and TCPA

[100] Counsel, Ms Jarrett, has submitted that there is absolutely no evidence to support any of the above contentions. In relation to the right to equality under the law, she submitted that this is a right modelled off the Universal Declaration of Human Rights and is part of the right to a fair trial. In support she cited the case **Gerville Williams et al v The Commissioner of Independent Commission of Investigations et al**[8]. Ms Jarrett contended that this right has not been engaged based on the factual matrix and that even if it could be argued that the right transcends a broader right to be treated fairly, there is no evidence of unfair treatment by the above defendants.

[101] In relation to the right to equitable and humane treatment, Ms Jarrett again submitted that there has been no evidence advanced to support such a contention in relation to the above defendants. She stated that the basis of the claimant's contention is the failure of NRCA and TCPA to consult with the claimant. However, the evidence of Mr Peter Knight is that NEPA, NRCA and TCPA did not receive

[8] [2012] JMFC Full 1

the claimant's objection letter. It is contended that there is also no evidence presented to support the allegation of the breach of the other described rights.

Submissions on behalf of the WMC

[102] Counsel, Mr Brown, has not made any specific submissions in relation to the issue of these breaches. He has submitted that the WMC cannot dictate to other central government agencies whether they should grant or refuse a permit or other licence under the statute governing the operation of those agencies. He referred the court to **H. Lavender & Son Ltd v Minister of Housing and Local Government**[9] and contended that any argument that the 'no objections' letter issued by the WMC was a decisive factor in granting the permits would be wrong in the absence of express statutory power to delegate that decision to the WMC. Counsel contends that the WMC had no authority to issue permits or licences under **Natural Resources Conservation Authority Act**; that the WMC did not at any time issue a building permit. He asked the court to consider also that the claimant's letter came four months after the application had been submitted. Finally, that the claimant's letter was not ignored but made its way through the system and that eventually the WMC did respond to his letter.

[103] Mr Brown agreed that an objection to an application would be a material consideration in a Municipal Corporation's deliberations on whether to grant or refuse the application. He contends however that the said objection letter led to the prompt issuing of a cease and desist notice and enforcement notice even though the response in writing to the claimant was delayed.

---

[9] [1970] 1 WLR 1231

Discussion

Right to equality before the law and the right to equitable and humane treatment by a public authority

[104] The issue is therefore whether as a matter of law and or evidence, the claimant has made out a claim for these breaches against all or any of the above mentioned defendants.

[105] Section 4(b) and (d) of the **Constitution of Trinidad and Tobago**, 1976 provides similar provisions to the Jamaican **Charter of Rights** - sections 13(3) (g) and (h). Sections 4(b) and (d) recognises *"the right of the individual to equality before the law and the protection of the law".*

[106] In **Central Broadcasting Services Ltd and another v Attorney General of Trinidad and Tobago**[10], the Privy Council considered the above provisions of the **Constitution of Trinidad and Tobago**. Lord Mance, in delivering the judgment of the Board stated[11] that section 4(b) is directed to equal protection as a matter of law and in the courts, and referred to **Bhagwandeen v AG**[12]. His Lordship indicated that there was no suggestion in the circumstances under consideration that either the law itself or its administration by the courts was discriminatory.

[107] In **Bhagwandeen** (which also originated from Trinidad and Tobago), the appellant also relied on both these sections of the **Constitution of Trinidad and Tobago**. Lord Carswell[13] who delivered the judgment of the court, expressed essentially that there was no breach of section 4(b) provision as the appellant had access to

---

[10] [2006] UKPC 35
[11] at paragraph [20]
[12] [2004] 5 LRC 501
[13] at paragraph [14]

a court of justice to determine his rights and liabilities, by way of judicial review. His Lordship stated also that it was not contended that he was deprived of the protection of the law and the case turned on whether he received equality of treatment.[14]

[108] In **Rural Transit Association Limited v Jamaica Urban Transit Company Limited et al**[15], the Full Court had to consider the same provisions in the Jamaican Charter and applied the interpretation as set out in **Central Broadcasting** and **Bhagwandeen**, having accepted that section 13(3)(g) of the **Jamaican Constitution** may be interpreted in the same way as section 4(b) of the **Trinidadian Constitution**.[16] We entirely agree with our colleagues in **Rural Transit** and the submissions of counsel, Ms Jarrett and conclude that there has been no engagement of the section 13(3)(g) provision by the claimant. There is no evidence that the law in relation to this matter or its administration by the courts is discriminatory.

[109] In relation to right to equitable and humane treatment, again the court follows the principles set out in **Bhagwandeen**. Lord Carswell[17] stated the elements that needed to be established to make out a breach as far as section 4(d) of the **Trinidad and Tobago Constitution** was concerned:

> *A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoun v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] 2 All ER 26 at para 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.*

---

[14] section 4 (d) provision
[15] [2016] JMFC FULL 04
[16] See: majority decisions of McDonald C, J at paragraph [171] and Williams F, J (as he then was) at paragraph [266]
[17] at paragraph [18]

[110] The Board decided the issue in **Bhagwandeen** on the above point and found that the appellant had no true comparator and had no foundation for his claim of unequal treatment. They found it unnecessary therefore to decide whether it was also necessary for the appellant to establish *mala fides* in the public authority. The Full Court in **Rural Transit**, also applied the above principle in determining the claim under section 13.

[111] In **Rural Transit**, also, C. McDonald J[18] accepted the Full Court's decision in **The Hon. Mrs Portia Simpson-Miller and ors v The Attorney-General of Jamaica and anor[19]** delivered by McDonald-Bishop J (as she then was), where the court accepted that it was necessary for the claimants to demonstrate that persons behaving in the same manner are meted out different treatment based on the possession of distinguishing characteristics. At paragraph [159] of the judgment, McDonald-Bishop J considered whether there was any evidence that someone in the same position of the claimant was treated differently and more favourably.

[112] At paragraph [197] of her judgment in **Rural Transit**, C. McDonald J stated that the words equitable and inhumane are to be read conjunctively and that she interpreted the word 'equitable' to mean fair or just. She stated that it does not mean equal. This is also in harmony with McDonald-Bishop J's consideration of the issue in the vein of unfairness. For his part, F. Williams J, who was also part of the majority in **Rural Transit[20]** stated that he understood the word 'equitable' also to mean fair and not equal. He also stated:

> *'…fairness is a concept that must be decided having regard to all the facts and circumstances of a particular case. "Inhumane" means "without compassion for misery or suffering; cruel".'*

---

[18] at paragraph [189]
[19] [2013] JMFC FULL CRT. 4
[20] at paragraph [274]

[113] In this case, in relation to the general issue regarding the granting of the permits, in the circumstances as it was done, there is no evidence of other persons in the same position as the claimant being treated differently. In relation to the specific issue as to the conduct of the WMC in not responding until several months later, and/or failing to advise the other defendants of his letter, there is also no evidence of someone else in the same position being treated differently. Furthermore, although there was no appropriate response to his letter received in February 2016 until November of that year, the evidence does reveal that the WMC did commence to deal with the complaint by April of 2016 and in fact issued enforcement notices against Mr Andrew Williams that same month. In relation to the other defendants, the evidence is incontrovertible that they would not have known of this letter of objection at the time they considered and granted the permits to Mr Andrew Williams.

[114] The claimant has therefore failed to make out a justiciable complaint in relation to the above rights.

Respect for and protection of private and family life and privacy of the home - section 13(3)(j)(ii)

Evidence of the Claimant

[115] The claimant complained that the work of the development had been a nuisance to him and his family. He complained that the family suffered from extreme noise nuisance from approximately 20 diesel trucks traversing the development day and night, seven days per week on a marl constructed roadway. He also complained that there was constant noise from the machinery and forklifts being utilized on the site; that the development had caused a dust nuisance with dust particles entering his home often and was quite widespread. In relation to the issue of flooding, he does not say that there has been any, but made a comparison with other commercial enterprises which were converted from residential properties which have caused flooding.

[116] According to the claimant, he is fearful of the health and safety of his family and himself as commercialised LPG plants have a well-documented history of commercial and industrial accidents. He is particularly worried as the Fire Brigade is located approximately three and a half miles from the development and this compounded with the poor water supply in the area may prevent a swift and effective response by the Fire Brigade.

[117] In relation to the threat to his private and family life as well as privacy to his home, also, he complains of the increase in foot and vehicular traffic to the development. He contends that this has caused a security risk and in April 2016 there was an attempted invasion of his home by an individual who the Police apprehended. The claimant also raised a concern for his property value, which he contends will be significantly reduced by the presence of an LPG facility and block factory.

Evidence of the Defendants

[118] The evidence of Mr Andrew Williams and Mr Miguel Nelson is that neither of these developments have begun operation. However, it is uncontroverted that Mr Andrew Williams began to develop the site without obtaining the permits in his hand. It is his evidence that he accessed the permits online and saw that they were granted. This is not permissible as the evidence from Mr Nelson, in cross-examination, indicates that approval is not granted until the permits with the conditions attached are received in hand by the applicant. Mr Andrew Williams would therefore have acted in breach of procedure by commencing any development of the site.

[119] It is clear that what the claimant complains about therefore is related to preliminary work on the site. The evidence, for example is that the four tanks were placed on the land. The permits have built in conditions (some with time lines) as to what is to be done. The permits provide for the establishment of mitigating conditions to reduce noise, dust and flooding. In particular, the issue of the noise level is also addressed in the preliminary stages of the construction. Environmental Permit

(2016-10017-EP00012) provides that the permittee (Mr Andrew Williams) shall ensure that the noise level during construction, operation and decommissioning does not exceed 70 dB at the boundary of the site. He must also fence the perimeter of the site to reduce the escape of fugitive dust and noise during construction, operation and decommissioning. As indicated previously, all the issues that the claimant speaks to are reflected in the conditions of the permits.

[120] In **Lopez Ostra v Spain**[21], the European Court of Human Rights (ECtHR) held that there had been a violation of Article 8 in relation to the applicant. Article 8(1) and (2) of the European Convention of Human Rights which provides for the right to respect for private and family life reads as follows:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

[121] The violation in **Lopez Ostra** related to smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste situated a few metres away from the applicant's family home. The plant had begun to operate without having obtained the requisite municipal licence relating to such activities. The government contended that the special application for the protection of fundamental rights was not the appropriate means of raising questions of compliance with the ordinary law or disputes of this scientific nature. The court held that –

(1) The applicant could properly seek redress before it; and

(2) For the purposes of Article 8 of the Convention, whether the question was analysed in terms of a positive duty on the State to take reasonable

---

[21] [1994] ECHR 16798/90

> and appropriate measures to secure the applicant's rights under Article 8(1), or in the terms of an 'interference by a public authority' to be justified in accordance with Article 8(2), the applicable principles were broadly similar, **regard was to be had to the fair balance that had to be struck between the competing interests of an individual--the applicant's effective enjoyment of her right to respect for the home and her private and family life--and of the community as a whole**--in the instant case, the town's economic well-being in having a waste-treatment plant-- and in any case the State enjoyed a certain margin of appreciation... In the instant case, the municipality had not only failed to take steps necessary for the protection of the applicant's right to respect for her home and for her private and family life but had also resisted judicial decisions to that effect. In the circumstances, the State had failed in striking a fair balance required and, accordingly, there had been a violation of Article 8 of the Convention. *(emphasis added)*

[122] In considering the principles enunciated in **Lopez Ostra**, dealing with the issue as to whether the public authorities had interfered with the right as described above, there is no such equivalent section specifically attached to section 13(3) (j) (ii), in the **Jamaican Charter**. However, section 13(2) of the **Jamaican Charter** provides generally that any infringement of rights guaranteed should be demonstrably justified in a free and democratic society. In any event, the local planning authority (WMC) had not authorized Mr Andrew Williams to commence the development and promptly issued enforcement notices when this was brought to their attention. Secondly, the court takes a broader view, to consider whether in general, the issuing of the permits at the later date, could result in such a breach of the claimant's right to family and private life. In this regard, the court would remind itself of its primary role.

[123] In **Judicial Handbook on Environmental Law,** at paragraph 4.1, the authors discuss the role of the courts in upholding the rule of law in the environmental

arena. They state that it is very much informed by the regulating mechanisms that deliver environmental protection:

> *Two primary, common regulatory systems aim to prevent environmental harm by anticipatory action. The first is a system that attempts to establish individualized pollution controls and mitigation measures through environmental impact assessment based on the character of the activity and environment surrounding the facility.*
>
> *The second system relies on a permit or licensing regime that requires adherence to pre-established norms (quotas, bans on the use of certain substances). Sometimes a facility or activity must comply with both types of regulatory regime and will have to apply technology-based controls (which tend to require the optimal level of control achieved at comparable facilities) and/or performance-based measures (which tend to focus on ensuring that pollution emissions will not surpass established limits or result in pollution in excess of an ambient environmental standard).*

[124] Based on the evidence presented to this court, the development was subject to the permit regime that requires adherence to pre-established norms. Bearing in mind the conditions attached to the permits as described above, it cannot be said that the NEPA, NRCA and TCPA did not put in place measures to strike a fair balance between the right to respect for the claimant's home and family life and other economic interests within the context of their responsibility for sustainable development. As we stated previously, there is no evidence before this court challenging the efficacy of these measures for example, the conditions dealing with drainage and stagnant water, noise, dust etc.

[125] We have considered also the case of **Vilnes and ors v Norway**[22]. The ECtHR held that there was a violation of Article 8 as the state had failed to ensure access to essential information regarding risks associated with the use of decompression tables to divers. In the present case, the claimant was well versed in the risks applicable to LPG and was also able to access information in relation to the status of the permits by visiting the WMC. He recalls that the secretary read a letter from NEPA to him. She also informed him that the development was not in accordance

---

[22] (2013) 36 BHRC 297

with the certificate of titles for his property. It is inferred that the claimant was informed about the restrictive covenants by the secretary at the WMC. Further, the claimant was advised by an employee of NEPA that the development was approved. He was able to obtain this information when he telephoned NEPA's office. NEPA also sent the minutes of the Technical Review Committee Meeting (held on the 1st of March 2016) to the claimant's Attorney-at-Law, upon his request. Finally, the claimant was able to access a number of documents via the Public Defender who carried out an investigation in response to his complaint.

[126] In relation to the issue of the security of his home it is difficult to conclude that this single example of criminal activity, by itself provides a sufficient basis to establish a breach of the claimant's constitutional rights. The claimant has therefore failed to establish any cogent basis for breach of the above right.

Right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage- section 13(3)(l)

[127] Learned author, David R Boyd in his book, **The Environmental Rights Revolution, A Global Study of Constitutions, Human Rights and the Environment** describes[23] the above right in the following vein:

> *The right to a healthy environment appears to embody both negative and positive aspects. There is a negative right to be free from exposure to toxic substances produced by the state or by state-sanctioned activities. There is a positive right to clean air, safe water, and healthy ecosystems which may require an extensive system of regulation, implementation and enforcement as well as remediation efforts in polluted areas.*

[128] The author also discusses[24] the debate as to whether the right to a healthy environment should be substantive (entitling individuals to a certain level of

---

[23] at page 24 under the heading 'The Right to a Healthy Environment'
[24] at page 25

environmental quality) or procedural (ensuring access to information, participation in decision making and access to justice when one's right is violated). He states that substantive environmental rights provide an assurance to all persons that they can enjoy environmental conditions that meet certain minimum requirements - clean air, safe water and a level of environmental quality that does not jeopardize their health or wellbeing. He stated also that substantive rights create a corresponding obligation on the government to both refrain from taking or authorizing actions that impair citizens right to a healthy environment.

[129] However, at page 35, he notes:

> *'…with respect to constitutional rights, "Even when the language of the text is strong and categorical, it is never understood to provide an absolute, ironclad guarantee." Just as the right to free speech is not a right to say, anything at any time or place, the constitutional right to a healthy environment would not be the right to pollution-free air, pure water and pristine ecosystems…Rather than trumping development, the right to a healthy environment would compel, or at least increase the likelihood of, sustainable development.'*

[130] The whole thrust of the **Natural Resources Conservation Authority Act** and the establishment of NEPA is a thrust towards sustainable development and laws that should operate to protect the environment, if the proper procedures and guidelines are adhered to. As mentioned previously, the permits reflect that certain environmental issues were taken into consideration by the authorities to ensure a certain level of protection and safety for the residents. These can be categorized as substantive rights. In relation to procedural rights, the claimant had access to information and the claimant's presence in the court speaks to access to justice.

[131] In **Social Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria**[25], the complainants (two human rights NGOs) alleged that the Nigerian government through its state oil company (and who was the majority shareholder in a consortium with Shell Petroleum

---

[25] Communication 155/96

Development Corporation) caused environmental degradation and health problems through the disposing of toxic waste into the soil, air and local waterways which harmed the health of the Ogoni people. It was alleged that the government did not monitor the operations and safety measures of these companies or require the companies or state agencies to produce health/social and environmental impact studies. Additionally, the government withheld information on the dangers created by the oil activities from Ogoni communities, and refused to involve them in decisions affecting the development of their land.

[132] In the Nigerian case, above, it was held:

> *[52] The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government.* ***It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources****. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16 (3) [sic] already noted obligate governments to desist from directly threatening the health and environment of their citizens.* ***The state is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the state for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.***
>
> *[53]* ***Government compliance*** *with the spirit of Article 16 and Article 24 of the African Charter* ***must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities****. (emphasis added)*

[133] In the case above, it is clear that the constitutional obligations are wider than what is contained in the **Jamaican Charter**, for example, Article 12 of the **ICESCR** and Article 16 of the **African Charter** have no corresponding sections. However, based on a common concept of substantive and procedural rights, it is certainly not evident that the claimant's rights under this section has been breached. There is

no evidence that toxic material has been or is likely to be deposited in the soil, air and waterways in the environment around the development. Dr Kerrine Senior has given unchallenged expert evidence in this regard as to the nature of LPG. The permits also speak to ongoing monitoring of the development and while proper consultation is an issue that may still have to be resolved, there is no evidence to maintain that the defendants either directly or indirectly (by virtue of non-intervention) have allowed the existence of threats to the health and environment of the citizens in the affected community.

[134] The claimant has therefore failed to establish any breach of the above right.

Issue 5: Whether the failure to give the claimant an opportunity to be heard amounts to a breach of natural justice

[135] The specific relief that is being sought is a Declaration to the effect that WMC, NEPA, NRCA and TCPA erred in failing to give the claimant an opportunity to be heard in respect of the issuing of the relevant permits after they were made aware of the claimant's letter of objection.

[136] Counsel for the claimant contends that having regard to the consequential nature of the decision to grant the permits and the fact that the claimant submitted a letter of objection, he should have been given an opportunity to be heard and that this failure amounts to a breach of natural justice.

[137] Neither counsel for the WMC nor counsel for NEPA, NRCA and TCPA made any submissions on this particular point.

[138] Based on the evidence, it does not appear that NEPA, NRCA and TCPA are disputing that the claimant's views ought to have been considered.

[139] However, Mr Knight in his evidence did not explicitly agree that the claimant ought necessarily to have been provided with an opportunity to be heard or an audience following the submission of his letter, but that the claimant's

representations/objections (as contained in the letter) ought to have been duly considered.

Discussion

[140] It has been opined that one of the difficulties felt in applying principles of natural justice is that there is a certain vagueness in the term[26]. Lord Morris of Borth-y-gest adopted Harman LJ's simple definition that natural justice is "fair play in action".[27]

[141] It is useful to have regard to the dicta of Harris JA from ***Derrick Wilson v The Board of Management of Maldon High School et al***[28], wherein it was stated generally that:

> *[29] Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:*
>
> > *"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."*

[142] The same author in a later edition (10th edition) opined at page 372, *"a decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable; it will also be of better quality.*

---

[26] Per Lord Hodson in Ridge v Baldwin [1964] AC 40, 132
[27] Ibid at page 113
[28] [2013] JMCA Civ 21

Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements."

[143] The right to be heard does not always necessitate an oral hearing or audience. Where there is no statutory requirement for an oral hearing, depending on the circumstances the requirements of natural justice can be served without an oral hearing. It may be sufficient in some cases for representations to be made in writing.[29]

[144] It seems that natural justice or fair play in action would have been achieved by the consideration of the claimant's views, but this need not have been by way of an oral hearing or audience with the WMC, NEPA, NRCA or TCPA subsequent to his letter. The WMC, although not the decision maker in relation to the Environmental and Planning Permits did act upon the claimant's letter by considering his complaint at a meeting and thereafter investigating and issuing an enforcement notice.

[145] We have already indicated that the claimant's objection letter ought to have been given due consideration. We do not find however that it would have been necessary for the claimant to have been granted an oral hearing or audience with the relevant authorities in order to satisfy the requirements of natural justice. The claimant has therefore failed to establish any breach of natural justice.

---

[29] see: **Regina v Race Relations Board**, **ex parte Selvarajan** [1975] 1 WLR 1686, 1693H-1694D

Issue 6: Whether the Town and Country Planning Act is unconstitutional

Submissions of claimant

[146] Counsel for The claimant has submitted that the **Town and Country Planning Act** is unconstitutional as it failed to provide an avenue by which a person other than the applicant for planning permission aggrieved by the decision may appeal.

[147] The question posed by Mr Wilkinson is whether the absence of a right of appeal in those circumstances causes the statute to infringe one of the fundamental rights guaranteed by the **Constitution**. Counsel further submitted that the above failure has infringed the claimant's right protected by sections 13(3)(g) and (h) - the right to equality before the law and the right to equitable and humane treatment. He submitted also that these infringements are not 'demonstrably justified in a free and democratic society' as provided by section 13(2) of the **Charter**.

Submissions on behalf of NEPA, NRCA and TCPA

[148] Counsel, Ms Jarrett, contends that none of the rights in the **Constitution** are engaged by the lack of third party appeal provisions in the **Town and Country Planning Act**. Although not challenged by the claimant, it was submitted that this is also true of the **Natural Resources Conservation Authority Act**. Further, it was submitted that the rights of third parties are adequately preserved and protected by the process. In her oral submissions, Ms Jarrett further submitted that this is the appropriate mechanism for third parties until Parliament decides otherwise.

[149] Counsel also commended the court's approach as set out by McDonald-Bishop J (as she then was) in **The Hon. Mrs Portia Simpson-Miller and ors v The**

Attorney-General of Jamaica and anor.[30] She acknowledged by reference to a number of authorities that there is a presumption of constitutionality in respect of parliamentary enactments, unless it is shown to be unconstitutional; and that the **Constitution** ought to be given broad and purposive construction. She also acknowledged (again by reference to a number of authorities) that where Acts of Parliament impinge upon certain rights, it may not necessarily be unconstitutional, as legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These represent qualified rights which may be limited, provided that the limitation pursues a legitimate aim and is proportionate.

Discussion

[150] The **Town and Country Planning Act** is intended to provide for the orderly and progressive development of land in both urban and rural areas as well as to preserve and improve the amenities found in these areas. It also provides for the appointment of the TCPA. The **Natural Resources Conservation Authority Act** provides for the management, conservation and protection of the natural resources of Jamaica and establishes the NRCA.

[151] Upon review of the **Town and Country Planning Act**, it is clear that this appeal process as provided for in section 13 grants the right to be heard to both the aggrieved applicant as well as to the authority concerned. Section 13(3) states:

> *(3) Before determining any such appeal, the Minister shall, if either the applicant or the authority concerned so desire, afford to each of them an opportunity of appearing before and being heard by him.*

[152] This appeal process is set within the context of both parties' involvement in the relevant application at a particular stage of the proceedings. Having considered the provisions of the **Town and Country Planning Act**, together with the submissions of Ms Jarrett, we find that the Act is not unconstitutional. We find that

---

[30] [2013] JMFC FULL CRT. 4

the absence of a provision which affords third parties the opportunity to appear before the Minister does not amount to such a breach.

[153] Firstly, we are guided by the pre-requisites for establishing a constitutional claim which was originally outlined by Parnell J in **Banton And Others v Alcoa Minerals of Jamaica Incorporated And Others**[31] in relation to Chapter III of the Constitution which has been repealed.

[154] Parnell J put it this way:

> *Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show:*
>
> *(1) that he has a justiciable complaint; that is to say, that a right personal to him and guaranteed under Cap III of the Constitution has been or is likely to be contravened. For example, what is nothing more than naked politics dressed up in the form of a right is not justiciable and cannot be entertained;*
>
> *(2) that he has a "standing" to bring the action; that is to say, he is the proper person to bring it and that he is not being used as the tool of another who is unable or unwilling to appear as the litigant;*
>
> *(3) that his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, compromise or lapse of time;*
>
> ***(4) that there is no other avenue available whereby adequate means of redress may be obtained.*** *In this connection, if the complaint is against a private person it is difficult, if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land. But if the complaint is directed against the State or an agent of the State it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court;* (emphasis added)
>
> *(5) that the controversy or dispute which has prompted the proceedings is real and that what is sought is redress for the contravention of the guaranteed right and not merely seeking the advisory opinion of the court on some controversial, arid, or spent dispute.*

---

[31] (1971) 17 WIR 275, 305

[155] In considering the **Charter** which replaced Chapter III, Sykes J (as he then was) in **Maurice Arnold Tomlinson v Television Jamaica Ltd et al**[32] found Parnell J's exposition instructive and opined as follows:

> *[110] In order to succeed Mr Tomlinson must show that:*
>
> *(1) he has sufficient standing to bring this claim, that is, he must show that a Charter right has been, is being or is likely to be infringed in relation to him;*
>
> *(2) the act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter;*
>
> *(3) the defendants are bound by the right(s) claimed;*
>
> *(4) the defendants' conduct infringed his Charter right;*
>
> ***(5) there are no other adequate means of redress.*** (emphasis added)

[156] In both formulations by Parnell and Sykes JJ, it is clear that in order for a person to successfully apply for redress under the **Constitution** (now found at section 19 of the **Charter**), that person must demonstrate that there are no other adequate means of redress. In the case at bar, the claimant has not so demonstrated. In fact, he has brought proceedings by way of applications for (a) judicial review, (b) relief under the Constitution and (c) declarations where the defendants are the State and public bodies. These are generally referred to as applications for an administrative order.[33] While this is entirely permissible, it fortifies Ms Jarrett's submission that the rights of third parties are adequately preserved and protected by the Judicial Review process. This is precisely the process of which the claimant has availed himself.

Is the law discriminatory?

[157] In the event that we are wrong, we have also considered the scope of the rights to equality before the law and equitable and humane treatment by any public

---

[32] [2013] JMFC Full 5
[33] see: **Civil Procedure Rules 56.1(1)** and **(2)**

authority in the exercise of any function, as provided for in sections 13(3)(g) and (h) of the **Charter**.

Section 13(3)(g) - right to equality before the law

[158] As discussed earlier, we would adopt the reasoning of the majority from the Full Court in **Rural Transit Association**, wherein it was held at that section 13(3) (g) is directed to equal protection as a matter of law and in the courts. We find that the claimant has access to a court of justice by way of Judicial Review proceedings. He has therefore not demonstrated that there has been a breach of his right to equality before the law, guaranteed by section 13(3)(g) of the **Charter**.

Section 13(3)(h) - right to equitable and humane treatment by any public authority in the exercise of any function

[159] There appears to be two considerations. Firstly, how should the words *'equitable and humane'* to be interpreted? We have previously adopted the reasoning of the majority[34] in **Rural Transit Association**, that the words are to be read conjunctively. Also that "equitable" means fair or just and not necessarily equal and that fairness is a concept that must be decided having regard to all the facts and circumstances of a particular case. "Inhumane" means cruel or without compassion for misery or suffering.[35] Secondly, it must be determined whether the claimant has established that he has been treated differently from similarly circumstanced persons.[36]

[160] In our view, the claimant has not demonstrated that he has been or is likely to be treated unfairly/unjustly and cruelly by virtue of not being allowed an opportunity to be heard by the relevant Minister. Further, he has not established that he is in a

---

[34] See: paragraphs [197] and [275], dicta of C. McDonald and F.Williams JJ respectively
[35] See: paragraph [274]
[36] See: paragraph [101]

different position to any other third party. In conclusion, therefore, the claimant has not established that the above-mentioned rights have been breached by the provisions of **Town and Country Planning Act**.

[161] Finally, as an aside we note that there are a number of provisions in the **Town and Country Planning Act** which contemplate third parties, such as the claimant, namely sections 11(4), 23(2B)(b) and 23(2D).

[162] Section 11(4) provides that where an application is made for permission to develop land each local planning authority must keep a register with respect to the applications and this should include information as to the manner in which the applications have been dealt with. This register must be available for inspection by the public at all reasonable hours.

[163] Further, where development is taking place without permission and the TCPA serves an enforcement notice, it must be displayed in a conspicuous public place[37] and the notice must provide that interested persons may make representations to the local planning authority (the Municipal Corporation), the Government Town Planner or TCPA. Interested persons are defined in section 23(2D) as owners or occupiers of premises abutting, adjoining or adjacent to the premises in respect of which the enforcement notice is served.

[164] Based on the above, the claimant's rights to equality before the law and equitable and humane treatment by any public authority in the exercise of any function, as provided for in sections 13(3)(g) and (h) of the **Charter** have not been breached by the Act. The claimant has therefore failed in his challenge in relation to the constitutionality of the **Town and Country Planning Act**.

---

[37] see: section 23(2A)(b)

Issue 7: Whether an Environmental Impact Assessment ('EIA') ought to have been conducted/required by the NRCA

Submissions of the claimant

[165] Queen's Counsel, Mr Wilkinson's major thrust is that the claimant's objections spoke to potential adverse environmental impacts and that an EIA was particularly crucial as the state agencies had no expertise in dealing with or managing LPG. He spoke to other issues raised by the claimant such as dust, noise pollution, flooding and harm from mosquitoes and submitted that the defendants were unaware as to whether the proposed development would contribute to such issues.

Submissions of NEPA, NRCA and TCPA

[166] Ms Jarrett submitted that in order to determine whether an EIA is required in any given case, the screening of the requisite application is done. She contends that the uncontroverted evidence is that the environmental screening was done and a planning determination was made that there was no need for an EIA. Ms Jarrett further contends that this is a matter which falls squarely within the planning judgment of the NRCA and TCPA. Reference was made to the NRCA's statutory discretion whether to require an EIA, provided for in section 10(1) of the **Natural Resources Conservation Authority Act**.

[167] The court was referred to the Canadian case of ***Bow Valley Naturalist Society v Canada (Minister of Canadian Heritage) (C.A.)***[38] which Ms Jarrett submits reinforces that the role of the court is supervisory and that it is not part of its role to substitute its own decision on the merits of decisions made by planning authorities.

---

[38] [2001] 2 F.C. 461, [2001] F.C.J. No. 18

The Law

[168] Section 9(5) of the **Natural Resources Conservation Authority Act** guides the Authority (NRCA) as to the process to be followed where an environmental permit is required in relation to a particular enterprise, construction or development.

[169] It requires the NRCA to (1) consult with any agency or department of Government exercising functions in connection with the environment and (2) to have regard to all material considerations including the nature of the enterprise, construction or development and the effect which it will or is likely to have on the environment generally, and particularly on any natural resources in the relevant area.

[170] Section 10 sets out details of the process that may be required and in particular, the power of the NRCA to request an EIA.

> *10.—(1) Subject to the provisions of this section, the Authority may by notice in writing require an applicant for a permit or the person responsible for undertaking in a prescribed area, any enterprise, construction or development of a prescribed description or category –*
>
> > *(a) to furnish to the Authority such documents or information as the Authority thinks fit; or*
> >
> > *(b) where it is of the opinion that the activities of such enterprise, construction or development are having or are likely to have an adverse effect on the environment, to submit to the Authority in respect of the enterprise, construction or development, an environmental impact assessment containing such information as may be prescribed,*
>
> *and the applicant or, as the case may be, the person responsible shall comply with the requirement.*

[171] The NRCA therefore is mandated to request an EIA from the relevant developer where it is of the opinion that the activities of the enterprise, construction or development are having or are likely to have an adverse effect on the environment.

[172] It is readily apparent therefore that the authority does not have to request such an assessment unless it is of the opinion that the development (in this case the LPG storage and dispensing facility and block making factory) is having or is likely to have such an effect as described above. The issue is not as simply put as posed

by counsel for the claimant in his submissions - *What if any impact this development would have on the surrounding homes.* The key phrase is the likely adverse impact/effect. In the case of **The Jamaica Environment Trust v The Natural Resources Conservation Authority and The National Environment and Planning Agency**[39], at paragraph [5] of the judgment the description of an EIA contained in NEPA's Guidelines for Conducting Environmental Impact Assessments at paragraph 1.4 was noted:

> *The environmental impact assessment (EIA) involves the process of identifying, predicting and evaluating potential environmental impacts of development proposals. The term describes a technique and a process by which information about the interaction between a proposed development project and the environment is collected, analysed, and interpreted to produce a report on potential impacts and to provide the basis for sound decision-making. The results of the study are taken into account by the Regulatory Authority in the determination of whether the proposed development should be allowed, and under what conditions.*

[173] Further it was noted at paragraphs [6] and [7]:

> *6. The description continues by stating that the EIA is used to examine both beneficial and adverse environmental consequences of a proposed development project and should be viewed as an integral part of the project planning process. Findings of the study should be taken into account in project-design and recommendations implemented should the projects be approved.*
>
> *A final definition is as follows:*
>
> *"EIA is an assessment of the impact of a planned activity on the environment." (UN Economic Commission for Europe 1991)*
>
> *7. The role of an EIA was discussed by my brother Sykes J in Northern Jamaica Conservation Association et al v NRCA and NEPA, Claim HCV3022/2005 (Pear Tree Bottom) pg. 4 – 12. He adopted the definition as summarized by counsel for the defendants in that case and stated that an EIA is a part of the information taken into account by the decision maker when deciding whether to grant permission to conduct any activity that might adversely affect the environment (See Belize Alliance of Conservation Non-Governmental Organization v The Development of the Environment and Belize Electricity Co. Ltd 2004 64 WIR 68).*
>
> *Sykes J noted that the authorities reflect that an EIA is satisfactory if it is comprehensive in its treatment of the subject matter, objective in its approach and alerts the decision maker and members of public of the effects of the proposed*

[39] (unreported), Supreme Court, Jamaica, Claim No. 2010HCV5674, judgment delivered 13 October 2011

> *activity. Sykes J also stated that it is wrong to look at the EIA as the last opportunity to exercise any control over any project to which the EIA is relevant.*

[174] In ***Bow Valley Naturalist Society v Canada (Minister of Canadian Heritage)***[40], a decision relied upon by Ms Jarrett, the court defined[41] the EIA as a tool used to help achieve the goal of sustainable development by providing an effective means of integrating environmental factors into planning and decision-making processes. The court also held[42] as follows:

> *In accordance with section 20, following a screening, the responsible authority must decide whether the project is likely to cause significant adverse environmental effects. This determination must take into account the implementation of mitigation measures. The evaluation consists of three determinations: (1) whether the environmental effects are adverse; (2) whether they are significant; and (3) whether these significant effects are likely to occur.*

[175] The court[43] reiterated its role in reviewing the decision of the responsible authority. This is to the effect that the court's role is to ensure that the steps in the Act are followed. However, it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in light of the mitigating factors proposed. The court also reminded itself that it is not for judges to decide what projects are to be authorized, but for the responsible authorities, provided they follow the statutory process.

[176] Essentially, in reviewing the decision of the relevant defendants, this court would have to consider whether they could (1) be alerted to the effects of the proposed activity and (2) determine whether environmental factors could be effectively integrated into the planning and decision-making processes without the EIA. We are also guided in our assessment of this matter based on definitions given by the

---

[40] [2001] 2 F.C. 461, [2001] F.C.J. No. 18
[41] Ibid, at page 3
[42] Ibid, at page 4
[43] Ibid, at page 5

learned authors[44] in **Judicial Handbook on Environmental Law**, at chapter 4 - Common Legal Mechanisms of Environmental Protection. In their discussion concerning the EIA, it is stated at paragraph 4.6:

> *Not every proposed activity is subject to assessment, only those that may be or are likely to cause a stated level of harm to the environment. The threshold differs in the many treaty references to EIA, with some referring to "measurable" effects, others "appreciable" or "significant" harm. The most frequently stated formulation requires a comprehensive EIA where the extent, nature, or location of a proposed activity is such that it is likely to significantly affect the environment.*

The Evidence

[177] The claimant's concerns, as stated previously, related to health and safety factors. He has the closest residence to the development and states that that type of commercialized LPG plant has had a well-documented history of commercial and industrial accidents. He exhibited several articles relating to explosions occurring at such sites in different countries. He stated also that LPG gas is heavier than air and as such it sinks to the ground, it is viscous, travels and is highly flammable. He referred in his affidavit to the NWA Guidelines for the Proper Siting and Design of Petrol and Oil Filling Stations 2015. He took issue with the defendant's expert's evidence (Dr Senior) regarding full compliance with these guidelines as the guidelines provide as follows:

> *The environmental impact on streams, lakes, ponds, aquifer etc. must be taken into consideration and should be reviewed in the Environmental Impact Assessment which will be required from the applicant.*

[178] It is the opinion of the witnesses from NEPA that such an EIA was not required in this case from the developer, Mr Andrew Williams. One of these witnesses, Mr Miguel Nelson, who holds a BSc. in Environmental Biology, was, at the time, an Environmental Officer in the Applications Processing Branch and a Technical Officer in the Development Assistance Centre (DAC).

---

[44] Dinah Shelton and Alexandre Kiss

[179] He stated that the DAC is a knowledge based service unit that supports the developmental approval process. It manages the processes for the supply of information to assess them to determine the feasibility of projects and to prepare developers to make a complete and acceptable application to the pertinent approval agencies. Based on a perusal of Mr Andrew Williams' application in relation to the LPG facility, a technical information document was produced. In that report given to Mr Andrew Williams, the following is stated concerning the EIA:

> ***14. Environmental Impact Assessment***
>
> *Based on the nature and scope of the development being contemplated, an Environmental Impact Assessment (EIA) is not likely to be required, however a final determination on that will be made upon review of the application by NEPA.*

[180] Mr Tennison Dixon, an employee of NEPA (who had official duties as an Applications Processing Officer in the Application Management Division) stated that Mr Andrew Williams requested an Environmental Permit on the 5th of November 2015 to construct and operate a Petroleum Storage and Dispensing Facility. He stated that when the application was reviewed, it was observed that the proposed development included a block factory at the said location. As such a letter was written to Mr Andrew Williams notifying him that an application should also be submitted for this additional facility. This was done on the 12th of January 2016.

[181] It is his evidence that a joint approach was employed in relation to the processing of the applications as it involved multiple applications for a single development. This included a planning application as well as the Environmental Permits, therefore requiring a team inclusive of an Urban and Regional Planner for the planning application and an Environmental Officer for the Environmental Permits.

[182] Mr Dixon's affidavit, at paragraphs 11 and 12, sets out in detail what the review of the Planning and Environmental Permit applications entailed. Particularly, in relation to the Planning Permit, it is noted that the review of the planning permission entailed:

e. The assessment of the potential impacts of the development on the surrounding properties and by extension the neighbourhood and the proposed mitigation measures outlined in the Permit Application Form.

f. Consultation with the National Works Agency (NWA) in regards to access, internal circulation within the site and ***drainage****.* (emphasis supplied)

[183] In relation to the Environmental Permit, it is noted that the review entailed:

a. The review of the detailed information provided in support of the application, inclusive of the application form, the project brief, the plans, the closure plan, the emergency response plan and the letter from the Agricultural Land Management Division dated 18 February 2014.

b. The assessment of the proposed development in relation to various environmental factors, the potential impacts and the proposed mitigation measures with particular emphasis on emergency management and fires.

c. Undertaking a site inspection.

d. Review of the comments from DAC.

e. Consultation with the National Works Agency (NWA) in regards to access, internal circulation within the site and drainage.

f. The completion of the screening form used to determine whether an Environmental Impact Assessment would have been required.

[184] Mr Dixon stated further that a joint site inspection was done on the 9th of December 2015 (but this would have been prior to the submission of the application for the block factory). In assessing the site, he states that due consideration was given, *inter alia*, to factors associated with the proposed development inclusive of emergency management, fires, fugitive dust, setbacks, sewage treatment, solid waste disposal, foot print, plot area ratio, parking requirements for the development.

[185] Mr Dixon states that based on the completion of the EIA screening form, it was determined that an EIA was not required as potential negative impacts were either non-existing or negligible.

[186] In the minutes from the Technical Review Committee meeting held on the 1st of March 2016, there was a consideration of the applications for two Environmental

Permits and a Planning Permission. It indicated that there was no need for an EIA and reads as follows:

> ***Environmental Impact Assessment (EIA)***
>
> *Based on:-*
>
> - *Detailed review of Permit Application Form, Project Information Form and*
> - *completion of the Screening Form to Review Environmental Permit Applications, and all accompanying addenda.*
> - *observation during site visit(s) conducted*
>
> *the potential impacts are not considered significant and no EIA is required for the development.*

[187] In that same document, the potential impact and mitigation measures are identified. These include (1) Emergency Management - which would include obtaining approval from the Jamaica Fire Brigade and the building of a 30-foot concrete wall around the property; (2) Fire and Spill – a firefighting system described which is to be set up; (3) Zoning; (4) Setback; (5) Air Quality (Block Factory) and (6) Solid Waste Disposal.

[188] The permits were then recommended subject to certain conditions. These conditions include: erecting a fence to reduce escape of fugitive dust and noise during construction etc.; drainage plan to be approved by the NWA, and that there should be no impeding of the natural drainage; leak detection and prevention including reporting requirements to NEPA if a leak is detected; structural integrity tests on the storage tanks and pipelines; safety conditions and reporting; commissioning – which includes notification of the date when facility will be commissioned and to submit to NEPA prior to the commissioning a precondition report on the tanks and pipelines. The developer is also to submit prior to commissioning an operation and maintenance plan for the tanks and pipelines.

[189] In relation to the block factory, conditions limiting noise level during construction, operation and decommissioning – not to exceed 70dB at boundary of the site,

fencing /hoarding perimeter of site to reduce the escape of fugitive dust and noise during construction as well as operation; drainage to deal with storm water and ban on impediments to natural drainage; dust control and safety plans. Both Environmental Permits reflect the above described conditions. The planning permission is described as one for General Industry (LPG refilling station and Block factory).

[190] Mr Dixon also spoke to consultation with Dr Kerinne Senior to further address the potential impacts as regards to the Emergency Response Plan as well as the potential impacts of fire, spill and air quality. Dr Senior advised him that the mitigation measures were adequate.

[191] In his review, he also considered the letter from NWA dated the 17th of May 2016 which spoke to traffic conditions, drainage and parking. The NWA's recommendations for approval and the subsequent submissions were taken into consideration for the preparation of planning permission. Mr Dixon indicated[45] that his assessment did not consider the impact of traffic and trucks based on the recommendations from the NWA and also because the development was near to a major thoroughfare which is heavily trafficked.

[192] In relation to possible nuisances of the facilities, he stated that specific conditions were included to mitigate against the possibility of the nuisances in the Environmental Permits. He set out the nuisances and relevant specific conditions as follows:

> *Noise and Dust during construction and operation of the facility – This was addressed by specific conditions 5-7, and 16-17 of 2016-10017-EP00012 and specific conditions 3-5 in 2015-10017-EP00217.*
>
> *Access and Drainage – These are within the remit of the NWA, and their recommendations as given in the letter exhibited as TD 7 above were included*

[45] At paragraph 32 of his affidavit

through specific condition 2 of 2015-10017-EP00217 and specific condition 6-7 of 2016-10017-EP00012.

Fire safety – addressed through the requirement that a fire certificate from the Jamaica Fire Brigade is obtained and submitted to the Agency and all firefighting equipment is inspected and approve by the Fire Department and are in place before fuel is received in the tanks, as set out in specific condition 13 in 2015-10017-EP00217. Additionally an emergency response plan to be approved by the Office of Disaster Preparedness and Emergency Management was also required as stated in specific condition 18 in 2015 -10017-EP00217 and specific condition 21 in 2016-10017-EP00012.

Engagement of the community – specific condition 8 of 2016-10017-EP00012 requires that a complaints register is established and maintained.

[193] Both Environmental Permits and the Planning Permit are exhibited as well as the letters from the Jamaica Fire Brigade dated the 19th of November 2015 and NWA dated the 17th of May 2016. In particular, it is noted that the recommendations from NWA spoke to the issue of drainage as follows:

> *8. A minimum of Seven (7) parking spaces 5.48m x 2.44m in size, with a 6.1m wide driveway for manoeuvring shall be provided within the curtilage of the site as illustrated on site plan.*
>
> *9. The parking bays shall be grass/terra crete or paver black constructed, the driveway paved and undeveloped areas landscaped to the satisfaction of the relevant authority.*

Reason: *To reduce hard surface coverage and provide percolation area for surface drainage within the site.*

Surface Drainage/Storm Water Runoff

> *10. Roof water from the proposed buildings shall be collected in gutters along the eaves, drained through pipes and channelled proposes drainage system or storage tank(s) or underdeveloped areas within the site.*

Reason: *The interception of storm water and disposal into dry wells/absorption pits or storage tanks will contribute to recharging of the aquifer or the harnessing of roof water for other uses and reduce runoff onto the Reserved Road.*

> *11. Surface drainage/storm water runoff shall be effectively intercepted and disposed of by means conforming to the approved detailed surface drainage infrastructure plan date stamped 6th April 2016.*
>
> *12. There shall be no deviation from the approved detailed surface drainage infrastructure plan or condition 10 without*

the consent of the Chief Executive Officer, National Works Agency.

13. *The Parish Manager, NWA and Superintendent of Works, Westmoreland Parish Council shall be consulted to inspect and monitor construction of the turning radii at the vehicular ingress/egress point and the surface drainage/storm water runoff infrastructure works at the 25%, 50%, 75% intervals and on completion confirm approval in writing to the Chief Executive Officer, NWA and Secretary/Manager, Negril Green Island Area Local Planning Authority respectively.*

[194] It is clear therefore that the authorities considered the impact of the proposed development and would have designed specific conditions as they identified as sufficient to meet the concerns raised by the claimant. However, Mr Wilkinson submitted also that the authorities failed to adequately consider the inflammable nature of LPG. Dr Senior acknowledged that LPG is generally classified as hazardous material under the **Natural Resources Conservation Authority Act**, even though there is no definition provided by the said Act. She also gave evidence that she was aware of some of the major international incidents involving LPG asserted to by the claimant. She stated that these incidents were due to a failure of safety systems, in particular, a general disregard for the safety procedures while offloading. These included the non-observance of the prescribed cooling-off times for the trucks, sparks caused by heavy vehicles using the restricted access zones (loading area) while the product was being offloaded, failure of fire protection and leak detection systems, lack of emergency response and spill control mechanisms. She opined that if the appropriate protocols had been followed, the incidents could have been easily avoided.

[195] Dr Senior stated also, that, although LPG is highly flammable, the risk of harm to human health and the environment is significantly lowered by the fact that it is classified as non-toxic. She opined that significant respiratory impacts are visible only upon prolonged inhalation and in such a case it can act as a simple asphyxiant. By way of illustration she stated that if the LPG were inhaled for a long period of time, in a confined space that lacked ventilation it could eventually displace all the oxygen and cause choking/suffocation.

[196] She acknowledged that there is a public impression of LPG as dangerous when stored in bulk as well as fears which are generally held in relation to the installation of LPG facilities. She opined that risks posed by storage can be lowered by adherence to international best practices and elaborate safety protocols by the local LPG sector. In relation to the installation, she stated that assurance may be had in the regulatory systems put in place to protect human health and safety.

[197] In relation to Mr Andrew Williams' development, Dr Senior gave evidence that it is an industrial type project which will involve the distribution and retail of LPG. She stated that based on Mr Andrew Williams' application there will be no processing or blending, as such there will be no generation of by-products. She opined that this significantly reduced the risks posed by the proposed LPG facility. She went on to explain that processing and blending would increase the risk of an accidental release and that distribution plants carry less 'intricacies' than a processing plant. This was a material consideration for the Pollution Prevention Branch.

[198] Dr Senior also gave details of the safety/control and mitigation measures, as well as a number of the conditions included in the permit, and what risks they were contemplated to mitigate

Applicability of the NWA Guidelines

[199] Mr Wilkinson also submitted the failure to request an EIA would have been aggravated by: (1) sufficient application of the provisions of the NWA Guidelines; and (2) lack of expertise by the defendants as it pertains to LPG management.

[200] The NWA Guidelines for the Proper Siting and Design of Petrol and Oil Filling Stations 2015/6 ('the NWA Guidelines'), as its title suggests provides a number of directives for the siting and design of stations. Stations include *"gas stations, gas bars, oil filling service stations and or any refuelling facilities."*

[201] Dr Senior stated in her affidavit that the NWA Guidelines were fully observed. In her oral evidence, she stated that not all provisions in the said NWA Guidelines

were applicable to LPG facilities. She noted that the relevant provisions/paragraphs were paragraphs 36 and 37 which speak to health and safety and emergency response.

[202] Dr Senior did not agree for example that paragraph 11 of the NWA Guidelines was relevant. Paragraph 11 provides, *"The environmental impact on streams, lakes, ponds, aquifer, etc., will be taken into consideration and should be reviewed in the Environmental Impact Assessment which will be required from the applicant."* She stated that paragraph 11 was not relevant because LPG when released is a gas (that is, in a gaseous state as oppose to a liquid) and that the NWA Guidelines deal specifically with liquid petroleum products, such as gasoline, and in that case the likely impact of streams, aquifer etc. would be considered. She opined that there was no way LPG could contaminate anything but the air.

[203] Mr Miguel Nelson also gave evidence that the NWA Guidelines which govern gas stations are not all relevant for an LPG facility. Both himself and Dr Senior admitted that at present there are no separate guidelines existing for LPG facilities. Both witnesses, however, indicated which guidelines were thought to be relevant and how these were taken into consideration in relation to the conditions set out in the permit. On the other hand, Mr Peter Knight did indicate that certain other aspects of the NWA Guidelines might be relevant. For example, numbers 19, 22, 23, 29, 31, and 33. These are as follows:

> *19. Direct fill and or remote fill points should be so sited that delivery trucks do not unduly restrict internal circulation or stand on a public street or highway.*
>
> *22. In a residential area a landscaped open space (vegetated with grass and shrubs not exceeding 4m in height) of:*
>
> *a. a minimum 3.0m wide space shall be provided along the rear property boundary and*
>
> *b. a minimum 5.0m wide space along the side property boundaries, and be separated from paved areas by kerb or other barrier.*
>
> *23. Where the site adjoins the side of, or rear boundary of a residential lot, a solid reinforced concrete wall a minimum of 0.15m thick and 3.0m in height should be constructed and maintained along that lot boundary.*

> *29. Proper facilities for storage and disposal of used and waste oil and gas must be provided to the satisfaction of the National Environment and Planning Agency.*
>
> *31. Storage Tanks should be designed and installed to have secondary containment (should have a volume of not less than a hundred and ten percent of the volume of the tank itself.) that should include but not be limited to leak spillage and over fill detection systems to minimise leakage and prevent contamination of ground water and should be to the satisfaction of the Jamaica Fire Brigade and the National Environment and Planning Agency.*
>
> *33. The material of the tank is to be adequately coated or treated to avoid corrosion and or deterioration to the satisfaction of the National Environment and Planning Agency.*

[204] It appears therefore that there is no uniformity of belief by the relevant defendants as to which paragraphs in the NWA Guidelines are relevant. Mr Knight did indicate however that it was the outcome of the screening process which determined whether an EIA would be required, not the NWA Guidelines.

[205] Mr Knight stated also that the EIA would become relevant after detailed screening when the hazards and risks become apparent. He added that the change from one use to the next does not automatically make an EIA relevant. He clarified that the EIA may become relevant when the project brief is being reviewed, that is after the application is made and the screening is done.

[206] In considering this issue, it is clear from the evidence of all the parties that the major issue as concerns LPG is the issue of inflammability. On an overall assessment of the evidence, it is apparent that the relevant defendants would have properly determined the likely risks to the environment and put in place relevant conditions to mitigate those risks. There is also no contrary evidence that speaks to likely adverse effects on ‘streams, lakes, ponds, aquifer etc.’ as suggested by the claimant. All the other areas of concerned that have been raised-flooding, noise, dust etc. are addressed within the conditions attached to the permits. Despite the inconsistencies in the evidence of the witnesses in relation to the applicability of the provisions under the NWA Guidelines, the defendants have provided evidence of sufficient cogency to support their decision not to request the EIA.

Lack of Expertise

[207] The claimants' concerns also includes the lack of expertise of NEPA's officers to treat with LPG. In conjunction with this are the uncertainties in the evidence of the witnesses for NEPA, in relation to the relevant guidelines to be adopted from the NWA guidelines as far as LPG facilities are concerned. Is this a factor that would affect the determination of whether an EIA ought to be conducted?

[208] Dr Senior admitted that she was not trained in the management of LPG. Her evidence is also that the experts who would be required to check and regulate the safety of the tanks are out of the company from which Mr Andrew Williams would be sourcing the LPG. As noted previously, the conditions attached to the permit do speak to the safety issues including - boundaries and setbacks, area where the tanks would be located and inspection of the tanks.

[209] Mr Nelson stated that he had attended a 40-hour course on LPG and natural gas management and suppression in Texas, USA but that he would not consider LPG to be his area of expertise. Mr Knight agreed with Mr Wilkinson's suggestion, that, in considering an application, it is important to have on the board an expert or someone trained in the management and properties of LPG. However, he did qualify his agreement by stating also that the Authority would be depending on the technical skills and competencies of the LPG companies and their compliance with international guidelines.

Discussion

[210] In **Judicial Handbook on Environmental Law**, the authors note in their discussion on the common legal mechanisms of environmental protection, at paragraphs 4.3 and 4.6, that these mechanisms include product and process standards and EIAs. It is indicated that process standards specify design requirements for operating such procedures applicable to fixed installations such as factories. They state also that process standards often are used to regulate the

operations of hazardous activities posing a risk of accident or other dangers and that these standards frequently establish norms for an entire industry or class of operation. Apparently, these are the standards that Dr Senior and Mr Knight are referring to, although there is some conflict as to whether this reliance on outside agencies is sufficient for the consideration of the authorities.

[211] The issue of expertise however, would have no bearing on whether an EIA should be conducted, as the purpose of the EIA has to be considered. It involves the process of *identifying, predicting and evaluating potential environmental impacts.* The expertise regarding LPG facilities would touch and concern the proper process standards to be put in place. Here, the legitimacy of the defendants' dependence on the technical competencies of outside agencies would be brought into question.

[212] In **The Northern Jamaica Conservation Association and ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency**[46], Sykes J (as he then was)[47] in examining section 9(5) of the **Natural Resources Conservation Authority Act** opined that it places a very high premium on interagency consultation, that the expectation is that the consultation should be done and done properly unless there is some overriding public interest that dictates otherwise. He also went on to state that there is no statutory duty to consult any member of the public or any specific interest group outside of the government apparatus.

[213] This does not mean that it can be concluded that there should not be consultation involving technical competencies of specific groups such as LPG companies where the norm has already been accepted and international standards have been put in place. However, it is a relevant complaint that the authorities are relying on the same industry to ensure the standards and to check that the standards are

---

[46] (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 3022, judgment delivered 16 May 2006
[47] at paragraph [41]

being maintained within the context of the conflicting evidence as to the applicability of the relevant guidelines and the necessity for internal expertise. The lack of internal expertise may have a bearing on whether the defendants would have failed to have regard to all material considerations in properly designating the conditions affecting the enterprise. However as expressed previously, the claimant has provided no contrary expert evidence to challenge the safety measures established in relation to the LPG tanks. In any event, the issue of the lack of expertise would not provide any basis to conclude that an EIA was required. Based on the totality of the evidence, the potential impact of the enterprise was clearly known. As such there is, no merit in this ground to challenge the legitimacy of the permits granted.

Issue 8: Whether damages should be awarded

[214] The claimant is seeking damages as well as constitutional damages.

(i) Damages

[215] Without reference to any particular rule, counsel for the claimant submitted that the **Civil Procedure Rules** now permit claims for damages to be joined in judicial review proceedings. It was further submitted that sufficient grounds have been raised in the claimant's affidavit to ground an award of damages. The claimant is claiming damages against the defendants for causing:

(a) extreme dust and noise nuisance,

(b) devaluation of his property;

(c) him and his family to be in a constant state of anxiety and fear; and

(d) possible risks of fires and, consequently, safety risks.

[216] Ms Jarrett submitted that the claimant is not entitled to any damages. She referred to **CPR** 56.10, which states:

56.10 (1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –

(a) arises out of; or

(b) is related or connected to,

the subject matter of an application for an administrative order.

(2) In particular the court may award -

(a) damages;

(b) restitution; or

(c) an order for return of property,

to the claimant on a claim for Judicial Review or for relief under the constitution if –

(i) the claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

[217] Ms Jarrett contends that for the claimant's claim for damages to succeed against NEPA, NRCA or TCPA, he must show that the actions of NEPA, NRCA or TCPA demonstrate an identifiable tort and that he failed to do same. She cited the case of ***X and others (minors) v Bedfordshire County Council***.[48]

[218] Mr Brown also submitted that the WMC has not committed any civil wrong for which it should be sanctioned in damages.

---

[48] [1994] 4 All ER 602, [1995] 2 AC 633,730

Decision

[219] There was no specific claim that was made by the claimant to show that he suffered any loss as a result of the activities of the defendants. The claimant alleges that the businesses for which the permits were granted would generate pollution, additional noise as a result of trucks, and the potential dangers from the LPG filling station. The claimant has not placed before the court any evidence where he is currently affected by any activities of the defendants. The claim for damages cannot be sustained at this time. There is also no basis to remit this matter to assessment as there must a decision concerning a tort for another court to assess.

(ii) Constitutional damages

[220] The court having arrived at the conclusion that there has been no breach of any of the claimant's constitutional rights, we find that there is no need for us to make any determination in relation this issue.

Bertram-Linton J (dissenting in part)

[221] I have read in draft the joint judgment of my sisters, Straw and Shelly-Williams JJ. Save for one issue, I am in agreement with their reasoning and conclusion.

[222] In my view the **Town and Country Planning Act** is unconstitutional insofar that it fails to provide an avenue for an interested third-party, such as the claimant, to be heard.

[223] The claimant's main thrust is that he is most directly affected by Mr Andrew Williams' proposed development and that from the get go he has voiced his concern, in writing, to all the persons he feels have been engaged in the decision making process without success. The claimant certainly has full *'locus standi'* in this regard, his property being the closest to the development.

[224] The principle of 'standing' suggests that people value their membership in a group and that societal institutions and decision-making procedures should affirm their

status as members. For example, it might follow from this principle that all stakeholders should have a voice in the decision-making process. In particular, disadvantaged or specifically affected members of a group or society should be empowered and given an opportunity to be heard. When decision-making procedures treat people with respect and dignity, they feel affirmed.

[225] Related to issues of respect and dignity is the principle of trust. One measure of fairness is whether society's members believe that authorities are concerned with their well-being and needs. People's judgments of procedural fairness result from perceptions that they have been treated "honestly, openly, and with consideration."[49] If they believe that the authority took their viewpoints into account and tried to treat them fairly, they are more likely to support and engage in the broader social system.

[226] The procedure, by not facilitating third party involvement, in my view, smacks of unfairness and inequality by not giving the "interested third party"[50] a voice.

[227] Certainly it is one thing to say the claimant has access to judicial review, but why does he not have fair and equal access as an affected third party to the initial procedure, as provided for in other sections. An unbiased, universally applied procedure, whether it serves to distribute wealth or deliver decisions, can ensure impartiality as well as consistency. The principle of consistency proposes that *"the distinction of some versus others should reflect genuine aspects of personal identity rather than extraneous features of the differentiating mechanism itself."* In other words, the institutional mechanism in question should treat like cases alike and ensure a level playing field for all parties.

---

[49] Neil Vidmar, The Origins and Consequences of Procedural Fairness, 15 *Law and Social Inquiry* 877-892 (1990)

[50] Ibid

[228] I believe that the claimant has met the test set out by both Parnell J[51] and Sykes J[52] (as he then was) in relation to the claimant's rights under sections 13(3)(g) and section 13(3)(h) of the **Charter -** the right to equality before the law; and the right to equitable and humane treatment by any public authority in the exercise of any function (respectively).

[229] The right to a Judicial Review should only be considered as applicable if the claimant is not successful initially.

[230] Accordingly, I would grant the following Declaration sought at VI, as amended:

> *A Declaration that in failing to provide an avenue by which a person other than the applicant for planning permission aggrieved by the decision of the Second Defendant or the Fifth Defendant may appeal, the Town and Country Planning Act breached the Constitution.*

Straw J

ORDER

1) The court grants the Declaration that the 4th and 5th defendants failed to take into account relevant considerations in relation to the issuing of the permits to the 7th defendant (namely - the results of properly conducted surveys and the failure to have regard to the claimant's objection letter) at the time of the deliberations in relation to the granting of the Environmental Permits 2015-10017-EP00217 and 2016-10017-EP00012, and Planning Permit 2015-10010-BA00159.

2) The order of Certiorari is therefore granted quashing the decision of the 4th and 5th defendants in relation to the issue of the said permits.

---

[51] **Banton And Others v Alcoa Minerals of Jamaica Incorporated And Others** (1971) 17 WIR 275, 305
[52] **Maurice Arnold Tomlinson v Television Jamaica Ltd et al** [2013] JMFC Full 5

Costs

[1] On the 17th of December 2018, the parties were invited to make submissions on costs. Save for Mr Canute Brown, who was informed of the date of delivery of judgment but did not appear, the court heard from counsel on behalf of all the other parties.

[2] Mr Wilkinson submitted that the main finding of the court was in favour of the claimant, as such costs should follow the event. Further he submitted that save for the WMC, costs should be awarded against all the defendants since they each had a role to play in the matter reaching before the court. In particular, he contended that the matter could have been resolved by Messiers Hubert and Andrew Williams who were integral to the process and contributed to what he referred to as the flaws. As such, he submitted that costs should be awarded to the claimant against all the defendants, except the WMC.

[3] On behalf of the third, fourth and fifth defendants, Mr Moulton submitted that no order should be awarded against NEPA, NRCA and TCPA. He submitted that because these were judicial review proceedings, the threshold for costs was higher and that costs should not be awarded unless the said defendants were found to have been acting unreasonably. Mr Moulton did however concede that the claimant would have had no other recourse but to bring proceedings by way of Judicial Review.

[4] Mrs Sabdul-Williams submitted that both Mr Hubert Williams and Mr Andrew Williams complied with the relevant authorities from the inception to the end and as such no costs should be awarded against them. She further contended that the flaws were squarely at the feet of the said authorities and that in balancing the scales of justice no orders should be made against her clients.

[5] The court considered the submissions of counsel and made an order awarding the claimant 75% of his costs against NRCA and TCPA.

Appendix

DATE	EVENT
October 2, 2013	**Change of use enquiry** An agent of Mr Andrew Williams (Mr Errol Brooks) sent a letter to the Agricultural Land Management Division of the Ministry of Agriculture and Fisheries ('MoAF') enquiring about the change of use for part of Llandilo Westmoreland.
February 18, 2014	**Response to change of use enquiry** Mrs Joan Brown Morrison, Director of the Agricultural Land Management Division in the MoAF responded, by letter, indicating that: i) The property consists of flat lands located approximately 2km north of Sav-La-Mar on the road to Grange Hill; ii) The MoAF has no objection to a request for change of use concerning lot A and B; and iii) The site is with the urban extent of Sav-La-Mar and is zoned as commercial/residential in the Provisional Development Order 1995 [sic]. *(see: Exhibit AW2)*
March 3, 2014	**Proposal submitted to NEPA** Mr Andrew Williams submitted a proposal to NEPA's Development Assistance Centre. This proposal (2014-10017-DAC00022) was for the construction of an LPG refilling facility at Llandilo, Westmoreland.
March 4, 2014	**Pre-consultation meeting held at NEPA** A pre-consultation meeting was held at NEPA's Development Assistance Centre, which included Mr Andrew Williams and two NEPA

employees (Mr Miguel Nelson and Mr Dwayne Barnes). In relation to the proposal, the following was discussed:

i) The potential conflict with establishing the proposed facility in an area that appeared to be predominantly residential; and

ii) The application requirements with the supporting technical documentation.

March 19, 2014 **Letter following pre-consultation meeting**

Mr Ainsley Henry, Director of the Development Assistance Centre, wrote to Mr Andrew Williams (copying the WMC) indicating that having reviewed the proposal and examined it in the context of planning and environmental requirements:

i) A potential conflict was identified with the existing surrounding land use which is predominantly residential;

ii) The proposal is an industrial use and this may pose an impediment to the development as proposed;

iii) It is recommended that a detailed proposal be prepared in accordance with the attached Technical Information Document (TID); and

iv) Formal applications were to be made to the WMC and NEPA per the TID.

(see: Exhibit MN3)

June 19, 2015 **Letter to the WMC requesting "no objection"**

Mr Andrew Williams wrote to the WMC requesting a "No Objection" letter and furnished copies of 'Land Change of Use' and a Surveyor's ID Report.

(see: Exhibit GW1)

July 22, 2015 **"No objection" letter from the WMC to NEPA**

Mrs Grace Whittley, Director of Planning for the WMC, wrote to NEPA (specifically Mr Peter Knight and copied Mr Andrew Williams) indicating that:

i) There are no current objections to the proposed development;

ii) The location lies off the Farm Pen main road and that the area is of mixed usage, both residential and commercial;

iii) Residential units are directly in front of the property which is approx. 6113.011 square metres;

iv) There is no specific zoning per the development order;

v) It is recommended that Mr Andrew Williams provide details, adhere to stipulations and consult with the community surrounding the proposed location.

August 5, 2015 **Letter from NEPA requiring community survey**

Mr Ainsley Henry, Director of the Development Assistance Centre, wrote again to Mr Andrew Williams (copying the WMC) indicating that there are no current objections to the proposed development and that a community consultation was required.

A Draft Terms of Reference for Community Survey was provided as a guide and it was also indicated that the results of the survey should be submitted with both the planning and environmental applications.

(see: Exhibit MN6)

October 12, 2015 **Application for Building and/or Planning Permit submitted to WMC**

A partially completed application was submitted by Mr Andrew Williams (Mr Hubert Williams' name was crossed out).

The application type is not indicated and it is presumably for both a Planning and Building Permit.

It is referred to as a Building Permit by Mrs Grace Whittley (para 8 of her affidavit). Mr Peter Knight refers to it as a Planning Application (para 15 of his affidavit).

(see: Exhibit AEP 5 and supposedly GW2)

October 30, 2015 **Initial site inspection carried out by WMC's Building Officer**

Mr Jermaine Medley carried out an initial site inspection to verify that the land could accommodate the proposed structure. It was confirmed that

the land was in its natural state and had adequate space to accommodate the proposed structures which included four LPG tanks with 2000 gallon capacity each and two single floor reinforced concrete buildings (for office and restrooms)

November 5, 2015 **Application for Environmental Permit (re: Petroleum Facility) submitted to NEPA**

Environmental Permit Application (2015-10017-EP00217) to construct and operate a petroleum storage and dispensing facility was submitted by Mr Andrew Williams to NEPA.

November 18, 2015 **Application for Planning Permit received by NEPA from WMC**

Planning Permit Application (2015-10010-BA00159) for the proposed development was received by NEPA from the WMC. (The application was submitted to the WMC a little over a month prior on October 12, 2015.)

November 19, 2015 **Notice of Recommendation from the Jamaica Fire Brigade**

Based on a review of building plan drawings, approval was given for the development subject to a number of conditions in relation to fire and safety.

(see: Exhibit AEP16)

December 9, 2015 **Joint site inspection**

A team from NEPA travelled to Llandilo, Westmoreland to verify the site location and carry out an assessment of the area.

January 12, 2016 Letter from NEPA informing Mr Andrew Williams that the application was placed on hold pending submission of an application for an additional Environmental Permit in respect of the Block Factory

(see: Exhibit TD1)

January 15, 2016 **Application for Environmental Permit (re: Block Factory) submitted to NEPA**

Environmental Permit Application (2016-10017-EP00012) to construct and operate a facility for the production of construction materials including blocks and bricks, was submitted by Mr Andrew Williams to NEPA.

January 29, 2016 **Mr Williams' applications presented to the Internal Review Committee of NEPA**

The Internal Review Committee (IRC) consists of representatives from various technical branches of NEPA. The IRC did not object to the applications.

February 2, 2016 **Mr Williams' applications presented to the Technical Review Committee**

The Technical Review Committee (TRC) consists of representatives from agencies including the National Works Agency, Environmental Health Unit, Water Resources Authority, as well as technical professionals (architects and engineers) and members of the NRCA and the TCPA.

The TRC recommended verification of the community survey and further examination of the potential impact of the proposed development on residents.

February 11, 2016 **NEPA observed uninstalled tanks on site and preparation works being done and instructed Mr Andrew Williams by telephone to cease until the requisite approvals were obtained.**

February 12, 2016 **Letter from Mr Pitt objecting to proposed development**

Mr Pitt wrote to a number of persons in the WMC, including the Mayor and Chair of the WMC – Mr Bertel Moore, Councillor – Mr Devon Thomas, Superintendent of Roads and Works – Ms Ava Murdoch, Director of Planning - Mrs. Grace Whittley and Secretary manager – Ms Opal Beharie. The letter was also copied to the Permanent Secretary of the Ministry of Local Government.

In this letter Mr Pitt expressed his disagreement with what he called 'heavy commercialization' of the lands adjacent to his. He raised his concerns about the trucks traversing in and out of a 'single pitched access road', noise and dust nuisance, flooding, stagnant water, mosquitoes, squatting and the erection of a concrete and steel

warehouse. In particular, he asked that careful consideration be had to the introduction of commercial activities in Farm Pen, which he called a '100% residential' community.

This letter was not forwarded to NEPA by WMC.

February 18, 2016 **Joint team from NEPA carried out verification survey requested by the TRC**

A paperless interview was conducted with community members chosen at random. This survey was commenced around 10:50 a.m. and lasted for two hours. A total of nine persons were surveyed and eight offered no objection to the proposed development. The individual who objected raised concerns of potential noise and dust nuisance.

March 1, 2016 **Mr Williams' applications presented again to the Technical Review Committee**

The TRC was updated based on the verification survey/site inspection and a further review of the potential impacts and the mitigation measures proposed. Thereafter, the TRC offered no objections subject to the conditions presented.

March 15, 2016 **Environmental Permit Applications 2015-10017-EP00217 and 2016-10017-EP00012 were approved by the NRCA.**

Planning Permit Application 2015-10010-BA00159 was approved by the TCPA.

April 11, 2016 **Mr Pitt visited the WMC**

Mr Pitt claims that he observed that the development appeared to be proceeding and on this visit to the WMC, he was informed that NEPA had opposed the development in a letter, which was read to him. He was also informed that the development was not in accordance with the Certificate of Titles for his properties.

April 13, 2016 **Mr Pitt informed that the development was approved by NEPA**

Mr Pitt claims that he called NEPA and spoke with Mr Rudolph Carroll (one of the members of the joint team who carried out the survey/site

inspection) who informed him that the development had been approved by NEPA.

In April 2016 — **Report made at WMC meeting that work had commenced on the development**

Site visit conducted by Mr Jermaine Medley to investigate and the report was confirmed

April 28, 2016 — **WMC caused Mr Jermaine Medley to serve an Enforcement Notice on Mr Andrew Williams**

The Enforcement Notice informed Mr Andrew Williams that:

i) he was prohibited from continuing development;

ii) he was to cease all activities associated with the development; and

iii) he should await the decision of the WMC

In or about April or May 2016 — **Mr Pitt contacted the Office of the Public Defender and made a formal complaint in relation to the development.**

Mr Pitt's complaint resulted in the Public Defender carrying out investigations.

May 3, 2016 — **NEPA's CEO became aware of Mr Pitt's concerns**

Mr Peter Knight claims he became aware of Mr Pitt's concerns following questions posed by a Reporter from the Jamaica Gleaner.

May 10, 2016 — **NEPA's CEO responded to Reporter's questions**

NEPA conducted an inspection and it was observed that construction had commenced without the Permits. Site Warning Notices (09458 and 09459) were served on Mr Andrew Williams.

May 17, 2016 — **No objection letter from National Works Agency to NEPA**

Mr Winston Hartley, Manager of Development Control and Physical Planning Unit and Mr Patrick Rose, Director of Planning and Research

wrote to Mr Peter Knight indicating that NWA had no objection to approval being granted subject to a number of conditions. One of the conditions involved surface drainage/storm water runoff.

(see: Exhibit TD7)

May 29, 2016 **The Jamaica Gleaner published article titled 'This Can't Be Right – Residents Protest Gas Plant On Their Doorsteps But NEPA Says No Harm Done'**

(see: Exhibit PK5)

May 30, 2016 **Letter from WMC to Public Defender indicated*, inter alia*, that the application had not been approved as the WMC was awaiting comments from NEPA and NWA**

(see: Exhibit AEP18)

June 6, 2016 **Letter from TCPA to Mr Andrew Williams (copied to the WMC) advising that permission was granted for the development**

Ms Morjorn Wollock, in her capacity as Secretary of the TCPA indicated by letter (with reference number 2015-10010-BA00159) that the abovementioned decision was taken at a meeting held on March 15, 2016.

She further set out some stipulations and the reasons for same. One of the stipulations included compliance with the storm water drainage plan as approved by the NWA in its letter dated May 17, 2016, which was provided to Mr Andrew Williams.

The letter contained an 'Informative' section wherein Mr Andrew Williams was told of his right to appeal and that the approval does not relieve him from complying with other obligations including modification/discharge of the restrictive covenant.

(see: Exhibit AEP26)

June 7, 2016 **NEPA's CEO and Director of Legal Services and Enforcement Division met with the Public Defender**

Mr Peter Knight and Ms Morjorn Wollock met with Mrs Arlene Harrison-Henry and responded to questions related to the development and

spoke about Mr Pitt's complaint. Documentation was also provided to the Public Defender subsequently.

June 14, 2016 **Letter from NEPA to the Public Defender**

Ms Morjorn Wollock wrote to the Public Defender indicating:

i) that having reviewed the file there was no indication that Mr Pitt was consulted and his correspondence was not forwarded to NEPA;

ii) NEPA did undertake public consultation in accordance with its Public Consultation Guidelines;

iii) that there is a distinction between modification of restrictive covenants and planning permission and that one does not influence or negate the effect of the other;

iv) that applicants (such as Mr Andrew Williams) are advised to apply where necessary for modification of restrictive covenant(s); and

v) that the Emerging Westmoreland Development Order (Policies UE3 and 5) were a material consideration during the review of the application.

(Exhibited as AEP22)

November 11, 2016 **Letter of WMC in response to Mr Pitt's letter of February 12, 2016**

Mrs Grace Whittley responded to Mr Pitt indicating that:

i) the WMC was pursuing both matters raised by Mr Pitt, namely Mr Andrew Williams' development and the flooding caused by the building owned by AlexDel;

ii) enforcement notices were served on both developments;

iii) in respect of Mr Andrew Williams' development the WMC had received no comments from NEPA, but had received from NWA and the Jamaica Fire Brigade;

iv) Mr Andrew Williams' application had not been approved;

v) the site had been visited on a number of occasions;

vi) the matter is currently before the Public Defender; and

vii) the WMC is in the process of deliberating the way forward to bring that matter to a resolve and had instructed that the status of the application by other processing agencies be ascertained and copies of surveys obtained.

(see: Exhibit GW4)

December 9, 2016 **Public Defender produced report**

(see: Exhibit AEP24)

January 13, 2017 **Letter from the WMC responding to the Public Defender's report**

(see: Exhibit AEP25)

March 6, 2017 **Environmental Permits 2015-10017-EP00217 and 2016-10017-EP00012 issued to Mr Andrew Williams**

Planning Permit 2015-10010-BA00159 issued to Mr Andrew Williams

March 27, 2017 **Letter from NEPA to the Public Defender providing copies of the Environmental and Planning Permits granted** *(see: Exhibit AEP26)*

June 6, 2017 **Mr Pitt filed application for leave to apply for judicial review**

July 4, 2017 **Leave to apply for Judicial Review granted by B. Morrison, J along with an injunction restraining Mr Hubert Williams and Mr Andrew Williams from taking any steps pursuant to the Permits**

July 17, 2017 **Mr Pitt filed his claim which is now the case at bar**