



[2023] JMSC Civ 256

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. SU 2020 CV 03397**

**BETWEEN                      CEAC OUTSOURCING COMPANY LIMITED                      CLAIMANT**

**AND                              MINISTER OF INDUSTRY COMMERCE                              DEFENDANT**  
**AGRICULTURE AND FISHERIES**

**IN OPEN COURT**

**Mr Sundiata J. Gibbs and Ms Timera A. Mason instructed by Messrs. Hylton Powell for the Claimant**

**Ms Faith Hall and Mr Dimitri Jean-Paul Mitchell instructed by the Director of State Proceedings for the Defendant**

**Heard: October 9 and November 24, 2023**

**Judicial Review – Claim for judicial review – Availability of remedy – Prohibition – Mandamus – Whether the Minister of Industry, Commerce, Agriculture and Fisheries has a statutory duty to issue guidelines for the transportation and handling of ship-generated food waste in accordance with environmental permits – The Animals (Diseases and Importation) Act – Plant (Quarantine) Act – Shipping (Training, Certification, Safe Manning, Hours of Work and Watchkeeping) Regulations 1998**

## **A. NEMBHARD J**

### **INTRODUCTION**

- [1] This matter raises the salient issue of the propriety of an Order of Mandamus compelling the Defendant, the Minister of Industry, Commerce, Agriculture and Fisheries to issue guidelines to the Claimant, CEAC Outsourcing Company Limited (“CEAC”), for the transportation and handling of ship-generated food waste.
- [2] By way of its Fixed Date Claim Form, which was filed on 5 August 2021, CEAC seeks the following Orders for Administrative and Declaratory relief: -
- i. An Order for Mandamus compelling the Defendant to issue guidelines to the Claimant for the transportation and handling of ship-generated food waste as contemplated by paragraph 101 of the Environmental Permit No. 2019-14017-EP00177.
  - ii. An Order for Prohibition restraining the Defendant and/or any of its agents or departments from incinerating ship waste without a permit to do so.<sup>1</sup>
  - iii. A Declaration that the failure to issue guidelines is a breach of section 13(3)(h) of the Charter of Fundamental Rights and Freedoms.
  - iv. Constitutional/Vindictory Damages for a breach of section 13(3)(h) of the Charter of Fundamental Rights and Freedoms.
  - v. Interest on Damages at the statutory rate of interest.
  - vi. Such further and other relief as this Honourable Court deems fit.

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<sup>1</sup> At the hearing of the Claim for Judicial Review, the Court was advised that CEAC will not be pursuing this relief.

vii. Costs to be agreed or taxed.

**[3]** These Orders are sought on the following bases: -

1. That CEAC is a company which provides hazardous waste management services for the collection, transportation, treatment, and disposal of hazardous waste, including ship-generated waste.
2. That the Defendant is the Minister whose Ministry is charged with the responsibility of examining and quarantining imported articles suspected to be infected with plant pests (among other things).
3. That Jamaica is a signatory to the International Convention for the Prevention of Pollution from Ships 73/78 (“the MARPOL Convention”).
4. That the MARPOL Convention requires signatories to ensure the provision of facilities for the safe reception of ship-generated food waste without causing undue delay to ships.
5. That, in accordance with this obligation and with permission from the National Environment and Planning Agency (“NEPA”), CEAC has safely received and incinerated ship-generated food waste in the past.
6. That, when such incineration occurred, MICAF’s Plant Quarantine Division approved guidelines for the transportation and handling of the waste and CEAC incinerated it under MICAF’s supervision and oversight.
7. That in 2019, CEAC obtained two environmental permits issued by NEPA which permitted it to construct and operate incineration

facilities capable of safely receiving and disposing of ship-generated food waste.

8. That the terms of those environmental permits required that CEAC incinerate and dispose of ship-generated food waste in accordance with guidelines issued by MICAF.
9. That CEAC entered into binding agreements with shipping agents and shipping lines across the globe for the incineration of ship waste.
10. That despite numerous requests by CEAC, MICAF has refused to provide guidelines for the reception, transportation, and incineration of ship-generated food waste from the various ships with which CEAC has contracted.
11. That at the same time, MICAF refused to issue guidelines to CEAC, it formulated guidelines for itself to incinerate ship-generated food waste without a permit to do so (in breach of section 9(1) of the Natural Resources and Conservation Authority Act).
12. That MICAF has also pressured NEPA to revoke CEAC's environmental permits because it disagrees with NEPA's decision to issue them.
13. That MICAF has not issued the guidelines on any of the occasions CEAC has asked for them and CEAC has consequently been unable to fulfil its obligations.
14. That MICAF's failure to issue guidelines for CEAC'S execution of contracts to incinerate ship-generated food waste while it unlawfully provided the same service, directly and adversely affected CEAC and caused it to suffer loss.

15. That MICAF's refusal to provide guidelines is irrational because it amounted to unjust inequality of treatment that falls within the ambit of 'Wednesbury' unreasonableness.
16. That MICAF's general refusal to issue guidelines for any of CEAC's contracts to dispose of ship-generated food waste while it unlawfully provided the same service in populated areas resulted in CEAC being treated inequitably by a public authority in the exercise of a public function, contrary to section 13(3)(h) of the Constitution.
17. That CEAC had a legitimate expectation that it would be entitled to receive and dispose of ship-generated food waste if it constructed its facility in Hill Run, in the parish of St. Catherine and complied with the terms of its licence.
18. That MICAF exercised its discretion for an improper purpose when it refused to issue the guidelines to CEAC.
19. That MICAF fettered its discretion by refusing to issue the guidelines to CEAC without considering the circumstances of each request.
20. That the Orders sought would be in the interest of both justice and good governance.
21. That CEAC has sufficient interest in the subject matter as MICAF's actions has caused it to suffer significant loss.

## **THE ISSUE**

- [4]** The following issue is determinative of the Claim: -

- i. Whether the Minister of Industry, Commerce, Agriculture and Fisheries has a statutory duty to issue guidelines for the transportation and handling of ship-generated food waste, in accordance with environmental permits.

## **THE FACTUAL BACKGROUND**

### **The MARPOL Convention**

- [5] The International Convention for the Prevention of Pollution from Ships 73/78, more commonly referred to as the “MARPOL Convention”, is the main international convention which covers the prevention of pollution of the marine environment by ships from operational or accidental causes.<sup>2</sup> The MARPOL Convention, to which Jamaica is a signatory, governs the prevention of pollution from ships, by regulating the reception and disposal of ship-generated waste. Importantly, Regulation 7 of Annex V of the MARPOL Convention stipulates that “the government of each party to the MARPOL Convention undertakes to ensure the provision of facilities at ports and terminals for the reception of garbage, without causing undue delay to ships, and according to the needs of the ships using them.”
- [6] In its 2012 Guidelines for the Implementation of the Convention for the Prevention of Pollution from Ships (“MEPC 2012 Guidelines”), the Convention on the International Maritime Organization established the Marine Environment Protection Committee. Annex V of the Regulations for the Prevention of Pollution by Garbage from Ships states that food waste carrying a risk of diseases or pests should be separated from other types of garbage.<sup>3</sup>

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<sup>2</sup> See – History of MARPOL on the International Maritime Organization’s Website

<sup>3</sup> See – Paragraph 6 of the Affidavit of Audley Shaw in response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

- [7]** The Veterinary Services Division (“VSD”) and the Plants Quarantine and Produce Inspection Branch (“PQIB”) fall under the portfolio of the Ministry of Industry, Commerce, Agriculture and Fisheries (“MICAF”). The VSD is tasked with the responsibility of enforcing the provisions of the Animals (Diseases and Importation) Act and all the applicable regulations, including the Animals Diseases (Importation) Controls Regulations, 1948. Under the Animal (Diseases and Importation) Act, import permits are required for the importation into Jamaica of certain animal products or animal-related material, such as, foods of animal origin or carcasses or parts thereof.
- [8]** Similarly, the PQIB’s duty is to enforce the Plants (Quarantine) Act and all the applicable regulations.<sup>4</sup> Under the Plant (Quarantine) Act, an import permit is required from the Plant Quarantine Officer for the importation of ship-generated food waste which contains plants or plant products, which may pose a risk of being a phytosanitary hazard.<sup>5</sup>
- [9]** Both the VSD and the PQIB are the authorities which are charged with the responsibility of determining the risks posed to animal and plant health by ship-generated food waste. These authorities determine whether ship-generated food waste is safe to be brought into and transported across Jamaica. Whilst the Ministry of Health and Wellness may also grant approval for waste disposal, its assessment would not be from the standpoint of the risk of plant and animal diseases entering Jamaica.<sup>6</sup>
- [10]** The Minister with oversight responsibility for MICAF avers that the Ministry is in the process of developing guidelines for port reception facilities to reflect the risk analysis which MICAF has conducted on the importation of ship-generated food

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<sup>4</sup> See – Paragraph 4 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>5</sup> See – Paragraph 7 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>6</sup> See – Paragraph 16 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

waste, in keeping with Jamaica's obligations under the Convention for the Prevention of Pollution from Ships.<sup>7 8</sup>

### **The position advanced by CEAC Outsourcing Company Limited**

- [11] CEAC is a private company with over twelve (12) years of experience in the business of providing hazardous waste management services. This includes the collection, transportation, treatment, and disposal of hazardous waste material, including ship-generated waste. CEAC's waste management processes are consistent with the recommendations prescribed by the United States Department of Agriculture's American Plant Health Inspection Service, ("APHIS"), the Department for Environment, Food & Rural Affairs ("DEFRA"), Animal and Plant Health Agency and the MARPOL Convention.<sup>9</sup>
- [12] CEAC maintains that it applied for and obtained the requisite environmental permits necessary to construct waste disposal facilities with incinerators capable of safely disposing of and/or recycling ship-generated waste. These environmental permits, pursuant to the Natural Resources Conservation Authority Act and the Natural Resources Conservation (Permits and Licences) Regulations, are as follows: -
- I. Permit No. 2018-13017-EP0015, for the waste disposal facility located at New Yarmouth Estates, in the parish of Clarendon.
  - II. Permit No. 2019-08017-EP00047, for the waste disposal facility located in Granville, in the parish of St. James.

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<sup>7</sup> See – Paragraph 18 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>8</sup> CEAC asserts that on multiple occasions, well in advance of the scheduled disposal dates, it had requested guidelines from MICAF. CEAC maintains that on those occasions, there was no attempt by MICAF to assess and approve the storage facility and secured vehicle CEAC proposed to use. See – Paragraph 12 of the Affidavit of Christopher Burgess in Response to the Affidavit of Audley Shaw, which was filed on 12 November 2021

<sup>9</sup> See – Paragraph 9 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021



- III. Permit No. 2019-14017-EP00177, for the waste disposal facility located in Hill Run, in the parish of St. Catherine.<sup>10</sup>

### **CEAC's New Yarmouth Facility**

- [13] CEAC contends that, in July 2018, it arranged with the Golar Artic (a vessel) to dispose of thirty cubic meters of frozen food waste. CEAC asserts that, at that time, there were no approved port reception facilities for the retrieval of ship-generated food waste and that its New Yarmouth Facility was capable of safely incinerating that type of waste. A condition which was attached to the permit which was granted in respect of the New Yarmouth Facility was that CEAC was required to obtain NEPA's written permission before incinerating any waste at any location. In compliance with this requirement, CEAC wrote a letter to NEPA, dated 13 July 2018, requesting written approval for the incineration of the Golar Artic's food waste. Enclosed with that letter was a work plan of the proposed process. CEAC maintains that it received, transported, and successfully disposed of the Golar Artic's waste, in accordance with the work plan, which it had submitted to NEPA.<sup>11 12</sup>
- [14] For its part, MICAFA asserts that permission was granted for the handling of the food waste from the Golar Artic, based on a request which was made by the Ministry of Health and Wellness. MICAFA further asserts that permission was granted based on the information, which was provided by the Maritime Authority of Jamaica. This information was that the container with food waste onboard the vessel was almost filled and that there were large volumes of ship-generated waste which were being stored on board the vessel. This waste was said to be

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<sup>10</sup> See – Paragraphs 10 and 11 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

<sup>11</sup> See – Paragraphs 14-18 inclusive of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

<sup>12</sup> See – Paragraph 9 of the Affidavit of Christopher Burgess in response to the Affidavit of Audley Shaw, which was filed on 12 November 2021. CEAC maintains that MICAFA is and was aware that CEAC had storage facilities for the incineration of ship-generated food waste because it approved CEAC's collection and disposal of the ship-generated food waste from the Golar Artic ship.

waste which could not be stored in a frozen state, thereby posing a health risk to the vessel's crew.<sup>13</sup> MICAF reiterates that the authorization which was given for the disposal of waste in this instance was due to an exceptional circumstance and was not intended as a repudiation of the standard or general procedures for ensuring the protection of plant and animal health.<sup>14</sup>

### **CEAC's Granville and Hill Run Facilities**

- [15] In October 2018, the Granville Facility did not have a permit to allow it to receive ship-generated food waste. After a series of consultations, and, with the exchange of correspondence between CEAC and NEPA, CEAC proposed the site located at Hill Run, in the parish of St. Catherine, as a possible site for the construction of a waste disposal facility. Subsequently, NEPA found that the Granville Facility was acceptable as a waste reception facility, though it did not approve the installation of an incinerator there. The permits for the Granville and Hill Run Facilities were granted on 9 September 2019.<sup>15</sup>
- [16] CEAC requested guidelines of MICAF on at least three (3) occasions. CEAC sought guidelines for the transportation and handling of ship-generated food waste, as contemplated by paragraph 101 of the Environmental Permit, which was issued for the Hill Run Facility. Paragraphs 100, 101 and 102 of the permit impose the following conditions: -

*“100. The Manager of the Enforcement Branch of the National Environment & Planning Agency, 10 Caledonia Avenue, Kingston 5, as well as the Ministry of Health, Harbour Master of the Port Authority of Jamaica and the Plant Quarantine and Veterinary Services Divisions of the Ministry of Industry, Commerce, Agriculture and Fisheries (MICAF) shall be notified in writing of the date of:*

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<sup>13</sup> See – Paragraphs 8 and 9 of the Affidavit of Audley Shaw in response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>14</sup> See – Paragraph 4 of the Second Affidavit of Audley Shaw, which was filed on 8 December 2021

<sup>15</sup> See – Paragraphs 19-28 inclusive of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

- *Collection of any ship-generated (food) waste*
- *Commencement of incineration of any ship-generated (food) waste*
- *Conclusion of incineration of any ship-generated (food) waste*

*101. The Permittee shall ensure that all waste is transported and handled in accordance with the guidelines and approvals of the relevant statutory bodies, including but not limited to the MICAFA, MOH, and the Maritime Authority of Jamaica. Copies of any written permission received subsequent to the granting of this Permit and prior to the receipt and/or incineration of any waste shall be provided to the Manager of the Enforcement Branch of the National Environment & Planning Agency, 10 Caledonia Avenue, Kingston 5.*

*102. Pursuant to Specific Condition 101, the Permittee shall submit copies of the following documents to the Manager of the Enforcement Branch of the National Environment & Planning Agency, 10 Caledonia Avenue, Kingston 5:*

- *Advance Notification Form for Waste Delivery to Port Reception Facilities.*
- *Waste Delivery Receipts.*

*These copies shall be submitted biweekly, for the first month of operation, and monthly thereafter.”*

**[17]** In compliance with clauses 100 and 101 of the Hill Run Permit, CEAC wrote a letter dated 25 November 2019, requesting that the Ministry indicate that it had no objection to CEAC’s removing, transporting, and incinerating the food waste of the AIDA cruise ship, which was scheduled to arrive at the port of Montego Bay on 8 December 2019.<sup>16</sup>

**[18]** CEAC contacted NEPA to communicate its growing concerns regarding the negative impact MICAFA’s approach was having on the efficacy of its Hill Run Permit. In a letter dated 4 December 2019, NEPA responded to those concerns by assuring CEAC that its Hill Run Permit could not be suspended and by arranging a meeting with MICAFA. Both MICAFA and NEPA met in December 2019,

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<sup>16</sup> See – Paragraph 34 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

at which meeting it was proposed that there be a site visit to the Hill Run Facility. This site visit was conducted in January 2020. That notwithstanding, CEAC avers that several months after the site visit, there was no response from MICAF regarding the guidelines.<sup>17</sup>

**[19]** By way of a letter dated 15 January 2020, MICAF indicated that NEPA did not consult with it before issuing the Hill Run Permit. MICAF indicated further that it had completed its risk assessment of CEAC's operations and asked that NEPA amends the said Permit to remove the clause which permitted the disposal of ship-generated food waste. CEAC avers that NEPA refused to make the amendment and, consequently, CEAC wrote to the responsible Minister for the MICAF and requested his intervention.<sup>18</sup>

**[20]** CEAC further avers that it was approached by Gateway Shipping International Limited about providing waste disposal services for cruise ships arriving at Jamaican ports. CEAC maintains that, on 12 August 2020, it wrote to MICAF asking that it be provided with guidelines for the transportation and handling of the waste. On 19 August 2020, CEAC also requested guidelines for the transportation and handling of approximately 1.0m<sup>2</sup> of ship-generated food waste.

**[21]** It is CEAC's contention that the documentation sent by MICAF reveals the following: -

*“(a) MICAF incinerated ship-generated food waste in breach of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, the National Guidelines on the Collection and Disposal of MARPOL 73/78 Annex V Waste and the Natural Resources and Conservation Authority Act.*

*(b) The incinerator MICAF used to dispose of the waste was located close to residencies, schools, and public institutions which, according to NEPA's previous*

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<sup>17</sup> See – Paragraphs 43 and 44 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

<sup>18</sup> See – Paragraph 46 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

*statements to CEAC, should have made it unsuitable for this type of waste incineration.*

*(c) Two weeks after refusing to provide guidelines (allegedly because of general concerns about transporting ship-generated food waste by land) MICAF received ship-generated food waste from a seaport and transported it by land across the island.*

*(d) MICAF engaged in the disposal of the ship-generated food waste without written permission from NEPA.*

*(e) NEPA was given notice that MICAF would be incinerating waste using an unpermitted facility long before I raised the issue in the August 5 letter.”*

**[22]** CEAC asserts that MICAF’s failure to issue guidelines on ship-generated waste has caused it to incur significant losses, which it assesses to be approximately US\$544,877.86, for the period of November 2019 to June 2020. It is estimated that on average CEAC loses US\$55,074.21, per month, on each occasion that it is forced to refuse business due to MICAF’s inaction.<sup>19 20</sup>

### **The dispute concerning the AIDA Vessel**

**[23]** In November 2019, CEAC contracted with AIDA, a German cruise line, to dispose of food waste from the vessel, on its arrival at the port of Montego Bay, in the parish of St. James. A disposal team from CEAC went to the port to collect the cruise ship’s food waste but was prevented from doing so by a team from MICAF’s Veterinary Services Division. The cruise ship left the port without disposing of the waste.<sup>21</sup>

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<sup>19</sup> See – Paragraphs 61 and 62 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

<sup>20</sup> See – Paragraphs 65 to 68 inclusive of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

<sup>21</sup> See – Paragraphs 29, 30 and 32 of the Affidavit of Christopher Burgess in Support of the Fixed Date Claim Form, which was filed on 5 August 2021

### **The position advanced by MICAF**

- [24] For its part, MICAF maintains that the Hill Run Permit covers ship-generated waste in general. Food waste on any international vessel may be regarded as “regulated garbage”, which is known to potentially harbour pathogens of transboundary animal diseases, such as African Swine Fever, Classical Swine Fever, Foot and Mouth Disease and Avian Influenza.<sup>22</sup>
- [25] In his Affidavit in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021, the responsible Minister for the MICAF avers that, on 23 November 2019, both the VSD and the PQIB received telephone calls from representatives of the Ministry of Health and Wellness. These telephone calls served to communicate that the Ministry of Health and Wellness and NEPA had given approval for the offloading of regulated garbage from a cruise ship which was scheduled to arrive in Montego Bay, in the parish of St. James. Neither the VSD nor the PQIB was made aware that a permit was issued by NEPA for the collection and disposal of ship-generated waste. It is further averred that there was no prior consultation with MICAF, prior to the issuing of the Hill Run Permit.<sup>23</sup>
- [26] It is further averred that there was insufficient time for the VSD and the PQIB to properly assess the potential risks associated with the request and consequently, the request was denied.<sup>24</sup>
- [27] Additionally, the PQIB had other substantive concerns as follows: -
- a. The contents of the food waste on the ship included plants and plant products in their fresh state, from multiple countries of origin, with diverse plant health statuses.

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<sup>22</sup> See – Paragraph 6 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>23</sup> See – Paragraph 10 of the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

<sup>24</sup> See – A copy of the Plant Quarantine Produce Inspection’s Cruise Ship/ Vessel Inspection Form, dated 24 November 2019, exhibited as “AS-2” to the Affidavit of Audley Shaw in Response to the Affidavit of Christopher Burgess in Support of Fixed Date Claim Form, which was filed on 27 October 2021

- b. The food waste contained prohibited fruits and vegetables in the form of citrus and banana.
- c. No consultation or assessment was done regarding the place for discarding the food waste and, as such, the risk to the environment for the introduction of pests was high.
- d. The volume of waste to be disposed of would have required some amount of storage, this presented an unacceptably high risk, particularly when the proposed location for incineration (an agricultural area), is considered.
- e. The transportation of the waste would require an approved secured vehicle.

**[28]** MICAF maintains that, at the time of the request to offload ship-generated food waste, it had developed no guidelines. MICAF maintains that it is still in the process of developing guidelines and that it has no statutory duty in relation to the issuing of guidelines to CEAC.

## **THE LAW**

### **The role of the court in judicial review proceedings**

**[29]** Part 56 of the Civil Procedure Rules, 2002, as amended (“the CPR”), is entitled Administrative Law and deals with matters such as this. The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.

**[30]** The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These

grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**.<sup>25</sup>

[31] Roskill, LJ stated as follows: -

*“...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'.”*

[32] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.

[33] Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. It is important to remember that, in every case, the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is

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<sup>25</sup> [1984] 3 All ER 935



to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.

- [34] The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the court.<sup>26</sup>
- [35] Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

### **Mandamus**

- [36] An Order for Mandamus commands the person or body to whom it is directed to perform a public duty imposed by law. A successful applicant for Mandamus must be able to show that he has asked that the duty be performed and has been refused. The court may not order mandamus against an authority which is doing its best to perform its duties.<sup>27</sup>
- [37] Sir William Wade, at page 649 of the 6<sup>th</sup> edition of his text, Administrative Law, is quoted as follows: -

*“The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands*

<sup>26</sup> See – **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141, at pages 143 g-h and 144 a

<sup>27</sup> Page 308 of the Garner’s Administrative Law, 8<sup>th</sup> edition. See also, *R v Bristol Corporation ex p Hendy* [1974] 1 WLR 498 at 503, CA; *R v Secretary of State for the Environment, ex p Smith* [1988] COD 3. Mandamus will not lie against the Crown, but it will lie against a Minister acting as such, see e.g. **Padfield v Minister of Agriculture, Fisheries and Food** [1986] AC 997.

*of the ordinary citizen when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction... the essence of mandamus is that it is a... command... ordering the performance of a public legal duty. It is a discretionary remedy, and the court has full discretion to withhold it in unsuitable cases.”*

## **THE SUBMISSIONS**

*The submissions advanced on behalf of the Claimant*

- [38]** Learned Counsel Mr Gibbs began his submissions by underscoring the fact that Jamaica is a signatory to the MARPOL Convention. The MARPOL Convention seeks to regulate the way ships receive and dispose of ship-generated waste. Mr Gibbs recognized that the MARPOL Convention has not been ratified into local law but reiterated the fact that the Government of Jamaica has promulgated regulations and has issued guidelines, which are aimed at ensuring compliance with the provisions of the Convention.
- [39]** Mr Gibbs maintained that NEPA is the entity responsible for granting environmental permits for the incineration of waste, including ship-generated waste. In the present instance, NEPA granted environmental permits for the Hill Run and Granville Facilities, which are operated by CEAC.
- [40]** Mr Gibbs contended that CEAC does not require the permission of MICAF to incinerate waste at the Hill Run Facility or to store waste at the Granville Facility, because NEPA has already granted CEAC that permission. What CEAC requires, Mr Gibbs further contended, are guidelines from MICAF on how to handle the waste.
- [41]** Both MICAF and CEAC are subject to the same environmental laws, which require NEPA’s approval to incinerate ship-generated waste.

- [42] It was submitted that the Government of Jamaica developed a policy of receiving and disposing of ship-generated waste, in keeping with its obligations pursuant to the MARPOL Convention. CEAC has requested of MICAF guidelines in relation to the receiving and disposing of ship-generated waste, on at least three (3) separate occasions and, on each of those occasions, those requests were dismissed out of hand, based on the general policy, without an assessment of the circumstances of each request.
- [43] Mr Gibbs asserted that MICAF's request that NEPA revoke CEAC's permit is an indication that it [MICAF] has shut its ears to any application by CEAC for guidelines, in respect of ship-generated food waste.

*The submissions advanced on behalf of the Defendant*

- [44] Learned Counsel Ms Faith Hall began her submissions by referring to the dictum of Lord Diplock in the authority of **Council of Civil Services Unions v Minister of State for Civil Services**.<sup>28</sup> Ms Hall reminded the Court that the test for unreasonableness and irrationality was expressed by Lord Diplock as applying to a decision which is so outrageous in its defiance of logic and accepted moral standards, that no sensible person directing his mind to the question could arrive at it.
- [45] It was further submitted that the essence of an Order for Mandamus is that it is a command, which orders the performance of a public, legal duty. It is, Ms Hall maintained, a tool which the ordinary citizen can utilize, when a public authority fails to do its duty by him. It is a discretionary remedy which the court will only order in a clear and appropriate case.
- [46] Ms Hall maintained that the Animals (Diseases and Importation) Act and the Regulations made thereunder, (including the Animals Diseases (Importation) Controls Regulations, 1948) and the Plant (Quarantine) Act and the Regulations

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<sup>28</sup> [1985] A.C. 374

made thereunder, fall under the remit of the MICAFA. These provide that import permits are required for the importation into Jamaica of certain animal products or animal-related material and the importation of ship-generated food waste that contains plants or plant products, respectively. It was submitted that the permit issued to CEAC should not be confused with approval for the removal of regulated garbage from any international vessel.

- [47] The extent of the potential risks which are associated with the transportation and handling of ship-generated food waste is so wide that it requires a multidisciplinary approach in assessing whether it is safe to import the ship-generated food waste into Jamaica. At the time of CEAC's request for guidelines in relation to the receipt and disposal of ship-generated waste, no such guidelines were in place. The process which was utilized to develop same was a novel endeavour, which resulted in the delay in responding to CEAC's request. In the circumstances, Ms Hall asserted, there was no refusal on the part of the responsible Minister for MICAFA and that his response is clearly a reasonable one. To buttress this submission, Ms Hall referred to the authority of **Associated Provisional Houses Limited v Wednesbury Corporation**.<sup>29</sup>
- [48] It was further submitted that CEAC has failed to establish that the delay in providing the requested guidelines rose to the level of unreasonableness, as contemplated by the law. The scope of the test is more focused on what the decision-making body considered or failed to consider, when coming to a decision and the rationality of that decision.
- [49] In the result, Ms Hall submitted that CEAC's request for an Order of Mandamus ought properly to be refused.

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<sup>29</sup> (1947) 2 All ER 680 at page 682

## **ANALYSIS AND FINDINGS**

- [50]** At the commencement of the proceedings for judicial review Mr Gibbs advised the Court that CEAC would not be pursuing the Order which it sought for the grant of an Order of Prohibition. Consequently, this Judgment is not intended to treat with that aspect of the Claim. Nor is this Judgment intended to treat with the Constitutional aspect of this Claim.
- [51]** In the present instance, it is common ground between the parties that there are currently no approved guidelines from the Government of Jamaica or from any responsible Ministry, including MICAFA, in relation to the transportation and handling of ship-generated food waste.
- [52]** The gravamen of CEAC's case is that the Minister of Industry, Commerce, Agriculture and Fisheries has a statutory duty to issue guidelines for the transportation and handling of ship-generated food waste, in accordance with environmental permits.
- [53]** Conversely, the case for the responsible Minister is that there has been no refusal to provide guidelines, but rather that there are simply no guidelines to provide.
- [54]** The law is quite clear that the Court can only exercise its discretion to grant an Order of Mandamus in circumstances where a public body or a public official is required, by statute, to perform a public duty. This statutory duty must emanate from either an Act of Parliament, regulation, rule, or bylaw, which form part of the laws of Jamaica. In the present instance, the grant of an Order of Mandamus can only be appropriate where there is a statutory duty imposed on the responsible Minister to create, formulate or to issue guidelines for the receipt and disposal of ship-generated food waste.
- [55]** The relevant environmental permits granted by NEPA were granted pursuant to section 9(3) of the Natural Resources Conservation Authority Act. An examination of this section, and other related legislation, such as the Plants

(Quarantine) Act, The Animals (Diseases and Importation) Act and all related subsidiary legislation in their entirety, does not reveal the imposition of a duty on the responsible Minister to provide guidelines on the transportation and handling of ship-generated food waste.

**[56]** For his part, Mr Gibbs submitted that the environmental permits which were granted to CEAC are delegated or subordinate legislation.

**[57]** In this regard, the Halsbury's Laws of England, Volume 96 (2018), Statutes and Legislative Process, at paragraph 637, states the following: -

*“Subordinate legislation is legislation made by virtue of powers conferred either by Act or by legislation which is itself made under statutory powers: it is referred to as delegated legislation in the former case, and sub-delegated legislation in the latter. Subordinate legislation is so called because it is inferior to and may always be revoked or amended by an Act... Much subordinate legislation, on the other hand, is made by independent persons and bodies to whom the legislature has entrusted the responsibility for, or the privilege of, regulating specified matters. Subordinate legislation, if validly made, has the full force and effect of an Act, but it differs from an Act in that its validity, whether as respects form or substance, is normally open to challenge in the courts.”*

**[58]** From this definition, it can be gleaned that the authority for subordinate legislation is usually derived from ‘parent’ legislation, which is an Act of Parliament. It is law made by an executive authority under powers delegated by an enactment of primary legislation, which grants the executive agency the power to implement and administer the requirements of the primary legislation. There is usually no distinction between the term ‘subordinate legislation’ and that of ‘delegated legislation’.<sup>30</sup> Typically, statutory instruments in the form of orders, regulations and rules are delegated or subordinate legislation. Admittedly, a

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<sup>30</sup> ‘Delegated Legislation’ is often used to underline the principle that power to make and pass further legislation is delegated from the machinery of Government to specially appointed committees and other bodies who have expertise in the subject. It is usually law made by a body other than the legislature but with the legislature’s authority, for the purpose of implementing and administering the requirements of primary legislation. Subordinate Legislation is also referred to as secondary legislation, primary legislation being that which is contained in Acts of Parliament.

litigant can raise a challenge to delegated or subordinate legislation. Halsbury's Laws of England Volume 61A (2023), Judicial Review, at paragraph 10, states: -

*“However, delegated legislation (also referred to as secondary or subordinate legislation) and byelaws [sic] may be attacked, either directly or collaterally. The grounds of challenge may be that the making of the instrument in question was not intra vires the relevant enabling power; or that the correct procedure for making it was not followed; or that it is repugnant to the enabling legislation or to the general law; or that it is bad for uncertainty. A court is entitled, and indeed obliged, to decline to enforce or give effect to provisions of subordinate legislation which are incompatible with Convention rights and where such incompatibility is not inherent in the enabling primary legislation. It may also be alleged that the discretion involved in making the relevant statutory instrument or byelaw [sic] was abused, for example because the authority allowed its discretion to be fettered, or on grounds of unreasonableness... Where the court has a discretion as to whether to grant relief, it has been suggested that, whereas an administrative act performed in excess or abuse of power will normally be struck down, a statutory instrument ought only to be quashed where special circumstances make it desirable to do so. However, the courts have held that delegated legislation does not have a specially protected position, and that the lawfulness of the exercise of a statutory power to make delegated legislation is reviewable by the courts.”*

- [59]** This Court readily accepts that delegated and subordinate legislation are generally amenable to judicial review. The Court is however unable to accept the submission that a permit, which is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority, constitutes a form of delegated and subordinate legislation. The nature of a permit speaks to the unique relationship between the permitter and the permittee. On the contrary, some examples of delegated and or subordinate legislation such as orders, regulations and rules tend to have overall implications for the public at large. In any event, this Court has not found any support in law for the submission that permits are delegated and subordinate legislation.

**[60]** Regrettably, this Court is unable to accept the submission of Mr Gibbs that the environmental permits, specifically Permit No. 2019-14017-EP00177, which was issued by NEPA, for the waste disposal facility in Hill Run, in the parish of St. Catherine, constitute a form of delegated or subordinate legislation.

**[61]** In the result, the Court is constrained to refuse the Order sought at paragraph 1 of the Fixed Date Claim Form, which was filed on 5 August 2021.

### **DISPOSITION**

**[62]** It is hereby ordered as follows: -

1. The Order sought at paragraph 1 of the Fixed Date Claim Form, which was filed on 5 August 2021, is refused.
2. There shall be no Order as to costs in respect of the Fixed Date Claim Form, which was filed on 5 August 2021.
3. The Defendant's Attorneys-at-Law are to prepare, file and serve these Orders.