JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO.2007 HCV 01554

BETWEEN	**DELAPENHA FUNERAL HOME LIMITED**	**APPLICANT**
AND	**THE MINISTER OF LOCAL GOVERNMENT AND ENVIRONMENT**	**RESPONDENT**

Mrs. Jacqueline Samuels –Brown and Miss Khadrea Ffolkes instructed by Mrs. Tameika Jordan for the Applicant.

Miss Julie Thompson and Miss Danielle Archer instructed by the Director of State Proceedings for the Respondent.

Heard: 12th, 13th December 2007 and June 13 2008.

MANGATAL J:

1. In the well-known House of Lords decision **Donoghue v. Stephenson**[1932] 1 A.C. 562, in relation to the Law of Negligence, Lord Atkin at page 580 of the judgment posed the fundamental question "Who, then, in law is my neighbour?". The present application is for judicial review and involves the environment. One could reasonably enquire, what then, in law is the environment? The authors of **Ball and Bell, on Environmental Law, Stuart Bell,** 4th Edition, page 4 provide an interesting answer to that question:

> *This is a difficult word to define. Its normal meaning relates to "surroundings", but obviously that is a concept that is relative*

to whatever object it is which is surrounded. Used in that sense, environmental law could include virtually anything: indeed, as Einstein once remarked, "The environment is everything that isn't me." However, 'the environment' has now taken on a rather more specific meaning, though still a very vague and general one, and may be treated as covering the physical surroundings that are common to all of us, including air, space, waters, land, plants and wildlife.

The present case involves the environment in the form of water resources in Hanover.

2. The Applicant/Claimant Delapenha Funeral Home Limited, "the Company" is a company incorporated under the Laws of Jamaica and has registered offices at 45 Union Street, Montego Bay in the Parish of Saint James.

3. The Company's main business is the provision of funerary services, inclusive of burial of deceased persons. It services the needs of residents in the Western Region of Jamaica, particularly those in St. James, Westmoreland, Hanover and Trelawny.

4. The present application is an application for judicial review of the decision of the Minister who then held portfolio responsibility for the Environment, Minister of Local Government and Environment , the Honourable Dean Peart. This decision was made on the 18th day of July 2006, and was published by way of a Notice in the Daily Gleaner of Saturday July 22, 2006. By virtue of this decision the Minister ordered the cessation of the Company's development of a cemetery at Lot 48 Burnt Ground in the Parish of Hanover, until a full Environmental Impact Assessment "E.I.A." had been conducted at the development site.

5. According to the E.I.A. done by Environmental Management Consultants (Caribbean) Limited "EMC²" in June 2007, "the traditional fear of ghosts does not exist and was not found to be one of the concerns in objecting to the development." It was instead the fear of water

contamination that prompted objections to this development. It is necessary to examine the background to the application.

This judgment is lengthy and so I have provided an Index on the last page which I trust will prove useful.

Background

6. The Company purchased property at Lot 48 Burnt Ground in the Parish of Hanover at a cost of $1,500,000.00 for their proposed plans of providing additional burial facilities for the western region of Jamaica. On the 5th of October, 2004, the Company applied to the Natural Resources Conservation Authority "N.R.C.A." for permission to establish a cemetery at Lot 48 Burnt Ground.

7. While the Company was awaiting the required approval from the N.R.C.A., the owners of Lot 47 Burnt Ground, which adjoined Lot 48, offered their property for sale to the Company. The Company decided to purchase Lot 47 with the intention of using it as an entrance to the cemetery and to build on it a chapel and administrative offices, with parking facilities. Lot 47 was purchased at a price of $1,400,000.00.

8. On February 15 2005 the Company was granted a permit by the N.R.C.A. to undertake the development of a cemetery and burial facilities at Lot 48 Burnt Ground. The permission was granted by the N.R.C.A. after consultation with the Water Resources Authority "W.R.A.", the Environmental Health Unit "EHU" of the Ministry of Health and the Hanover Health Department.

9. The permit indicated that although the entire property was 3.28 hectares, only 2.43 hectares will be developed into burial facilities inclusive of a non-denominational chapel, banquet hall, office, commissary and a parking lot. In the body of the description of the permitted activity, the permit continues:

There will be approximately 100 vaults/ 0.2 hectares giving a total of 1,215 vaults. All vaults will be constructed with strip footing below the wall system. Five eighths (5/8) rebars will be used for reinforcement. The finished vaults will be covered with 6 prefabricatedtiles (16" by 35" by 2 / 12" thick). Constructed vaults will then be covered with at least 24" of top soil and landscaped until ready to be used. Once vaults are reopened they are coated with whitewash. ...

10. The permit also had the following terms and conditions:

It is an implied condition of every permit that based on the information presented in the Project Information Form, the Application Form and where applicable, the Environmental Impact Assessment, and any adjustments made thereto, that the Authority is of the view that the activity subject to all the conditions stipulated in this permit is not likely to be injurious to public health or the environment....

The Permittee hereby undertakes to comply with the following terms and conditions:-

General Conditions....

4. The Authority reserves the right to alter, amend or introduce new conditions to this Permit at any time.

5. The Authority may in its sole discretion revoke or suspend this permit if it is satisfied that a breach of any term or condition, implied or express, subject

to which this permit has been granted has been committed.

6. The Permit is granted subject to any existing legal rights of third parties.

7. This permit does not dispense with the Permittee's obligations under any other law, nor does it authorize a contravention of any statute, regulations, the common law or breach of any agreement.

8. The Authority reserves the right to review this permit periodically and may initiate administrative and/or judicial action for any violation of any condition by the Permittee, its customers or guests, its agents, employees, servants, contractors or assignees.

.....

Specific Conditions

...2. Vaults shall be constructed from concrete blocks, steel bars and shall be completely scaled at the base with a minimum of 4 inches thick concrete for effective containment.

...10. The Permittee shall submit to the Authority on a quarterly basis a status report during the construction phase of the facility. This report shall cover, but not be limited to, burial facilities construction and dust control.

11. The Permittee shall submit to the Authority on a half yearly basis a status report on the operational phase of the facility. This report shall cover, but not be limited to, the status of burial and site facilities as well as dust control.

12. The Permittee shall notify NEPA in writing of:
a) the date of commencement of construction of the facility; and
b) the date when the facility will be commissioned at least two (2) weeks prior to construction and commissioning.

11. Having obtained the permit from the N.R.C.A., the Company applied to the National Works Agency " N.W.A." in March 2005, for their approval of the proposed entranceway to the property at Lot 47 Burnt Ground.

12. The Company also submitted an application to the Hanover Parish Council in April 2005 for the approval of building plans relating to Lot 47 Burnt Ground.

13. Approvals were granted by both the N.W.A. and the Parish Council.

14. In her Affidavit in Support of the Application for Judicial Review sworn to on the 18th September 2006, Mrs. Marcia Delapenha, a Director of the Company, states that it has followed all of the appropriate and required procedural steps in applying for the N.R.C.A. permit and N.W.A. and Parish Council approvals. She also states that the Company has diligently followed all of the guidelines set out in the permits and approvals.

15. By letter dated April 19, 2005 the Hanover Parish Council informed the Company that it had received an objection to the proposed development of Lot 47 Burnt Ground. The objection was made by one Mr. Ambleton Wray in his capacity as President of the Ramble Community Development Committee. "R.C.D.C."

16. Meetings were held between representatives of the Company, in particular Mrs. Delapenha's son Dale, who is a Chairman and Director of the Company, Church Representatives, and members of the Ramble community.

17. According to Mr. Delapenha in his Affidavit sworn to on the 18th day of September 2006, at the meeting he clarified several misconceptions that were held by the residents of the community. For example, he says that the residents were of the belief that the Company was going to establish a funeral home at the Burnt Ground site whereas it was a cemetery that was to be developed.

18. Having considered the Company's application for permission, the Hanover Parish Council by resolution passed May 11, 2005 granted approval for the construction of a commercial unit (the chapel and administrative offices) on lot 47.

19. There has notwithstanding been a very public show of opposition to the Company's development of the cemetery in Burnt Ground. According to Mr. Delapenha, the residents of the area have clamoured for an EIA to be done at the Government's expense, despite the fact that the W.R.A. conducted a detailed assessment of the area and found that the cemetery posed no threat whatsoever to the area's water resources.

20. Mrs. Delapenha states that some time between June and July 2005, in response to objections from members of the Ramble community, the Minister visited the site of the development, along with a delegation of environmental experts and other scientific experts from the National Environment and Planning Agency "N.E.P.A."

21. On the 27th October, 2005, the Supreme Court of Judicature of Jamaica heard an application brought by Mr. Ambleton Wray on behalf of the Ramble Community Development Committee for leave to apply for judicial review of the decision of the N.R.C.A. granting the permit to the Funeral Home for the development of the cemetery on Lot 48 Burnt Ground. The application was dismissed.

22. Mrs. Delapenha states that there have been several news reports and other media programmes relating to the company's development of the cemetery at Burnt Ground and she exhibits some of these reports to her Affidavit.

23. Additionally one Mr. Basil Young has bored holes on land adjoining the company's properties, which Mr. Young has claimed has been done in pursuance of further environmental studies which he has been doing as a geologist working for the Government.

24. Letters were written to the Minister of Land and Environment by the Company's Attorneys-at-Law to which there has allegedly been no response.

25. In May 2006 Mr. Dale Delapenha had a meeting at the offices of N.E.P.A. According to Mr. Delapenha at that time it was confirmed that amongst other things:

> N.E.P.A. did not see the need for the commissioning of an Environmental Impact Assessment "E.I.A.", nor was N.E.P.A. aware of such an E.I.A. being commissioned.

25A. Subsequent to the granting of the N.R.C.A. permit which included a report from the WRA, representatives of the WRA carried out a more detailed follow-up assessment which showed that the water table in Burnt Ground was not in any way at risk, as a result of the Company's development of the cemetery in the area.

26. Despite the results of the second WRA study, objections to the development continued. The Company had not been and has not been given any indication whatsoever from N.E.P.A. that there were any concerns as to its compliance with the permit, nor that there were any detrimental environmental matters which N.E.P.A. deemed were linked to the Company's construction of the cemetery at Burnt Ground.

27. Mrs. Delapenha states that whilst there was much coverage of objections in the media, and political activists held meetings in and around the community alleging that the cemetery was not safe, the Company began to hear rumours that an EIA was to be carried out and on June 13 2006 Minister Peart wrote to the Company ordering the cessation of further development work pending a full EIA.

28. The letter of June 13 2006 reads as follows:

Re: Development of Cemetery and Burial Facilities at Burnt Ground-Hanover

Cognisant of the critical importance of ensuring that the captioned development poses no danger to the water table and therefore no threat to public health, it has been decided that a full Environmental Impact Assessment of the Development be conducted at the Government's expense.

I therefore direct that you cease any further development work pending completion of the assessment

Yours sincerely,

Dean Peart

Minister

29. A Notice was published in the July 22 2006 edition of the Gleaner Newspaper stating as follows:

Whereas the Natural Resources Conservation Authority has reported to the Minister that the underground water resources at Burnt Ground, Hanover, appear to be threatened with destruction or degradation as a result of the proposed establishment of a cemetery and burial facilities in that community:

Now therefore in exercise of the powers conferred by the Minister by section 32 of the Natural Resources Conservation Authority Act, the following Order is hereby made:

1. *This order may be cited as the Natural Resources Conservation (Burnt Ground)(Environmental Protection Measures) Order, 2006.*
2. *It is hereby directed that activities on any land within the area specified in the First Schedule to this Order shall, in addition to any other requirements relating to land use, be subject to the environmental protection measures specified in the Second Schedule hereto.*

First Schedule *(Paragraph (2)*

All that parcel of land part of Burnt Ground in the Parish of Hanover known as Lot 48 Burnt Ground

Second Schedule *(Paragraph (2)*

All development works being carried out pursuant to Permit Number 2004-09017-EP00157 shall be halted until a full Environmental Impact Assessment has been conducted and thereafter submitted for review by the Authority

Dated this 18th day of July, 2006

Dean Peart

Minister of Local Government and Environment

30. Mrs. Delapenha states that this course of action on the Minister's part has put a stop to the Company's development of the land, which it had been carrying out in full compliance with the permit obtained from the NRCA/ N.E.P.A.

31. Mrs. Delapenha also states that the Company has spent in excess of $40,000,000.00 on its development of the cemetery at Burnt Ground and its operations have been severely prejudiced by the cessation order issued by the Honourable Minister. Based on the stage the project had reached, the Company estimates that if it had not been for the Minister's cessation order, the cemetery would have been operational by August 1, 2006. Up to July 22, 2006 the company only awaited N.E.P.A.'s final approval and there was nothing to indicate that this would not have been forthcoming.

32. The Respondent filed several Affidavits in Response. In his Affidavit sworn to on the 9th November 2006, Minister Peart states that he has

been Minister of Local Government & Environment since April 1, 2006 and Minister of Land & Environment before that.

33. Included in his portfolio responsibility under his then current and former Ministries were N.E.P.A. and the N.R.C.A.

34. According to Minister Peart he is familiar with the Permit dated February 15, 2005 granted to the Company to establish a cemetery and burial facilities at Lot 48 Burnt Ground, Hanover and with the planning permission granted by the Parish Council to develop Lot 47, Burnt Ground. He also has detailed knowledge of this matter as he has been approached by and has met with the citizens of Ramble, Hanover in his capacity as the Minister with portfolio responsibility for the environment, to look into the environmental impact of this cemetery and burial ground on their community.

35. Prior to the granting of a permit N.E.P.A. obtains and considers the comments of several agencies including the WRA. In this case a report from the WRA dated November 17, 2004 was obtained "the First Report".

36. The WRA was asked to conduct a further assessment of the site, and prepared a Report dated December 13, 2005 "the Second Report". According to the Minister, this Second Report stated that the nature of the rock formation and soil type, the depth of the groundwater and difference in water elevation, would be sufficient to prevent any adverse impact by the cemetery on the ground water resources.

37. Minister Peart states that the citizens of the Ramble community in the Parish of Hanover were convinced that highly carcinogenic chemicals used in the embalming process may inevitably find their way into the underground water system, thereby contaminating the drinking water. Consequently, they hired their own hydrologist Mr. Basil Young to conduct their own bore hole tests. According to the Minister the results of those tests appeared to invalidate the factors which led the WRA to the conclusion reached in their Second Report.

38. In an attempt to resolve the issue the Minister says that he spoke to Mr. Dale Delapenha and offered an alternative site for the establishment of the cemetery and burial ground but this offer was refused.

39. The Ministry then decided to have an independent hydrologist, acceptable to both parties, review the Reports, i.e. the Reports of the Water Resources Authority and the Report of Mr. Basil Young. The independent hydrogeologist proposed was Mr. Brian Richardson. There was however no response from either Mr. Young or the citizens of Ramble.

40. According to the Minister the new information and findings contained in Mr. Young's Report were considered by the NRCA. This new information indicated that the water resources in the Burnt Ground area may be threatened by chemicals used in the embalming process entering the public water supply, the probable consequences of which had to be guarded against.

41. By letter dated May 8 2006, the law firm of Gifford, Thompson & Bright, acting on behalf of the R.C.D.C., wrote to N.E.P.A. amongst other matters, requesting that the Environmental permit granted to the Company be suspended pending a full E.I.A. based on the report of Mr. Basil Young, and " in light of crucial new information and in accordance with General Condition 4 of the permit".

42. By letter dated July 7, 2006 the Chairman of the NRCA recommended that a full EIA of the development be conducted and that, to facilitate this, all the work on the site be halted pending completion and review of the EIA. The Minister was asked to invoke his powers under the NRCA Act to take this additional measure. This letter from the Chairman Mr. Rawle expressly indicated that it was upon bearing in mind the precautionary principle that the recommendation of the full EIA was being made.

43. Consequently, the Minister states, that pursuant to section 32(1)(b) of the NRCA Act, he ordered that all developmental works being carried out at Lot 48 Burnt Ground pursuant to permit Number 2004-09017 EP 00157 be halted until a full EIA had been conducted and submitted for review by the Authority.

44. The Minister goes on to state that his decision was taken out of an abundance of caution considering the possibility of leakages from the vaults which would be injurious to human health. The Minister states that he considered the lives of the citizens of Ramble sufficiently important to warrant the course of action adopted. He points out that Jamaica is situated in an earthquake belt and is prone to tremors which could cause the vaults to crack notwithstanding the specifications for construction in the approval. Formaldehyde he states is known to have a progressively carcinogenic effect on the human body causing cancer and in all the circumstances his actions were reasonable.

45. In his Affidavit sworn to on the 10th December 2007, Mr. Gilroy English, one of N.E.P.A.'s legal officers, indicates that draft terms of reference for the EIA were prepared with the input of the RCDC and government agencies and Environmental Management Consultants(Caribbean) Limited " EMC^2" were contracted to conduct the EIA on January 2, 2007.

46. EMC^2 held two public meetings on February 2 and 18, 2007 to present and discuss the Terms of Reference and methodology proposed for use in preparing the E.I.A.

47. The draft E.I.A. was submitted to N.E.P.A. on March 30, 2007. A public presentation of the E.I.A. was made on April 22, 2007 and comments received from RCDC, WRA, EHU and were incorporated in the Final E.I.A.

48. Mr. English in his Affidavit summarizes the main environmental findings of the E.I.A. These findings indicated amongst other things, that

the development was unlikely to pose a threat to the Shettlewood Spring, its sub-water shed or groundwater source.

49. Mr. English indicates that on June 19 2007 the N.R.C.A. reviewed the key environmental findings and recommendations of the Final E.I.A. on the proposed cemetery at Burnt Ground. Having accepted the findings of the E.I.A., the N.R.C.A. recommended the following:

a) That the Honourable Minister of Health and Environment remove Stop Order in relation to the Environmental Permit # 2004-09017- EP00157.

(b) That the permit be amended to include the following in accordance with the findings and recommendations of the E.I.A.:

(c) The southwestern section of the property should be excluded from the interments and the remaining 2.9 hectares can be used for interments.

(d) A perimeter buffer zone should be implemented at the following areas:- 5m wide parallel to the north boundary, 2.5 m wide parallel to the north east and boundary and 10m wide parallel to the remaining boundaries.

(e) Deep rooted vegetation shall be planted along the buffer zone.

(f) Cremated remains can be disposed of by scattering or by shallow burial in buffer zone, provided that they are at least 2m from any boundary and there is no potential for them to be transported offsite.

(g) An impermeable earthen berm not less than 1m high shall be constructed along the western boundary to prevent run-off from the adjacent site (pig farm) from entering the site.

(h) The cut slope on the northern boundary (Area 1) shall be supported to ensure the stability of the slope.

(i) The highest land on the site (Area 2) is presently slated for burial. A retaining wall backfilled with free-draining adsorptive materials should be implemented if it will be used for burial.

(j) Direct earth contact interments are recommended. Filling the base with gravel and charcoal may be considered, when using concrete vaults.

(k) For multiple vault burials a minimum of 0.3 m (about 1 ft) compacted soil layer shall be used between each interment. Minimum invert level for various numbers of interments should be: for one- 1.5 m (about 5 ft); for two - 2.3m (about 7.5.ft) and for three- 3m (about 10 ft).

(l) A minimum of 1.5 m of unsaturated soil below the bottom of the burial pit. (This applies to double and triple vertical vaults).

(m) The proponent shall install a monitoring well at borehole B3. The proponent shall measure water level monthly and carry out water sample test every six (6) months for total dissolved solids, chloride and sulphate, ammonium, nitrate, electrical conductivity, sodium, potassium, magnesium, orthophosphate and formaldehyde (and other embalming fluid used).

49A. In his Affidavit sworn to on the 7th December 2007, the Honourable Rudyard Spencer, who was sworn in as Minister of Health and Environment on the 14th September 2007, indicates that prior to his taking office NEPA and the NRCA fell under the Ministry of Local Government and Environment but these agencies now fall under the

Ministry of Health and Environment and are now part of Minister Spencer's portfolio responsibility.

50. Minister Spencer indicates that by letter dated October 1, 2007, the NRCA wrote to him recommending that the Stop Order issued in relation to the Environmental Permit #2004-09017-EP00157 granted to the Company be removed and that the permit be amended to include the findings of the EIA.

51. The Minister states that based on the findings of the EIA, he adopted the recommendation of the NRCA and directed that the Stop Order be removed and that Permit No. 2004-09017- EP00157 be amended as recommended by the NRCA.

52. In exercise of his powers pursuant to section 32 of the NRCA Act the Honourable Minister Spencer revoked the National Resources Conservation (Burnt Ground Hanover) (Environmental Protection Measures) Order, 2006 (which required the cessation of developmental works at Burnt Ground, Hanover pending the outcome of the E.I.A.), by Order cited as the Natural Resources Conservation (Burnt Ground, Hanover) (Environmental Protection Measures) (Revocation) Order, 2007.

53. Mr. English indicates that the Permit has not yet been amended as he is advised by Mr. Marc Rammelare of N.E.P.A. that the Company contacted him in December 2007 to discuss including a portion of Lot # 47, Burnt Ground, Hanover, which was not part of the original permit with a view to having Lot # 47 included in the amended Permit.

54. In a Further Affidavit sworn to on the 13th September 2007, Mr. Dale Delapenha states that he has viewed the 103 paged Final EIA Report compiled by Dr. Ravida Burrowes and Dr. Boyd Dent and he attaches excerpts from the Report which he relies upon as confirmatory of the position which was taken in the Interim Report.

55. Those excerpts relied on are at page 84 of the Report at paragraph 6.4 under the heading "Conclusions of Impact Significance" as follows:

> *....the property is predicted to function well within national and international environmental laws, policies and criteria regulating such developments.....*
>
> *It is the finding of this study that the development proposal to locate a cemetery at Burnt Ground, Hanover is unlikely to produce any significant negative environmental impact.*

56. Mr. Delapenha goes on to state in his Affidavit that the Company continued to suffer greatly and remained in financial limbo as a result of the Minister's order. Mr. Delapenha and the Company's Chartered Accountants A. E. Maddix & Co. estimate the net loss of income at $41,000,000.00.

The Claim and Orders Sought By the Applicant

57. As originally filed, the Company sought the following orders (Paragraphs 1-9 of the Fixed Date Claim Form):

(a) Certiorari quashing the Minister's decision for the cessation of the development of a cemetery by the Company at Burnt Ground, Hanover.

(b) A Declaration that the Company has a right to develop its cemetery at Burnt Ground, Hanover in accordance with the permission granted by the N.R.C.A. on February 15, 2005.

(c) An injunction restraining the Minister or the N.R.C.A. or N.E.P.A. or anyone on behalf of them from entering onto the Company's premises at Burnt Ground, Hanover for the purposes of carrying out an E.I.A. or other study pursuant to the Minister's Order of July 18, 2006.

(d) A Declaration that section 10 of the N.R.C.A. Act provides for the N.R.C.A. to commission an E.I.A. in the circumstances of this case; viz. where the Company has applied for a permit, or a person has undertaken development of a prescribed

nature and the N.R.C.A. has by notice given in writing required such a person to submit such an E.I.A.

(e) A Declaration that under section 13 of the N.R.C.A. Act, the N.R.C.A. is the body that has the power to order cessation of work such as has been undertaken by the Company.

(f) A Declaration that in the circumstances of this case, no cessation of work may properly be ordered as the Company applied for and obtained a permit for its development prior to commencement of the work.

(g) A Declaration that the Company has not breached any order, requests or directives of the N.R.C.A., or otherwise acted in breach of section 13 of the N.R.C.A. Act.

(h) A Declaration that in the circumstances, the Minister has no power to order a cessation of the development herein.

(i) Damages (in the form of loss of income since that time and continuing).

58. The grounds upon which the Company relies in support of the relief sought are essentially as follows:

(a) The Minister's decision was irrational and unreasonable as it took into account irrelevant and immaterial considerations and/ or failed to take into account relevant and material considerations.

(b) The Minister acted ultra vires as :

(i) There was no evidence that showed any threat of destruction or degradation of the underground water resources in the area.

(ii) By ordering cessation of the development pending an E.I.A., the Minister has taken no measure which is apart from or in addition to those specifically provided for in the Act.

(iii)Where a permit has already been granted, the Authority is empowered to order cessation of the development activities (section 13) or to require that an EIA be done in particular circumstances (section 10). Since those measures exist in the Act, the Minister's order was unnecessary and ultra vires.

Relevant Issues and Relief

59. By virtue of the fact that the Stop Order has now been revoked, the Respondent's Attorneys argue that a number of the types of relief sought in the Fixed Date Claim Form are no longer relevant, in particular the relief sought at paragraphs 1-3 (inclusive) of the Fixed Date Claim Form. On the other hand, the Attorneys for the Company argue that the need for the Court's intervention by way of Certiorari and injunctive relief is still necessary because the reversal of the decision has been incomplete and conditional. However, both sides agree that the remaining claims for relief(paragraphs 4-9 of the Fixed Date Claim Form) still stand. The Application gives rise to the following main issues:

(1)Whether the Minister's decision to have ordered cessation of the development at Lot #48, Burnt Ground, Hanover, was irrational and unreasonable as it took into account irrelevant or immaterial considerations and/or failed to take into account relevant and material considerations?

(2) Whether the Minister acted ultra vires his powers when he ordered the cessation of development works at Lot # 48 Burnt Ground, Hanover under the Act?

(3) Even if the Minister's decision is unlawful in accordance with public law principles, is the Company entitled to the damages being claimed?

The Law

60. **Issue # 1: Whether the Minister's decision to have ordered cessation of the development of Lot # 48, Burnt Ground, Hanover, was irrational and unreasonable as it took into account irrelevant or immaterial considerations and/or failed to take into account relevant and material considerations?**

61. In the leading case of **The Council of the Civil Service Unions v. Minister for Civil Service** [1984] 2 All E.R. 935 at page 953-4, Lord Roskill summarized the three broad grounds upon which an administrative decision may be impugned:

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

62. At pages 950-951 of the **Council of the Civil Service Union** judgment Lord Diplock indicated that the grounds upon which administrative action is subject to control by judicial review can conveniently be classified under three heads, i.e. "illegality", "irrationality" and "procedural impropriety". Lord Diplock elucidated what he meant by these terms as follows:

> *By 'illegality'.... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. ...By 'irrationality' I*

> *mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'.... It applies to a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.... I have described the third head as 'procedural impropriety' rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.....*

63. As the learned authors of **De Smith, Woolf and Jowell,** point out in their Work **Judicial Review of Administrative Action**, 5th Edition, page 294, these "grounds" of review, i.e. illegality, irrationality and procedural impropriety are not exhaustive and they may overlap.

64. There is a useful discussion in relation to "The Balance Of Relevant Considerations" by the authors of **De Smith, Woolf and Jowell, Judicial Review of Administrative Action** at page 557 :

> *When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts, have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.*

65. Discussing " Rationality: logic, evidence and reasoning" the learned authors state at page 559, and 561:

> *Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the*

strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer". "Absurd" or "perverse" decisions may be presumed to have been decided in that fashion, as may decisions where the given reasons are simply unintelligible. Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision..... Irrationality may sometimes be inferred from the absence of reasons. ....

...courts in judicial review will not normally interfere with an administrator's assessment of fact. In two situations, however, they may do so: first, where the existence of a set of facts is a condition precedent to the exercise of a power, and second, when the decision-maker has taken into account as a fact something which is wrong or where he has misunderstood the facts upon which the decision depends. Similarly, if there is "no evidence" for a finding upon which a decision depends, or where the evidence, taken as a whole, is not reasonably capable of supporting a finding of fact, the decision may be impugned. Again, these decisions are surely best described as strictly "irrational".

66. In **R v. Lord Saville of Newdigate and others, ex parte A and others**[2000] 1 W.L.R. 1855, a decision of the English Court of Appeal, Lord Woolf makes the important point that the justification which will be necessary to avoid a decision by a public authority being considered by the courts to be irrational will depend upon the possible consequences of the decision. In the English and European arena, it is pointed out that

the human rights context is important. Having discussed the **Wednesbury** decision, at paragraphs 32 and 33 of the Judgment, Lord Woolf states:

> *32....The courts have the final responsibility of deciding (whether a decision is unlawful) and not the body being reviewed. The courts therefore can and do intervene when unlawfulness is established. This can be because a body such as a tribunal has misdirected itself in law, has not taken into account a consideration which it is required to take into account or taken into account a consideration which it is not entitled to take into account when exercising its discretion. A court can also decide a decision was unlawful because it was reached in an unfair or unjust manner.*
>
> *33. However, there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision-maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-maker has in fact misdirected itself in law. What justification is needed to avoid a decision being characterized as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.*

67. Justice Sykes in the unreported local decision **Kristi Charles v. Maria Jones And The Minister of Education** Claim No. 2007 HCV0351, delivered April 25 2008, remarks at para. 55 that one of the notable things about the passage cited above is that Lord Woolf conceives of the possibility that a decision maker may not be perverse or unreasonable in the **Wednesbury** sense, but may still be subject to challenge by way of judicial review if the material before him does not support the decision he has made.

The Analysis

68. In paragraph 3(i) of the Fixed Date Claim Form the Company contends that the Minister's decision was irrational and unreasonable as he took into account irrelevant and immaterial considerations and/or failed to take into account relevant and material considerations.

69. The relevant material which the Company states that the Minister failed to take into account include the following facts:

(a) the development of the cemetery was undertaken pursuant to a permit which was granted after the N.R.C.A. consulted with the W.R.A.;

(b) the permit was subject to numerous conditions which the Company had complied with during the course of the development;

(c) at the time of the Minister's Order the Company's development had reached the stage of virtual completion;

(d) The Second Report of the W.R.A. done in December 2005 concluded that the cemetery would have no negative impact on the area's water resources;

(e) Up to some time in March 2006 the Minister indicated he was satisfied that the Company's development was properly approved and saw no reason for an E.I.A. to be done, and

(f) N.E.P.A. indicated that there was no need for an E.I.A.

70. The Company has not expressly stated the irrelevant considerations that it is claimed were taken into account by the Minister. The nearest the Company comes to raising details of that issue is when its Counsel Mrs. Samuels-Brown in her oral submissions, which buttressed her written speaking notes, indicated that the Company questions the qualifications of Mr. Basil Young as he has not been established as a Hydrologist. However, although this point was made in argument, it does not appear on the evidence before me that this was ever raised before the Minister, or the N.R.C.A. whether by the Company or otherwise and all of the bodies who analyzed Mr. Young's Report, including N.R.C.A., Mr. Brian Richardson, and EMC^2, appear to have treated the Report and bore-holes of Mr. Young as qualified and worthy of analysis, consideration and response (although Mr. Richardson describes Mr. Young as a "self-styled field geologist of Civil Works Limited).

71. In their written submissions, Mesdames Julie Thompson and Danielle Archer, instructed by the Director of State Proceedings , for the Respondent, submit that the Minister did take into account the matters raised in sub-paragraphs 69 (a) to (f) . However, they submit that although the Minister had to and did consider those factors, he had to weigh them against the recommendation from the N.R.C.A. by letter dated July 7, 2006 to temporarily halt the development works pending an E.I.A. based on certain new information and the fact that clause 4 of the Environmental Permit allowed for its terms and conditions to be amended and that the Permit stated in the Schedule thereto that it was granted based on the information presented.

72. The submission continues that the Shettlewood Spring which is located approximately 1.9 km to the northeast of and down gradient of the cemetery site is the water source that the residents complained could be contaminated by the cemetery at Burnt Ground. The Shettlewood Spring is one of the most reliable sources of water for the public supply

within the central region of the Great River Basin. Water from this Spring is damned and taken off by the NWC to supply Burnt Ground, Shettlewood, Copse, Ramble and other surrounding communities.

73. It is the Respondent's case that the N.R.C.A. being mindful of the precautionary principle, and notwithstanding the comments of the regulatory agencies, recommended that a full E.I.A. of the development be conducted and the work on the site halted pending completion and review of the E.I.A. The Minister was asked to invoke his powers under section 32(1)(b) of the Act as a result of the new information.

74. The submission continues that, in the absence of scientific consensus, the Minister's duty is first to protect the environment and the fundamental right to life of the citizens of the area. The Minister took into account all relevant considerations, and balanced and weighed them prior to arriving at his decision.

75. The Respondent submits that it could not be said in these circumstances, with contradictory reports, that the Minister's decision to cease developmental works pending the completion and review of an E.I.A., was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Counsel therefore submit that the Minister's decision was not unreasonable or irrational.

76. The second Report of the W.R.A. dated January 9, 2006 indicated that the depth to water table beneath the cemetery, based on the water table at the Knockalva well, was estimated to be 200 feet. On the other hand, Mr. Young, on behalf of the R.C.D.C. conducted exploratory boreholes during the period March 8-10 2006 and states that the water table (acquifer) was encountered at a depth of 46 feet below the surface.

77. In my judgment, there is a certain amount of overlap between Issue #1 re Irrationality, and Issue #2 re Illegality and thus I intend to resolve the matter after discussing Issue #2.

78. **Issue #2: Whether the Minister Acted Ultra Vires His Powers?**

The Company also argues that the Minister's decision is ultra vires firstly, because there was no evidence showing any alleged threat of destruction or degradation of the underground water resources in the area. Secondly, because by ordering cessation of the development pending an E.I.A., the Minister " has taken no measure which is apart from or in addition to those specifically provided for in the Act". Thirdly, where a permit has already been granted, the Authority is empowered to order cessation of the development activities (section 13) or to require that an E.I.A. be done in particular circumstances (section 10). Since those measures exist in the Act, the Minister's order was unnecessary and ultra vires.

79. I have found the discussion of the ultra vires doctrine set out in the work of authors **Beatson, Matthews and Elliott on Administrative Law** useful. At page 11 they state:

> *Courts may intervene whenever a decision-maker acts 'ultra vires'- 'beyond powers' conferred by legislation....The central idea here is that, in reviewing governmental action, the courts are merely doing Parliament's bidding by enforcing the limits upon power which are found(expressly or impliedly) in statue. Prima facie, this theory provides a powerful justification for the exercise of the supervisory jurisdiction;*

80. In Chapter 6 of the **De Smith, Woolf and Jowell**, the ground of Illegality is discussed. At page 295 it is stated:

> *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 straight-forward 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.

The Analysis

81. Section 32(1)(b) of the N.R.C.A.Act provides as follows:

"32.-(1) Where the Authority reports to the Minister-

(a)....

(b) that a natural resource in any part of the Island appears to be threatened with destruction or degradation and that measures apart from, or in addition to those specifically provided for in this Act should be taken promptly,

The Minister may by order published in the Gazette, direct the enforcement of any measures that he thinks expedient for removing or otherwise guarding against any such condition

and the probable consequences thereof, or for preventing or mitigating as far as possible such destruction or degradation."

82. I shall deal with the first, second and third contentions regarding illegality in reverse order since logically, based on their substance, that seems to me to be the best order in which to approach these issues.

The Third Contention in Relation to Ultra Vires

83. The third basis upon which the Company attacks the Minister's decision as being ultra vires is that where a permit has already been granted, the Authority is empowered to order cessation of the development activities(section 13) or to require an E.I.A. to be done in particular circumstances(section 10). Since those measures exist in the Act, and they are powers conferred on the Authority and not the Minister, the Minister's order was not necessary and was therefore ultra vires section 32 of the Act.

84. It is necessary to look at sections/ sub-sections of the **N.R.C.A. Act** and the **N.R.C.A. Regulations**. Pursuant to section 2 of the Act, "Authority" means the N.R.C.A.

85. Section 9 of the Act provides:

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.

86. By virtue of the **Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996** except under and in accordance with a permit issued by the Authority, no person is permitted to undertake the development of cemeteries and crematoria in the Island of Jamaica and the territorial sea of Jamaica.

87. Section 12 (1) of the Act states:

12-(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.

88. Sub-section 13(1) and (2) of the Act states:

13-(1) Without prejudice to the provisions of section 9(7), 10 (4), 11 and 12 (3)-

(a) where a person fails to comply with the provisions of section 9(2); or

(b) where the person responsible fails to submit an environmental impact assessment within the time specified by the Authority; or

(c) where a person fails to comply with the provisions of section 12(1),

The Authority may issue an order in writing to such person directing him to cease, by such date as shall be specified in the order, the activity in respect of which the permit, licence or environmental impact assessment, as the case may be, is required.

(2) Where the person to whom an order is issued under subsection (1) , fails to comply with the order, the Minister may take such steps as he considers appropriate to ensure the cessation of the activity to which the order relates.

89. It is clear from section 13 of the Act that the N.R.C.A. is empowered to issue an order directing a person to cease the activity in respect of which the permit, licence or environmental impact assessment is required only in particular circumstances.

90. The Company in this case was granted an Environmental Permit on the 15th February 2005 and commenced development works. Those development works ceased pursuant to the Minister's order pending an E.I.A. being conducted. I agree with the Respondents submission that the N.R.C.A. would not have been the proper party to have ordered cessation of the works, pursuant to section 13 of the Act as the Company's activities (a) were not being undertaken without a permit, (b) there was no failure on the part of the Applicant to have submitted an E.I.A., and (c) the Company was not discharging any noxious, poisonous or polluting effluent without a licence.

91. The Company is therefore not entitled to the Declaration sought at paragraph 5 of the Fixed Date Claim Form.

92. As regards the power of the N.R.C.A. to require an E.I.A. to be done in particular circumstances, section 10 of the Act states:

10-(1) Subject to the provisions of this section, the Authority may by notice in writing require an applicant for a permit or the person responsible for undertaking in a prescribed area, any enterprise, construction or development of a prescribed description or category-

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

(b) where it is of the opinion that the activities of such enterprise, construction or development are having or are likely to have an adverse effect on the environment, to submit to the Authority in respect of the enterprise, construction or development, an environmental impact assessment containing such information as may be prescribed, and the applicant or, as the case may be, the person responsible shall comply with the requirement.

(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 (1), 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.

93. 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.

94. I accept the Respondent's submission that at the time at which the Company applied for the permit, the N.R.C.A. did not deem it necessary to require an E.I.A. as the information from the regulatory agencies (W.R.A., N.W.A., E.H.U.), as well as the technical opinion of NEPA, concerning the development , did not warrant such an assessment based on impacts.

95. The Respondents submit that in light of the new information received, it was possible for the N.R.C.A. to have requested the Company, responsible for construction and development of the site, to have submitted an E.I.A. A close reading of the relevant section suggests that that is correct. I agree however with the submission that section 10 is limited in scope and that the N.R.C.A. would not have been empowered to suspend the development pending the E.I.A. I can also see where what the N.R.C.A. would now have wanted provided to it would be an E.I.A. performed by an independent body, as opposed to the Company.

96. The only power which the N.R.C.A. has to suspend a permit is for breach or default as set out in section 11 of the Act where it is stated:

> *11-(1) Subject to subsection (2), the Authority may by notice addressed to the person to whom a permit was issued revoke or suspend the permit if it is satisfied that there has been a breach of any term or condition subject to which the permit was granted, or if such person fails or neglects to submit to the Authority, in accordance with section 10, any documents, information or assessment required thereunder.*
>
> *(2) Except as provided in subsection (3), the Authority shall, before revoking a permit, serve on the person to whom it was granted a notice in writing-*
>
> *(a) specifying the breach or default on which the Authority relies and requiring him to remedy it within such time as may be specified in the notice; and*

(b) informing him that he may apply to the Authority to be heard on the matter within such time as may be specified in the notice.

(3) The Authority shall not be obliged to serve a notice pursuant to subsection (2) in relation to any breach if a cessation order pursuant to section 13 or an enforcement notice pursuant to section 18 is in effect in relation to that breach.

97. I therefore disagree with the Company's Attorneys that the Minister's order was unnecessary and ultra vires on the basis of measures existing in the N.R.C.A. Act. This is because the circumstances in the instant case differ from the factual matrices required to bring the measures existing in the Act as discussed above, into operation.

The Second Contention re Ultra Vires

98. The Company's Second contention was that the Minister acted ultra vires as he has not taken any measures apart from or in addition to those specifically provided for in the Act. I agree with the Respondents ' submission that it is the N.R.C.A. that is to report to the Minister that a natural resource appears to be threatened with destruction or degradation and that it is the N.R.C.A. that recommends that measures apart from, or in addition to those specifically provided for in the Act should be taken promptly. In the letter of July 7th 2006 the N.R.C.A. Chairman asked the Minister to order work on the site halted pending completion and review of the E.I.A. as a measure which he termed "an additional one". It is also true that the Minister is not only empowered to by order direct the enforcement of any measures recommended by the N.R.C.A., but he is also empowered to take any measures that he thinks expedient for preventing or mitigating such destruction or degradation (my emphasis).

99. In my view, the measure which the Minister implemented regarding the halting or suspension of the works was a measure which

was available apart from those specifically provided for in the Act, because the factual scenario necessary to bring the other relevant provisions of the Act (discussed above) into operation, are distinguishable from the circumstances existing here. The fact that the N.R.C.A. may also have been able to order the submission of an E.I.A. or had a discretion to do so, does not to my mind render the Minister's decision ultra vires. I therefore reject the Company's contention that the Minister's decision was ultra vires on this ground.

First Contention re Ultra Vires – No Evidence Of Threat

100. In relation to the first contention, the Attorneys for the Respondent submit that "it is clear from the findings of Basil Young, which contradicted the findings of the previous WRA Reports, that the water table was closer to the surface than previously indicated as a consequence of which there was a real threat of contamination of the water supply. The N.R.C.A. was now faced with a report which contradicted that of the two reports of the WRA which raised doubts as to the findings of those Reports."

101. The submission continues that this was therefore a sufficient basis for the Minister to have commissioned an independent assessment to stave off and avoid possible harm to the citizens of the area and to the environment, which was his duty. Therefore the Company's contention that there was no evidence that showed any threat or destruction or degradation of the underground water resources in the area is untenable.

102. In the Second Report by the W.R.A., prepared 9 January 2006, and revised 27 June 2006, under the heading 'Background", it is stated:

> *The W.R.A. had in its initial assessment of the proposed cemetery site at Burnt Ground recommended that the cemetery could be approved by N.E.P.A. as it posed no risk to water resources in the area. The citizens of the area objected on the basis that the approval by N.E.P.A. was wrong and should not be implemented. The W.R.A.,*

in light of the protests, decided to review its initial assessment and a site visit to the proposed Cemetery was made on December 13 2005. Miss Anika Sutherland Assisitant Hydrogeologist and Mr. Andreas Harduk, Water Resources Engineer of the WRA conducted this assessment.

103. The Report concluded that the underlying rock formation of low transmissivity, the thick clay overburden atop the limestone, the high depth to ground water and the difference in water table elevation between the northeast block(where the cemetery is located)(432 feet above sea level), and the midblock (where the Shettlewood Spring is located) (475 feet above sea level), would be sufficient to prevent any impact of the cemetery on the ground water resources of the area. It is also concluded that the World Health organization "W.H.O." Guidelines for siting and designing cemeteries were all exceeded at the site and that there should be no impact on water resources. It was estimated that the depth to water beneath the cemetery site, based on the water table at Knockalva Well, would be approximately 200 feet.

104. According to Mr. Young's Report of March 2006, based on boreholes taken by him, the level of ground water is approximately 45 feet below existing ground level.

105. Mr. Brian Richardson, a Consultant Hydrologist has also given evidence on Affidavit filed by the Company. Mr. Richardson has set out a long and impressive list of qualifications and experience. He states that his experience and expertise make him very capable of analyzing the issues which affect the development of the cemetery being built by the Company in Burnt Ground, Hanover. In particular he is technically able to speak to the hydrogeological issues and risks that are involved and which form the basis of the objection to the said development.

106. According to Mr. Richardson in his Affidavit sworn to on the 10th April 2007, the Company's development would not pose a significant risk

to ground water once the W.H.O.guidelines, adopted by the W.R.A. and used as the benchmark against which the Company's development was assessed, are adhered to. Some of these Guidelines which are discussed by Mr. Richardson are as follows:

(1) Human or animal remains must not be buried within 250 metres of any well, bore hole or spring from which a potable water supply is drawn.The site is approximately 2.3 kilometres from Shettlewood Spring (via G.P.S. Measurements).

(2) The place of interment should be at least 30 metres away from any other spring or water course and at least 10 metres from any field drain. This too has been met (at Burnt Ground) as there is no source of potable water within 30 metres of the intended site.

(3) All burial pits on the site must maintain a minimum of 1 metre/3 feet of subsoil below the bottom of the burial pit(i.e. the base of the burial must be at least 1 metre above solid rock). Based on the WRA data, and more specifically the boreholes advanced by Mr. Young, at least 5.8 metres of clay will remain beneath the base of the burial vaults, assuming a 3metre bgl vault.....

...In the United Kingdom, the W.H.O. requirements are enshrined into law, with the additional requirement that no burial must be done into standing water, i.e. below the natural ground level. Groundwater at the site, by Basil Young's boreholes, is at least 11.5m/ 38 feet below ground level.

107. In other words, what I understand Mr. Richardson to be saying is that even using the information and input obtained from Mr. Young's Report and boreholes, the development passed, indeed surpassed, international requirements, which requirements the regulatory agencies such as the W.R.A. had already used to assess the development in the first, and second place.

108. At paragraph 1.1.3 under the sub-heading "Project Background", the E.I.A. states:

In March 2006 the Ramble CDC commissioned five boreholes to be drilled around the site (including one borehole immediately opposite) from which the depth to groundwater in this area was estimated to be ~ 14 m below ground level. This was in contrast to the WRA's estimate of 96 m., which was based on drilling in the Bonnygate bedrock done at Knockalva in 1971. WRA records for this well indicated that the well was abandoned after the water table had fallen even lower and the well was dry. However, WRA 's findings in respect of the thickness of the soil (estimated to be 14m. thick on the site) which was one of WRA's main considerations in respect of the potential for groundwater contamination, were generally consistent with the findings of the CDC's March drilling exercises (12 m at Shettlewood Baptist Church and 9m across the road from the cemetery.

109. One of the things that the E.I.A. reveals is that, even taking into account the discrepancies between the WRA depth to ground water estimates and those of Mr. Young, the thickness of the soil, which was one of the main considerations taken into account by the WRA in assessing the potential for groundwater contamination, were generally consistent with the thickness of the soil findings of Mr. Young pursuant to his drilling exercises.

110. It is important to look at some other relevant provisions of the **Natural Resources Conservation Authority Act** The N.R.C.A. is established pursuant to section 3 of the Act. Section 4 of the Act sets out the functions of the N.R.C.A. and states, amongst other matters, as follows :

4(1) The functions of the Authority shall be-

(a) to take such steps as are necessary for the effective management of the physical environment of Jamaica so

as to ensure the conservation, protection and proper use of its natural resources;

.....

(b) to advise the Minister on matters of general policy relating to the manage development, conservation and care of the environment; ....

(2) In performing the functions specified in subsection (1) the Authority may-

(a) develop, implement and monitor plans and programmes relating to the management of the environment and the conservation and protection of natural resources.

111. The Jamaican Act, like its counterpart in other jurisdictions, does not define the word "environment", perhaps deliberately so, in order to encompass a wide range of situations and meanings over time. In this case, the N.R.C.A was concerned with the protection of the environment in Jamaica as it relates to water supply.

112. It is useful to look at the full terms of this letter to the Minister from the N.R.C.A.:

7th July 2006

.....

Dear Minister,

Re Burnt Ground

On the 15th February 2005, a permit was granted by the N.R.C.A. to Delapenha's Funeral Home Limited allowing the establishment of a cemetery and burial facilities at Burnt Ground, Hanover. At the time it was not deemed necessary to require an Environmental Impact Assessment (E.I.A.),as the information from the regulatory agencies (Water Resources Authority, National Works Agency, Environmental Health Unit), as well as the technical opinion of the National

Environment and Planning Agency, concerning the development, did not warrant such an assessment based on impacts.

Certain new information has now been made available to the Authority which would indicate that the water resource in the area may be threatened by chemicals used in the embalming process entering the water supply, the probable consequences of which must be guarded against.

The Authority, being mindful of the precautionary principle and notwithstanding the comments of the regulatory agencies, therefore recommends that a full E.I.A. of the development be conducted and that, to facilitate this, all work on the site be halted pending completion and review of the E.I.A.

We ask that you invoke powers under the NRCA Act to facilitate our taking this additional measure.

Yours sincerely,

James E.D.Rawle,
Chairman
Natural Resources Conservation Authority

Copy Dr. Leary Myers, CEO NEPA

113. In the course of making her submissions that the Minister acted ultra vires, Mrs. Samuels-Brown also sought to argue that although the law refers to "environmental impact assessments", nowhere is it defined or treated as a term of art. In the context, the submission continues, of the law, it must mean a study or investigation into the impact of certain events or phenomena on the environment or sections of the environment. Counsel therefore submits that it would not therefore be correct to say that when the permit was granted or any time up to June 13 no

environmental impact assessment had been carried out relative to the development.

Counsel for the Respondent, Miss Danielle Archer, on the other hand, submitted that the term "Environmental Impact Assessment" is a term of art, and that there is a distinction between a mere Report and an Assessment. The Respondents cited **Ball and Bell on Environmental Law**, 5th Edition, Chapter 12, "Environmental Impact Assessment" pages 347-348:

What is environmental impact assessment?

On a simple level, EIA is merely an information-gathering exercise carried out by the developer and other bodies which enables a local planning authority to understand the environmental effects of a development before deciding whether or not to grant planning permission for that proposal. On this level, however, there is little to distinguish this concept from the normal planning process under which environmental effects are a material consideration. The innovation behind the formal EIA process is the systematic use of the best objective sources of information and the emphasis on the use of the best techniques to gather that information. The ideal EIA would involve a totally bias-free collation of information produced in a form which would be coherent, sound and complete. It should then allow the local planning authority and members of the public to scrutinise the proposal, assess the weight of predicted effects and suggest modifications or mitigation (or refusal) where appropriate.

Thus, EIA is a technique and a process. It is inanimate rather than tangible. The key point is that strictly the 'assessment' is undertaken by the local planning authority on the basis of environmental information supplied to it. This information consists in part of an environmental statement prepared by the developer (or more likely, by hired consultants) which details at least the main environmental impacts of the project and any mitigating measures which are proposed to reduce the significance of those impacts. But just as importantly it also includes other information

supplied by various statutory consultees (e.g. EA, English Nature), independent third parties (such as local conservation and amenity groups), members of the public and even the local planning authority itself.

Crucially, EIA is an inherently procedural mechanism. Although it is intended to be preventive (and, some would argue, also precautionary), there is nothing that requires the decision- maker to refuse a development project because negative environmental impacts are highlighted by the EIA, or even to impose conditions to mitigate any such impact. It should also begin as early as possible when projects are being planned. A further, and crucial, point is that EIA should be an iterative process, where information that comes to light is fed back into the decision-making process. Ideally, this would also involve some kind of post-project monitoring, but neither the Directive nor the 1999 Regulations currently require this.

Environmental Impact Assessment Directive

Directive 85/337 as amended by Directive 97/11 requires Member States to ensure that public and private projects likely to have significant effects on the environment by virtue of their nature, size or location are assessed with regard to their environmental impact before development consent is given. Projects are categorized into Annex I (where EIA is compulsory) and Annex II (where EIA is only needed if there are significant effects).

I take the view that environmental impact assessment "E.I.A." as used in the N.R.C.A. Act is a term of art and I therefore disagree with Mrs. Samuels-Brown that when the permit was granted or up to June 13 2006 (when the Minister wrote to the Company), it would be incorrect to say that no environmental impact assessment had been carried out. What had been provided up to that point was information/statements from the company and information from the other regulatory agencies, with technical reports and opinions from the WRA and N.E.P.A. These are to be distinguished from an E.I.A. In any event, what the letter of June 13 2006 and the Order of July 18, 2006 specifically refer to is a full

E.I.A., to be done at the Government's expense, and I do not think that it can be contested that up to that time a full E.I.A. had not yet taken place.

114. Mrs. Samuels-Brown on behalf of the Company has argued that "appears to be threatened" is a different concept than "may be" threatened and that the Minister therefore misconstrued his powers under the Act. She argued that the letter written by the N.R.C.A. and the information available to them had not reached the threshold that is required to lawfully trigger action by the N.R.C.A. itself, or the Minister. She submitted further that there is no place for the precautionary measure under section 32(1)(b) of the Act; the measures under the Act must be necessary to prevent destruction and degradation. Mrs. Samuels-Brown in addition referred to the fact that the use of the word "appears" also occurs in section 18 of the Act. Section 18(1) of the Act provides as follows:

> *18-(1) Subject to the provisions of this section, where it appears to the Authority that the activities of an undertaking in any area are such as to pose a serious threat to the natural resources or to public health, the Authority may serve on the person who appears to have carried out or to be carrying out the activity, a notice (hereafter referred to as an "enforcement notice") specifying the offending activity and requiring such steps as may be specified in the notice to be taken within such period as may be so specified to ameliorate the effect of the activity and, where appropriate, to restore the natural resources to their condition before the activity took place.*(emphasis mine)

115. It seems to me that Mrs. Samuels-Brown has a sound point. The words in subsection 32 (1) (b) of the Statute are "Where the Authority reports to the Minister that a natural resource appears to be threatened". The letter from the N.R.C.A. did not say that; instead it

reports that "certain new information has now been made available which would indicate that the water resource in the area may be threatened" (emphasis mine). It seems to me that the term "appears to be" is a more certain and immediate concept than the words "may be". However, the more crucial point is that the N.R.C.A. have not reported to the Minister that a natural resource appears to be threatened. When the N.R.C.A. says "may be threatened" that to my mind suggests that it could be, it might be, the possibility exists, that it may be threatened, as opposed to the N.R.C.A. forming an opinion that the resource "appears", or seems in its opinion to be, in a threatened state. In **Shroud's Judicial Dictionary of Words and Phrases**, 7th Edition, page 158, the term "appear" is discussed as follows:

> ***APPEAR****.....A state of things "made to appear" see* Stanley v. Fielden, *5 B & Ald. 431, at 433, 437. Semble, the phrase is nearly, if not quite, synonymous with "proved".*
>
> *But where the phrase is as , e.g. in Public Health Act 1875 (c.55) , s. 36, if a state of things shall " appear" to a local authority "that is obviously for the purpose of making the local authority the judge" i.e. it was their opinion, and not the fact which was predicated (per Channel J., Robinson v. Sunderland [1899] 1 Q.B.751,...)*
>
> *"Whenever it appears" see St. James' Hall Co. v. London CC [1901] 2 K.B.250,....*

At page 1653 the term "may be" is discussed as follows:

> ***MAY BE****. Guarantee of "any balance that may be due", construed by Pollack C.B. and Martin B. (dissenting Bramwell B.) as referring to a future balance (Broom v. Batchelor, 25 L.J. Ex. 299). Pollock C.B. said : " 'May be' is, in my judgment, clearly future. I have been unable to find direct authority in any dictionary, but in* Cruden's Concordance of the Bible, *from 60 to 80 references are given, and the expression 'may be' is found*

> *in various parts of the bible, nine out of 10 of which have manifestly a reference to the future, and not to the past or present, and not one is necessarily future. The* Concordance of Shakespeare *gives no references in respect to the words 'may' and 'be'. But as far as I can bring my knowledge of the English language to bear upon the subject, 'may be' is much oftener used with reference to the future than the past or the present".*
>
> *On the other hand, Bramwell B. said: "'May be' is the present tense, and, prima facie, means 'now may be'. It is occasionally used in the future tense, no doubt, as, for instance, 'may be due to-day', or 'may be due to-morrow'. I apprehend you may use it to indicate future applications but in that case it must be understood as applied in the present tense. A thing 'may be black', or 'it may be fit to eat', or 'it may be fit to cook'. If you use the words 'may be' without indicating the time, to my mind the expression applies to the present, or more correctly, not to a question with reference to the future".*

I have looked at the cases referred to and the references in the Shroud's Dictionary are accurate and comprehensive for the present purposes. In the **St. James Hall Co. v. London** County decision, the words in the Statute to be construed were "whenever it appears to the Board." In the course of his judgment, Chanel J. stated at pages 254 -255:

> *The condition precedent is not that there should in fact actually be danger, but merely that there should "appear to the Board" to be danger.*

In Longman's Dictionary of Contemporary English, 1990 edition, the word "appear" is stated as having the following meanings: -

[1] to become able to be seen, come into sight or become noticeable: ...

[2] to seem, to give to other people a particular idea or feeling ....

[5] to be found; exist

The term "maybe" is defined as "perhaps; possibly"

Usage 1. Maybe is more informal than perhaps ...

Language Note: Tentativeness

These Dictionary meanings support my own understanding of the plain and ordinary meaning of the relevant terms "appear" and "maybe".

116. In my judgment Minister Peart did act in excess of his powers when he acted under section 32 of the N.R.C.A. Act pursuant to the N.R.C.A.'s letter dated July 7 2006. This is because the N.R.C.A. did not by virtue of that letter report that a natural resource appears to be threatened with destruction or degradation. I say this not only as a result of the use of the words "may be threatened", but also when one looks at the full contents of the letter and what the N.R.C.A. states that it is relying on, i.e. the new information, and Mr. Young's Report. It is clear that the N.R.C.A. had not concluded that the water supply appeared to be threatened. Indeed, they would have been hard-pressed to state the case any higher than they did, which was that the water resource in the area may be threatened, given the information and comments of the Company, the Regulatory Agents, particularly the W.R.A., and the technical opinion of N.E.P.A. Had the N.R.C.A. formed such a view and so reported to the Minister, the lawfulness of the Minister's decision would have to be analyzed in a very different manner. One has to look at the N.R.C.A Act which confers the power on the Minister to see whether his decision falls within its four corners. I am of the view that the Minister acted unlawfully and exceeded the powers conferred upon him under section 32 of the N.R.C.A. Act. Although the Act confers a broad discretion on the N.R.C.A. so that they may form their opinion as to whether a natural resource appears to be threatened, when one looks at the scheme of the Act, one can see clearly that the N.R.C.A. forming a view that the resource may be threatened is not enough. The natural resource must appear to be threatened. In this case, it is even more clear that this must be so since the Company here already had acquired rights; it was the holder of a permit from the N.R.C.A. to develop the

cemetery. Indeed, the N.R.C.A is by virtue of sub-section 9(5) of the Act, not permitted to grant a permit if it is satisfied that any activity connected with the development is or is likely to be injurious to any natural resources. The N.R.C.A. itself is only empowered to revoke or suspend a permittee's permit where that party is in breach or default.

It therefore seems to me, that albeit, it may well have been that both the N.R.C.A. and the Minister were acting with the best of intentions, motives and in good faith, and were trying to act in line with the precautionary principle, the Minister exceeded the power conferred on him under section 32 of the N.R.C.A. Act.

117. I am also of the view that the words of Lord Woolf in the **Lord Saville of Newdigate** decision are apposite here. As Lord Woolf stated in that case, here the decision is also flawed because the material upon which it is based could not be arrived at lawfully and in such cases it may be said that the decision is irrational or perverse. However, the decision maker here may be the most rational of persons and the true explanation for the decision being flawed is really that the decision-making body has in fact misdirected itself in law. Here, in addition to the decision being unlawful on the grounds of illegality, it is also flawed because the existence of the set of facts which is a condition precedent to the exercise of the Minister's power, i.e. that it is reported to the Minister by the N.R.C.A. that a natural resource appears to be threatened with destruction or degradation, is absent. It may therefore in this sense also be said to be bad on the grounds of irrationality and unreasonableness. In my judgment there is no evidence in this case that the Minister took into account irrelevant and immaterial considerations and/or failed to take into account relevant and material considerations. There is also nothing to demonstrate that manifestly excessive or manifestly inadequate weight has been accorded to any relevant consideration. The decision is not outrageous or in defiance of logic or perverse in the

Wednesbury sense .However, the decision is unlawful on the basis of illegality and irrationality for the reasons discussed above.

Issue # 3: Whether the Applicant is entitled to the damages being claimed?

118. In **De Smith, Woolf & Jowell on Judicial Review of Administrative Action**, 5th Edition, at paragraph 19-003 it is stated:

The general approach

19-003 A fundamental tenet of English law is that the failure of a public body to act in accordance with public law principles of itself gives no entitlement at common law to compensation for any loss suffered. Nor does the careless performance of a statutory duty in itself give rise to any cause of action in the absence of a common law duty of care in negligence or a right of action for breach of statutory duty. To recover damages, a recognized cause of action in tort must be pleaded and proved. In short, while in some cases it may be a necessary condition, it is never a sufficient one for the award of damages that the act or omission complained of be "unlawful" in a public law sense.

119. Although under the Civil Procedure Rules 2002, Part 56, damages may be recovered in judicial review proceedings, I take the view that no new right to damages is introduced by the new rules; it is simply a matter of procedural convenience that private law damages may be included in a claim for judicial review. For views to this same effect see **Judicial Review Remedies in Public Law**, 3rd Edition, by Clive Lewis, paragraph 2-168, and **Judicial Review of Administrative Action**, 5th Edition, by De Smith, Woolf & Jowell, paragraph 9-010.

120. The English Common Law has traditionally set its fact against the granting of claims for damages for purely administrative acts or omissions. Such reluctance was justified on the grounds that the prerogative orders were designed essentially to cure administrative wrongdoing rather than to compensate the victim of such act or

omission-see **Damages for Administrative Errors:- The Developing Jurisprudence A Case Note on Bolden v. Attorney General of Barbados** West Indies Law Journal (1991) Volume 16 page 59.

121. At paragraphs 19-008, and 19-009 of the De Smith, Woolf & Jowell it is stated:

19-008.The correlation between a finding that a decision of a public body is, as a matter of public law, flawed and a person's right in private law to damages is not straightforward....

Holding a decision to be unlawful does not involve a finding that it was taken negligently; a decision without legal authority may nevertheless have been the product of very careful consideration by a decision-maker. Unlawfulness (in the judicial review sense) and negligence are conceptually distinct and so negligence cannot be inferred by a process of "relating back" from a finding of invalidity.

.....19-009. There is no special affinity between any particular grounds of judicial review and cause of action for damages; whether there is a cause of action will depend on the particular facts.....

Although the term "reasonableness" may be used to define both the standard of care imposed by the tort of negligence and as a ground of judicial review, the terminology does not always bear a consistent meaning between the two branches of the law.

122. At paragraphs 19-051 to 19-054 the learned authors of the DeSmith, Woolf & Jowell consider the question of whether the breach of a statutory duty in itself and without proof of negligence , may give rise to an action for damages for the tort of breach of statutory duty.

19-052.

Some statutory provisions expressly create rights of action for damages in tort against public bodies in breach of a statutory duty and here few problems arise. More difficult is the more common situation where the

legislation is silent on the issue whether breach entitles a person who suffers loss due to non-compliance with the statutory duty to commence an action for damages. The question is always approached as one of statutory construction to ascertain whether the legislature intended to provide for such private law claims for monetary compensation.....

19-053

Most statutory duties in the public law context are owed to the public at large rather than to private individuals...

19-054

It is therefore a necessary, but not sufficient, precondition to liability to establish that the particular statutory duty was intended to protect a certain class of persons (rather than the public at large) from a particular type of damage.

123. At paragraph 19-007 the learned authors state:

19-007.

The absence of a general common law right to compensation does not necessarily mean that a person who suffers loss as a result of unlawful administrative action remains uncompensated. Statute may give an express right to financial redress; but such legislative provisions are ad hoc responses to particular situations, rather than the result of a general principled approach to government liability.

In their written submissions, the Company's Attorneys have now sought to raise for the first time, the tort of misfeasance in a public office and reliance was placed on the authority of **Three Rivers District Council and Others v. Bank of England (No. 3)** [2001] 2 All E.R. 513. The headnote in that case accurately summarises the essential elements of the tort and also discusses the concept of untargeted malice, where it is not alleged that the public officer did or made the acts or omissions

intentionally with the purpose of causing loss to them. It is stated, at page 514 c-f:

...it was necessary to consider some of the essential elements of the tort of misfeasance in public office. First, there had to be an unlawful act or omission done or made in the exercise of power by the public officer. Secondly, as the essence of the tort was an abuse of power, the act or omission had to have been done or made with the required mental element. Thirdly, the act or omission had to have been done or made in bad faith. When the allegation was one of untargeted malice, the required mental element was satisfied if the act or omission was done or made intentionally by the public officer in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he willfully chose to disregard that risk. As regards that form of the tort, the fact that the act or omission was done or made without an honest belief that it was lawful was sufficient to satisfy the requirement of bad faith. Bad faith would be demonstrated by knowledge of probable loss on the part of the public officer or by recklessness on his part in disregarding the risk.

124. The Attorneys for the Company raised the issue of the tort of misfeasance in public office for the first time at the substantive hearing after case management conferences had taken place some time ago. I agree with Counsel for the Respondent Miss Archer that this tort involves a serious allegation of misconduct and it is required to be sufficiently pleaded. She placed reliance on paragraph 19-048 of de Smith, Woolf & Jowell where it was stated:

Often there may be no direct evidence of the existence of malice, and in these circumstances the court may make adverse inferences, e.g. from the fact that a decision is so unreasonable that it could only be explained by the presence of such a motive. A court will not entertain allegations of bad

faith or malice made against the repository of a power unless it has been expressly pleaded and properly particularized. (emphasis in last sentence mine).

125. At paragraphs 49, 51 and 56 of the **Three Rivers** judgment Lord Hope states:

[49] In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other....

[51] On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis of the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.....

[56] In this case it is clear beyond a peradventure that misfeasance in public office is being alleged. There is an unequivocal plea that the Bank was acting throughout in bad faith.

126. I agree with Miss Archer that here the Respondent has not been given fair notice of this allegation and that there is no sufficient pleading or particularization of this tort in the papers filed on behalf of the Company.

127. I also am of the view that it would not have been appropriate to grant leave to amend to include this claim at this stage. The Company's Attorneys say the issue is properly raised because not only did Minister Peart act without lawful authority, but he did so and persisted in his course of action deliberately /and or with unacceptable recklessness.

128. In **R v. Barnsley Metropolitan Borough Council** [1976] 3 All E.R. 452, Lord Denning (at page 457 c-d) opined that the Statement of Grounds in a judicial review application should not be treated as rigidly

as a pleading in an ordinary civil action, and that the matter is then considered at large on the Affidavit evidence so that if there appear to be grounds other than those set out in the application for leave to apply for certiorari the court can enquire into them without being bound by the grounds set out in the original Statement. The Judicial Review Court will look at the substance of the matter. As Jones J. pointed out in the unreported local decision in Consolidated Claims No. 81 of 2002 and HCV 0612 of 2003, **Lackston Robinson v. Daisy Coke et al (All Members of the Public Service Commission)**, delivered July 31, 2007, at paragraph 126, page 50, Rule 56.10 of the C.P.R. 2002 provides that a claim for damages can be made when it arises out of or is related or connected to the subject matter of an application for an administrative order.

Further, Rule 56.10(2)(ii) indicates that the court may award damages to the claimant on a claim for judicial review if the facts set out in the Claimant's Affidavit or statement of case justify the granting of such remedy or relief. However, when Part 56 is read as a whole, in my judgment it is plain that the substantive law has not been changed, and that the Claimant must plead sufficient particulars and provide evidence which is ample to raise a private law right to damages whether by way of tort or contract.

128A. There should in this case have been sufficient particularization of the tort of misfeasance in public office, especially as regards the serious allegation of bad faith. In that regard, the instant case must be distinguished from the **Three Rivers Case** where there was an unequivocal plea of bad faith. The Judicial Committee of the Privy Council's Judgment in **Gulf Insurance Limited v. The Central Bank of Trinidad and Tobago**, P.C. Appeal No. 78 of 2002, delivered 9th March 2005, relied upon by the Company's Attorneys is also distinguishable because, although in that case there was no express plea of the tort of conversion, a claim for damages was sufficient because it was clear that

the complaint was that the Central Bank had unlawfully disposed of the company's assets and undertaking, which amounted to, and was in substance, a claim of conversion.

129. Further and in any event, separate and apart from the pleading point, in the instant case there is in my view nothing on the evidence which could support an allegation of bad faith, or that the Minister knew that his act was unlawful or beyond his powers, or lacked an honest belief that his act was lawful or was actuated by any malice. Counsel Mrs. Samuels-Brown sought to point to the fact that the letter of June 13 2006 was written by Minister Peart before he received the letter from the N.R.C.A. dated July 7 2006, as showing that the Minister had already made up his mind and that the requisite mental element may be inferred. I agree with Miss Archer that this, and indeed, other evidence relied on would be insufficient from which to infer the requisite state of mind. Further, I accept Miss Archer's submission that at the time of writing the letter of June 13 2006, the Minister had already received the Report of Mr. Young by letter of March 27 2006.

130. **The Natural Resources Conservation Authority Act** does not provide for compensation in the event of suspension or revocation of permits. In England, the statutory legislation dealing with planning and the environment expressly deals with compensation.

131. In my judgment, the Company would not be entitled to damages as the N.R.C.A. Act makes no specific provision for damages being awarded in these circumstances and there is no evidence that there has been any negligence, breach of contract, breach of statutory duty or other tort such as to ground an entitlement to damages. Thus, although I am of the view that the Minister's decision of July 18 2006 was unlawful, and the Company is entitled to remedies which I have set out below, the Company is not entitled to an award of damages.

132. As to whether there ought to be a right to damages and financial redress, created by Statute, that is a very different question. This is further discussed in paragraphs 140 and 141 below.

Other Issues

133. In the course of the submissions on behalf of the Company, Mrs. Samuels- Brown for the first time alluded to the concept of legitimate expectation and submitted that the Company had a legitimate expectation that they would be allowed to proceed with their development on the basis of the permit granted. Miss Archer, for the Respondent, (with some justification), argued that in raising legitimate expectation in that manner (amongst other matters) Counsel had sought to "move the goal post". Mrs. Samuels-Brown's submission was not really fully developed and she did not dwell on it. In light of the fact that I have already indicated other bases for my finding that the decision was unlawful, I do not intend to address this issue.

134. At the very tail-end of her submissions, Mrs. Samuels-Brown also sought permission to amend the Claim to add constitutional relief in the form of a declaration that the Company's proprietary rights have been adversely affected and seeking damages for breach of the Company's rights under the Constitution. She cited the case of **Fuller v. the A.G.** 56 W.I.R. 337. I agree with Miss Archer that the amendment ought not to be granted, and like her, I found myself unable to fathom what unpleaded provision of the Constitution could be prayed in aid. I also agree with Miss Archer that the avenue of constitutional redress would only be available if the Court were satisfied that adequate means of redress for the alleged contravention is not available to the person concerned. That is not the situation which obtains here. In the circumstances therefore, the application to amend is refused.

SUMMARY OF COURT'S REVIEW

135. I am of the view that the Minister's decision of July 18 2006 is ultra vires and unlawful on the grounds of illegality and irrationality.

The Relief Sought and that Which Ought To Be Granted

136. The prerogative orders are discretionary remedies which may be refused in certain circumstances even where the public body has acted contrary to the law. In this case, there is no longer any necessity for the Court to quash the decision of Minister Peart of July 18 2006, as the order of Minister Spencer of 2007, gazetted November 5, 2007 revoked the 2006 "stop order". This is so even though Minister Spencer has also ordered the Company's permit to be amended to accord with the findings of the E.I.A. The Law, and the permit itself expressly (Condition 4), authorize the N.R.C.A. to alter, amend or introduce new conditions to the Permit.

137. I make the following declarations:

(a) The then Minister of Local Government and Environment's decision/Order of July 18 2006, halting all of the Applicant Company's development works being carried out pursuant to Permit No 2004-09017-EP 00157 was unlawful, ultra vires and illegal as the Minister misconstrued and acted outside of his powers under Section 32 of the Natural Resources Conservation Authority Act;

(b) The then Minister of Local Government's decision/Order of July 18 2006, halting all of the Applicant Company's development works being carried out pursuant to Permit No. 2004-09017-EP00157 was unlawful and was an improper exercise of the Minister's power under Section 32 of the Natural Resources Conservation Authority Act on the grounds of unreasonableness and irrationality.

138. As stated earlier, based on the present state of the law, the Applicant / Company is not entitled to an award of damages.

Lessons to be Learned and the Way Forward?

139. It is clear to my mind that in this case both the N.R.C.A. and the Minister acted in good faith and had the interests of the citizenry at heart, in particular their health and safety. They had in mind protection of the environment, of the water resources in the area. Both purported to act with the precautionary principle in mind but, regrettably, the result was that the Minister responsible for the Environment acted unlawfully. This case suggests to me that one way to implement and exercise the preventive and precautionary principles may be to categorize projects such as, the instant one, projects to do with cemeteries, (because of their nature size and location) as requiring compulsory Environmental Impact Assessment before permits are granted. This will of course be in the final analysis a matter for the technocrats and legislators. As the extract from **Ball and Bell on Environmental Law,** referred to earlier treating with "Environmental Impact Assessment" indicates, the E.I.A. should begin as early as possible when projects are being planned. Ideally, it will allow for all stakeholders, including the Applicant for the permit, the statutory consultees, members of the public, and independent third parties, such as local conservation and environmentalist groups to have some input and dialogue. Though at a cost to tax payers, conducting the E.I.A from the outset would foster greater public confidence in the regulatory and planning systems and may be the prudent course to take in the long run. I daresay that had the N.R.C.A. required, or been able to require an E.I.A. in the first place when the Company applied for the permit, the public objection and outcry by the citizens of Ramble, may well have been quelled, or at any rate substantially diminished.

140. As regards the question of remedies for those who have been wronged, there are some who feel strongly that it is time for a new approach to handling losses caused by Government action. At paragraph 19-004 of De Smith, Woolf & Jowell on **Judicial Review of Administrative Action**, it is stated:

19-004

This general regime of pecuniary liability for unlawful governmental action may seem rather stark, given the special functions performed by public bodies, e.g. the regulation of economic activity, levying of taxes and charges and the provision of public goods, and their consequential ability to inflict harm upon or deprive of benefits those they govern.

141. In **Ball and Bell on Environmental Law** , at pages 277 and page 398 the following informative discussion ensues and may well guide our legislators and planners when it comes to dealing with situations such as the instant case where the party who has acquired rights under a permit has committed no breach. *Page 277...*

Enforcement where there is no breach of planning law – There are some courses of action available to the local planning authority where there is no breach of the planning legislation. Normally these require the payment of compensation for the loss of any rights which have been taken away, so they are little used. But they are of importance as reserve powers where there is something creating an environmental problem that may not be removed or controlled in any other way.

Under s.102 a local planning authority may serve a discontinuance order, which may require that any use be discontinued or that any buildings or works be removed or altered. Under s. 97 a local planning authority may revoke or modify a planning permission that has already been granted. In both these cases there are provisions for a public local inquiry to be held and compensation to be paid. The Secretary of State must also confirm these orders before they have effect and has reserve powers to make either type.

... page 398- Suspension of a Licence ..

The powers to suspend and revoke a licence are of great use where licenced activities are giving rise to problems, for example where the site is being inadequately managed or is causing pollution. The grounds for their use are, in general terms, similar to those relating to the refusal of an initial licence application, though they are in fact slightly less wide. These provide an opportunity to police the licence on a continuing basis and may be used in addition to other enforcement mechanisms, such as prosecution or ordering a clean-up.

.....

One limitation of these powers is that, if the Secretary of State determines on appeal that the Environmental Authority acted unreasonably in suspending a licence, the licence holder can claim compensation for consequential loss from the Environmental Authority. This potential financial liability may act as a brake on the use of suspension notices by the Environmental Authority. (emphasis mine)

142. I will therefore make the declarations in favour of the Company as set out in paragraph 137 above. Costs are awarded to the Applicant/ Company to be taxed if not agreed.

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