[2022] JMSC Civ. 153

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 03058

BETWEEN	**ARLENE ELMARIE PETERKIN**	**CLAIMANT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**1st DEFENDANT**
AND	**TOWN AND COUNTRY PLANNING AUTHORITY**	**2ND DEFENDANT**
AND	**NATIONAL HOUSING TRUST**	**3RD DEFENDANT**

IN OPEN COURT

Kent Gammon and Robert Collie, instructed by Collie Law, for the claimant

Faith Hall, Director of State Proceedings, for the 1st and 2nd defendants

Lord Anthony Gifford K.C. Ingrid Clarke Bennett and Renae Robinson, instructed by Pollard Lee Clarke and Associates, for the 3rd defendant

Heard: May 9, 10, 11, 12, 13 and September 23, 2022

Judicial Review – Statutory interpretation – Illegality – Whether the authority acted illegally –Irrationality – Whether the authority acted irrationally – Whether illegality and irrationality are equated in law – Effluent(s) – Absence of meaning in the Act – Use of a dictionary meaning – Secondary dictionary meaning – Environmental permit – Environmental licences – Object and purpose of the statute – Relationship

between primary and subsidiary legislation – Presumption of correctness in statute – Whether provisions are mandatory or discretionary – Whether regulations are ultra vires the primary legislation – Whether public consultation should be conducted – Environmental Impact Assessment – Application for leave to apply for judicial review– Subsequent grounds added after the leave to apply for judicial review was granted – Marine Outfall – Development Order – Appropriate costs order

ANDERSON, K.J

BACKGROUND

[1] The claimant, filed this fixed date claim form for judicial review on September 27, 2019 of licences and a permit granted to the National Housing ('NHT'), allowing it to build a housing scheme with an associated sewage plant at Industry Cove, in the parish of Hanover. The orders sought in that fixed date claim form against the Natural Resources Conservation Authority ('NRCA'), the Town and Country Planning Authority ('TCPA') and the NHT, are as follows:

a. 'A declaration that the 1st defendant acted illegally or in the alternative irrationally in not requiring the NHT to submit with their application for a permit for the construction and operation of a sewage treatment plant, an Environmental Impact Assessment (EIA), in accordance with regulation 5(3)(c) of the Natural Resources Conservation (Wastewater and Sludge) Regulations, 2013 (hereinafter referred to as: '*the NRCA Regulations*').

b. A declaration that the 1st defendant acted illegally or in the alternative irrationally in granting a permit to the NHT for relaxing the standards for the Discharge of Sewage Effluent without requesting that the application for the permit be accompanied by: (1) a model of the plume behaviour of the effluent in the coastal and marine

environment; (2) the data, studies and calculations that show that the proposed outfall will allow for effluent quality which is still acceptable and will not affect the marine environment beyond the levels already established for the ambient water quality; (3) the data and studies to show the effect of the effluent on the flora and fauna of the marine environment, within the sphere of influence of the above mentioned plume; (4) a drawing of the route of the marine outfall pipe and the construction material and bio-physical survey of the route of the pipe, including the method of laying the pipeline and the floor of sea stabilisation method; and (5) Bathymetry of the seafloor along the alignment of the pipeline, in accordance with **regulation 23 of the NRCA Regulations**.

c. An Order of Certiorari quashing the decisions made by the 1st and 2nd defendants relating to Environmental Licences numbered 2017-09017-EL00021A and 2017-09017-EL00021B for the construction and operation of a sewage treatment system and Environmental Licence numbered 2017-09017-EL00021C for the discharge of sewage effluent into the Caribbean Sea from the said sewage treatment system;

d. An Order of Prohibition preventing the 1st and 2nd defendants from granting environmental permission for the sub-division of the lands located at Industry Cove, Hanover, in the alternative, if the 1st and 2nd defendants have granted environmental permission, an Order of Certiorari quashing any such decision;

e. An Order for constitutional redress by way of Damages and an Injunction against the defendants collectively and/or separately for breaching the Claimant's human rights under Chapter III of the Constitution of Jamaica, section 13(3)(l), namely the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage, by irrationally and/or unreasonably approving the construction and operation of a sewage treatment plant which, as designed and if constructed will result in the complete and/or catastrophic loss of the beach, wetland and marine resources at Industry Cove, Hanover and for the damage already caused to the marine life and resources of the wetland located at the Claimant's property;

f. Costs of this claim to be awarded to the Claimant.'

[2] The NHT acquired lands at Industry Cove, Green Island, in the parish of Hanover and built 63 houses. The claimant is a resident of Industry Cove and an adjoining landowner to the above-mentioned construction site. She avers that the NRCA granted the relevant licences without requiring the NHT to submit an environmental impact assessment report, along with its application for those licences, in contravention of the NRCA Regulations. She also avers that she will be negatively impacted by the proposed sewage treatment plant as the said plant to be built, as designed and approved, does not have an outfall pipe. She contends that this will result in the pollution of the marine environment, relative to the beach which is used by the wider community for recreational purposes and fishing. She states that the beach is located within an environmentally sensitive wetland.

[3] The Natural Resources Conservation Authority ('NRCA') is the statutory body established under **The Natural Resources Conservation Authority Act** ('**NRCA**

Act'). It is empowered to, inter alia, grant environmental permits and licences for enterprise, construction or development in prescribed areas. The Town and Country Planning Authority ('TCPA') is a statutory body established under **The Town and Country Planning Act.** The TCPA is empowered to, inter alia, take decisions, grant approvals and make recommendations for orderly development and planning permission.

[4] The National Environmental Planning Agency ('NEPA'), is an executive agency which has the responsibility to carry out the technical and administrative mandate of the NRCA, the TCPA along with the Land Development and Utilization Commission. NEPA's mandate is to promote sustainable development by ensuring protection of the environment and orderly development in Jamaica. It reviews applications for permits and licences pursuant to the relevant Acts on behalf of the 1st and 2nd defendants. It considers applications by a process of review, research and preparation for review committees.

[5] On March 17, 2017, the NHT submitted to NEPA, applications for an environmental licence for the construction and operation of a wastewater treatment plant as well as an environmental licence, for the discharge of treated effluents into the environment and an environmental permit for subdivision and construction of housing projects of fifty-one or more houses. The NHT later, on November 7. 2017 submitted an application for a beach licence.

[6] NEPA, following its internal procedures and inquires, approved the following licences to the NHT on April 17, 2018:

a. a beach licence for construction, placement and maintenance of a pipeline (2017- 09017-BL00021):

b. environmental licence to construct a wastewater treatment plant (2017-09017-EL00021A);

c. environmental licence to operate a wastewater treatment plant (2017-09017- EL00021B) and

d. environmental licence to discharge sewage effluent into the environment (2017-09017- EL00021C).

[7] On August 31, 2018, NEPA, after conducting its enquiry issued the environmental permit for subdivision and construction of fifty-one or more houses, on August 31, 2018 (2017-09017 EP00086) to the NHT.

[8] It is to be noted that no planning permission was applied for by the 3rd defendant, with respect to the construction of any of those houses. See in that regard, paragraph 54 of the claimant's affidavit filed in support of the application for judicial review and paragraphs 34 and 35 of Danville Walker's affidavit, Mr. Walker is the Chairman of the boards of NRCA and TCPA.

[9] The claimant sought leave to apply for judicial review and was granted same by Mr. Justice Gayle, on September 16, 2019.

[10] The order for constitutional relief was sought, but at the onset of the trial of the claim, counsel for the claimant, Mr. Gammon, informed the court that his client was no longer pursuing that relief and therefore, withdrew it, without prejudice. In the circumstances, this court will not treat with that relief, in these written reasons.

ISSUES

[11] The following issues arise for consideration in light of the facts of the case:

a. Can illegality and irrationality, as a matter of law, properly be treated with, as being the equivalent of each other?

b. Is the word 'effluents' as used in the **sections 9 and 12 of the NRCA Act** and **regulation 5 of the NRCA Regulations** applicable to the factual substratum of this case?

c. What are the roles of **sections 9, 10 and 12 of the NRCA Act** within the context of this case?

d. Whether **section 10(1)(b) of the NRCA Act** should be interpreted as being mandatory in effect rather than as is presently worded, discretionary, in effect.

e. Which section(s) of the NRCA Act ought properly to be treated with, by this court, as 'the enabling provision(s)' which serve to enable the relevant Minister of government to make regulations within the scope or framework as set by that/those enabling provision(s)?

f. Is **regulation 5(3) of the NRCA Regulations** ultra vires **section 10(1)(b)** or any other section of the **NRCA Act**, and if so, how should it be treated with, by this court?

g. Is **section 10(1)(b) of the NRCA Act** inconsistent with section **38(1)(b) of the NRCA Act**, and if so, how should that inconsistency be resolved?

h. What is the applicability of the presumption of regularity to this case?

i. Whether an Environmental Impact Assessment ('EIA') ought to have been done in this case, prior to the licences having been granted to the NHT.

j. Did the NRCA act irrationally or illegally when it determined that no EIA was required in this case?

k. Did the NRCA act either illegally or irrationally, when it did not engage in public consultation with affected parties prior to the licences having been issued to the NHT?

l. Whether consultations with members of the community or communities surrounding the location where the wastewater treatment plant is intended to be operated from, should have

been engaged in, by the NRCA prior to the relevant licences having been issued by the NRCA to the NHT, regardless of whether an EIA is required or not.

m. Whether leave was ever granted to the claimant to apply for judicial review, to challenge the grant by the NRCA to the 3rd defendant of licences to construct and operate a wastewater treatment plant, on the ground that in doing so, the NRCA acted in breach of **regulation 23 of the NRCA Regulations** and if leave was not so granted whether that ground can properly now be pursued, on a fixed date claim form, which was filed, pursuant to the leave earlier granted.

n. Does the NHT's proposed sewage disposal constitute a marine outfall, under **regulation 23 of the NRCA Regulations?**

o. Did the TCPA grant any of the disputed environmental licences which are relevant for the purposes of this claim, or has any application been made to the TCPA, for any environmental licences to be granted to the NHT, with respect to the NHT's construction of the said sixty-three (63) houses?

LAW AND ANALYSIS

Burden and standard of proof

[12] The burden of proof in matters such as these, rests with he who raises the allegations. Hence the well-known phrase, '*he who asserts must prove*.' The claimant has brought this claim against the defendants, and she therefore, had the burden of proving her case. That is, she needed to adduce sufficient evidence, upon a balance of probabilities, to make out her case against the defendants, or at least, against one or the other of the defendants.

Grounds for Judicial review

[13] On an application for judicial review, the court is not concerned with the substance of the decision made by the defendants, but rather, is considering the propriety of the methods by which the decisions were arrived at. In other words, a judicial review proceeding is supervisory only. It is not akin to an appeal.

[14] The case of **Council of Civil Service Unions v Minister of State for the Civil Service [1985] AC 374, HL (CCSU case),** is often relied on, in examining the bases on which judicial review may be sought. Per Lord Diplock, these are illegality, irrationality and procedural impropriety. At page 410, it is reported that he stated:

> *'By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable*
>
> *By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury' unreasonableness Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.'*
>
> *'*

[15] Illegality in the context of judicial review proceedings takes into account, whether the defendant considered irrelevant factors in coming to its decision, whether the defendant failed to consider relevant factors in coming to its decision and whether the defendant acted in bad faith and used its powers for an illicit purpose.

[16] Learned authors, De Smith, Woolf and Jowell, in chapter 6 of their text: **Judicial Review of Administrative Action,** 5th ed., discussed the ground of illegality in a fulsome manner. At page 295, in particular, they have indicated that:

> *'The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners". In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will - seeking to ensure that the exercise of power is what Parliament intended.*
>
> *At first sight the application of this ground of review seems a fairly straightforward exercise of statutory interpretation, for which courts are well suited. Yet there are a number of issues that arise in public law that make the courts' task more complex. The principal difficulty is the fact that power is often conferred, and necessarily so in a complex modern society, in terms which appear to afford the decision-maker a broad degree of discretion. Statutes abound with expressions such as "the minister may"; conditions may be imposed as the authority "thinks fit"; action may be taken "if the Secretary of State believes". These formulae, and others like them, appear on their face to grant the decision-maker infinite power, or at least the power to choose from a wide range of alternatives, free of judicial interference. Yet the courts insist that such seemingly unconstrained power is confined by the purpose for which the statute conferred the power…'*

Irrationality/ Unreasonableness

[17] The concept of 'Wednesbury unreasonableness,' is derived from the decision of the Court of Appeal of England in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 233**. Lord Greene, by way of summary, stated at pages 233- 234 as follows: -

> *'The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them.'*

[18] It is important to note that unreasonableness in the making of a decision ought not to be equated with an error or errors of law, involved in the making of that decision.

From the quotations above, the court is of the opinion that irrationality and illegality are not to be equated. These are two separate concepts which turn on different understanding of the relevant principles.

[19] In so far as the legal knowledge associated with illegality and irrationality are typically kept as separate and distinct legal concepts within the ambit of administrative law and noting the distinction made between illegality and irrationality, by Lord Diplock, in one of the leading administrative law cases, that being the **CCSU case (op. cit)** wherein Lord Diplock, not only treated with the same as separate and distinct, when summarily defined (as he did in that case), but also, bearing in mind that he thereafter stated, as quoted above that, irrationality, can stand on its own feet as an accepted ground of judicial review, I am of the view that it ought now, to be properly taken as settled, that irrationality and illegality, are not interchangeable terms, nor are they equivalent. To my mind, they are separate and distinct legal concepts, which can each stand on their own, as grounds for judicial review relief.

[20] I mention this, because during his oral submission to the court, the lead counsel for the claimant - Mr. Gammon, relied on a judgment of my then sister judge (now ret'd.) - Mangatal J., in the case of **Delapenha Funeral Home Limited v The Minister of Local Government and Environment –Claim No. 2007 HCV01554.** Mr. Gammon boldly stated, while relying on the **Delapenha case (op.cit)** that having proven that the decision to grant the licences were illegal, then as a matter of law, the decision should be quashed for being irrational, because illegality and irrationality, are the same. From my review of that case, that judgment and the reasons underlying it, do not support that proposition of the claimant's counsel. I therefore respectfully, disagree with that view. Thankfully though, for the claimant, the manner in which the claimant's grounds for the application have been framed, in and of themselves suggest otherwise.

Approach

[21] The claimant does not dispute that the 1st and 2nd defendants are indeed, the relevant and appropriate authorities that are, by law, seized with the jurisdiction to approve permits and licences, in their respective spheres of operation. What is disputed concerns the proper methods of achieving those results, and whether the authorities have acted according to the law, within their capacity and in the context of this particular claim, whether the relevant permit and/or licences granted to the NHT, as regards the relevant housing project and the sewage treatment plant which is expected to be utilized by the 3rd defendant as part and parcel of the housing project, were granted illegally and/or irrationally.

[22] In considering this claim for judicial review, the court must, therefore, make a determination as to whether there is evidence to support the claimant's averments that the TCPA and NRCA erred in law and/or acted irrationally when they respectively granted the said permit and licences to the NHT.

[23] The approach to be taken by the court will, therefore, concern a thorough examination of the sequence of events and the factual circumstances of this case. This court will also be determining the meaning and scope of the material provisions of the **NRCA Act, the NRCA Regulations and the TCPA** and any other relevant statutory provisions, orders and regulations.

[24] This court has not made its final adjudication on this claim, based on what may be viewed by some, as an attractive legal submission, or an attractive approach to the resolution of the legal dispute as referenced in this claim. This court does not adjudicate based on visceral considerations. Instead this court has made its final adjudication on this claim, based on the applicable law and the proven evidence. Also in making that adjudication, this court has not substituted its own view, as a matter of public policy, for the views of any of the defendants, with respect to the matter at hand. That is not and never has been the role of any superior court of law in this jurisdiction.

Legislative Framework

[25] It is necessary to carefully consider, the relevant and varied legislative provisions, in order to best enable a proper understanding of these reasons. As such, those legislative provisions, are hereafter set out and encompass both primary and delegated legislation.

[26] **Section 9 of the NRCA Act,** reads as follows:

> *9 (1) 'The Minister may, on the recommendation of the Authority, by order published in the Gazette, prescribe the areas in Jamaica, and the description or category of enterprise, construction or development to which the provisions of this section shall apply, and the Authority shall cause any order so prescribed to be published once in a daily newspaper circulating in Jamaica.*
>
> *(2) Subject to the provisions of this section and section 31, no person shall undertake in a prescribed area any enterprise, construction or development of a prescribed description or category except under and in accordance with a permit issued by the Authority.*
>
> *(3) Any person who proposes to undertake in a prescribed area any enterprise, construction or development of a prescribed description or category shall, before commencing such enterprise, construction or development, apply in the prescribed form and manner to the Authority for a permit, and such application shall be accompanied by the prescribed fee and such information or documents as the Authority may require*
>
> *(4) Where a permit is required under subsection (2) and any activity connected with the enterprise, construction or development will or is likely to result in the discharge of effluents, then, application for such permit shall be accompanied by an application for a licence to discharge effluents as required under section 12.*
>
> *(5) in considering an application made under subsection (3) the Authority—*
>
> *(a) shall consult with any agency or department of Government exercising functions in connection with the environment; and*
>
> *(b) 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 resources in the area concerned,*
>
> *and the Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources.'*

[27] **Section 10 of the NRCA Act** provides that:

> *(1) 'Subject to the provisions of this section, the Authority may by notice in writing require an applicant for a permit or the person responsible for undertaking in*

a prescribed area, any enterprise, construction or development of a prescribed description or category:

a) to furnish to the Authority such documents or information as the Authority thinks fit; or

b) where it is of the opinion that the activities of such enterprise, construction or development are having or are likely to have an adverse effect on the environment, to submit to the Authority in respect of the enterprise, construction or development, an environmental impact assessment containing such information as may be prescribed,

and the applicant or, as the case may be, the person responsible shall comply with the requirement.

(2) A notice issued pursuant to subsection (1) shall state the period within which the documents, information or assessment, as the case may be, shall be submitted to the Authority.

(3) Where the Authority issues a notice under subsection (l), it shall inform any agency or department of Government having responsibility for the issue of any licence, permit, approval or consent in connection with any matter affecting the environment that a notice has been issued, and such agency or department shall not grant such licence, permit, approval or consent as aforesaid unless it has been notified by the Authority that the notice has been complied with and that the Authority has issued or intends to issue a permit.

(4) Any person who, not being an applicant for a permit, refuses or fails to submit an environmental impact assessment as required by the Authority shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding thirty thousand dollars.'

[28] Section 12 of the NRCA Act provides that:

(1) 'Subject to the provisions of this section, no person shall-

a. discharge on or cause or permit the entry into waters, on the ground or into the ground, of any sewage or trade effluent or any poisonous, noxious or polluting matter; or

b. construct, reconstruct or alter any works for the discharge of any sewage or trade effluent or any poisonous, noxious or polluting matter,

except under and in accordance with a licence for the purpose granted by the Authority under this Act

(2) A licence shall not be required if the discharge or entry-

(a) results only from a use of water made in pursuance of a licence to abstract and use water granted under any enactment; or

(b) is in accordance with good agricultural practice, as determined by the Authority after consultation with the Minister responsible for agriculture; or

(c) is caused or permitted in an emergency in order to avoid a greater danger to the public and, as soon as practicable thereafter, particulars of the discharge or entry are furnished to the Authority; or

(d) results from the domestic waste effected by means of absorption or soakaway pits or other prescribed waste disposal system and is in accordance with such provisions as may be prescribed by or under this enactment or any other law in force pertaining to such disposal.

(3) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment, and-

(a) where a person defaults in the payment of a fine imposed under this subsection, he shall be liable to imprisonment for a term not exceeding one year; and

(b) where the offence is a continuing offence, he shall be liable to a further fine not exceeding three thousand dollars for each day on which the offence continues after conviction.

(4) The provisions of regulations made under this Act shall have effect in relation to the grant, suspension and revocation of licences and otherwise in relation thereto.'

[29] Under **section 38(1) b of the NRCA Act,**

(1) 'The Minister may make regulations for the purpose of giving effect to the provisions of this Act, and in particular but without prejudice to the generality of the foregoing, such regulations may contain provisions in relation to-

a…

b. the description or category of enterprise, construction or development in respect of which an environmental impact assessment is required by the Authority;

…. '

[30] Section 43(2) of the NRCA Act specifies that:

(2) 'Any person who is engaged in doing or causing to be done any act referred to in section 12 in respect of which a licence is required under that section, shall apply for a licence in accordance with regulations made under this Act.'

The NRCA Regulations 5, 23 and 24

[31] Under the **NRCA Regulations**, as regards, a requirement for an EIA, **regulation 5** specifies that:

(1) 'Subject to paragraph (2) a person who intends to operate a treatment plant for the discharge of trade effluents or sewage effluent shall apply to the Authority for a licence in the form set out as Form 1 in the First Schedule.

(2). A licence shall not be required to-

a. the discharge or entry of trade effluents or sewage results from domestic wastewater treated by-

i. Means of absorption or soak away pits; or

ii. Other prescribed waste disposal system, and

b. it is in accordance with such provisions as may be prescribed under these Regulations or any other law pertaining to such disposal.

(3) An application made pursuant to this regulation, shall be accompanied by-

a. An application fee prescribed

b. where applicable a compliance plan for approval by the Authority

c. an environmental impact assessment; and

d. any other documents requested by the Authority for the purpose of evaluating the application.'

[32] Regulations 23 and 24 of the NRCA Regulations provide that:

23. (1) 'Where marine outfalls are proposed, a request may be made by an applicant to the Authority to have effluent limits relaxed

(2) Request for the use of marine outfalls shall be accompanied by-

a. a model of the plume behaviour of the effluent in the coastal and marine environment

b. the data, studies and calculations that show that the proposed outfall will allow for an effluent quality which is still acceptable and will not affect the marine environment beyond the levels already established by the ambient water quality

c. the data and studies to show the effect of the effluent on the flora and fauna of the marine environment, within the sphere of influence of the plume as described in paragraph (a)

d. a drawing of the route of the marine outfall pipe and the construction materials and bio-physical survey of the route of the pipe, including the method of laying the pipeline on the floor of sea and stabilisation method; and

e. bathymetry of the seafloor along the alignment of the pipeline.

(3) Where, after review, the request made under paragraph (2) is denied, then the standards set out in the Third Schedule shall apply.

24. (1) A person who proposes to install outfall pipelines for the discharge of sewage effluent on the foreshore and floor of the seas shall apply for a licence, in accordance with section 5 of the Beach Control Act.

(2) Subject to paragraph (1) where the authority approves a licence to install outfall pipelines, such pipelines shall be installed in such a manner as not to interfere with the passage of marine vessels. '

Town and Country Planning Act

[33] Section 11 of the Town and Country Planning Act specifies that:

11 (1) 'Subject to the provisions of this section and section 12 where application is mde to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations.

(1A) Where the provisions of section 9 of the Natural Resources Conservation Authority Act apply in respect of a development which is the subject of an application under subsection (l), planning permission shall not be granted unless-

(a) an application to the Natural Resources Conservation Authority has been made as required by such provisions as aforesaid; and

(b) that Authority has granted or has signified in writing its intention to grant, a permit under that Act.'

NHT's proposed sewage project

[34] The NHT plans to construct a treatment plant to dispose of the sewage created by the householders who will reside in the houses that the NHT has built at Industry Cove, Green Island, in the parish of Hanover. The effluent discharged is to be disposed of into what are known as 'absorption manholes.' There are intended to be three such manholes. There is also to be an overflow line, which discharges any excess, treated effluent, along with storm waters into the sea, in the event of an exceptional weather occurrence. In essence, it is meant to be a tertiary system which will release treated effluents which, mixed with flood waters, would only reach the sea if there is an act of God, that causes the overflow of the absorption manholes.

[35] The question which must be first answered by this court is whether the disposal as proposed by the NHT, is 'effluent,' so as to fall within the framework of **sections 9, 12 or 43(2) of the NRCA Act.** The lead counsel for the defendants have both stated, during the course of their oral submissions, as made upon the trial of this claim, that the said proposed sewage disposal does not constitute 'effluent.'

Definition of effluent

[36] Before embarking on an analysis of the definition of effluent(s), as used in the relevant statutory provisions, it is useful to have regard to the major principles governing statutory interpretation. In the text – **Cross' Statutory Interpretation, 3rd ed (1995),** the learned editors have proffered a summary of the rules of statutory interpretation. They stressed the use of natural or ordinary meanings of words and cautioned against 'judicial legislation' by reading words into statutes. At page 49 of their work, they set out their summary thus:

> *1. 'The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of the general words with reference to that context.*
>
> *2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in a secondary meaning which they are capable of bearing.*
>
> *3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.'*

[37] See in that regard, paragraphs 53 and 54 of the dicta of Brooks, JA (as he then was) in **Jamaica Public Service Company Limited v Dennis Meadows and others [2015] JMCA Civ 1**, referring to the said **Cross text (op. cit)**. As aptly stated by Brooks JA (as he then was) the summary as quoted above, is an accurate reflection of the major principles governing statutory interpretation.

[38] There is no specific definition of 'effluent(s)' in the **NRCA Act**. There is then some latitude given to the court to rely on dictionary meaning, as to what the word as

used, means. Of course, such a dictionary definition, must be applied in such a manner as to give effect to the word or words to be interpreted, when those words are considered within the context of the statue, read and understood holistically.

[39] To reiterate merely for emphasis, though the natural and ordinary meaning of a word, is the starting point, this is not an absolute position. Such natural and ordinary meaning, must be then applied to the context of the statute and in so doing, the court must reject any meaning which causes the statute, not to make sense.

[40] Accordingly, this court will be firstly guided by the ordinary meaning of, 'effluent(s).' According to the **Oxford Dictionary**, effluent is: '*Liquid waste or sewage discharged into a river or the sea.'*

[41] The court recognizes from the definition above, that effluent is classified, based on its destination, that is, into the river or sea.

[42] In this regard, the court must examine the context of the statute in determining what meaning, ought to be applied to **sections 9 and 12 of the NRCA Act and regulation 5 of the NRCA Regulations.**

[43] Learned authors of the **Cross text (op. cit)**. at page 82, quoted from Lord Simon in the House of Lord's decision of **Maunsell v Olins [1975] 1 All ER 16, at page 25**:

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

[44] Also, Lord Scarman in **Duport Steels Ltd and others v Sirs and others [1980] 1 All ER 529**, at page 551 specified as follows:

> *'In this field Parliament makes and unmakes the law. The judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But out law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires.'*

[45] According to **section 12 of the NRCA Act,** 'effluent,' is referenced in the context of: '*discharge on or cause or permit the entry into waters, on the ground or into the ground.'* If this court was to, within the context of this statute, favour a meaning which refers to discharge only into water or sea, that would make no sense, in the context the wording of the **NRCA Act** and run contrary to the role of the court in interpreting statutes drafted by legislators. **The NRCA Act** is geared at protecting Jamaica's environment. If the court were to take the view that, 'effluent' used, is only in reference to liquid waste discharged into the sea, that would run contrary to the purpose of the Act. Accordingly, '*effluents*' is to be given a broad meaning in **sections 9 and 12 of the NRCA Act and regulation 5.**

[46] Having concluded that, '*effluents*' as used in **sections 9 and 12 of the NRCA Act and regulation 5 of the NRCA Regulations,** ought to mean liquid waste discharged, into water, on the ground or into the ground, then it is important to identify the legislative lens through which the facts of this case ought to be examined.

Roles of sections 9, 10 and 12

[47] Each side has advanced different roles for each section. The claimant has placed heavy reliance, on her contention, through her attorneys, that the primary applicable section in the circumstances, is **section 12 of the NRCA Act.** Counsel for the defendants on the other hand have placed heavy reliance on their contention, through their attorneys, that the applicable section which the facts of this case ought to be considered through, is **section 10 of the NRCA Act** and

that any regulations made, would have to be in accordance with the applicable section(s).

Environmental Permit

[48] Before one can understand the regimes of **section 9, 10 and 12 of the NRCA Act,** it is pertinent that there be an understanding as to what are licences and permits under **the NRCA Act**. Counsel for the claimant had, during his oral submissions to this court, at trial, initially urged upon this court, that there is very little, if any, difference between licences and permits under the NRCA Act. In rejoinder though, he urged this court to the contrary, stating that although licences and permits are ordinarily similar concepts, they ought not to be interpreted by this court as such, in this case. Counsel for the 1st and 2nd defendants on the other hand, had in her oral submissions at trial, suggested that the terms are used interchangeably in the **NRCA Act** and that those terms carry the same meaning.

[49] It is a primary principle of statutory interpretation, that wherever a defined term appears, the text in which it occurs, must be read as if the full definition were substituted for that term, except for grammatical purposes. See in that regard: **Halsbury's Laws of England/Statutes and Legislative Process (Volume 96 (2018)** at **paragraph 820**. Accordingly, words defined in the relevant statute, will have the same meaning throughout the statute and a different meaning should not be inserted for the said words, so defined in the statute.

[50] Under **section 2 of the NRCA Act:** ***'permit' means a permit required under section 9.'***

[51] Under **section 9(2) of the NRCA Act**, a permit is required to work on any prescribed property. Under **Section 9(4) where a permit is required**, and any activity is connected with the enterprise, construction or development will or is likely to result in the discharge of effluents, then, application for such permit shall be accompanied by **application for licences** connected to the discharge of effluents as required under **section 12.** (Highlighted for emphasis)

[52] The wording of the statute clearly indicates that licences and permits are not the same. **The NRCA Act** stipulates when a permit is required as well as when a licence is required and in some instances, when both may be required under the respective statutory provisions.

Applicable section

[53] The NHT therefore needed a permit in accordance with **section 9** as well as a licence in accordance with **section 12**, if they were to have lawfully constructed and operated the relevant wastewater treatment plant, in such a manner as would result in the discharge of sewage effluents, whether in the ground, or into the water, such as, for instance, the sea, this after having first constructed the intended housing development which is comprised of 63 houses. **Sections 9(2) and 12** are both instructive on the facts of this case. This is no doubt why the NHT applied for and was granted, an environmental permit for the construction of the relevant housing development, along with the licences to construct and operate a wastewater treatment plant and also, to discharge sewage effluent.

Role of section 10

[54] **Section 10(1) of the NRCA Act** under the margin note: '*Power of Authority to request an Environmental Impact Assessment etc*,' provides that:

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

[55] Counsel for the defendants have urged the court that **section 10(1)(b) of the NRCA Act** is the enabling provision as it relates to the decision as to whether an EIA ought to be required in this case. It has been submitted by defence counsel, that given that **section 10(1)(b) of the NRCA Act** concerns a discretion to the NRCA to determine when an EIA is to be required, then they acted lawfully and within their discretion, when they determined that an EIA was not required.

Mandatory or discretionary

[56] Under **section 10(1)(b) of the NRCA Act**, the authority may require an EIA where a permit is required. Mangatal J. (ret'd.) in her judgment in the case: **Delapenha Funeral Home Limited v The Minister of Local Government and Environment (op.cit),** at paragraph 93, stated that:

> *'It is clear that section 10 of the N.R.C.A. Act empowers the N.R.C.A., at their discretion, to require an applicant for a permit or the person responsible for undertaking any construction or development to submit an E.I.A., where it is of the opinion that the activities of such construction or development are likely to have an adverse effect on the environment.'*

[57] In **Matthews v The State [2000] 60 WIR 390**, a decision of Trinidad and Tobago's Court of Appeal, which has been consistently applied in our jurisdiction, the court considered the use of the word 'shall' in a statutory context. It is cited at **page 403** as follows:

> *'Turning to the argument based on the language of s 18, courts no longer accept that it is possible merely by looking at the language used by the legislature, to distinguish between mandatory or imperative provisions, the penalty for breach of which is nullification, and provisions that are merely directory for breach of which the legislation is deemed to have intended a less drastic consequence. The fact of the matter is that most directions given by the legislature in statutes are in a form that is mandatory. It is now accepted that in order to determine what is the result of failure to comply with something prescribed by a statute, one has to look beyond the language and consider such matters as the consequences of the breach and the implications of nullification in the circumstances of the particular case.'*

[58] The word **'may'** does not always connote a discretionary scenario, but may also, be an imperative. There is no dispute between the parties in this case as to the discretion given to the NRCA under **section 10(1)(b)** to require an EIA when a permit is being applied for. What is being disputed, is the extent of this discretion.

[59] On the wording of **section 10(1)(b) of the NRCA,** there is a discretion given to the NRCA on when to request an EIA, where a permit is being applied for. The specific use of the word permit, should not be interpreted to mean permit and licence.

Margin Notes

[60] The context of **section 10** is important, in informing the court as to the interpretation which ought to be given. It is to be noted that the margin note to **section 10,** stipulates: '*power of authority to request an EIA etc.*' The court must then factor this into the context of the interpretation of **section 10(1)(b).**

[61] Learned authors of the **Cross text (op. cit)**. at page 133, have noted from the decision of **R v Gavin [1987] QB 862**, that side/margin notes should not be used to restrict the plain meaning of enacting words. This was expounded on, by the learned authors of the text: **Bennion on Statutory Interpretation,** 2nd ed. (1992) as follows, at page 513:

> *'If the side note contradicts the text, it puts the interpreter on inquiry, but the answer, may be that the drafter chose an inadequate signpost, or neglected to alter it to match the amendment made to the clause during the passage of the Bill.'*

[62] From the quotation above, margin notes may be examined as an aid to understanding a section of the statute in dispute, where the enacting section is unclear. In examining same, these marginal notes cannot serve to negate the clear words of the particular statutory provision which is being interpreted.

[63] The margin note of **section 10 of the NRCA** states*: 'power to require an EIA* etc.' That margin note does not contradict the clear enacting words of **section 10(1)(b) of the NRCA.** Discretion has been given, by the relevant statutory provisions to the NRCA, to determine if an EIA is required and if considered to be appropriate to do so, to require same, where it is of the opinion that the prescribed construction in respect of which the environmental permit relates, will have, or is likely to have, a negative environmental impact. This is a discretion which is exercisable by the NRCA, though, only with respect to an application for a permit under **section 10 of the NRCA Act.**

Licences

[64] Under **section 2 of the NRCA Act,** '*licence' means a licence required under* ***section 12.'*** **Section 12 of the NRCA Act** concerns licences to discharge effluents, construct or reconstruct alter any works for the discharge of any sewage as well as some of the procedures surrounding same.

[65] **Section 12(4)** stipulates that the provisions of regulations made under the **NRCA Act** shall have effect in relation to the grant, suspension and revocation of licences and otherwise in relation thereto.

Power to make regulations

[66] There is a live issue in this case as to what provision is the enabling provision which allows the Minister of government to make regulations concerning the discharge of effluents. **Section 38(1) of the NRCA Act,** grants the Minister the general power to make regulations as regards the **NRCA Act**. **Section 38(1)(b)** particularly concerns the power of the Minister to make regulations concerning when an EIA is required.

Section 10(1)(b) and 38(1)(b) of the NRCA Act

[67] Lead counsel for the 3rd defendant contended during his oral submission, that **section 10(1)(b)** is inconsistent with **section 38(1)(b),** as is presently worded. This he contends to be so, as the Minister under **section 38(1)(b),** possesses a discretion to require an EIA in any instance under the regulations compared to **section 10(1)(b),** which clearly states that the discretion as to when to require an EIA, is at the instance of the NRCA. Accordingly, it was his submission that the court should either add or remove words from the relevant sections to bring them in line with each other.

[68] The question which must then be answered is whether **section 10(1)(b) and 38(1)(b)** are contradictory. If, but only if, that question is answered in the

affirmative, the court ought next to go on to consider, which is the leading provision and thus, which one must give way to the other.

[69] The Privy Council in its judgment in the case: **Owens Bank Ltd v Cauche and Others (1989) 36 WIR 221** at page 226 stated that as regards statutory inconsistency between provisions, the following approach is to be utilized by courts:

> *'Where such an inconsistency exists, the courts must determine, as a matter of construction, which is the leading provision and which one must give way to the other (see Institute of Patent Agents v Lockwood [1894] AC 347 at page 360 and 44 Halsbury's Laws of England (4th Edn) paragraph 872).'*

[70] On a literal interpretation of the **section 10(1)(b**), the NRCA has a discretion on when an EIA should be required, in a situation wherein, a permit is being applied for. **Section 38(1)(b) of the NRCA** on the other hand, gives the Minister a general discretion to make regulations as it relates to when an EIA is required in order to give effect to the provisions of the **NRCA Act,** in totality.

[71] An argument may be entertained that theoretically, such a section granting the Minister the power generally when to require an EIA could potentially, at some point abrogate the discretion given to the NRCA under **section 10(1)(b**) to decide on when same is required for a permit. Notwithstanding such a theoretical, potential abrogation, that theory is not, to my mind, applicable in reality, based on the relevant legislative framework. The fact that the NRCA has a discretion under **section10(1)(b)** to determine when an EIA is required, under an application for a permit, cannot serve as an absolute bar to any powers of the Minister to make regulations requiring an EIA to be done, for any **other applications** under the NRCA Act. (The words of mine – 'other applications' are highlighted for emphasis, only.)

[72] Accordingly, there is no contradiction between **sections 10 and 38**. Though they reference EIAs, when examined closely, within their respective contexts, they are different and the court is not minded to add or remove words from the sections.

Role of regulation 5(3)

[73] Under the regime of applying for a licence connected to the discharge of effluents **under section 12 of the NRCA Act, regulation 5(3)** must be read in conjunction with **section 12**. That regulation provides the practical procedure which ought to be followed. These requirements include, an application as well as an EIA. **Section 12 of the NRCA Act** does not explicitly require an EIA, however, the regulations stipulate that same is a requirement where licences are being applied for in connection with the discharge of effluents under **section 12 of the NRCA Act.**

Whether regulation 5(3) is mandatory?

[74] The court, before examining **regulation 5(3),** must first consider whether the use of the word 'shall' as used in **regulation 5(3) of the NRCA Regulations** renders **regulation 5(3)** as being either mandatory or discretionary. This court accepts that the fact that the wording of the regulation states 'shall,' does not mean that **regulation 5(3)**, should be given a mandatory interpretation. Instead, per **Matthews v The State (op. cit)** in considering whether the section should be interpreted as mandatory or discretionary, the court will, in short order, consider the context, within which the word, 'shall' as used, is referenced. See paragraph 81 below.

Whether regulation 5(3) is ultra vires

[75] Counsel for the defendants have urged this court to conclude that **regulation 5(3)** which mandates an EIA, is ultra vires the primary provision of **section 10**. This court has concluded, that **section 10** does not grant a discretion to the NRCA on when an EIA should be required, in all cases. It has been submitted by learned counsel for the 3rd defendant that **regulation 5(3)** is ultra vires, because it mandates an EIA in all cases and therefore, goes beyond the authority given to the NRCA, even when there is no likelihood of there being any adverse effect on the environment.

[76] Duffus CJ in **Francis v The Kingston Pilotage Authority and Another (1969) 14 WIR 196** considered whether the Pilotage (Board) (Amendment) Regulations 1968 are ultra vires. At page 204, the following dictum of Lord Denning, in **Padfield v The Minister of Agriculture, Fisheries and Food [1968] 2 WLR 924** at page 928 is cited with approval:

> *'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.'*

[77] The court in that case, found that the regulations were counter to the policy and objects of the **Pilotage Law 1957** and having thwarted the policy and objects of that law, were ultra vires and void.

[78] In **Utah Construction & Engineering Pty Ltd and Another v Pataky [1965] 3 All ER 650,** the Privy Council considered the relationship between an Act and a Regulation. Under the relevant Act, the governor had power to make regulations not inconsistent with the Act, prescribing all matters which were authorised to be prescribed or necessary or convenient to be prescribed for giving effect to the Act. The regulation in question, mandated a provision which was not in the principal Act. It was held that the regulations were ultra vires, as the provision in question imposed an absolute duty which was not contemplated in the principal Act. At page 3, the following is noted:

> *'The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.'*

[79] For the purposes of this judgment, I think that it is fair to state that the lead counsel for the 3rd defendant, during his oral submissions to this court, relied fairly heavily

on the court's reasoning as expressed in the **Utah Construction case (op. cit)**. There is no doubt in my mind, that the court's reasoning and conclusion in the **Utah Construction case (op. cit)**, were sound. For present purposes though, what really matters is the extent to which, if at all, said reasoning can properly be applied or needs to be applied, within the particular case, which is now at hand.

[80] The question which must be then answered, is whether **regulation 5(3)**, mandating an EIA, is ultra vires any section of the **NRCA Act.** It is undoubted that in the totality of the provisions, both in the Act and Regulations, **regulation 5(3)** is the only provision which mandates an EIA, in all cases wherein, a licence connected to the discharge of effluent is contemplated.

Presumption of regularity/correctness

[81] The learned authors of **Halsbury's Laws of England/Statutes and Legislative Process (Volume 96 (2018)) at paragraph 758** note that:

> *'Unless the contrary intention appears, an enactment by implication imports the presumption of correctness, arising under the principle of legal policy expressed in the maxim omnia praesumuntur rite et solemniter esse acta (all things are presumed to be correctly and solemnly done).* ***By virtue of the presumption, words in an Act must be taken to be used correctly and exactly, and the onus on those who assert that they are used loosely or inexactly is a heavy one. The presumption requires it to be assumed, in the absence of evidence to the contrary, that an Act is properly passed, or delegated legislation correctly made.*** *The presumption also applies to the administration of legislation[5]; it must not be assumed that the powers conferred by an Act on the executive will be abused.'* *[Emphasis added]*

[82] There is a presumption that when one is interpreting legislation, be it primary or secondary, that same is in order. It is presumed that no part of it is ultra vires. This presumption, is rebuttable and will be taken by a court, as having been rebutted, where there is cogent evidence presented, that the statute in question is irregular.

The interaction between regulation 5(3) of the NRCA Regulations and the NRCA Act

[83] Contrary to what has been submitted, there is no inconsistency between **regulation 5(3) of the NRCA Regulations** and any section of the **NRCA Act**.

When there is a question of discharge of wastewater into the environment, the Minister must set out regulations governing that. That is so, because it is not going to be subjected to the discretion of the NRCA, since it was likely presumed by the legislators, that the discharge of wastewater into the environment, will likely result in there being a negative impact on the environment. In respect of that type of activity, an EIA is required.

[84] It should be noted that an environmental permit is almost always required, when any proposed work concerns a prescribed area in Jamaica. This may range from a small construction to a commercial development. In that light then, the NRCA has the discretion, based on its function to protect Jamaica's natural resources, to determine when, or if, an EIA is required, before it grants said permit. That discretion though does not apply to an application for a licence connected to the discharge of effluent(s) under **section 12 of the NRCA Act.** The legislative framework presumes a negative environmental impact associated with the discharge of effluent(s) and in that light, an EIA is required.

[85] It is for that reason, that **regulation 5(3)** is to be given a mandatory interpretation. Such interpretation accords with the objectives and purposes of the NRCA Act.

[86] **Section 43(2)** makes it clear that with respect to an application for a licence connected to **section 12**, that being a licence authorizing the proposed discharge of effluent(s), an applicant shall apply for a licence, in accordance with the regulations. There is no doubt that on the wording of **section 12(4) and 43(2) of the NRCA Act,** that where a licence connected to the discharge of effluent is concerned, such application ought undoubtedly to be made in accordance with **regulation 5 of the NRCA Regulations**. **Regulation 5(3)** mandates that an EIA is required, along with such an application, whenever that application is being made.

[87] From a detailed look at **sections 9, 10, 12, 38 and 43(2**) **of the NRCA Act**, and **regulation 5(3) of the NRCA Regulations,** there is no conflict in the **NRCA Act** concerning the circumstances wherein an EIA is required or may be required.

Regulation 5(3) of the NRCA Regulations, no doubt, acts ancillary to the provisions of the **NRCA Act** and operates to give legs to its provisions, surrounding an application for a licence connected to the discharge of effluent(s). Where permits are required, this as distinct from a licence, or a permit along with a licence and where that licence pertains to the proposed discharge of wastewater into any part of the environment.

EIA required

[88] In light of the reasoning above, the court notes that since the NHT's process, contemplated discharge of effluents into the environment, there needed to have been compliance with **regulation 5(3)** and an EIA submitted. Having not required same to be done, even though the NHT did all that was required of them, by the NRCA and even though the NRCA appears to have acted in good faith at all times, in having required what it did in fact require, the applicant (NHT) to do and moreover, even though the NRCA was of the considered view that the construction and operation of the wastewater treatment plant by the NHT was not likely to have any damaging effect on the environment, it matters nought, as to what the outcome of this claim, in this court's considered view, ought to now be. It matters nought, as to same, because in having failed to comply with the applicable legislative process, the NRCA erred in law, having granted to the NHT the licence which it did, for the operation of the wastewater treatment plant, without having required the NHT to submit an EIA which is a legal prerequisite, required to be met by the NHT, in a circumstance such as the one which is now under consideration by this court.

[89] The following dicta in the case of **The Jamaica Environment Trust v The Natural Resources Conservation Authority and The National Environment and Planning Agency** (unreported), Supreme Court, Jamaica, Claim No. 2010HCV5674, judgment delivered 13th October 2011 is helpful in understanding the role of an EIA:

> *'5.The environmental impact assessment (EIA) involves the process of identifying, predicting and evaluating potential environmental impacts of development proposals. The term describes a technique and a process by which information*

about the interaction between a proposed development project and the environment is collected, analysed, and interpreted to produce a report on potential impacts and to provide the basis for sound decision-making. The results of the study are taken into account by the Regulatory Authority in the determination of whether the proposed development should be allowed, and under what conditions.

6. The description continues by stating that the EIA is used to examine both beneficial and adverse environmental consequences of a proposed development project and should be viewed as an integral part of the project planning process. Findings of the study should be taken into account in project-design and recommendations implemented should the projects be approved.

A final definition is as follows:

'EIA is an assessment of the impact of a planned activity on the environment." (UN Economic Commission for Europe 1991)

7. The role of an EIA was discussed by my brother Sykes J in Northern Jamaica Conservation Association et al v NRCA and NEPA, Claim HCV3022/2005 (Pear Tree Bottom) pg. 4 – 12. He adopted the definition as summarized by counsel for the defendants in that case and stated that an EIA is a part of the information taken into account by the decision maker when deciding whether to grant permission to conduct any activity that might adversely affect the environment (See Belize Alliance of Conservation Non-Governmental Organization v The Development of the Environment and Belize Electricity Co. Ltd 2004 64 WIR 68).'

[90] An EIA is not just a document. It is far more than that. The obtaining of an EIA is a process. In the circumstances, though defence counsel has submitted that environmental factors were taken into account, that without more, cannot suffice as amounting to compliance, for this court to be satisfied that **regulation 5(3) of the NRCA Regulations** was complied with. An EIA requires detailed studies to be done. Also, that EIA could not have been done by an agent of the NRCA. The NRCA would have had to have engaged an outside contractor to provide that EIA. Additionally, by the NRCA's own written practice with respect to an EIA, public consultation would have been a prerequisite, for the proper conclusion of same.

[91] In the final analysis, there has not been compliance with **regulation 5(3) of the NRCA Regulations**, which mandates an EIA where there is contemplated, some discharge of effluents into Jamaica's environment, be it sea, on the ground or underground. That is because whenever the discharge of effluent(s) into any part of Jamaica's environment is contemplated, in terms of the operation of a wastewater treatment plant, an EIA is, by law, required to be done, in order for the licences for same to be done, to lawfully be granted by the NRCA.

Public consultation

[92] The claimant contends that public consultation should have been engaged in prior to the licences having been granted to the NHT. According to the claimant's counsel, it was made clear in the **Jamaica Conservation Association et al v NRCA and NEPA, Claim HCV3022/2005 (Pear Tree Bottom Case)** that it is an important part of natural justice. Counsel for the defendants noted in response, that such consultation would only have been necessary if an EIA was required to have been done, as was so, in the **'Pear Tree Bottom case**,' and since in their opinion, an EIA was not required, this ground cannot succeed. Further the 1st and 2nd defendant noted that **section 9(5) of the NRCA Act** provides for inter-agency consultation and accordingly, the claimant could not, have a legitimate expectation for public consultation.

[93] In the **Pear Tree Bottom Case (op.cit)** Sykes J (as he then was) noted as follows at paragraph 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 a permit is being considered.'*

[94] For reiteration **section 9(5) of the NRCA Act** provides that:

> *(5) in considering an application made under subsection (3) the Authority—*
>
> *(a) shall consult with any agency or department of Government exercising functions in connection with the environment; and*
>
> *(b) 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 resources in the area concerned,*
>
> *and the Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources.'*

[95] The court agrees in part with the counsel for the defendants. There is no explicit requirement for public consultation. In the **NRCA Act**, it is noted that consultation

is a part of the EIA process. It is, in fact, an important part of that process. The court having determined that same was to have been done, then the requirement for public consultation would form a part of that. It is to be noted however that independently of an EIA, there is no provision in the **NRCA Act**, which mandates public consultation where a permit or licences are being applied for. It is not to be treated as a right arising from any provisions under the NRCA. This implicitly falls within the scope of an EIA. With there not having been an EIA done, in respect of the construction and operation of the wastewater treatment plant, the NRCA erred in law, as they acted outside of the scope of their statutory jurisdiction. In other words, the NRCA acted illegally in having granted to the NHT the licence which was granted to it, to enable the operation of the wastewater treatment plant, which is intended to result in the discharge of effluent(s) into the ground, primarily, or in other words, into the environment.

[96] In the final analysis, the NRCA and TCPA are guided by the respective legislative provisions. There is no provision in the **NRCA Act** or **TCPA Act** which stipulates a general obligation to consult with members of the community in the absence of an EIA.

[97] Additionally, no breach of fairness applies, in the circumstances wherein there has been a failure of a party who/which is intent on carrying out particular work, or fail to carry out an EIA, in circumstances wherein the relevant statutory provisions do not require same to be done. In such a circumstance therefore, this court will not and should not fill in that, which does not exist in the relevant legislation. To do so, in a circumstance such as that, would be for the court to legislate, rather than adjudicate according to the law. Whilst it is known and accepted by this court that at times, it will be appropriate for courts to fill in legislative gaps which cause unfairness, to the extent of enabling the applicable statutory provisions to be applied fairly, this is not necessary, based on the particular circumstances of this particular case. Each case though, must of necessity, be considered on its own merits, in that regard.

Marine Outfall

[98] The claimant contends that the 3rd defendant having applied for a marine outfall in the application, needed to have complied with **regulation 23 of the NRCA Regulations,** which is automatically triggered by virtue of they having ticked that option on the application. Counsel for the 1st and 2nd defendants noted that the claimant did not raise this point when leave to apply for judicial review was being sought and subsequently granted and accordingly, she cannot now rely on same at the hearing for judicial review. In the alternative she submits that there is no evidence that there is any application to relax any effluent. It is contended that there will be no direct discharge to the marine environment and that, as such, there is no real question of a marine outfall. Thus, even though same was ticked on the application, what is meant is that the treated sewage, may end up into the sea, in the event of an act of God. Counsel for the 3rd defendant contended that **regulation 23** should not be considered, because there is no pipe as the regulation contemplates.

Leave to apply for judicial review

[99] **Civil Procedure Rule 56.3 (1)** has established that: A person wishing to apply for judicial review must first obtain leave. **Rule 56.3(3)(c)** provides that the application must state the grounds on which the relief is sought.

[100] The claimant has sought a declaration that:

> *'A declaration that the 1st defendant acted illegally or in the alternative irrationally in granting a permit to the NHT for relaxing the standards for the Discharge of Sewage Effluent without requesting that the application for the permit be accompanied by: (1) a model of the plume behaviour of the effluent in the coastal and marine environment; (2) the data, studies and calculations that show that the proposed outfall will allow for effluent quality which is still acceptable and will not affect the marine environment beyond the levels already established for the ambient water quality; (3) the data and studies to show the effect of the effluent on the flora and fauna of the marine environment, within the sphere of influence of the abovementioned plume; (4) a drawing of the route of the marine outfall pipe and the construction material and bio-physical survey of the route of the pipe, including the method of laying the pipeline and the floor of sea stabilisation method; and (5) Bathymetry of the seafloor along the alignment of the pipeline, in accordance with regulation 23 of the NRCA Regulations.'*

[101] This order was not mentioned at the stage when leave to apply for judicial review was being sought, nor was evidence led on affidavit in respect to it. It then follows that the order as sought and the evidence led by the claimant, purportedly in support of that order, are new. Can the court then properly address that order, given that no leave was granted, permitting the claimant to pursue that relief, upon her present application?

[102] In **John Reginald Mais v Administrator-General of Jamaica [2019] JMSC CIV 40,** the court dealt with the issue as to whether an amendment of a fixed date claim form could be granted to add a new ground for judicial review.

[103] At paragraph 54 the court specified as follows:

> *'Accordingly, in seeking leave to apply for Judicial Review the pre-requisite requirement is that the grounds on which the proposed claim is based and evidence presented before the Court must disclose that there is an arguable case with a realistic prospect of success. In the present case, however, there is an over-arching issue which surrounds the request for the amendment of the Fixed Date Claim, which is the initiating document that is filed after the application seeking leave for Judicial Review has been granted. That over-arching issue, is as to whether or not the claim that was originally filed, pursuant to the grant of leave order which was earlier made, ought to be permitted to be amended so as, to now add new grounds, in order to properly reflect what has occurred since leave was granted and thus, the amendments, if permitted by this Court, would thereafter constitute the entirely new grounds on which this claim would thereafter be based.'*

[104] Further at paragraph 71, the court specified the following:

> *'Even though it is my belief and well established, that the matter of placing form over substance, when dealing with matters is no longer a good practice and that where there exists grounds and evidence capable of grounding Judicial Review, the request should be granted; the circumstances surrounding the matter at hand having been changed, it would only make sense to apply for leave in a time-sensitive manner, regarding the second decision, given the requirements that have to be met. Leave would need to be obtained and the new grounds that must be incorporated in order of the Court to consider if there is an arguable case with a realistic prospect of success for leave to be granted. This would not be a matter of placing form over substance, but rather, would be a matter of recognizing that these procedural matters are of a substantive nature. '*

[105] I am of the view that the above quotation is a correct reflection of the state of the law concerning the need to seek judicial review in respect of all grounds. The claimant having not sought judicial review in respect of the applicability of

regulations 23 and 24, cannot now lead evidence of same at trial. Further if the court were to allow applicants who have sought and been granted leave to apply for judicial review to advance a new ground, or new grounds, that could operate to make the rules requiring leave and the grounds for leave to apply for judicial review to be sought, a nullity. That interpretation given to **Rule 56.3**, best accords with the interest of applying the rules meaningfully.

[106] In the final analysis, the claimant needed to have sought leave to apply for judicial review in respect of Order 2. In the event that I may be wrong however, on my interpretation of **Rule 56.3**, I will now go on to address that order and the evidence and arguments led in support of and opposition to, same.

[107] The court agrees with counsel the claimant that once marine outfall is contemplated, **regulations 23 and 24** must be complied with. Those regulations have a mandatory effect and cannot be escaped. There is no doubt that **regulation 23(2)**, requiring specific information, has not been complied with by the NHT.

[108] The question which must then be answered and which cannot be presumed, is whether notwithstanding the NHT's application, will they be engaged in any marine outfall, so as to cause **regulations 23 and 24 of the NRCA Regulations** to come into play?

[109] **Regulation 2** defines, 'outfall' as follows:

> *'outfall" means any appurtenance or structure, intended for the ultimate discharge of sewage, trade effluent or domestic wastewater from a treatment plant.'*

[110] It is imperative that the court first satisfy itself that NHT's disposal of effluent constitutes marine outfall within the context of the regulations. This, in circumstances where there is intended to be three absorption manholes, into which the treated sewage, is expected to be discharged and it is alleged that it will only be, in the event of an act of God, such as a hurricane or tropical storm, that the said, treated effluent, mixed with storm water from that hurricane/tropical storm, may then, go into the sea.

[111] The literal interpretation of the words used in **regulations 2 and 23 of the NRCA Regulations** are clear. From the NHT's proposed plan, there is no intention for the ultimate discharge to be, into the sea. Though one may reason that ultimately, in the case of an act of God, effluent may go into the sea, that interpretation will be a strained one and is not within the contemplation of the existing statutory framework. The overflow drain by the NHT is not intended to be the ultimate discharge, but at most, incidental. Intended, incidental discharge, is not to be equated with intended, ultimate discharge. Accordingly, the NHT's wastewater treatment plant project, does not, to my mind, contemplate a marine outfall.

[112] In the circumstances therefore, the NHT did not breach **regulation 23 of the NRCA Regulations.** The fact that the NHT had apparently, at one stage, mistakenly believed that they needed to have applied for beach licence arising from a marine outfall, does not serve to change what is the law as regards a marine outfall. The term – 'outfall' has been defined in **regulation 2**. Based on that definition, the NHT has not, by virtue of its construction and intended operation of the relevant wastewater treatment plant, constructed, nor do they have the intention to operate a 'marine outfall.'

[113] Equally, to my mind, the fact that the NHT, has applied for a beach control licence, in accordance with **regulation 24** and also obtained same does not change the legal fact, that **regulations 23 and 24 of NRCA Regulations** have no applicability to the construction and/or operation of the relevant wastewater treatment plant. Even if I am wrong about that though, I agree with the submission made by the respective defence counsel for the parties, that there has been no '*request made by the NHT to the NRCA to have effluent limits relaxed*.' As such, the declaratory relief as sought in the claimant's fixed date claim form in paragraph 2 cannot properly be and ought not to be and ultimately will not, be granted.

Illegality or irrationality

NRCA

[114] From the analysis above, **regulation 5(3) of the NRCA Regulations** does apply to the matter at hand. Consequently, to my mind, the NRCA acted unlawfully, in having granted to the NHT, licences to discharge effluent, via the operation of the relevant sewage plant, without having required the NHT to have, conducted an EIA as a prerequisite. The court however, is not persuaded that the NRCA acted irrationally, as there is no evidence to suggest that the decision to grant any permit or licences that are now in dispute, such that no reasonable tribunal properly directing itself, could have arrived at such a decision. The challenge to the NRCA though, which they have been unable to overcome is that they acted illegally in having granted to the 3rd defendant, a licence to operate a wastewater treatment plant which will result in the discharge of effluents, without having required the NHT to submit an EIA. As earlier stated, that is an issue of illegality and the same is distinguished from irrationality.

Affected licence(s) and/or permit

[115] The claimant avers that the licences and permit granted, should all be quashed. In relation to the environmental permit specially, the claimant avers that the permit and the licences operate in tandem and as such, if one is successfully challenged then all should be quashed. Further the claimant avers that the licences being granted before the environmental permission, points to the fact that 1st and 2nd defendants acted unlawfully.

[116] The defendants contend that the **NRCA Act** stipulates the specified provisions wherewith each licence or permit should be considered. In that light, if one licence is successfully challenged, that does not automatically result in the other licences, or the permit, which were granted, being successfully challenged.

[117] Further, counsel for the 1st and 2nd defendants has submitted, in the alternative, that if the court determines that an EIA was to have been submitted, with same having not been submitted in accordance with **regulation 5 of the NRCA Regulations,** then the only licence which should be successfully challenged is the licence to operate the wastewater treatment plant. She contends that the licences

to operate a wastewater treatment plant, construct a wastewater treatment plant and to discharge effluents are covered under **regulations 5, 6 and 7 of the NRCA Regulations**, respectively. As such, according to her, under **regulation 5 of the NRCA Regulations,** the only successfully challenged licence ought to be the licence to operate a wastewater treatment plant, in light of this court's conclusion, that **regulation 5 (3) of the NRCA Regulations**, has not been complied with.

[118] In keeping with the court's conclusion above, any licence issued in contravention of **regulation 5 of the NRCA Regulations,** ought to be quashed. To determine what is/are such licence(s), it is useful at this juncture to state the wording of **regulations 5, 6 and 7 of the NRCA Regulations**.

5.

(1) 'Subject to paragraph (2) a person who intends to operate a treatment plant for the discharge of trade effluents or sewage effluent shall apply to the Authority for a licence in the form set out as Form 1 in the First Schedule.

(2). A licence shall not be required to-

a. the discharge or entry of trade effluents or sewage results from domestic wastewater treated by-

i. Means of absorption or soak away pits; or

ii. Other prescribed waste disposal system, and

b. it is in accordance with such provisions as may be prescribed under these Regulations or any other law pertaining to such disposal.

(3) An application made pursuant to this regulation, shall be accompanied by-

a. An application fee prescribed

b. where applicable a compliance plan for approval by the Authority

c. an environmental impact assessment; and

d. any other documents requested by the Authority for the purpose of evaluating the application.'

6.

1. Any person who intends to construct a sewage wastewater treatment plant shall apply to the authority for a licence so to do.

2. An application made pursuant to paragraph 1, shall be

a. In the form set out as Form 1 in the first schedule

b. accompanied by a plan in respect of the management and operation of the plant

c. accompanied by the application fee prescribed

d. accompanied by any other documents requested by the authority for the purpose of evaluating the application.

3. The authority may issue a licence to construct sewage waste water treatment plant if the requirements under paragraph 2 are adhered to.

4. Any person who constructs a treatment plant except under and in accordance with a licence issued under this regulation commits an offence

7.

1. A person whose business, industry, manufacturing or trade operations, involve the discharge of trade effluent or sewage effluent, or both, as the case may be, from a treatment plant into the environment, shall apply to the authority for a licence to discharge such effluent into the environment.

2. An application for a licence under paragraph (1) shall be in form set out as Form 1 in the First Schedule.

3.No application shall be processed prior to the payment of the full amount of the prescribed application fee.

4. Where the authority issues a licence under this regulation, the discharge of trade effluent, sewage effluents or both shall be in accordance with the terms and condition of the licence granted by the authority.

5. The point of discharge of trade effluent, sewage effluent or both shall be clearly identified in accordance with the second schedule at the site, as a warning to the public

6. Any person referred to in paragraph (1) whose operation discharged trade effluent, sewage effluent or both into the environment except under and in accordance with a licence issued under this regulation commits an offence.'

Licence to operate wastewater treatment plant for the discharge of effluent

[119] There is a distinction between **regulation 5 and 7 of the NRCA Regulations. Regulation 7 of the NRCA Regulations** does not apply to this case, because the NHT is not involved in the business, manufacture or trade operation for the discharge of sewage effluent. Instead, **regulation 5 of the NRCA Regulations** is the fitting regulation for a situation such as this, that is, the NHT intended to operate

a treatment plant for the discharge of effluent with respect to its development of houses in Industry Cove, Hanover. Accordingly, the licence issued to operate a wastewater treatment plant for the discharge of sewage effluent is in breach of **regulation 5 of the NRCA Regulations**, which is mandatory and therefore the licence to operate e a wastewater treatment plant ((2017-09017- EL00021B) and the licence to discharge sewage effluent into the environment (2017-09017-EL00021C) must both be quashed.

Licence to construct a wastewater treatment plant

[120] It is recognized by the legislators that there is a difference between operating a treatment plant for the discharge of sewage effluent and someone who is applying to construct a wastewater treatment plant which is not going to involve the discharge of effluent. If one intends to construct a sewage/wastewater treatment plant which is deigned to discharge effluent, then such type of sewage plant, will require a licence for the discharge of the effluent. One may therefore construct a treatment plant which can serve for other purposes than for the discharge of effluent into the environment. In this light, an EIA is not, of necessity required.

[121] In order to be able to stand consistently with **regulation 5 of the NRCA Regulations** though and have a logical application, to my mind **regulation 6 of the NRCA Regulations** should read as follows: 'A*ny person who intends to construct a treatment plant, for any purpose other than the discharge of effluents, shall*….'

[122] It then begs the question: To what extent can the court add words into, or remove words from a statute? Learned editors of the **Cross text (op. cit)**, have noted the following, at page 99:

> *'The power to add to, alter, or ignore statutory words is an extremely limited one. Generally speaking, it can only be exercised where there has been a demonstrable mistake on the part of the drafter or where the consequences of applying words to their ordinary meaning, or discernable secondary meaning would be utterly unreasonable. Even then the mistake may be thought to be being correction by the court, or the tenor of the statute may be as such as to preclude the addition of words to avoid an unreasonable result. '*

[123] In **Federal Steam Navigation Co Ltd and another v Department of Trade and Industry [1974] 2 All ER 97,** a decision of the House of Lords, Lord Reid stated at page 100 as follows:

> *'There is a multitude of cases where courts have considered whether it is proper to substitute one word for another, and in particular whether it is proper to substitute 'and' for 'or' or vice versa. There may be some difference between commercial or informal writings, on the one hand, and deeds and statutes on the other hand. One is entitled to expect greater skill in drafting deeds and statutes. A great number of different words have been used in stating the criteria, and I do not think that it would be useful or indeed possible to examine them all.*
>
> *Cases where it has properly been held that a word can be struck out of a deed or statute and another substituted can as far as I am aware be grouped under three heads: where without such substitution the provision is unintelligible or absurd or totally unreasonable; where it is unworkable; and where it is totally irreconcilable with the plain intention shewn by the rest of the deed or statute. I do not say that in all such cases it is proper to strike out a word and substitute another. What I do say is that I cannot discover or recall any case outside these three classes where such substitution would be permissible.'*

[124] **Regulation 6 of the NRCA Regulations,** only makes sense if it applies in circumstances wherein the construction of the relevant wastewater treatment plant is not intended to discharge sewage effluent. If it is intended to discharge effluent, then under **regulation 5 of the NRCA Regulations,** it is not only the operation of that sewage treatment plant but also the construction of that plant, which should meet the requirement of an EIA being done as stipulated in **regulation 5 of the NRCA Regulations**. Otherwise, persons desirous of operating a treatment plant which will result in a discharge of effluent into the environment will be allowed to get a licence to construct said treatment plant for that purpose without the need for an EIA, and then at a later stage, after an EIA is obtained, and the results of that EIA are determined and considered carefully by the relevant authority i.e., the NRCA, it must be open to the NRCA to conclude that the relevant licence shall not be granted. What then would the point of enabling a person to construct a wastewater treatment plant which is intended to discharge effluent into the environment, if it is not by any means certain, or closely certain, that a licence to operate such treatment plant and to discharge effluent will be granted? A great deal, must of necessity, depend on the outcome of the EIA.

[125] For present purposes though, the court thinks that if any change(s) in that regard are to be made in the regulations, the same should be made by the relevant government Minister who is tasked with the making of said regulations, pursuant to **section 38(1)(b) of the NRCA Act.** Hopefully, such change(s), will promptly, hereafter, be made.

Environmental permit

[126] The claimant contends that the environmental permit having been granted without an EIA, renders that permit subject to being quashed. She also contends that, in the absence of an EIA, no determination could lawfully have been made by the NRCA, that the activities with respect to which, the environmental permit relates, would not be injurious to the environment, per **section 9(5) of the NRCA Act.**

[127] A careful reading of **section 9(4) of the NRCA Act,** reveals that where a proposed activity requires an environmental permit and licence for the discharge of effluent under **section12**, both sections ought to be read together. If then, the licence to operate a wastewater treatment for the discharge of effluent is successfully challenged, it follows that, any permit granted under **section 9 of the NRCA Act** is successfully challenged. That is so, because **sections 9 and 12 of the NRCA Act**, have to be read together. This is so, because the proposed construction of the housing scheme involved the discharge of effluents.

[128] To my mind, given that two of the licences, granted under **section 12** have been successfully challenged by the claimant, then, it follows that the permit granted under **section 9,** cannot stand.

Costs

[129] CPR 56.15 (4) and (5) stipulate that:

> *(4) 'The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*

(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

(Part 64 deals with the court's general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders.)'

[130] **Part 64 of the CPR** outlines the general rules concerning costs orders. **Rule 64.6 (3) 64.6 (4) (b) and (d)** read as follows:

(3)' In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(4) In particular it must have regard to –

a. …

b. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

c..

d. whether it was reasonable for a party - (i) to pursue a particular allegation; and/or (ii) to raise a particular issue;'

[131] At the onset of this claim, the claimant pursued substantially, five (5) orders. Of those orders, based on the court's analysis above, she has been successful in a part of that claim. She has been successful in obtaining three of the five orders sought. In that light, she will be entitled to recover three-fifths (60%) of the costs of her claim against the 1st defendant.

[132] The claimant has obtained no relief as against the TCPA, as that authority granted none of the licences or the permit, which have been challenged in this claim. Accordingly, the court should next consider whether the claimant acted reasonably or unreasonably in bringing the claim against them. I am of the view that the claimant acted unreasonably, within the context of the factual substratum of the present claim, in having brought this claim against the TCPA. That is so, because the claimant never had, at any stage, any evidentiary basis upon which she could have understandably, via her attorneys, reasonably concluded that any permission to sub-divide the relevant land and construct the sxty-three (63) houses on that

land, had ever been granted to the NHT, by the TCPA. As such, the 2nd defendant shall receive its costs against the claimant and such costs shall be taxed, if not sooner agreed.

[133] By consent of the parties on November 20, 2021, my sister judge, then acting - Henry-McKenzie J (Ag.) had made an order that the NHT is joined as a defendant in this matter, as a party that is directly affected. To my mind though, in the particular context of this particular claim, it would have been preferable, if the NHT had been joined in this claim by order of the court, or at the instance of the claimant, as an interested party. This is as distinct from a defendant. That is so, to my mind, because it is not, in reality, the body that has made any statutory determination which has been challenged in this claim. According to the claim as filed, the statutory determinations which were allegedly made, and being challenged, were made by the NRCA and the TCPA.

[134] Leave to apply for judicial review against the NHT within the context of the substratum of the present claim, was never granted by the court. Even though no order(s) has/have been made against the NHT, within the context of this claim, I am unable to properly conclude that the claimant acted unreasonably in having brought this claim against them, as a named defendant. That is so though, to be clear, only because, it was the parties themselves, who had consented to the making of the order, that the NHT be joined as a party to this claim, this as distinct from an interested party. Accordingly, in the circumstances, no costs order will be made, against the NHT.

Whether two separate licences - one to operate a wastewater treatment plant for the purpose of discharging effluents and for the discharge of effluent(s) are legally required

[135] There does not need to be a separate licence for the discharge of effluents. **Regulation 5 of the NRCA Regulations** speaks to the intended operation of a treatment plant for the discharge of sewage or trade effluent. It then follows that if one gets the licence to operate a treatment plant for the discharge of effluent(s),

one would not need a separate licence for the actual discharge of effluent. This is so because it is presumed that if one has obtained a licence to operate a sewage treatment plant for the purpose of the discharge of sewage effluent, then sewage effluent will be discharged, once the plant is operated. There does not need to be a separate licence, either applied for, or granted, for the discharge of effluent(s), in circumstances wherein a licence to operate a treatment plant for the discharge of effluent(s) has been. **The NRCA** therefore should discontinue its practice of requiring a licence either applied for, or granted, to operate a sewage plant that is intended to be operated so as to discharge effluents as well as a separate licence to discharge effluent(s). The latter-mentioned is superfluous, in the context of the applicable law.

CONCLUSION AND THE WAY FORWARD

[136] The NRCA acted illegally when it approved the environmental licences to operate a wastewater treatment plant, for the discharge of effluent(s) and to discharge effluent(s) in contravention of **regulation 5(3) of the NRCA Regulations** which is mandatory and consistent with the relevant sections of the **NRCA Act**, and it furthers the object and policy of the **NRCA Act.** In the circumstances, both licences contemplated under **regulation 5**, that is, to operate a wastewater treatment plant, shall be quashed and to discharge effluent, shall also be quashed. Following those two pertinent licences being quashed, the environmental permit granted for the subdivision of land and construction of the sixty-three houses, will also be quashed.

[137] As things now stand therefore, in respect of the relevant housing development, an EIA will need to be conducted, at the expense of the NHT, using an independent and competent party to carry out same, if the relevant sewage treatment plant as designed and which is intended to be constructed and operated, in order to dispose of the sewage which is expected to be generated, arising from the occupation of that housing development, is in fact to be used as the NHT wishes to. It is only if that EIA serves to justify the use of same in its present form, or suggest

modifications to same, which are thereafter complied with, by the NHT, that the operation of that sewage treatment plant, can properly be allowed by the NRCA, to take effect and therefore be licensed by them.

[138] If that licence is properly granted, then, but only then, can the relevant environmental permit for the subdivision and construction of housing projects of fifty-one or more houses, also, albeit, with retrospective effect, properly be granted.

DISPOSITION

[139] In the circumstances this court's orders are as follows:

1. The 1st defendant acted illegally in not requiring the NHT to submit an environmental impact assessment (EIA), with its applications for licences to operate wastewater treatment plant and discharge sewage effluents in accordance with **regulation 5(3)(c) of the Natural Resources Conservation (Wastewater and Sludge) Regulations.**

2. Environmental licence to operate a wastewater treatment plant for the discharge of sewage effluent (2017-09017- EL00021B), is brought into this court and quashed.

3. Environmental licence to permit the discharge of sewage effluent (2017-09017- EL00021C), is brought into this court and quashed.

4. Environmental permit for subdivision and construction of housing projects of fifty-one or more houses (2017-09017 - EP00086), is brought into this court, and quashed.

5. The NRCA shall reconsider the quashed licences and permit and shall act in accordance with this judgment in assessing each of same.

6. The claimant is awarded three-fifths (60%) of the costs of this claim, against the 1st defendant and such costs shall be taxed, if not sooner agreed.

7. The 2nd defendant is awarded the costs of this claim against the claimant and such costs shall be taxed, if not sooner agreed.

8. Liberty to apply is granted to the claimant, 1st defendant and 3rd defendant.

9. No costs order is made against the NHT.

10. The claimant shall file and serve this order.

.....

Hon. K. Anderson, J