IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV 3022 OF 2005

IN THE MATTER OF THE NATURAL RESOURCES CONSERVATION AUTHORITY ACT

AND

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT

AND

IN THE MATTER OF PART 56 OF THE CIVIL PROCEDURE CODE

BETWEEN	**THE NORTHERN JAMAICA CONSERVATION ASSOCIATION**	**FIRST APPLICANT**
AND	**THE JAMAICA ENVIRONMENT TRUST**	**SECOND APPLICANT**
AND	**CECILE CARRINGTON**	**THIRD APPLICANT**
AND	**ELEANOR GRENNAN**	**FOURTH APPLICANT**
AND	**ANNABELLA PROUDLOCK**	**FIFTH APPLICANT**
AND	**JOHN DeCARTERET**	**SIXTH APPLICANT**
AND	**THE NATURAL RESOURCES CONSERVATION AUTHORITY**	**FIRST RESPONDENT**
AND	**THE NATIONAL ENVIRONMENT AND PLANNING AGENCY**	**SECOND RESPONDENT**

Mr. Dennis Morrison Q.C. and Mrs. JuliannE Mais-Cox instructed by DunnCox for all the applicants

Mr. Patrick Foster, Acting Deputy Solicitor General and Mrs. Symone Mayhew, Assistant Attorney General, instructed by the Director of State Proceedings for both respondents

April 27, 28, May 4, 5, 11 and 16, 2006

JUDICIAL REVIEW, LEGITIMATE EXPECTATION, UNREASONABLENESS AND DELAY

SYKES J

1. Along the northern coastline of Jamaica there is a bit of land, nestled by the sea, just outside of Runaway Bay, in the parish of St. Ann. It is rich in biodiversity. It is known as Pear Tree Bottom. It has caught the eye of many persons. Local residents and environmentalists have for years lauded and enjoyed its picturesque grandeur. It teems with wildlife ranging from potoos and patoos to yellow snakes and yellow-billed parrots. It is agreed that it is a very sensitive area from an ecological standpoint. The affidavit of Dale Webber, marine biologist and Director of the Centre for Marine Sciences and Head of the Department of Life Sciences, sworn on behalf of the applicants, makes this plain. His expert opinion is that "the ecological value of Pear Tree Bottom area is very high and that the ecological resources are important". He speaks of the fringing reef. He adds that few areas along the north coast display "this sort of bathymetry and … diversity of corals, fish, invertebrates and associated benthic flora".

2. Some years ago Tank-Weld Ltd. purchased the property and had in mind to develop a resort there. For whatever reason, it did not follow through with its intention and in 2003 sold the land to Spanish hotel developers known as the Pinero Group. The Pinero Group also found the location idyllic and wish to build a 1918 room hotel at the site. In Jamaica, the Pinero Group takes the corporate form of Hoteles Jamaica Pinero Limited ("HOJAPI").

The litigants

3. The Northern Jamaica Conservation Association ("NJCA") has had a long history in environmental matters. Prior to its change of name it was known as the St. Ann Environment Protection Association. It was founded in 1989. It is a limited liability company without share capital and governed by a Board of Directors elected by the members. The affidavit of Miss Wendy Ann Lee (formerly Wendy Van Barneveld and Wendy Bell) establishes beyond question the interest of the NJCA in environmental issues generally and Pear Tree Bottom in particular. The interest in Pear Tree Bottom has been unflagging and extends over some twelve years. Mesdames Carrington, Grennan and Proudlock are members of NJCA. These are the third to fifth applicants. Miss Lee swore her affidavit on behalf of the third to the sixth applicants.

4. The second applicant, Jamaica Environment Trust ("JET"), is a non-profit non-governmental organisation formed in 1991 to protect the natural environment in Jamaica

and promote environmental awareness. It is run by a Board of Directors. Mr. DeCarteret is a member of JET.

5. The Natural Resources Conservation Authority ("NRCA") was established by the Natural Resources Conservation Authority Act (see section 3 of the NRCA Act). The National Environment and Planning Agency ("NEPA") is described as an Executive Agency. It is said to be an amalgam of the Town Planning Department, the NRCA and the Land Development and Utilization Commission. NEPA then is the agency under which the NRCA falls. This explains, in part, why they are respondents in this judicial review.

The challenge and grounds

6. The applicants have sought judicial review of the decision to grant a permit given to HOJAPI to build the hotel. This permit is an environmental permit. Without it the development at Pear Tree Bottom would quite likely not take place. When this permit is secured then the developer will have an easier task to obtain building and planning permission. The applicants have asked for the following orders:

(1) An order of certiorari to quash the decision to grant a permit granted pursuant to section 9 of the Natural Resources Conservation Authority Act to Hoteles Jamaica Pinero Limited (HOJAPI Ltd.) for a development of a Bahai Principe Resort at the place called Pear Tree Bottom in Runaway Bay, St. Ann on Jamaica's north coast;

(2) An order of mandamus to direct the Natural Resources Conservation Authority to reconsider its grant of a permit to HOJAPI Ltd;

(3) A declaration that procedures of the Natural Resources Conservation Authority and/or the National Environment Planning Agency were not complied with in granting this permit;

(4) Such further or other relief as may be just;

(5) Costs

7. The applicants accept that the National Resources Conservation Authority ("NRCA") is the body authorised by the relevant statute to grant permission to engage in the development at Pear Tree Bottom. The many paragraphs in the fixed date claim form can be summarized as follows:

the NRCA Acted irrationally and unreasonably when it granted the environmental permit to HOJAPI because

(1) it failed to take into account all relevant considerations when deciding to grant the permit;

(2) it Acted outside its statutory mandate given in sections 4 and 9(5) of the National Resources Conservation Authority Act ("NRCA Act") in that the Act says that the permit shall not be granted if the development to which the application relates is or is likely to be injurious to public health or to any natural resource;

(3) it failed to take into account and properly address the material concerns of the Water Resources Authority and the St. Ann Parish Development Committee before granting the permit;

the NRCA and NEPA failed to meet the legitimate expectation of the applicants that

(4) the public meeting which is part of the consultation process would be conducted in accordance with the guidelines for holding public meetings published by NRCA;

(5) a second public meeting would be held before any permit would be granted to HOJAPI

8. Before turning to the issues in detail I need to say a few words at this early stage about an environmental impact assessment ("EIA").

The role of an EIA

9. Mr. Foster has submitted quite forcefully and with merit that an environmental impact assessment is not an end in itself but a means to an end. The submission was in response to the applicants' position that the EIA in this case was so flawed that any decision based on it must be unreasonable. He placed much reliance on the case of ***Belize Alliance of Conservation Non-Governmental Organization v The Department of the Environment and Belize Electricity Company Ltd*** (2004) 64 WIR 68. Mr. Foster relied on paragraphs 10, 63, 68 and 69 (from the majority judgment of Lord Hoffman) for the following propositions:

a. an EIA is 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;

b. the EIA is not expected to resolve every issue raised and indeed it could not since by its very nature it does not purport to explore every single possibility and advance solutions;

c. 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;

d. 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 the public of the effects of the proposed activity.

10. There is nothing to suggest that the minority (Lords Walker and Steyn) dissented from these propositions. The point of separation was on the weight to be given to the erroneous statement in the EIA concerning the type of bedrock at the proposed dam site. It seemed to have been accepted by all the judges who heard the case (from first instance to the Judicial Committee of the Privy Council) that the EIA was otherwise quite detailed and impressive in quality and depth. This certainly was the view of the Chief Justice and the Court of Appeal. It must be pointed out that it is not entirely clear whether the encomiums heaped up on the EIA by both lower courts would have been the same had they known about the serious error that had been made which was apparently concealed by authorities. Lord Hoffman did not dissent from Lord Walker's accusation that the authorities were less than frank. He looked at the matter in the round and said "no engineer with experience of building dams has said that the classification of the rock is significant as such" (para. 47) whereas Lord Walker observed that the "sandstone bedrock is probably capable of providing a satisfactory foundation for a dam but only if the new geological information is taken into account in the design" (see para. 118). Lord Hoffman seemed to be saying that the decision maker would have made the same decision in any event so there was no need to quash the decision. Lord Walker's view of the matter led him to think that the revelation about the bedrock made a fundamental difference to the weight to be given to the EIA because it changed the complexion of the information in possession of the authorities. Apparently the error was known to the authorities but they maintained a deliberate silence. There was evidence to suggest that error and the consequences of the error were concealed from the public. The public was led to believe that a particular state of affairs existed when that was clearly not the case. Thus it was no longer simply a matter of a dam with bedrock of granite but a dam with bedrock of sandstone. The change in bedrock meant also a change in the design of the dam. I much

prefer the approach of the minority judgment to the issue than that of the majority. Concealment of material information could hardly be said to enhance good administration. Lord Walker emphasised that in the context of the Belizean legislation and Regulations the design of the dam was required to be included in the EIA and should have been subject to public consultation and public debate before approval. He noted that changes were to be made in the design but the nature of the changes had been withheld from the public.

11. Mr. Dennis Morrison Q.C. highlighted a significant difference between the EIA in the instant case and the EIA in the case before the Board. In Belize the minimum requirements of the EIA were specified by statute and it may well be that the majority felt that since the EIA met the statutory conditions that it was not for the courts to impugn it. This is true but I do not get the impression that the majority rejected the proposition that it was possible to have such a flawed EIA that it was invalidated. Implicit in both the majority and explicit in the minority was the understanding that there can be situations where an EIA has such fundamental errors that it is invalidated and consequently any decision based upon it is open to challenge. That this is so is demonstrated by the fact that Lord Hoffman accepted that the EIA was thorough and impressive. Lord Walker did not question its thoroughness generally but he felt that the error regarding the bedrock was so fundamental that it went to the heart of the matter.

12. The propositions advanced by Mr. Foster are quite unexceptionable and I agree with them. He next submitted that there were no fundamental flaws in the EIA albeit that there were areas that could have been explored some more. However, he said, those defects did not prevent the EIA from meeting the standards of comprehensiveness, objectivity and alerting the decision maker and members of the public to the possible effects of the proposed activity at Pear Tree Bottom. I reserve my judgment on these submissions until I examine more closely the facts of this case against the background of the applicable law.

Summary of applicants' submissions

13. The applicants' submission can be placed under three categories. Firstly, they submit that the NRCA frustrated the legitimate expectation of the applicants; the legitimate expectation being that the respondents would comply with its stated policy of having consultation with the public and other interested groups in accordance. Second, they submit that the NRCA acted irrationally in that it acted upon a flawed EIA and that in and of itself

placed it in breach of its statutory mandate to take into account only material consideration and exclude irrelevant considerations. Thirdly, they say that the applicant failed to give sufficient regard to the concerns expressed by the Water Resources Authority ("WRA").

14. In relation to the first category they submit that there were material non-disclosures that deprived the consultation of any meaning. They even went as far as saying that the process was a sham. They were not treated fairly and that amounted to a breach of their legitimate expectation that they would be fairly treated, that is to say, (i) be properly consulted; (ii) given reasonable opportunity to make adequate representations and (iii) given full, adequate and accurate information in order that the consultation process is meaningful.

15. On the second category they submit that the legislation governing the NRCA and its published guidelines were breached in that the respondents failed to act in accordance with those guidelines. Finally, they insist that the WRA raised very important objections about sewage disposal, the set back distance from the waters' edge and the wet land and those issues were not addressed at all.

The law

16. It is clear that the applicants are raising the issue of whether the respondents made a decision that was so unreasonable that no reasonable decision maker could have made it. This immediately introduces what is now referred to as Wednesbury unreasonableness. The case of ***Associated Picture Houses v Wednesbury Corporation*** [1948] 1 K.B. 223 is the source of Wednesbury unreasonableness. As is often common with cases like this they are more often cited than analysed. In that case the local authority granted a licence to the claimant to operate a picture house on Sundays. The condition imposed was that children under fifteen years would not be admitted unless they were accompanied by an adult. The claimant challenged the condition. Lord Green M.R. rebuffed the challenge on the basis that the conditions imposed were not unreasonable. I have decided to set out this long passage found at pages 228-231 in order to make a few points that are relevant to this case.

> *The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.*
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> *What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie*

that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a 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." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [FN17] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

...It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt

on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

17. These are my observations on the passage.

a. The court is not to substitute itself for the decision maker. Where Parliament by legislation has entrusted the decision making on a particular issue to a functionary it is for that functionary alone to make the decision.

b. Where the statute states or implies the criteria that must be used to make the decision then the decision maker must consider those matters. This is the broad definition of unreasonableness.

c. Lord Greene went on to speak of unreasonableness in a more narrow and specific sense that is, a decision that is so absurd that no reasonable person could "could ever dream that it lay within the powers" of the decision maker (see page 229). In this narrow sense the successful challenger must prove "something overwhelming". It is not enough to assert that the decision maker made an unreasonable decision. The decision must be so unreasonable that it is irrational. When put like this it is not surprising that the claimant in ***Wednesbury*** failed in his challenge. This formulation of the narrow Wednesbury unreasonableness suggests that there are degrees of unreasonableness. Lord Greene's use of the words "something overwhelming", in my view, makes it clear that he has in mind unreasonableness that defies comprehension. It is only this kind of unreasonableness that will suffice for Lord Greene.

18. The difficulties with narrow ***Wednesbury*** are not readily apparent unless one begins to ask, how was the condition imposed on the licence determined? What informed the decision? These questions go past the actual decision to look at process. How was the decision made? How then does a claimant establish unreasonableness in the narrow sense given the absence of a general duty on the part of the decision maker to give reasons? Often times the applicant will only have the decision to point to and ask the court to look at the power given to the functionary and examine the decision in light of power. During all this the applicant may not know much about the actual process of making the decision. The applicant is relying on an inference to be drawn from the fact of the decision that was made. No wonder Lord

Greene required something overwhelming. This is in reality a very extreme form of unreasonableness. It is really saying that the decision maker was capricious or whimsical or even quirky. He gave no thought to the matter at all. The decision maker indulged in an unrefined, uncultured exercise of power without even a veneer of cerebral activity.

19. What of broad Wednesbury? This at times may not prove beyond the reach of applicant for judicial review because the statute itself may state the matter to be considered. At other times, the relevant considerations are implied and are not hard to discover.

20. Since Lord Greene spoke the courts have developed techniques that can be prayed in aid to circumvent narrow Wednesbury. For example, the doctrine of legitimate expectation. At the time of Lord Greene, concepts such as procedural fairness were still rudimentary. ***Ridge v Baldwin*** [1963] 2 All ER 66 was still two decades away and ***Council of Civil Service Unions (CCSU) v Minister of the Civil Service*** [1984] 3 All ER 935 was not even contemplated by anyone back in the 1940s. ***Burroughs v Katwaroo*** (1992) 40 WIR 287 is a further example of the ingenuity of the judiciary to ensure the narrow Wednesbury does not unnecessarily impede the path on which fairness walks. Since these landmark cases, administrative law has not only been marching but hurtling along in the search for more refined techniques of judicial review. Nothing is wrong with this. It perhaps should come as no surprise that the refinement of administrative law also coincided with the rise of the welfare state which saw the Government intervening in areas that were once the exclusive concern of the private citizen.

21. We are now at the stage where it is safe to say that the intensity or stringency of the review varies according to the importance of the subject matter. Human rights issues therefore attract a very stringent review with lesser rights (I am not devaluing their significance) attracting a lower level of stringency. It would seem to me that environmental legislation ought to attract a fairly high level of scrutiny. The consequence of bad environmental management can be disastrous and in some cases fatal. Those of us who have lived in this region where hurricanes travel with great and increasing frequency have seen the damage that can be wrought. Wednesbury unreasonableness does not assist much with this kind of refinement. At least three judges of the House of Lords have recognised this. In ***Regina (Daly) v Secretary of State for the Home Department*** [2002] 1 A.C. 532, Lord Cooke of Thornton said pages 548 – 549, paragraph 32

> *The other matter concerns degrees of judicial review. Lord Steyn illuminates the distinctions between "traditional" (that is to say in terms of English case law, Wednesbury) standards of*

judicial review and higher standards under the European Convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in Smith and Grady v United Kingdom (1999) 29 EHRR 493 and Lustig-Prean and Beckett v United Kingdom (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

22. ***Daley's*** case involved the fundamental issue of whether the prison authorities were infringing prisoners' right to legal professional privilege when the letters they wrote to their lawyers were examined but not read by prison officials. It is my view, however, that Lord Cooke was making a general statement to the effect that the intensity of judicial review will vary according to the subject matter under review and what is fair in the circumstances of the case. His Lordship recognised that Lord Greene's narrow formulation of unreasonableness was really describing "a very extreme degree" of conduct. Lord Greene's approach then is not very helpful when one is dealing with a first generation right such as some of those enshrined in Chapter three of the Constitution of Jamaica. Neither is it very helpful when dealing with whether an environmental management agency acted fairly and properly in making its decisions. Lord Steyn's contribution in the same case is of importance because he made the point that even in a heightened or more intense scrutiny of executive acts the courts are not engaged in the actual merits of the decision. The separation of powers between the executive and the judiciary is not infringed.

23. Lord Slynn returned to this theme and took the matter a step further in ***Regina (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*** [2003] 2 A.C. 295. The issue in that case was whether the applications made by persons were determined by an impartial tribunal. The question arose in the context of applications for planning permission to use land in particular ways. Lord Slynn observed that the time had come when English courts should accept that the principle of proportionality is part of English law and should be applied to acts subject only to domestic law. In other words, the principle of proportionality is applicable to executive acts that are not covered by European Community law. His Lordship said at page 321, paragraph

51 that "*[t]rying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing*".

24. In ***Regina (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*** **[2003] Q.B. 1397** it was the turn of the Court of Appeal to question the wisdom of keeping separate proportionality and Wednesbury. Lord Justice Dyson had this to say at pages 1413-14, paragraphs 34 and 35:

> ***34*** *Support for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention is to be found in para 51 of the speech of Lord Slynn of Hadley in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, 320-321; and in the speech of Lord Cooke of Thorndon in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 548-549, para 32. See also de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed (1995), p 606. It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the Wednesbury principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated: see Lord Steyn in the Daly case, at pp 547-548, para 27. It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the Wednesbury test. But the strictness of the Wednesbury test has been relaxed in recent years even in areas which have nothing to do with fundamental rights: see the discussion in Craig, Administrative Law, 4th ed (1999), pp 582-584. The Wednesbury test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann's Third John Maurice Kelly Memorial Lecture 1996 "A Sense of Proportionality", at p 13. Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the Wednesbury test.*
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> ***35*** *But we consider that it is not for this court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion. The obvious starting point is R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696. The Home Secretary had issued directives to the British Broadcasting Corporation and the Independent Broadcasting Authority prohibiting the broadcasting of speech by representatives of proscribed terrorist organisations. The applicant journalists challenged the legality of the directives on the ground that they were incompatible with the Convention, and also on the ground that they were disproportionate in a sense going beyond the established doctrine of reasonableness. Mr. Pannick submits that the Brind case [1991] 1 AC 696 does not stand in the way of this court holding that proportionality has supplanted the Wednesbury test in English domestic law, even where no human right or European Community law issues are raised. We do not agree. It is true, as Mr. Pannick points out, that Lord Bridge of Harwich and Lord Roskill left the door open for the possible future introduction and development of the doctrine of proportionality into English domestic law. But all of their Lordships rejected the proportionality test in that case and applied the traditional Wednesbury test. In other words, they closed the door to proportionality in domestic law for the time being.*

25. This decision was decided a month before ***Alconbury***. It may well be that had ***Alconbury*** been delivered before, Dyson LJ may well have taken a different course. Dyson LJ reluctantly applied narrow Wednesbury and upheld the judge's decision to refuse to quash the Secretary of State for Defence's decision. It seems that it is only a matter of time before the House of Lords makes the final and logical step. I have made these points because Mr.

Foster has relied heavily on both narrow and broad Wednesbury to resist the applicants' case. It must now be recognised that Wednesbury unreasonableness, in either sense, needs further refinement. The law has matured enough for us to conclude that the process of decision making is just as important as the decision itself and may be, depending on the subject matter, even more important that the decision. We are long past the climate of Lord Greene's era. We now have what may be described as a "rights culture" where increasingly a number of "rights" are being recognised and conferred on citizens and strangers. Even the Royal Prerogative and in the case of Jamaica, the Prerogative of Mercy has been called into question. Due process now permeates not only criminal and civil trials before impartial and properly constituted courts but also tribunals and government agencies that are given the task of decision making. In England the Human Rights Act has accelerated this development. For us here in Jamaica, the Constitution is but one of the sources of this rights conscious age. In formulating the matter in this way, the aim is not a demand for perfection in human affairs but rather about ensuring that the executive behaves lawfully. No one has argued nor indeed could argue that the executive has the right to breach the law (even if the law is "merely" procedural) when making a decision it is authorised to make. This way of looking at the matter benefits the citizen or stranger who will know that he is not subject to whimsical and irrational decisions. This is not encroaching on the domain of the executive. It is about ensuring that executive power is used in accordance with the law. It enhances the rule of law and does not derogate from it which in turn can only enhance the quality of life of the citizenry. This is one of the natural outcomes of a constitutional democracy built on the rule of law.

26. This leads me to the important case of ***Regina v North and East Devon Health Authority, Ex parte Coughlan*** [2001] QB 213. This was as strong a court as could be assembled to consider a matter of public law. It comprised Lord Woolf (whose contribution to public law needs no telling), Sedley LJ's (whose distinguished career as counsel and judge in public law is captured in the law reports) and Mummery LJ. The judgment of the court reflected the efforts of all three members and it was delivered by Lord Woolf. The importance of the case lies in the discussion by Lord Woolf M.R. of the two kinds of Wednesbury unreasonableness, legitimate expectation and consultation. His Lordship while accepting that narrow Wednesbury still exists as a head of judicial review recognised its limitations.

27. The facts were that the health authority had promised Miss Coughlan and others that they would stay at Mardon House for the rest of their lives. This was a house for persons in need of long term health care. The health authority subsequent to this promise decided that Miss Coughlan and the other residents of Mardon House did not meet its new criteria for long term health care. The authority, after public consultation, decided to close Mardon House and transfer responsibility for Miss Coughlan's care to the local government authority although no place had been identified for her. The Court of Appeal upheld the judgment of the judge quashing the decision to close Mardon House by holding that where a public body exercising a statutory function had made a promise and that such promise induced a legitimate expectation of a benefit that was substantive, any frustration of that expectation would be an abuse of power unless there was an overriding interest justifying the departure from what was expected. The court found that the health authority committed an unjustifiable breach of the promise made to Miss Coughlan. This was said to be unfairness amounting to an abuse of power. Counsel for the health authority argued in a manner consistent with narrow Wednesbury unreasonableness. He sought to say that the decision of the health authority was not so unreasonable that no reasonable health authority could come to it. It is readily accepted by both sides in the case before me that this case is not one where the NRCA and NEPA induced a legitimate expectation of a substantive benefit and on that score the ***Coughlan*** case is readily distinguishable. However that does not devalue the learning to be derived from it.

28. Lord Woolf began his analysis of the concept of legitimate expectation with these words found at page 241, paragraph 55:

> *In considering the correctness of this part of the judge's decision it is necessary to begin by examining the court's role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr. Goudie and Mr. Gordon accept.*

The opening sentence in this passage is wide enough to cover both substantive and procedural legitimate expectation.

29. The Master of the Rolls explained at pages 241- 242, paragraphs 56 – 59:

> *56 What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in In re Findlay [1985] AC 318, 338, "But what was their legitimate*

expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in In re Findlay. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

57 There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see In re Findlay [1985] AC 318; R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

58 The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

59 In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's words in In re Findlay [1985] AC 318) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation: see R v Grice (1977) 66 Cr App R 167; cf R v Reilly [1982] QB 1208, R v Dover Magistrates' Court, Ex p Pamment (1994) 15 Cr App R(S) 778, 782. No attempt is made in those cases, rightly in our view, to draw the distinction.

It is to be noted that for Lord Woolf legitimate expectations are of two kinds: procedural and substantive. Nonetheless, his discussion in the joint judgment of the court did not reflect any notion that because a legitimate expectation was procedural, that without more, meant that a decision could not be quashed (see page 243, para. 60). He was quite insistent that even if the legitimate expectation fell within category two, the decision maker and ultimately the

court would have to "take into account that only an overriding public interest would justify resiling from the promise" (see page 243, para. 60).

30. He reinforced the point that procedural expectations are not to be dashed absent some compelling reason. At page 243, paragraph 62 he said:

> *There has never been any question that the propriety of a breach by a public authority of a legitimate expectation of the second category, of a procedural benefit--typically a promise of being heard or consulted--is a matter for full review by the court. The court has, in other words, to examine the relevant circumstances and to decide for itself whether what happened was fair.*

31. During his analysis Lord Woolf dealt with this problem: how is the court to strike the balance between not impeding the executive from initiating and responding to change while at the same time seeing that persons' legitimate expectations are not frustrated? What standard does the court use to resolve this issue? One way is to limit the court to an examination of whether (a) the decision defies comprehension (i.e. narrow Wednesbury) or (b) the decision was arrived by flawed logic (i.e. broad Wednesbury). If this approach is taken, according to Lord Woolf, the court would not be able to examine, another aspect of decision making that is of equal importance, namely, whether the process by which the decision was made deprived the affected person of any legitimate expectation (see page 244, para. 65 – 66).

32. In order to engage in an examination of this equally important (i.e. the decision making process) aspect of decision making the courts have taken two approaches. One is to ask whether the decision maker has acted unfairly to the point where he has abused his power. This approach does not trespass on the executive's authority and it ensures that the courts, not the executive, are the arbiters of this issue should it arise. The second approach is an application of the doctrine of legitimate expectation. This doctrine has emerged as "as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits" (see ***Coughlan*** page 246, para. 71). This second approach "makes no formal distinction between procedural and substantive unfairness" (see ***Coughlan*** page 247, para. 73). Again this does not infringe the executive's right to make decisions. In both instances it cannot be for the executive to decide whether it has abused its power or it has deprived the citizen or stranger of his legitimate expectation should a dispute arise and there is no resolution between the parties. If that were so the executive would constitute itself a judge in its own cause (see ***Coughlan*** page 245, para. 66).

33. Lord Woolf makes the link between fairness, legitimate expectation and category one by asking what by that stage in his analysis was a rhetorical question, "If this is the position in the case of the third category, why is not also the position in relation to the first category?" (see ***Coughlan*** page 246, para. 71). The analysis was deepened by Lord Woolf when he proceeded to examine a number of other cases and at page 248, paragraph 74 he confirmed that nothing "in this body of authority... [suggests] that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision". In other words, not even narrow Wednesbury is not a bar to applying the doctrine of legitimate expectation to the decision under review.

34. It might be thought that there is a blurring of the clear bright line between executive authority and judicial authority. That is not so. To safeguard the principle that the executive's decision and policy making powers are left untouched by the courts Lord Woolf stated that "the court will only give effect to a legitimate expectation within the specific statutory context in which it has arisen" (see page 251, para. 82).

35. So far I have not looked at the concept of fairness. Fairness is not a predetermined and unalterable standard – a kind of one size fits all. Lord Mustill in ***Regina v. Secretary of State for the Home Department, Ex parte Doody*** [1994] 1 A.C. 531, albeit in the context of a case involving life sentences of convicted murderers stated at page 560

> *My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer*
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36. This is a sufficiently general statement that can easily be moulded to address the particular case before the court. It recognises that fairness is influenced by context. With this understanding of fairness combined with Lord Woolf's exposition in ***Coughlan*** it would seem

to me that it is difficult to resist the conclusion that under English and Jamaican law a decision maker may well survive the Wednesbury test in both the narrow and broad senses but is still found to have acted unfairly. The unfairness may have deprived the person of a legitimate expectation (procedural or substantive). Unfairness is an abuse of power. Irrationality is simply an extreme form of abuse of power. As Lord Woolf said at page 251 paragraph 81: *Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine.* The role of the court then is not to stymie the executive or the decision maker but to determine whether the executive or decision maker has acted unlawfully. It is not for the executive or decision maker to determine whether it has acted fairly. That is a judicial function. In some instances the decision maker may recognise his error and make amends. When the executive discovers its error and tries to remedy the situation it is not usurping the judicial function. It is alternate dispute resolution in action – something to be encouraged. Where there is no such acknowledgement and there is need to adjudicate on the question then it is for the judiciary to make that determination.

37. In the end, it is now possible to deal with ***Wednesbury*** in two ways. The first is to follow the irresistible logic of the observations made in the House of Lords and the Court of Appeal of England and Wales (proportionality with intensity of scrutiny varying according to subject matter) or to go the route of Lord Woolf, which in substance is a significantly modified Wednesbury. I have used both approaches in this case. The virtue of the proportionality approach is that it focuses the mind of decision maker. It enhances protection for citizen and stranger without stymieing the executive. It places the burden on the executive to justify its actions rather than the citizen to show that the executive has acted improperly once the citizen has established a case which if unrebutted would lead to the conclusion that the executive has acted improperly. If ***Wednesbury*** were to occur today it may be that the courts would not visit the condition with a high degree of scrutiny because no right or important interest is at stake. I now turn to consultation.

Consultation

38. It is now safe to say that consultation of citizens by public bodies and authorities is now a well established feature of modern governance. Sometimes a statute may impose a duty to consult. At other times the decision maker decides to consult where there is no statutory

duty to consult. The law now requires that any consultation embarked upon must meet minimum standards. The standard is the same whether the consultation arises under statute or voluntarily undertaken by the decision maker. He cannot conduct a flawed consultation process and when challenged say, "I was under no duty to consult so be off with you!" What then is proper consultation? The answer was provided by Mr. Stephen Sedley Q.C. (as he then was) in the case of ***Regina v Brent London Borough Council, Ex Parte Gunning and others*** 84 L.G.R. 168, 189. Mr. Sedley formulated his description while appearing for the applicants and it was adopted by Hodgson J. It is now called the Sedley definition. The definition has received the imprimatur of Lord Woolf in ***Coughlan*** at page 258, paragraph 108:

> *It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168.*

39. Lord Woolf explained that consultation is not litigation. Consultation does not require the disclosure of every submission or (absent a statutory mandate) all the advice received. The duty entails letting "those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response". That "obligation, although it may be quite onerous, goes no further than this" (see page 259, para. 112). Earlier at page 258, paragraph 108 Lord Woolf accepted the proposition that "adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".

40. It does not follow from this that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem to me that it depends upon the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision. It must be recognised that the consultation process may not go as well as everyone would like so at the end of the day the question may well be a qualitative one, that is to say, the courts will

examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy.

The case

The statutes

41. I shall summarise the relevant statutory provisions. The NRCA's functions are set out in section 4 of the NRCA Act. The Authority has power to delegate any of its functions to any member, officer or agent of the authority. Under section 9 (1) the Minister may prescribe areas in Jamaica where if certain types of construction or development are to take place a permit has to be issued by the NRCA. Section 9(2) prohibits any person in any area prescribed under section 9(1) from undertaking any enterprise, construction or development of a prescribed description or category except under and in accordance with a permit issued by the NRCA. Section 9(3) mandates that before any activity of the type mentioned in section 9(2) takes place the person proposing to undertake such activity must apply to the NRCA for a permit. Section 9(4) says that if the activity is likely to result in the discharge of effluent then the application for the permit is to be accompanied by an application for a licence to discharge effluents. Section 9(5) uses language that suggests that consultation is mandatory when considering any permit under section 9(3). Section 9(5) says that the NRCA "**shall** consult with any agency or department of Government exercising functions in connection with the environment" and "**shall** 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 in particular on any natural resource in the area concerned." Where the NRCA is of the opinion that the development involves activities that have or likely to have an adverse effect on the environment it may ask for an environmental impact assessment ("EIA") containing such information as may be prescribed (see section 10 (1) (b) of the NRCA Act). I make no conclusion on whether shall means must or may but I shall proceed on the basis that consultation is discretionary. No arguments were addressed to me on the point. What I can say is that section 9(5) of the NRCA Act places a very high premium on inter agency consultation and the expectation is that this consultation should be done and done properly unless there is some overriding public interest that dictates otherwise. There is no statutory duty to consult any member of the public or any specific interest group outside of the Governmental apparatus.

The environmental permit application and the EIA

42. It has already been noted that the permit is crucial to development. On September 28, 2004, HOJAPI submitted an application for a permit under section 9 of the NRCA Act. HOJAPI wanted to build a 1918 room hotel at Pear Tree Bottom on approximately 80 acres or 34 hectares of land located along the coast, west of Runaway Bay, St. Ann. The NRCA decided than an EIA was needed. This was communicated to HOJAPI by letter dated October 21, 2004. The terms of reference of the EIA were sent by letter dated December 6, 2004, to HOJAPI. On February 28, 2005, the EIA was submitted to NEPA. The EIA was circulated to a number of government agencies for their comments and recommendations. This included the WRA. The document was posted on the website of NEPA. Miss Macauley's affidavit said February but this is quite likely an error. The evidence about the posting on the website comes from Mr. Jerome Smith, technical officer attached to NEPA. This was the only area of conflict between the applicants and the respondents. Mr. Smith is able to give better evidence on this point and so I accept his testimony.

43. The EIA was then disseminated to the public for their comments. The public were asked to submit their comments by March 29, 2005. Mr. Smith said that the document was sent out on March 7, 2005. Miss Lee swore that she did not receive it until March 21, 2005. There is no evidence challenging this assertion and I accept it. This, in practical terms, meant that she had eight days to review a 111 page document which contained graphs, maps, references to literature, statistical and technical information. I should point out that for the purposes of the response to the document NJCA and JET quite sensibly combined their efforts. At the time Miss Lee received the document two public holidays, Good Friday and Easter Monday intervened. This reduced the ability to secure technical advice if needed. Despite these difficulties, NJCA submitted its own response by April 18, 2005 and a joint response with JET by April 28, 2005. A public meeting was held on April 28, 2005, in Runaway Bay, St. Ann.

44. All this appears to be an example of a public body engaging in consultation. However it had one defect. It is common ground that a marine ecology report that should have formed part of the EIA was not submitted at the time the EIA was sent to the NRCA. The marine ecology report was also missing at the time of the public meeting. In fact, the public, other than perhaps the applicants, still do not know of the marine ecology report. The report has not been exhibited. It is said that this was an oversight. No one knows what effect it might

have had on the public discussion. No one knows if a different decision would have been made had it been made public or how it would have affected the public's understanding of the project. Even as I write these words the report is still safely locked away in the NRCA's repository. It was after this public meeting that the marine ecology report was submitted to the NRCA. This omission forms part of the grounds of complaint by the applicants. Before the public meeting, unknown to the applicants, the NRCA granted what is called a preliminary site clearance. This development was stumbled upon by the applicants.

45. Mr. Foster submitted that there was a duty to consult the public but this duty did not arise from the statute. The source of this duty was based on the NRCA's stated policy that it would consult with the public in certain circumstances, this being one of them. He submitted that the consultation was adequate. He added that I must look at the matter in the round. I must look at the fact that the EIA consultants spoke to members of the public during the EIA process; the EIA was sent to the nearby police station and it was left at the St. Ann's Bay Parish Library; it was posted on the NRCA's website and relevant interest groups had sight of it. He added that there is a limitation on consultation. All consultation must come to an end. These proposition are acceptable but I must say that I do not see how this can justify not informing the public that the document that it had was incomplete. I do not see how this can justify causing the public to believe in a particular states of affairs, that is the EIA was complete, when this was not so. I do not see how this can justify not bringing the omission to public attention during the public consultation with a promise to remedy that omission and facilitating public discussion once the missing portion is to hand. I should indicate that report arrived at the NRCA some time in May 2005. This was the first document received in May.

46. A second document was received in May by the NRCA. I shall call this document the May addendum to distinguish it from the marine ecology report that was also received in May. NEPA wrote a letter dated May 5, 2005, to HOJAPI asking that it addressed matters raised by the applicants, government agencies and presumably other persons who responded to the request for comments on the EIA. It is the response to this May 5 letter that I call the May addendum.

47. There is a third document received by the NRCA. This document was prepared in response to further queries from the NRCA. It was received in June. I call this the June addendum. All three documents came to the NRCA after the public meeting.

48. Mr. Jerome Smith, on behalf of the respondents, addressed these three post public meeting documents at paragraphs 16 – 18. In paragraphs 16 and 17, he outlines the circumstances that led to their submission. At the risk of being accused of being pernickety, I must point out that he apparently refers to the May and June addenda, as "the addenda" and calls what I call the marine ecology report, "an assessment of the marine biology". This is important because he then states in paragraph 18 that "The addenda [meaning the May and June addenda] was (sic) not circulated to all the external government and non-government agencies but it was (sic) reviewed by the internal review committee, the TRC and eventually by the board of the NRCA. The Internal Review Committee is comprised of managers and other person who are trained in various areas of environmental management". This is not nitpicking because at paragraph 20 Mr. Smith says that *"[t]he application, the EIA, the comments and the addenda to the EIA were placed before the internal review committee on June 3, 2005, the TRC committee on June 20, 2005, and the Natural Resources Conservation Authority Board on June 22, 2005 along with a submission …for consideration*". This paragraph does not mention the marine ecology report by name. If I am correct that Mr. Smith does indeed distinguish between the marine ecology report and the May/June documents then he seems to be saying that the marine ecology report was not placed before the Board at all at the June 22 meeting.

49. Why do I say that he made the distinction? I say this because in paragraph 16 he notes that the EIA did not include "an assessment of the marine ecology of the area as required by the terms of reference". He added that this was corrected when he wrote to the developers. At paragraph 17 he says that the consultants to the EIA, by way of an addendum, responded to the NRCA's letter of May 5. We know that this addendum could not be the marine ecology report because that addendum has been placed before the court and the marine ecology report has not. This means that we are really talking about two separate and distinct documents. We also know that it could not be the June document because it is accepted that the marine ecology report arrived at the NRCA in May.

50. If Mr. Smith has made the distinction that I believe he did he is saying that the marine ecology report was not circulated to any non-government agencies and neither was it circulated to any external government agencies. I say this because he did not say what became of the marine ecology report after NEPA received it. On the other hand, if he is using addenda to include the marine ecology report he is still saying that they were not circulated

to any non-government agency and neither were they circulated to all the external government agencies. He never asserts that it was circulated to the public. If I am wrong about the distinction I believe he made, that error would not alter the conclusion that the marine ecology report was not and has not been exposed for public scrutiny and comment. The significance of the distinction, if it was made, lies in the list of material laid before the Board on June 22.

51. This omission is significant. The area under consideration is agreed to be an area that is an ecologically important area. It is located where two rivers enter the sea. There are mangroves that filter the fresh water that runs into the sea and that helps to balance the salinity of the sea so that marine life suitable to that environment can flourish. The area provides a home for migratory birds while beach offers a home to turtles to lay their eggs. The virtues of the ecosystem in the area have been extolled by many. It has been said that "*no other wetland of equivalent size and with the same mix of physical and vegetation characteristic has been described from this coast*"(see affidavit of Dale Webber). It is true that some damage to the ecosystem was done by Tank-Weld some years ago. I have already used some of the language from Dale Webber's affidavit at the beginning of this judgment. I repeat it here for ease of reference. He said that "*the ecological value of the Pear Tree Bottom area is very high and that the ecological resources are important. The fringing reef is characterized by close proximity to shore, a well developed spur and grove topography, with buttresses (coalescing periodically to form tunnels and caves) and a steep descent into the abyss. Few sections of the island's north coast display this sort of bathymetry and the diversity of corals. Fish invertebrates and associated benthic flora make it a particularly attractive site for recreational as well as scientific diving. The back reef sea grasses constitute a mature, climax community. They have been identified as having particular value as a nursery area for juvenile fishes*" (para. 3 of Webber's affidavit). This evidence is not disputed. This is the setting in which the marine ecology report is missing. It is obvious that such a report must be of significance. As I shall show later, not only was the report missing but it is beyond question that the EIA has significant empirical shortcomings that might not have mattered but in the context of an ecologically important area these short comings loom unimpressively large.

52. The May and June addenda were not circulated to the applicants, the public or all non-governmental agencies. The addenda were reviewed by an internal review committee

comprising managers and other persons trained in various areas of environmental management and finally by the board of the NRCA (see paragraph 18 of Smith's affidavit).

53. I have already listed the documents from Mr. Smith's paragraph that he says were placed before the NRCA Board. This permit was amended on July 26, 2005, because it erroneously referred to 567 rooms when it should have referred to 734 rooms. If Mr. Smith made the distinction between the marine ecology report and the May addenda then it would mean that the Board did not take the report into account. This omission would strengthen the applicants' case that the Board did not take all relevant matters into account.

C. The time line

54. It is instructive to isolate from the evidence above the time line in order to appreciate the basis of the applicants' complaint.

a. September 28, 2004, HOJAPI applies for environmental permit under section 9 of the NRCA Act.
b. NRCA tells HOJAPI in letter dated October 21, 2004, that it needs to do EIA.
c. Terms of reference of EIA sent to HOJAPI by letter dated December 6, 2004.
d. EIA submitted on February 28, 2005.
e. On March 7, 2005, EIA sent to the public including non-governmental agencies.
f. JET receives EIA on March 21, 2005.
g. Responses to be sent to NRCA by March 28, 2005.
h. Unknown to applicants NRCA on March 14, 2005, grants site clearance permission to HOJAPI.
i. NJCA sends response to EIA by April 18, 2005.
j. JET and NJCA send joint response to EIA on April 28, 2005.
k. Public meeting held on April 28, 2005.
l. Some time in May the consultants sent to NRCA the marine ecology report which should have been part of the EIA.
m. NRCA sends letter dated May 5, 2005, to HOJAPI which responds via the consultants who prepared the EIA. They send the addendum in May. I shall call this addendum the May addendum.
n. The consultants send a second addendum in June 2005. This is the June addendum.

o. Neither the marine ecology report nor the two addenda were disclosed to anyone outside of NEPA.

p. Permit granted July 5, 2005 and amended on July 26, 2005.

55. The claimants say that this chronology, in the context of an EIA which is a technical document, shows that the time for consultation was so short that it was really no consultation. This they say breached their legitimate expectation that they would be properly consulted. The claimants do not just stop at this. They have submitted that an examination of the EIA, the minutes of the public meeting, their comments and the comments of other government agencies and demonstrate that the decision maker acted unreasonably in the narrow Wednesbury sense or failed to take into account all material considerations. They put the matter in this way: when one examines all the information put before the decision maker the evidential basis for granting the permit did not exist.

E. Was the consultative process flawed?

Inter agency consultation

56. The applicants say that the NRCA met only part of the legal definition of consultation. The NRCA did receive comments from the WRA but they did not conscientiously take them into account when deciding to grant the permit. The applicants submitted that the granting of the permit over the continued objection of the WRA demonstrates that the WRA's comments were not conscientiously examined by the NRCA. The applicants rely on four letters that passed between the WRA and NEPA between March 24, 2005, and June 21, 2005. I do not quite agree with this way of putting the matter. If this were correct then it would mean that the WRA and not the NRCA would become the de facto decision maker. The NRCA Act does not give the WRA this power over the NRCA. I do not agree with the applicants that the WRA's continued objection meant that the consultation process broke down. However this does not necessarily mean that the applicants must fail on this ground for it may well be possible to demonstrate that there was a failure to (i) consult as required by section 9(5)(a) of the NRCA Act and/or (ii) conscientiously consider the WRA's concerns by examining the response and conduct of the NRCA to the issues raised by the WRA. In this examination I am guided by Lord Walker's dictum at paragraphs 85 and 86 of the ***Belize Alliance*** case. He said

> ***85.*** *In R v Lancashire County Council ex parte Huddleston [1986] 2 All ER 941, Sir John Donaldson MR (with whom the other members of the Court of Appeal agreed), having referred to*

the preliminary stage of obtaining leave to seek judicial review, said (at page 945),

> *"But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.*
>
> *Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration."*

The Master of the Rolls then referred to the submission that it was not for the public authority to make out the applicant's case for him, and said,

> *"This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."*

86. *Similar observations have been made in many later cases, including several decisions of the House of Lords. It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.*

57. The far reaching nature of Lord Walker's proposition must be noted. He is actually requiring public authorities to disclose reasons for their decisions once the applicant has been granted leave for judicial review. This to my mind is a salutary development in the law because without this kind of disclosure it may well be very difficult to establish that the decision maker did not (a) conscientiously take the views of those consulted into account or (b) followed his procedures. I am happy to note that Mr. Foster attempted to demonstrate that the NRCA and NEPA properly consulted and took the matter into account by referring to the conditions of the permit. This approach by Mr. Foster must have been on the basis that he took the view that the public body ought to be able to show that it conscientiously considered the views of the consultees. Although the proposition comes from the dissenting judgment I am confident that no reasonable person would disagree with it as a good general principle. I recognise that there may be exceptions but the case before me would not qualify to be excepted. There is nothing before me to indicate that any matters of exceptional sensitivity were involved.

58. Let us scrutinise the evidence further. There are two letters from the WRA to NEPA on the EIA dated March 24, 2005 and May 2, 2005. There are two more letters from the WRA to NEPA dated June 10 and June 21, 2005. There is one letter from NEPA to the WRA dated

June 16, 2005. We know that the marine ecology report did not arrive at the NRCA until May. The letters need to be put in their proper context.

59. On March 24, the WRA responded by letter (written by Mrs. Michelle Watts, Senior Environmental Officer) to the EIA. On May 2, the WRA sent another letter (written by Mrs. Michelle Watts) not so much about the EIA but about the way in which the public meeting was conducted. On June 10, the WRA sent a third letter (written by Mr. Basil Fernandez O.D., Managing Director of the WRA) dealing with the EIA. This letter was addressed to Mr. Milton Weise, Chairman, Technical Review Committee. On June 16, 2005, NEPA responds to the June 10 letter written by Mr. Hopeton Herron, Acting Chief Executive Officer of NEPA, and copied to Mr. Milton Weise. We know that NEPA's June 16 letter is a response to WRA's June 10 letter because it begins by referring to the June 10 letter. The WRA wrote another letter, signed by Mr. Basil Fernandez, dated June 21, 2005, which opens, "I have received your response to my letter to the Chairman of the Technical Review Committee (TRC) on the above captioned development. I have also received a copy of the addendum to the EIA dated May 2005".

60. Prior to the letter of June 21 from the WRA to NEPA there is nothing in the correspondence between them that could remotely suggest that the marine ecology report was mentioned. When the June 21 letter referred to the addendum, it was referring to the May addendum submitted by the EIA consultants in response to NEPA's May 5 letter and not to the marine ecology report. I am convinced that this is so because an examination of the contents of the May addendum against the specific references in the June 21 letter leaves no doubt that that is the document cited in the June 21 letter. The effect of this is that there is no evidence that the marine ecology report was sent to the WRA between May when NEPA received it and June 22, when the decision was taken to grant the permit. In the absence of this evidence it is open to me to conclude that the WRA at no time received a complete EIA. On this premise it must be said that the consultation with the WRA was undermined because the full picture was not presented to it.

61. I have been referring to the WRA without indicating its role in Jamaica. The WRA is a statutory body charged with the responsibility of regulating, conserving or otherwise managing the water resources of Jamaica under section 4 of the Water Resources Act 1995. With this statutory mandate it is readily apparent why it would be concerned that there are wells about which it has no knowledge and why the issue of the ground water, blue holes

and sewage treatment would attract its attention. I have not yet examined the content of the letter in great detail. This I now do to see if Mr. Foster has made good his submission that the consultation process, both inter agency and public, in the round was satisfactory.

The letters

62. In March 24, 2005 letter, sent by the WRA to NEPA, the WRA raised the issue of sewage disposal. The WRA was concerned that the proposed methods of sewage disposal might contaminate the ground water and the marine water. To date there is no evidence that at the time the permit was issued this matters have been addressed adequately. The only evidence from the respondents on this is that a condition of the permit was that HOJAPI should apply for a permit to discharge effluent. I shall deal with this condition later in the judgment. It does not require a great deal of thought to accept that sewage disposal at the best of times is always a vital question which assumes even greater importance when a hotel development is being considered for an area of great ecological value. The EIA at page 84 stated

> *When the ground is saturated with water (e.g. during the rainy season) it is proposed to discharge the treated effluent to ground via deep well injection. Another option could be a distributed discharge around the periphery of the southern end of the wetland, using the natural system for effluent polishing. In this case, the limited capacity of wetlands to absorb phosphorus should be taken into account."*

The March 24 letter responded to this proposal in this way:

> *The proposal is to discharge sewage effluent, during saturated ground conditions into a deep well. Groundwater levels are less that 3m below ground. A deep well disposal proposal must be accompanied by detailed hydrological analysis and the implementation of a rigorous (sic) water quality monitoring system. This analysis must establish a lithological profile of the deep well, identify the geologic unit into which the wastewater will be discharged, the depth of the discharge and evaluate/predict the movement of the wastewater once released into the ground.*
>
> *The proposal is to treat sewage at the secondary level, and as such nutrients will not be removed by the treatment process. Sewage effluent with high nutrients discharged underground may impact negatively on groundwater and the marine environment making the detailed hydrologic assessment critical to any consideration of this disposal strategy.*
>
> *Discharge into the periphery of the southern end of the wetland must also be carefully evaluated and the details of the evaluation submitted for review. Mass balance calculations with respect to nutrients are necessary, particularly in light of already elevated nitrate levels in the Pear Tree River.*

63. The March 24 letter also stated that "a number of critical issues which have not been adequately addressed by the EIA document and before any further consideration of this proposal, these must be addressed". The letter took issue, inter alia, with a factual assertion in the EIA that wells sunk in the limestone aquifer up to depths of 75 feet have produced yields of 2 million gallons per day. The letter of March 24 challenged this by saying that the WRA is not aware of these wells. The letter also took issue with the EIA referring to the Montpellier Limestone as an aquifer. These and other issues raised by the WRA led NEPA to ask for "a more detailed assessment of the springs occurring in proximity to or on the property. The effect of tidal fluctuations on groundwater should also be discussed for this site. The hydrology of the wetlands should be discussed". I shall not refer to the May 2 letter because it dealt largely with the conduct of the public meeting. I would have thought that if the statutory body charged with the responsibility of managing Jamaica's water resources is suggesting that the proposed method of sewage disposal put forward in the EIA may contaminate the ground water and marine environment that that reservation would have been given great weight by the NRCA and NEPA but it appears that that was not the case.

64. In a letter dated June 10, 2005, the WRA wrote to NEPA. The letter began with these words "I note from the agenda of the Technical Review Committee and the submission presented that NEPA is recommending approval of the [hotel at Pear Tree Bottom]. However, the WRA has several issues which need to be sorted out and specific solutions determined before we can give our full approval." The WRA places its concerns in this context (a) Pear Tree Bottom Blue hole is located at the site and the outflow of groundwater from the Dry Harbour Mountains that maintains the delicate balance of fresh/saline water in the coastal zone, as well as the wetlands as Pear Tree Bottom; (b) the wetland perform the function of filtering runoff into the coastal zone and prevent saline intrusion into the aquifer.

65. The WRA turned its critical eye to the EIA. It said that the hydrogeology of the EIA was poorly done and failed to deal with the drainage area, the blue hole and the wetlands. It adds that "[n]owhere in the environmental impact monitoring plan on page 107 of the EIA is protection of the blue hole, groundwater or the wetlands mentioned. Table 8.3.1 of page 104 summarises the construction phase impacts and again, neither the blue hole nor the wetlands are mentioned". The letter went on to raise the issue of drainage for the area.

66. NEPA wrote to the WRA in a letter dated June 16, 2005. NEPA chided the WRA for not raising, in the March 24 letter, the impact on the blue hole located on the property. The

letter then says that HOJAPI have now revised the plans and shifted the "footprint" eastwards to eliminate any direct impact on the wetlands. On the issue of drainage, the letter stated that a formal submission had been made to the National Works Agency for review. The letter also gave reasons granting site clearance permission and finally it said that the notes from the public meeting were submitted to NEPA.

67. The WRA by way of letter dated June 21, 2005, responded to NEPA's June 16 letter. The June 21, 2005 letter, is an important letter. It criticises the EIA, yet again, in that EIA mentions one blue hole whereas the WRA knows of ten and those ten holes have an average flow of 50 million gallons of water per day. The letter complained that the decision to grant site clearance should have been circulated to all members of the Technical Review Committee.

68. The letter then addressed the May addendum. The addendum sought to deal with the issue of threats posed by natural hazards. The WRA felt that the addendum did not address the threats adequately. The EIA said that the main threat is vulnerability to storm induced surges or tsunamis. The addendum repeated its assertion that it was already stated in the EIA that buildings would be set back 50m from the shoreline and that the ground floor of the building would be set at least 3m above sea level. The addendum asserted that buildings would be located in the areas on the site that exceeded 2m above sea level.

69. The June 21 letter pulled no punches. It bluntly declared that these proposals were useless in light of UNESCO's recent review of coastal zone development in Asia (post tsunami). The letter writer alluded to a specific recommendation from UNESCO and said that this recommendation "should be done here on the north coast". The letter writer savages the response to queries about the water quality aspect of the EIA. The persons who did the EIA responded by saying that they did not have the luxury of time to execute a baseline study of water quality. The letter writer says that that response is inadequate and demonstrates why the EIA was not able to explain the "cause of high BOD/low DO mentioned". The letter writer debunks the idea of disposing of sewage effluent by drilling an injection well. He said that such drilling would require the consent of the WRA as well as a permit. He indicates that the WRA was not in favour of that disposal solution.

70. June 22, 2005, was the date on which the NRCA Board decided to issue the permit to HOJAPI. Mr. Jerome Smith says that the June 21 letter did not arrive in time for meeting that decided to grant the permit. He did not say when he received the letter. The permit was not

issued until July. I say this to say that the fact that the letter did not arrive in time for the June 22 meeting could not relieve the NRCA of its duty to consider conscientiously matters arising from the consultation once it was still possible to do so before the permit was issued. There is no evidence that the NEPA Board took into account conscientiously matters raised in the June 21 letter. There was a delay in issuing the permit. No reason has been advanced why the very material consideration of whether the proposed set back distance of buildings from the water's edge was sufficient was not considered between June 21 and July 26, when the amended permit was finally issued. This is one card that is missing to say nothing of placing it face up.

71. At the risk of repeating myself I emphasise that the courts are not questioning the choice of the NRCA because it is recognised that when a discretion is conferred on a functionary that by definition implies a range of possible choices from which the decision maker may choose. Why he chose one over another is not a matter for the court but the court can and must not shirk its responsibility of closely examining the process of decision making to see whether it meets the legal standard. That is what I am doing here.

72. I now examine the permit to see if there is evidence the concerns raised by the WRA were conscientiously considered. The concern about drainage is dealt with by specific condition 3. Sewage is mentioned in specific condition 10. It is hard to see what that condition adds to the permit because the NRCA Act obliges the permittee to apply for a permit if the development will or is likely to result in the discharge of effluents. The specific condition, in my view, simply restates the legal requirement. To date, there is no evidence about the precise plan for disposal of sewage. This is in a context where during saturation the ground water is less than three metres below ground. It seems to me that the matter was not conscientiously considered. I do not see how telling the permittee what the law already requires him to do shows conscientious consideration. There is no evidence that a sewage disposal plan was proposed to the NRCA at the time the permit was issued. The post monitoring activities proposed by the NRCA do not address the important consideration of sewage disposal in a low lying area that has ground water of less then 3 metres below the surface when the earth in that area is saturated. Condition 10 could not be described as evidence of conscientiously taking into account the risk of contamination of ground and marine water in an ecologically sensitive area. All the condition does is to postpone the day of reckoning.

73. I now begin my conclusions on the inter agency consultation. The affidavit of Mr. Smith confesses at paragraphs 16 and 18 that the May and June addenda were not circulated to "all the external government and non-government agencies but was (sic) reviewed by the internal review committee" (see para. 18). Mr. Smith seeks to explain by saying that "the Internal Review Committee is comprised of managers and other persons who are trained in various areas of environmental management" (see para. 18). It seems to me that failure to circulate the addenda to the government agencies was a breach of the statutory duty to consult "any agency or department of Government exercising functions in connection with the environment" (see section 9 (5) (2) of the NRCA Act).

74. When Mr. Smith says that addenda were not circulated to all the external government agencies I take it that he means those agencies exercising functions in connection with the environment. It is not for the NRCA or NEPA to be selective both in the information and which agencies or departments of Government in seeking to comply with the statutory duty of consultation. Assuming that there was some reason for this departure from the statutory standard no overriding reason was given. The fact that the review committee was comprised of managers and other persons trained in environmental management is irrelevant. Mr. Smith seems to suggest that the statutory standard varies according to the composition of the internal review committee. This was not the intention of Parliament.

75. There is no clear and unequivocal evidence from the NRCA that the marine ecology report was circulated to all the agencies or department of Government with which it was obliged to consult. The absence of such a declaration by the respondent would suggest that they did not comply with the statute. The answer to this cannot be that it is for the applicants to make the case. I rely on the Lord Walker's dicta at paragraphs 85 and 86 of the ***Belize Alliance*** case. This type of litigation is conducted with the cards face up. Absent affirmative evidence from the NRCA, it is difficult to see how the applicant would obtain evidence of this nature. In other words, once the application for judicial review is granted the public authority is under a duty to make full and fair disclosure and in the absence of unequivocal evidence that consultation took place on the marine ecology report, as mandated by the statute, the review court is entitled to conclude that no such consultation took place. There is no room for any presumption in favour of the public body that it consulted.

76. Even if one were to say that the requirements of section 9 (5) of the NRCA Act was not mandatory and directory only, the expectation would have to be that consultation should take place unless there was some overriding public interest not to do so. No such overriding interest has been identified or argued before me. For Mr. Foster to argue that consultation must end at some point is not, I fear, an adequate answer. He has stated the obvious but he needs to demonstrate what overriding interest existed in this application that would demand a truncation in the statutory requirement of consultation.

77. In any event, it is clear that the WRA was not furnished with the marine ecology report when it wrote its first two letters. It is equally clear that there is no evidence that the WRA received the marine ecology report after it was received by the NRCA or NEPA. No explanation has been advanced for this omission.

78. I therefore find that there the consultation required under section 9 (5) (a) was not met. No compelling reason for the departure was proffered. The need for exceptional haste in making a decision, which may arise in some cases, has not been demonstrated here. Mr. Foster's submission that there was need to bring the consultation to an end is not an adequate response to the point. To use the language of proportionality, I would say that the failure to consult by the NRCA with all relevant government agencies and departments without an overriding reason why this process should be curtailed was a disproportionate response to achieve the goal of making a decision within a reasonable time. The failure to provide the WRA with a full and accurate EIA cannot be a proportionate response to effect a policy of speedy decision making. Speed is one thing but incomplete information is another. The requirement that the NRCA gives full and accurate information to the other agencies to be consulted does not place the NRCA at the whim of other agencies. There may well be evidence that suggests that the agencies have no intention of responding at all or within a reasonable time. I come to the same conclusion applying orthodox judicial review principles. The NRCA failed to comply with the statute and so acted ultra vires. The behaviour of the NRCA and NEPA in this matter means that they deprived themselves of the benefit of consultation with the WRA on the marine ecology report.

Public consultation

79. The NRCA has published guidelines indicating how public consultation ought to take place. The first level of consultation is that done by those responsible for doing the EIA

When the EIA is completed it is then disseminated for public discussion. The purpose of this is to receive responses from members of the public and interest groups which ought to be taken into account when the decision whether to grant the permit is being considered.

80. The EIA in this case was circulated for public discussion. The applicants received their copies shortly before March 29, 2005, the date set for submission of comments, but based upon the evidence the comments they made were accepted by the NRCA. There was consultation in the form of a public meeting that was held on April 28. At the meeting, the citizens were told that they still had an additional thirty (30) days to submit further comments in writing. This meant that the period during which the public could submit comments on the project was extended until May 29.

81. On the face of it, it would seem that there was adequate public consultation on the matter. It is accepted that the EIA did not have the marine ecology report as it ought to. The applicants have, since the application for judicial review was granted, learnt of the May and June addenda. It would seem to me that if there is going to be effective public discussion then all the information that ought to be disclosed must be disclosed. This is a legitimate expectation of the applicants. They were entitled to believe that the respondents would (a) tell them that the EIA was incomplete at the time it was circulated and (b) disclose the missing parts when it came to hand.

82. Mr. Foster's earlier submission about consultation need not be repeated here. Mr. Foster also submitted that the omission to include the marine biology report did not undermine the public consultation. This is a difficult position to defend. If Mr. Foster is correct, it would mean that a decision maker who embarked on consultation could deprive the consultees of some relevant information, terminate the consultation without any prior indication and without the existence of any overriding public interest justifying that action and when challenged say, "All those are matters for me to decide". It may well be that the NRCA wished to make a decision in the shortest possible time. This is a laudable objective but that has to be balanced against what is required under the law when consultation is embarked upon. It was disproportionate not to disclose the marine ecology report if the desired objective was a speedy decision being made. No compelling reason for not complying with the law was advanced. Again, the same conclusion is reached applying the usual judicial review criteria. I find that the NRCA acted unfairly and abuse their power in the circumstances of this case. Fairness required that the applicants and members of the public

be provided with the marine ecology report so that they could make an informed and intelligent response to the EIA. I now turn to more difficult aspect of the case, that is whether the May and June addenda should have been disclosed.

83. The May and June addenda mentioned the marine ecology report. Had the addenda been disclosed they would have alerted the public and the applicants to the fact that a marine ecology report existed which should have been part of the EIA and perhaps prompted them to ask for the report. Initially, I had concluded that the May and June addenda need not be disclosed. But in the context of non-disclosure of the marine ecology report or that the report even existed I have decided that the addenda ought to have been disclosed in the circumstances of this case. This might have gone some way to correcting the omission to put the report in the public domain.

84. I now examine the public meeting. There is no doubt that the public meeting exceeded the recommended periods for presentation and questions. The guidelines recommend a presentation for approximately 20 -30 minutes with 30 -60 minutes for questions. Punctilious observance of the times suggested in the guidelines is not required. Wholesale disregard of them to the point where the public do not have an adequate opportunity to air their views is not acceptable. In the instant case, the presentation by the developers went on for over two hours. The question and answer period went on for one hour and twenty minutes. It is being said that by the time the question and answer period came it was very late and many persons had left. This, it is said, made the meeting flawed. On examining the minutes against the guidelines I would say that the meeting met the standards. In particular, there was a presentation of adverse and beneficial impact of the proposed development. For example, the loss of use of land, the generation of solid waste, the lack of carrying capacity in terms of housing and health. In the question and answer the topics of water, flooding and electricity generation were raised. I would say that given the magnitude of the project it would have been difficult to meet the 20 – 30 minute guideline. Two hours were long but not inordinately long in the circumstances of this case. I do not therefore find that the way in which the meeting was conducted breached the substance of the guidelines which is that the beneficial and adverse impacts *as contained in the EIA as disclosed* were discussed. What I am saying is that the meeting discussed what was *known to the public* and on that basis the meeting was fairly conducted but in my view the process was depreciated considerably because the marine ecology report was not disclosed.

The promise of a second meeting

85. The applicants further allege that they were promised a second meeting. This, they submitted undermined the consultative process which made it so flawed that it amounted to no consultation. This issue arose out of the fact that Mr. Dennis Morrison (not counsel in this matter), a government official (not from the respondents) during the meeting promised that he would hold a second meeting. When the minutes were closely examined the promise was conditional. The terms of the promise were that a second meeting **might** be held if the public wished. His actual words were "*And what I want to report is advance work taking place in that regard if the community wishes we can organise a special session where the people who are making that work can come and make a detailed presentation that you are made aware of what is being done"* (see page 115 of the minutes). This comment was made in the context where there was discussion about planning for infrastructure, health service, electricity and education. There was discussion about coral reef damage (see pages 104 to 113 of the minutes). Applying Lord Woolf's recommended method I have examined the precise terms of the promise and the circumstances in which it was made. I find that the promise was conditional and predicated upon the communities' desire to have another meeting. There is no indication that the NRCA or NEPA, in the meeting, ever said that they would not consider any permit until the second meeting was held. This was neither said expressly nor implied. In fact there was no mention of the permit during the entire meeting. I therefore conclude that the applicants have not made out this part of their case.

Defects in the EIA

86. I now come to that part of the applicants' submissions where they say that the EIA had many fundamental errors that no reasonable decision maker could rely on it. To deal with this submission I have to look at the EIA and the May and June addenda to see if there are these defects alleged by the applicants. The EIA covered areas such as hydrology, oceanography, terrestrial ecology, wetland ecology, marine ecology, socio-economic environment and natural hazard vulnerability. The deficiencies of the hydrogeology portion have been pointed out already. I do not propose to deal with every single alleged error. I shall merely set out some of them to give a flavour of what the applicants are saying.

Fauna and Flora

87. Page 7 of the EIA states that the status of terrestrial flora and fauna of the study area were determined by a review of the literature relevant to the area, by discussion with local persons, and by field investigations undertaken on 15 February 2005. The EIA said that seven representative sites or stations were used. The applicants say that the field assessment was inadequate because it was apparently based on one site visit and it is not clear whether the visit was in the night or day. They say that there is no indication in the EIA showing the basis on which the sites or stations were chosen. The applicants then go on to point out that there are many species of birds at Pear Tree Bottom that cannot be determined in one or even two site visits. The applicants say that nocturnal birds such as potoos and patoos were present at the site. The applicants heaped more opprobrium on the EIA by asserting that there are a great many species of birds found at Pear Tree Bottom.

88. The EIA mentions the *possibility* that the wetland is being used as a winter stop-over for some birds. The applicants say that this is not a possibility but a fact. The failure to conclusively establish this, the applicants say, shows the poor quality work of the EIA. The applicants assert that during the colder months a variety of seabirds can be seen wading in the shallows, hovering over the reef or feeding on the beach. The EIA is said to be defective because it failed to assess the importance of the site for migrant bird populations as well as year round birds.

89. There was a criticism that the EIA did not have a species list of lizards and tree frogs reported to be at the site. This list should have been prepared and form part of the EIA. The EIA consultants responded by saying that a specific survey for these creatures was not carried out but scientific literature and experience dictate that small reptiles and amphibians would inhabit the dry limestone forest along with other types of animals.

90. It was said that EIA did not mention other fauna at the site other than the yellow snake and the yellow-billed parrots. One commentator on the EIA asserted that the primary subjects for assessments by the EIA consultant appeared to be birds and butterflies. The consultants responded by confirming that birds and butterflies were the primary subjects for assessments as they were major pollinators. The consultants defended confining their reference to yellow snake and yellow-billed Parrot because (and here I quote) “these were the only rare endemic and endangered species that had previously been reported at the site”. The applicants seized on this response by submitting that it clearly points to

inadequate time for carrying out a comprehensive assessment of the fauna present at the site. A thorough assessment, they say, can only be properly done by visiting the site a sufficient number of times over an adequate period of time. It is remarkable that the consultants could say that they only mentioned the Yellow snake and the parrot, not because he saw them, but because somebody else said they were there.

91. The applicants assert that the EIA failed to mention the bat population. The EIA, it is said, failed to note the sea turtles that come on to the beach at Pear Tree Bottom.

Wetlands/mangroves

92. The applicants say that the EIA does not clearly state what are the plans for the management of the wetlands other than to say "the marsh will be incorporated as a special feature in the landscape design". The EIA does not assess the potentially damaging impact of the project and set out preventive and restorative measures. The EIA does not state the size of the wetland and how it will be protected. Worse, the wetlands were not identified on a map and there were no pictures.

Sewage and litter management

93. The complaint here was that no mitigation measures were highlighted for sewage. Additionally, sewage options were not identified nor presented by the consultants for the construction phase of the project. This elicited the admission that this was on oversight and went on to say that ad hoc defaecation is the provision of chemical toilets or the construction of temporary VIPs. This the applicants say is another vignette in to the shoddy work by the consultants. I need not repeat what I said earlier about sewage disposal in the post construction phase.

Water quality

94. The criticism here was that the EIA used one data point and this was insufficient and an extended period was recommended. The consultants responded by saying that they did not have enough time to carry out a sampling programme. They also note that previous EIAs done in 1993 and 1999 did not contain any water quality analysis. The developers accepted that in the absence of a more comprehensive assessment it was not possible to determine

the cause of high BOD and low DO readings that were noted in the EIA. The inadequacy of this response speaks for itself and needs no comment.

Oceanography

95. The EIA presented information from an unnamed source. The response was that the source was unknown and "appears to have been prepared by a coastal engineer".

Marine Ecology

96. Apparently the marine biology report was seen by someone who indicated that the location of major submarine caves were not indicated on the map. This quite likely would be someone in the NRCA or NEPA. The response of the EIA consultants was that the caves were not visited by the marine biologist who focussed her attention on the shallower areas since these were more at risk. This yet another red flag hanging over the empirical work of the EIA consultants. The EIA relied on a 1993 report for descriptions of the fringing coral reef and the shallow back reef lagoon. The EIA stated that there was oral confirmation that the description given in 1993 more or less applied in 2005. The source of this confirmation was not stated. This assertion was challenged by one Jeremy Woodley who was Head of the Discovery Bay Marine Laboratory from 1975 – 1993 and Director of the University of the West Indies' Centre for Marine Sciences from 1993 – 2000. He said that shallow reef had improved since 1993. What emerges from this is that there is no reliable evidence that the consultant undertook himself or acquired information from some who could speak authoritatively about the state of the coral reefs.

Marine life and marine pollution/coral reef impacts

97. The EIA is said to be deficient in that it relies on a 1993 study and a verbal confirmation to say that between then and February 2005 the marine life has not changed. In other words, no current study was done. I have read the study and there is no indication of the source of this confirmation which means that no one is able to assess whether the source (a) knows what he is talking about and (b) the basis of the this knowledge.

98. The EIA states that the discharge of sewage should not be allowed. This aspect has been dealt with under inter agency consultation and need not be repeated here.

Analysis of EIA

99. There are more than enough deficiencies highlighted that ought to have raised serious doubts about the quality of the empirical work of the EIA. What strikes me is that the things that required observation and measurement over a period of time were not measured or observed adequately. There was reliance on old information and in at least two instances, unnamed and consequently unverifiable sources. The species list for the lizard and frogs could not be provided because that kind of work was not done. The water quality report was not properly done – this in an ecologically sensitive area near the sea and two rivers is a significant defect. The oceanography part of the EIA was supported by an unknown and undated source. No one could double check it.

100. Even NEPA found the Biological Assessment Report that was provided when the developers asked for site clearance permission said that a more representative list should be presented (see letter of April 8, 2005, granting permission for site clearance). NEPA also asked for a categorization of "[a]ll ecologically important flora within the area should be categorised as endemic, endangered or rare". This requires serious field work. There is no evidence that this was done. This April 8 letter was a response to a March 14, 2005, letter from HOJAPI asking for site permission clearance to take substrate and soil samples for analysis.

101. It could be said, perversely, that the lack of good quality empirical work by the EIA consultant met the standard essayed by Mr. Foster earlier in this judgment, that is, it alerted the NRCA to the need for rigourous empirical work to be done in areas such as water quality. It may even be said that specific condition 14 which required the permittee to submit an environmental monitoring programme 14 days before construction began dealt with the issue. The respondents may point to general condition 12 which mandates the permittee to keep all environmental monitoring results. These two conditions could be said to address the empirical defect with regard to water quality. The problem with this way of looking at the issue is that one would need to know the state of water quality in order to put in an adequate monitoring system.

Delay

102. Mrs. Symone Mayhew submitted that there is a general principle that judicial review ought to be applied for at the earliest opportunity and that any delay in applying for

judicial review could be fatal to the applicant's prospect of securing the remedy asked for. She further submitted that in this case, although the applicants applied for judicial review within the three month period (counting from the date the amended permit was issued on July 26), the applicants' delay should prevent them from getting any of the orders sought.

103. She relied on the provision of rule 56.6 (1) of the Civil Procedure Rules ("CPR") which states that an application for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose. She also rested on rule 56.6 (5) of the CPR which states that when considering whether to grant relief where there has been delay the court should take into account whether the relief would be likely to cause substantial hardship to or substantially prejudice the rights of any person or detrimental to good administration. The delay in this context must mean delay in applying for judicial review. Mrs. Mayhew pressed into service the work of Sir William Wade and Christopher Forsythe *Administrative Law,* 9th (Oxford) pp. 658 – 660. The authors say that it is conceivable that undue delay can arise even if the application is made within three months.

104. It is necessary to state the sequence of events in this matter to determine whether the submissions of Mrs. Mayhew are sustainable. The application for the environmental permit was submitted to the NRCA on September 28, 2004. The NRCA Board at a meeting held on June 22, 2005, approved the issuing of the permit. The permit was actually issued on July 5, 2005, but amended on July 26, 2005. Both sides have treated July 26, 2005, as the effective date the permit was granted. I accept that date. Both sides have accepted that that date is the date from which the three month period ought to be measured. JET knew on or about July 4, 2005, that the NRCA had decided to issue the permit. The applicants filed their application for leave for judicial review on October 10, 2005, which was not heard until November 29, 2005. There is no explanation for this delay. Rule 56.4(1) was breached not by the claimants but by the administrators of the court. The rule states that an application for leave for judicial review must be considered forthwith by the Court. Forthwith means just that. It is regrettable that we had a delay in excess of six week because of the defects within the Supreme Court. That an application for leave for judicial review took over six weeks after filing to be heard is unfortunate.

105. This summary of events masks important activity that must have taken place in the interim. The applicants were represented at the November 29 hearing by Queen's

Counsel and a junior. To get to this stage, the applicants must have sought legal advice. No doubt counsel would have advised them of the magnitude of the task and the type of information they would need to put before the court to obtain leave. The first two applicants are non-profit organisations. Such organisations tend not to be awash with funds. I am prepared to assume that these organisations are reasonably well run which implies that their respective Boards would have to authorise the expenditure of funds on what by any account must be expensive litigation. The Boards would have had to decide (1) whether there is to be a legal challenge; (2) retain counsel who would have to tender his advice; (3) to consider the advice and assess the likelihood of success and (4) commit funds to this kind of litigation. The applicants pulled together, for the application for leave, a formidable amount of documents, letters, emails and correspondence. All this takes time. At that hearing the applicant even produced minutes and correspondence that were older than ten years – a tribute to their dedication to environmental matters.

106. I gratefully adopt the words of Lord Steyn in ***Regina (Burkett) v. Hammersmith and Fulham London Borough Council*** [2002] 1 W.L.R. 1593, 1610 para. 50

> *Thirdly, the preparation of a judicial review application, particularly in a town planning matter, is a burdensome task. There is a duty of full and frank disclosure on the applicant: The Supreme Court Practice 1999, vol 1, p 916, para 53/14/57. The applicant must present to the court a detailed statement of his grounds, his evidence, his supporting documents in a paginated and indexed bundle, a list of essential reading with relevant passages sidelined, and his legislative sources in a paginated indexed bundle. This is a heavy burden on individuals….*

His Lordship spoke in the context of town planning legislation but there is no reason why the same cannot be said of environmental legislation

107. Mrs. Mayhew's submissions did not make a sufficient distinction, assuming her arguments were correct, between the different remedies asked for and how each would be affected by the delay. The first two orders sought, certiorari and mandamus, in my view would not be affected in the same way or to the same extent as a declaration. The decision of Webster J. in ***R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*** [1986] 1 W.L.R. 1 demonstrates this. In that case the judge declined to quash the regulations but granted the declarations sought by the applicant. The case of ***R v North West Leicestershire District Council East Midlands International Airport Ltd, ex parte Moses*** [2000] Env. L.R. 443, a case relied on by the respondents,

the delay was measured in terms of years. To be fair, Mrs. Mayhew was using this case to indicate that just as in planning cases, there developed a "six week rule" in England consistent with the duty on applicants to apply promptly, so too, by analogy, environmental cases, such as the present should attract a similar approach. Therefore an application made ten weeks after the grounds for judicial review arose, is late although made within the three months. I again am indebted to Lord Steyn in ***Burkett***. He stated that judicial policy cannot abridge the time given by the rules (see pages 1610-11 para. 53). The relevant provisions of the CPR confer on the court a discretion which is to be exercised in the context of the particular case. I accept that early challenge to decisions is desirable but that cannot translate in to a policy that says delay, without more, means deprivation of remedy even if the person applies within the three month period. On this approach the courts could not grant even a declaration. Such an approach would not be the application of discretion but judicial fettering of the discretion given by law. I agree with the sentiment expressed by *Philpot and Jones,* ***He who hesitates is lost: Judicial review of planning permission****,* J.P.L 2000 June 564 – 589, 567 where they said that "[i]*n the case of applications for judicial review, therefore, the complexity of the issues involved and the difficulty or ease involved in assembling the necessary documentation should be a relevant consideration to the assessment of whether the application has been made promptly."*

108. Because of the way in which Mrs. Mayhew presented her submission I have found it necessary to pursue the source of this "six week rule" in planning cases which she tried to import into the case before me. This is what I have found. Under the then system (I am not saying it is the same now or has changed) the person aggrieved had six months to appeal to the Secretary of State. At that hearing the person could call evidence and argue his case fully. He could advance any argument he wished. If the Secretary denied his appeal it is from this decision that he had six weeks to appeal to the High Court. This was an appeal, not an application for judicial review. It is readily apparent, without further comment, that the applicant in this position was not starting from scratch. He would be quite familiar with the issues. He may well have had counsel advising him during the appeal to the Secretary of State. In addition if he failed before the Secretary he would be given reasons. Added to this he would not pay the costs of the appeal.

109. When Order 53 rule 4 was introduced in the then Rules of the Supreme Court that rule said that applications for judicial review should be made promptly or at any rate not

later than three months after the grounds giving rise to judicial review had arisen. The Order said nothing about planning cases. The appeal to the High Court in planning cases was restricted to points of law only which was much narrower in scope than judicial review. This was the context in which judges in England began to speak of a "six week rule" for planning cases. This judicial pronouncement was not warranted by the actual text of Order 53 rule 4. What may have happened is that a rule of thumb applicable to judicial review developed based on the six weeks to appeal against the decision of the Secretary of State. The judiciary in England could, with some justification say, "If you can be ready to appeal to the High Court in six weeks, why can't you apply for judicial review in the same time?" This does not appear to be an unreasonable position. I go no further than this since it would be inappropriate for me to comment on the wisdom or otherwise of this development. I have done this to explain why I do not think that the six weeks rule of thumb in English cases for judicial review of planning permission should be adopted in Jamaica and applied to environmental litigation. I am indebted to Phillpot and Jones for this understanding of matter. The six week rule had a context that has not developed in Jamaica.

110. I would also add that rule 56.3 of the CPR lists a formidable list of matters that must be dealt with by the applicant for leave for judicial review. The more complex the matter the greater the need for care, accuracy and precision. It must not be forgotten that in an application for leave the applicant may not have vital information that is in the possession of the authority being challenged. No one has suggested that this matter was not complex. Environmental litigation is still new to this jurisdiction and it would be wrong to begin to develop some kind of rule of thumb analogous to the "six week rule". I do not accept that there was undue delay in applying for judicial review in this case. I would not deny relief on this basis.

111. Mrs. Mayhew also sought to castigate the applicants for not applying for an injunction to stop the construction. This submission ignores the reality of an undertaking as to damages that would have had to have been given.

112. It follows from this that I need not take into account rule 56.6(5). The application of this rule is predicated on the idea that the applicant for judicial review delayed his application. It does not assist with determining the exercise of the discretion to grant relief. For that I have to look elsewhere. Rule 56.15 (3) permits the court to grant "any relief

that appears to be justified by the facts... whether or not such relief should have been sought by an application for an administrative order".

Remedies

113. I now come to what has been the most difficult aspect of this case. Although I am not under rule 56.6(5) I cannot ignore matters such as the possible prejudice to third parties and the impact on administration. I also have to look to see whether granting the reliefs sought would serve any useful purpose. There is the question of the primacy of the rule of law. I must take note that the hearing began nine months after the permit was issued.

114. As I have said there was no undue delay in applying for judicial review on the context of this case. During all this time construction has been going on. This is not the fault of HOJAPI. They are entitled to act on the permit which is valid until it is set aside. I need to make the point that HOJAPI in this case took a calculated risk of not putting before the court direct and affirmative evidence of the hardship that might be caused if the permit is quashed. I was told that HOJAPI was advised of these proceedings. In many of the cases I have looked at so far, the third parties have not left matters in the hands of just the applicant for judicial review and the public body. They put evidence before the court indicating the likely consequences if the decision was quashed. Similarly in ***Caswell v Dairy Produce Quota Tribunal for England and Wales*** [1990] 2 W.L.R. 1320 the tribunal put affirmative evidence before the court on the effect that quashing the order may have on the administration of the scheme under consideration. The delay there was attributable to the applicant as distinct from delay arising from other causes. But for the respondents putting before the court post permit monitoring reports there would not have been any reasonably reliable evidence that construction had begun. This is indeed a risky strategy. The respondents have submitted, in their written submissions, that should the permit be quashed HOJAPI would be prejudiced because they "would have expended millions of dollars on the construction of the hotel pursuant to valid environment permit or building or planning approval" (see para. 37). There is no evidence before me that it has spent "millions of dollars" doing anything. That they would have spent some money I would accept but to say that it ran to millions needs affirmative evidence.

115. It is reasonable to assume that HOJAPI would have engaged architects, engineers, contractors, labourers, goods and materials. This is an important consideration. This must be balanced by the view that the law should be obeyed. Turning to Lord Walker once more in ***Belize Alliance*** who said at paragraph 121:

> *The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). … The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction.*

This was said in response to the Attorney General's submission that Belize needed foreign direct investment and delay in the project might mean that the project dies and that would be a great blow for the country. I cannot help but note that at paragraph 119, Lord Walker proposed a drastic remedy. The people of Jamaica are entitled to be properly informed about the project by being given full and accurate information. Concealing information and failing to disclose its existence are not consistent with this expectation and if unchecked will undermine public confidence in the decision making process. Citizens and strangers have vested interest in seeing that public authorities act according to law and where they fail to do so they ought to be held accountable. The courts should not be astute to find evidence of delay and detriment to good administration so as to avoid granting a remedy - even drastic ones.

116. I now consider what is meant by detriment to good administration. This is not an easy phrase to define. Lord Goff in ***Caswell v Dairy Produce Quota Tribunal for England and Wales*** [1990] 2 W.L.R. 1320 declined to define the term too closely. At page 1328 Lord Goff said that the factual circumstances in which judicial review are so diverse that the need for finality in one context may be greater than another context. He added that in the context of ***Caswell*** granting leave would mean reopening decisions made over a number of years. In that case the applicant was denied his remedy even though he had made good his case. Lord Goff emphasized the need for citizens to know their position and regulate their affairs based upon the decision made. I should point out however that in ***Caswell*** the applicant was mounting his challenge two years after the grounds giving rise to judicial review arose. The reason for the delay was that he was not aware of the remedy of judicial review and took no steps to challenge the decision. This leads to the case of ***R. (on the application of Gavin) v. Haringey LBC*** [2004] 2 P. & C. R. 13. I have benefited greatly from the judgment of Richards J.

117. In the ***Haringey*** case the applicant did not know that planning permission had been applied for and granted because the authority had failed in their duty to publicise that an application had been made as required by law. The challenge to the decision came two and one half years after permission was granted. The significance of the case is that although the claimant was absolved of blame for the delay in applying for judicial review and the delay was directly attributable to the lack of publicity by the respondent the court refused to quash the permission.

118. Richards J. held that there was no duty on the party who received planning permission to check that the planning authority had followed its own procedures. This was in response to the submission that the third party was the author of its problems by failing to check to see if the authority acted within the law. He said at pages 227/30, paragraphs 78 – 84

78 *Both Mr Stephenson for the council and Mr Goatley for Wolseley place considerable reliance on detriment to good administration as a further ground for withholding relief. They point out that the refusal of relief on this ground was upheld by the House of Lords in Caswell. In that case Lord Goff, having referred to observations of Lord Diplock in O'Reilly v Mackman [1983] 2 A.C. 237 on the public interest in good administration, went on:*

> *"I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened. In the present case, the court was concerned with a decision to allocate part of a finite amount of quota, and with circumstances in which a re-opening of the decision would lead to other applications to re-open similar decisions which, if successful, would lead to re-opening the allocation of quota over a number of years. To me it is plain, as it was to the judge and to the Court of Appeal, that to grant the appellants the relief they sought in the present case, after such a lapse of time, would be detrimental to good administration ..." ([1990] 2 A.C. 738 at 749F-750B).*

79 *It is submitted that in the planning context there is a particular need for prompt challenges and certainty in the interests of good administration. The need to bring any challenge to a planning permission speedily has been emphasised repeatedly in the cases (although they must now be read subject to the qualifications in R. (on the application of Burkett) v Hammersmith & Fulham LBC [2002] 1*

W.L.R. 1593). Mr Goatley cites, by way of example, the reasons given by Pill L.J. in R. v Newbury DC Ex p. Chieveley Parish Council [1999] P.L.C.R. 51:

> *"A reason for that approach is that a planning permission is contained in a public document which potentially confers benefit on the land to which it relates. Important decisions may be taken by public bodies and private bodies and individuals upon the strength of it, both in relation to the land itself and in the neighbourhood. A chain of events may be set in motion. It is important to good administration that, once granted, a permission should not readily be invalidated. As confirmed in the House of Lords, section 31(6) recognises that there is an interest in good administration independent of hardship, or prejudice to the rights of third parties. The court is entitled to look at the interest in good administration independently of those other matters. It is important that citizens know where they stand and how they can order their affairs in the light of the relevant decision (Caswell ...). In my judgment, weight should be given to this aspect of the case notwithstanding the absence of convincing evidence that the applicants for planning permission have been prejudiced by the delay .... I have no doubt that interests of good administration, which, as contemplated by Caswell, extend beyond the interests of the parties to the litigation, should constitute an important factor in the decision."*

80 *Although Mr Goatley also relies on R. v North West Leicestershire DC Ex p. Moses [2000] J.P.L. 1287 which cites Chieveley, it was based on very different facts and I do not think that it adds to the relevant principles.*

81 *Mr McCracken, on the other hand, relies on the following passage in the judgment of the Court of Appeal in R. (on the application of Lichfield Securities Ltd.) v Lichfield DC [2001] P.L.C.R. 519, submitting that, although not an essential part of the court's reasoning in the case, it is of strong persuasive authority:*

> *"39. The question of possible detriment to good administration arises under section 31(6) only if there has been undue delay. Mr Mole, for LDC, has laid understandable stress on this ground for denying relief which is otherwise called for. It is a relatively unexplored ground, if one may judge by its brief appearance in Fordham's encyclopaedic Judicial Review Handbook (2nd ed), paragraph 26.9.3, no doubt partly for the reasons indicated in Lord Goff's speech in R v Dairy Produce Quota Tribunal Ex p. Caswell [1990] 2 A.C. 738 at 749-750. Lord Goff was careful to avoid a formulaic approach, limiting himself to the specific effect in that case of a very long delay on the desirability of a regular flow of consistent decisions by the tribunal in question. But a further reason for the relative infrequency of decisions based on good administration is in our view that it can come into play only (a) where undue delay has occurred, and (b) -- in practice -- where the consequent hardship or prejudice to others is insufficient by itself to cause relief to be refused. In such a situation it can rarely, if ever, be in the interests of good administration to leave an abuse of public power uncorrected. Indeed Fordham records the decision of May J in R. v. Mid-Warwickshire Licensing Justices Ex p. Patel [1994] C.O.D. 251 that, despite undue delay, the interests of good administration were served not by withholding but by granting relief." (per Sedley L.J. at at 539-540)*

82 *In my judgment it is plain that detriment to good administration is capable in principle of amounting to a sufficient reason for withholding relief. Section 31(6) of the 1981 Act so contemplates and Caswell shows that circumstances can arise where relief may properly be refused on the ground of detriment to good administration even in the absence of proven hardship or prejudice to third parties. I do not think that the Court of Appeal in Lichfield can have had in mind the kind of situation that arose in Caswell when making the observations that it did about the limited room for reliance on detriment to good administration. The context in Caswell was, however, very different from that of the present case, and the observations of the Court of Appeal have much greater relevance to the present context. But even then they should, in my view, be read not as precluding the refusal of relief on the ground of detriment to good administration, but as serving to emphasise the need for caution in deciding whether the grant of relief really would be detrimental to good administration and, if so, how much weight to attach to that detriment.*

83 *I do not doubt the importance of certainty in the context of planning decisions, for reasons of the kind mentioned in Chieveley. Third parties are entitled to rely, and do in practice rely, on the information contained in the planning register, and to quash a planning decision long after it was made will undermine the basis upon which people have acted in the meantime. The developer who undertakes work in reliance on the permission is likely to be the person principally affected, though is also likely to be the person best placed to establish substantial hardship or prejudice. But it would be wrong to focus on the developer alone. Others may also have relied on the planning permission and have ordered their affairs accordingly, e.g. in negotiating the price of property near the development. It is very unlikely that all those affected could be identified or that specific hardship or prejudice could be proved in relation to each. Nevertheless it is contrary to the interests of good administration to undermine the basis upon which they have acted (and at the same time to create uncertainty as to the reliance that can safely be placed on apparently valid planning permissions in the future). I therefore consider that detriment to good administration ought to be taken into account as a separate and additional factor relevant to the exercise of discretion to quash. But it is of only secondary significance as compared with the hardship or prejudice to the developer.*

84 *In reaching that conclusion I have borne in mind that the interests of good administration cut both ways, in that they are also served by correcting legal errors where they have occurred. But in my view there would still be a net detriment to good administration if the planning permission were quashed so long after it was granted.*

119. Although this long passage deals with whether granting of relief should be granted because of delay, the considerations whether relief should be granted are the same whether or not there is delay. These include the impact on third parties, the impact on good administration and whether there is any practical value in granting the remedy. No one could say that adhering to the rule of law is inherently bad for administration. What the passage shows is that context and evidence guide the exercise of the discretion. Richards J. indicated that while detriment to good administration should be given due consideration it should be used with great caution as ground for refusing relief. Certainty in administration is important. Third parties may have relied on the decision to their detriment. In this case HOJAPI would be the person principally affected by a decision to quash the permit. There is the important public interest in seeing that the rule of law is upheld. There is also the public interest in not having decisions of the past easily set aside with consequential uncertainty and possibly wasted expenditure by the persons directly affected by the decision to grant the licence or permit in question. Where these two interests intersect (not conflict) there will always be situations in which reasonable men could come to different conclusions. No one in this case has sought to argue that protection of the environment is a matter of relative unimportance. While it is not a first generation right on par with human rights which attract the highest level of scrutiny, it is certainly an issue that has far reaching consequences that reverberate long after the decision maker and his generation have passed on and for that reason ought to attract a relatively high degree of scrutiny and where there are serious errors in procedure

the law ought to say so and grant the appropriate remedy. As I have said, there is no cogent evidence of the substantial hardship that may be caused to HOJAPI. No evidence of substantial detriment to good administration is before me. We are still within one year of the grant of the permit and there has not been undue delay on the part of the applicants in applying for judicial review. In these circumstances I must give greater primacy to obedience to the law than to hardship to third parties and detriment to good administration. The arguments raised by Mr. Foster on these matters if taken to their logical and inevitable conclusion would mean that as long as some hardship can be shown and some detriment to good administration can be shown the citizen could always be deprived of certiorari and mandamus. This would be so because it will always be inconvenient to reopen past decisions. It will always be possible to find someone who acted in reliance on the decision. It is to forestall this kind of argument why the adjective *substantial* is so valuable. There must be **evidence** not intelligent rationalisations about the impact of quashing the decision. Merely to say construction has begun is not enough. To say that building and planning permission were granted based on the permit is no where near what is required. As I have pointed out the cases on impact on administration and third parties provide examples of the quality of evidence put before the court on these matters.

Conclusion

120. Taking all matters into consideration

1. I have concluded that the order of certiorari should be granted quashing the decision to grant the permit and the permit for the following reasons:

a. the NRCA has failed in its statutory duty to consult according to law with the relevant government department and agencies by failing to circulate the marine biology report to them and in particular the WRA;

b. the NRCA failed to take into account the issues relating to the set back distance raised by the WRA in its letter of June 21;

c. the NRCA and NEPA failed to meet the legal standard of consultation by not circulating the marine ecology report to members of the public and the applicants and also by failing to inform members of the public and the applicants that the document circulated was incomplete thereby increasing

the real possibility that the public and the applicants might make incorrect conclusions about the impact of the development at Pear Tree Bottom;

d. the NRCA and NEPA failed even after receiving the marine ecology report to put that information in the public domain without advancing any overriding public interest why this was not possible or even desirable;

e. the NRCA and NEPA failed to give adequate weight to the obvious empirical failings of the EIA thereby depriving themselves of the opportunity to put in place adequate controls in light of the circumstances that actually existed in the ecologically sensitive area. Unless there was reasonably accurate empirical data in the EIA in light of the fact that neither NEPA nor the NRCA nor anyone else undertook such studies to submit to NEPA or the NRCA there was no evidence upon which the NRCA and NEPA could act in determining the proper terms to include in the permit. Without a proper evidential basis it would be difficult to see on what basis an effective monitoring programme could be developed since one would need to know the true ecological state of Pear Tree Bottom at the time the monitoring programme is implemented. Without this it is difficult to see how it could be determined whether the ecology of the area was improving, deteriorating or static;

f. the NRCA and NEPA failed to demonstrate that they conscientiously considered the issue of the adequacy of the setback raised in the July 21 letter from the WRA.

2. order of mandamus directed to NRCA to reconsider its decision to grant a permit to HOJAPI;

3. I also declare that the NRCA and NEPA breached their own stated standards of consultation in that they failed to give the public and the applicants all information required for them to make a fully informed and intelligent decision when it withheld the marine ecology report and caused the public to deliberate on a document which to the certain knowledge of the NRCA and NEPA was incomplete; further the NRCA and NEPA continued with the misleading picture in that at the public meeting when an additional thirty days was given to comment on the EIA the NRCA and NEPA even then did not disclose to those present the document they were deliberating on was incomplete. This was a breach of the legitimate expectation of the applicants

that when they were invited to participate in the consultation, either as members of the public or in their own right, the information provided would be full, fair and accurate and that any defect in the information provided would have drawn to the attention of the public and the applicants.

Conclusion

121. The consultation process was flawed because an important part of the EIA was not placed in the public domain and the public was not told about this omission. The public were led to believe that the EIA was all that there was when this was not the case and this was known the NRCA and NEPA. The public were therefore deprived of participating in a consultation process that was based on full and complete information. The NRCA and NEPA did not give sufficient weight to the empirical weaknesses of the EIA and this weakness was all the more significant when the proposed project was to take place in an ecologically sensitive area. That fact alone ought to have suggested that a relatively high quality of empirical work needed to be undertaken. The NRCA therefore failed to act in accordance with its mandate given in the NRCA Act.

122. This case demonstrates that traditional narrow Wednesbury is not very helpful when the complaint is that the decision was arrived at by a flawed process. Merely to say that the decision is one that a reasonable decision maker could make is not a sufficient rejoinder to the challenges raised in this case. Had the court been restricted to the application of narrow Wednesbury the NRCA and NEPA might well have escaped unscathed. Narrow Wednesbury while not dead has been mortally wounded. It has served its purpose and worked well in its time. Administrative law has moved on and we should embrace the views of Lords Woolf, Cooke, Slynn and Steyn who have taken us to the door of proportionality. Let us now open the door to see the dawning of a new day.

123. Let me acknowledge the erudition and learning of counsel on both sides. They have lightened by task considerably by the quality, clarity and depth of argument. They brought much light to bear on the issues at hand.