IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV5674/2010

IN THE MATTER of the Natural Resources Conservation Authority Act

AND

IN THE MATTER of the Beach Control Act

AND

IN THE MATTER of Part 56 of the Civil Procedure Rules, 2002

BETWEEN	THE JAMAICA ENVIRONMENT TRUST	1st CLAIMANT
AND	THE NATURAL RESOURCES CONSERVATION AUTHORITY	1st DEFENDANT
AND	THE NATIONAL ENVIRONMENT & PLANNING AGENCY	2nd DEFENDANT

Ms. Danielle Andrade for the Claimant

Mrs. M. Shand-Forbes and Ms. T. Hamilton for the Defendants

Breach of statutory Duty -Judicial Review - Legitimate Expectation – Unreasonableness

Heard: June 6 and October 13, 2011

Straw J

The Claim

By way of Fixed Date Claim Form, the claimant is seeking the following relief against the 1st and 2nd defendants:

1. A declaration that the Natural Resource Conservation Authority (NRCA) and/or the National Environment & Planning Agency (NEPA) breached their statutory duty and/or acted unreasonably or irrationally by allowing the construction of a highway, two seawalls and a boardwalk at Palisadoes, St. Andrew to proceed without having obtained all the relevant permits pursuant to Section 9 of the Natural Resource Conservation Authority Act.

2. A declaration that the NRCA and/or NEPA breached the legal standard for consultation and breached the legitimate expectation that all environmental information relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.

The Background

It is agreed by all the parties that the Palisadoes is of national importance because it has significant historical, ecological and cultural value.

The Palisadoes tombola (strip of land) forms part of the Palisadoes - Port Royal Protected Area (PPRPA).

3. The first defendant, the NRCA, which was established under the Natural Resources Conservation Authority Act (NRCA Act), designated the second defendant, NEPA as the responsible agency for the management of the area. NEPA is an Executive Agency which falls under the NRCA. Mr. Peter Knight is the Chief Executive Officer at NEPA.

The Jamaica Environment Trust (JET) is a non-profit, non-governmental organization incorporated for the purpose of protecting and conserving Jamaica's natural environment which includes ensuring that environmental issues are properly considered in development planning.

4. Mrs. Diana McCauley is the Chief Executive Officer and Director of the Board of the JET, the applicant. She has stated that NEPA has in the past consulted JET in relation to the management of the PPRPA and that since 2002, JET has been regularly invited by NEPA to attend stakeholders' consultation meetings relating to the conservation and management of the PPRPA. JET also routinely reviews Environmental Impact Assessments (EIA) for proposed developments and has on many occasions been invited to do so by NEPA. Since January 2005, JET reviewed over 27 EIA's and submitted written comments to NEPA. This has not been contested by the defendants

Environmental Impact Assessment

5. The following description is given under NEPA's guidelines for conducting EIA, (paragraph 1.4).

"What is the EIA?"

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

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

A final definition is as follows:

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

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

Sykes J noted that the authorities reflect that an EIA is satisfactory if it is comprehensive in its treatment of the subject matter, objective in its approach and alerts the decision maker and members of public of the effects of the proposed activity. Sykes J also stated that it is wrong to look at the EIA as the last opportunity to exercise any control over any project to which the EIA is relevant.

The Facts

8. On February 16, 2007, the National Works Agency (NWA) which had responsibility for conducting rehabilitative works along the Palisadoes shoreline, submitted Beach Licence

Applications for the construction of a boulder revetment, rehabilitation of sand dunes on the Caribbean Sea front and dredging of 1,100,000 cubic metres of sand to NEPA. NEPA, as is required, requested an EIA report from NWA for the project on April 19, 2007.

9. An EIA was submitted to NEPA in September 2007. A public presentation is a requirement as part of the EIA process under NEPA's guidelines for public presentation. The guidelines state that the authority may waive this requirement from time to time, if deemed appropriate.

The policy in relation to the public presentation is set out under paragraph 2.3 of the NEPA Screening and Scoping Process:

> *"The public presentation gives the proponent an opportunity to present to the public the finding of the EIA. It also provides additional avenue for the public to raise questions about the proposed project and for the proponent to respond to these issues and make any necessary changes to the project and the EIA report."*

10. Two public meetings were held to discuss the findings of the Cuban report submitted by NWA which was a detailed study of the Palisadoes Peninsula (dated February 15, 2007) done by Cuban Coastal Engineers. There was also a public consultation/public presentation in keeping with the EIA on the findings on March 12, 2008.

11. Mrs. McCauley attended the said public meeting in March. There is no challenge or dispute in relation to the sufficiency of the EIA or the process of consultation.

12. The claimant is contending that in 2010, it was published in a local newspaper that NWA proposed to modify the design for the Palisadoes development.

Mr. Knight has explained that due to Hurricane Gustav and subsequent storms, NWA observed damage to the dunes and roadway and commissioned Civil Engineers and Coastal Planners (CEAC) to conduct a revised study of the proposed works. He further stated that NWA

subsequently presented NEPA with a new design and made a new application for beach licence on July 24, 2009.

13. Mr. Knight agrees that the scope of works to be done under this new design was different from the initial design. He has listed the difference as follows:

- The revised project substituted the offshore dredging for dune rehabilitation with the deployment of a comprehensive robust rock revetment system designed to withstand a 100 year Return Period Event as compared to 50 years.

- The construction of 4km of rock revetments on either side of the roadway extending from150km beyond the Harbour View Roundabout to the entrance to Gunboat Beach.

- Construction of a 3 metre wide boardwalk on the harbour side, the width of which will facilitate walking, jogging, cycling and drainage improvement works to include swales and culverts.

14. Mr. Knight stated further that NEPA used this study (CEAC) along with the Cuban report and the 2007 EIA to assess the potential impact of the project on the environment and that it was determined that a new EIA was not required as the new design was within the footprint of the previously prepared EIA. He has also stated that there was no need for a new public presentation as the potential impacts of the new scope of works were less than that previously proposed and further, there was no new EIA.

He stated that NRCA considered the project and approved a beach licence for construction and maintenance of two sea walls/revetments.

Mr. Knight explained that further to this approval, NWA prepared and submitted a sea grass and mangrove replanting plan and oil spill contingency plans to NEPA. These documents were reviewed and approved by NEPA.

15. It is interesting to note that Mr. Knight states that as a result of the prevalence of media reports of things that were not considered by the Authority, NEPA and NWA agreed that

additional applications would be submitted. NWA did so and on August 17, 2010, the Authority considered and approved the following:

- Beach licence for coastal reclamation (to carry out coastal reclamation works using 1500 cubic metre of material).
- Environmental Permit for Wetland Modification

16. In the continuing saga of developments, Mrs. McCauley states that on September 24, 2010, she received a press release from NEPA advising that two permits and two licences had been granted by NEPA for the modified design/specifically:

1. Beach Licence for sea walls along both sides of the Palisadoes.
2 Beach Licence for coastal reclamation works.
3. Permit for Wetland Modification (harbour side).
4. Permit for petroleum storage.

17. She further stated that the said press release indicated that a public meeting would be held at a date to be announced "to discuss the scope of the project with interested stakeholders." (See DM 12)

18. It is agreed by both that a public meeting was held on October 4, 2010. Mr. Knight, however, has stated that it was a public meeting at the instance of NWA to which NEPA was invited. He states that it was a public presentation of the works to be done and not a public consultation.

19. At any rate, Mrs. McCauley attended the meeting at which time she voiced her concern about the manner in which the development had been approved, in particular, disclosing the change in design after the development had already been approved.

20. On October 20, 2010, Mrs. McCauley obtained a report entitled "Design Summary for Palisadoes Shoreline Protection and Rehabilitation Works: NWA Design (2009) Modification of the Cuban Design (2007)" (See DM 16).

21. This document describes the difference between the original and the modified design as follows:

1. The Caribbean Sea side works have been upgraded from a 22 year Return Period Event to a 100 year Return Period Event.

2. The number of lanes has been increased from two lanes to four lanes to facilitate development of Port Royal and the Norman Manley Airport in the future. In addition, the road will be raised from o.6 to 1.0 metres at present to 3.2 metres above MSL.

3. Inclusion of harbour-side revetment to protect against waves within the harbour.

22. It is against this background that the declarations are being sought on the two limbs namely:

> The claimant is contending that the manner in which the development was approved is in contravention of the NRCA Act as NEPA and NRCA have allowed the development to proceed without all the relevant permits.
>
> Secondly, that NEPA failed to follow its own guidelines for permitting developments and that all environmental information would be disclosed to the public before the decision was taken to approve the development and that the concerns of the public would be taken into consideration prior to approval being granted and work commencing.

23. **Did the process of decision-making meet the legal standard?**

It is not contested that the common-law duty to ensure a proper process of consultation existed in relation to the process of decision-making by NEPA, although there was no statutory requirement (**R v North and East Devon Health Authority, Exparte Coughlan** (2001) QB, 213; **Council of Civil Service Unions and others v Minister for the Civil Service** (1985) AC, 374).

Such a failure by a public authority is a matter for full review by the court (**Exparte Coughlan** (supra) per Lord Woolf MR, pg 243, para. 62).

24. The claimant is contending that the consultation did not adhere to the standard of proper consultation because it took place after the permits were already granted and work had commenced on a modified design which changed the scope of the works. As a result, the public was deprived of the opportunity to consider the modified design, advocate alternatives during the decision-making process and make an intelligent response and input into the final design.

25. The EIA is disseminated for public discussion. The purpose is to receive feedback from members of the public and interest groups which ought to be taken into account when the decision whether to grant the permit is under consideration.

The question for consideration is whether there ought to have been further consultation once it became necessary to modify the design. In other words, under the circumstances as they existed, whether what happened was fair ((**R v North and East Devon Health Authority, Ex Parte Coughlan** (supra); **R V (Medway Council) v Secretary of State for Transport (**2002) EWCH 2516 (Admin) per Maurice Kay J at paragraph 28.

In **R v North and East Devon**, supra, Lord Woolf MR described what is proper consultation (at pg. 258, para. 108):

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

26. As a corollary, counsel for the claimant has submitted that certain documents, the Design Summary, the Proposed Mangrove Methodology and the CEAC report provided information which was supplemental to the EIA and should be regarded as addenda to the EIA and ought to have been submitted for public consultation prior to the grant of the licences and permit relevant to the modified works. It is an accepted principle of administrative law that a public body undertaking consultation must do so with fairness. There is a limitation to this principle as stated by Lord Woolf MR, (supra) para 112, pg 259):

> *"…consultation is not litigation: the consulting authority is not required to publicise every submission it receives or to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration telling them enough (which may be a good deal) to enable them to make an intelligent response."*

27. In the **Pear Tree Bottom** case, supra, a marine ecology report and two documents/addenda which were responses to NEPA's further requests for information from the developers were submitted to NEPA after the public meeting was held and public consultation concluded in April 2005. The marine ecology report ought to have been included in the EIA but was submitted in May. It was not circulated to either external government agencies or non-government agencies or the public. The omission of the report was significant in relation to the terms of reference of the EIA.

28. The two addenda submitted in May and June respectively were reviewed by an internal review committee comprising managers and other persons trained in various areas of environmental management and finally by the board of NRCA. The two addenda made reference to the marine ecology report.

29. Sykes J held that the public consultation was flawed and that the failure to disclose the three documents to the public was a breach of the legitimate expectation of the public. In particular, in relation to the two addenda, Sykes J reasoned that, in the context of the non-disclosure of the marine ecology report or that the report even existed, the addenda ought to have been disclosed and that this would have alerted the public and the applicants to the fact that a marine ecology report existed which should have been part of the EIA:

> *"It would seem to me that if there is going to be effective public discussion then all the information that ought to be disclosed must be disclosed. This is a legitimate expectation of the applicants. They were entitled to believe that the respondents would (a) tell them that the EIA was incomplete at the time it was circulated and (b) disclose the missing parts when it came to hand."*

30. In the present case, there is no submission that the EIA was incomplete in anyway. However, the proposed activity for which the EIA was mandated had been modified since the public consultation.

In relation to the modified design, Mr. Knight stated that NEPA considered all the documents i.e., the new design and the CEAC report and at its meeting in September 2010, considered the project and approved a beach licence. Mr. Knight also stated that the CEAC report examined the scope of the new proposed works, the resultant impact on the coastal and terrestrial environment and recommended mitigation measures.

Analysis of NEPA's Guidelines and the Law

31. It is clear that the EIA alerts the decision-maker and members of the public to the effects of the proposed activity. The public presentation provides additional avenue for the public to raise questions about the proposed project also for the proponent to respond and make any

necessary changes to the project and the EIA report (see NEPA Screening and Scoping Process, paragraph 2.3).

32. If the proposed activity is modified, then even if a further EIA is not required, it should be evident that the public consultation would have to be extended in order to present the modified design and allow for concerns to be addressed and discussed before any permits or licences are granted in relation to the modified design.

33. When the issues are examined in light of the criteria laid down by Lord Woolf MR in **R v North and East Devon** supra, it is clear that the defendants fell woefully short by breaching the legal standard of consultation and the legitimate expectation that all the relevant environmental information would be disclosed to the public before approval was given.

34. The New Design Summary as well as the later CEAC report should have been disclosed prior to any approval being granted as Mr. Knight has stated that the CEAC report 'examined the scope of the new proposed works and the resultant impact on the coastal and terrestrial environment and recommended mitigation measures.' At the least, since the new design would include the removal of the mangroves on the harbour side, (as a result of the proposed rock revetment), there should have been disclosure and adequate time given for the consideration of this activity.

35. In relation to the Proposed Sea Grass and Mangrove Replanting Plan requested by NEPA from NWA, the introduction to that document reads as follows - (See DM13 attached to the first affidavit of Mrs. McCauley):

> *"1.0* ---
>
> *This report was prepared at the request of Mr. Christopher Burgess, CEAC Solutions Ltd.; -----. It involves the mapping and assessment of the mangrove and sea grass communities within the proposed footprint*

> *of the revetment on the harbour side of the proposed development. It will provide the guidelines and methodologies to be employed in the successful removal of and replanting of the mangrove and sea grass community."*

36. The inference to be drawn is that the CEAC report identified the need for such a plan to be submitted. Mr. Knight stated that the NRCA approved a beach licence for construction and maintenance of two sea walls/revetments with specific conditions attached. As a result, the NWA prepared and submitted the sea grass and mangrove replanting plans which were reviewed and approved.

37. I am not of the opinion that the defendants would have been required to disclose this plan as part of the consultation process. Their obligations would have been met once the modified design with any resulting environmental impact had been disclosed and the concerns of the public taken into account.

38. Under NEPA's guidelines for conducting the EIA (supra), it is stated that the results of the study, that is, the EIA are taken into account by the regulatory authority in the determination of whether the proposed development should be allowed and under what conditions.

39. There is no requirement for further public consultation in relation to the conditions to be attached if the development is allowed.

40. I have come to this conclusion based on the purpose of the EIA. As stated previously, the EIA is the term that 'describes a technique and a process by which information about the interactions between a proposed development project and the environment is collected, analysed and interpreted to produce a report on potential impacts and to provide the basis for sound decision-making.'

41. In NEPA's guidelines, the word 'project' is defined as a proposed installation, factory, works, mine, highway, airport or scheme and all activities with possible impacts on the environment.

42. The disclosure of the modified design and the CEAC report would have indicated that the mangroves on the harbour side had to be removed in order to facilitate the construction of a revetment. An assessment of this activity would have been part of the consultation exercise and discussion of the project.

However, on a wide view, the proposed project, the replanting exercise could be interpreted as an activity, although a corollary, to the major project. Under these circumstances, it could be argued that there should have been disclosure as part of the consultation exercise (See **Edwards v Environment Agency** (2006) EWCA Civ. 877).

43. I also consider the UNEP goals and principles of the EIA as stated in NEPA's guidelines at paragraph 1.5, principle 4:

> "An EIA should include, at a minimum
>
> (a) ---
>
> (b) ---
>
> (c) ---
>
> (d) ---
>
> (e) An identification of the likely description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of these measures."

44. It would therefore appear that unless the EIA had specifically dealt with identification of mitigation measures and alternatives with direct reference to the mangrove sea grass relocation

on the harbour side, there would have been an obligation to disclose any plan to remove and replant mangroves in the absence of any addenda to the EIA.

45. I am constrained therefore to reach the conclusion that the defendants breached the legal standard for consultation and breached the legitimate expectation that all environmental information (in particular, the Modified Design Plan and the CEAC report) relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.

Breach of Statutory Duty and/or Irrationality

46. The claimant is contending that the defendants breached their statutory duty or acted irrationally and unreasonably by failing to grant permits for the following activities which were aspects of the modified design:

a. Port and harbour development;

b. major road improvement projects including construction of a road of four or more lanes;

c. clearing and reclamation of beach areas.

47. It is important to examine the NRCA Act, which provides one of the statutory bases for the actions of the defendants in relation to environmental control.

Under Section 9 of the Act, persons who propose to undertake construction or development of a prescribed description or category must first obtain a permit (See Section 9 (1), (2), (3), (4)).

48. The list of activities to which this section applies is set out in the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprises, Construction and Development (Amendment) Order, 2003.

49. Section 9 (5) of the above Act reads as follows:

> "(5). In considering an application made under subsection (3), the Authority
>
> (a) shall consult with any agency or department of Government exercising functions in connection with the environment; and
>
> (b) shall have regard to all material considerations including the nature of the enterprise, construction, or development and the effect which it will or is likely to have on the environment generally, and in particular or any natural resources in the area concerned;
>
> and the Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources."

The relevant categories in the Schedule are as follows:

> "4 Port and harbour development.
>
> 16. Construction of new highways, construction of arterial roads, construction of new roads --- major road improvement projects including construction of a road of four or more lanes or realignment or widening or an existing road into four lanes---
>
> 21. Modification, clearance or reclamation of wetlands.
>
> 22. Dredging, excavation, clearing and reclamation of riverine, swamps, beach, wetlands or marsh areas."

50. Section 9 (6) reads as follows:

> "(6) The Authority may –
>
> (a) grant a permit subject to such terms and conditions and as it thinks fit; or
>
> (b) refuse to grant a permit.

51. It is the evidence of Mrs. McCauley that when a permit is approved by the Board, it will typically include conditions which require the developer to take steps to prevent or mitigate

against any harmful impacts on the environment. These may be monitored by the issuing agency.

52. It is imperative therefore that both NRCA and NEPA scrupulously maintain control in these areas as mandated by Parliament, both in the consideration and issuing of permits as it is clear that the requirement for a permit to be granted under Section 9 of the NRCA Act is mandatory in relation to the categories listed.

53. In **De Smith's Judicial Review,** 6th edition Sweet and Maxwell, 2007, the authors discuss the topic '**Mandatory and Directory Duties and Powers**' (at paragraph 5-049, pg 251) and summarises the main principles that the courts have generally followed (para 5 -050, pg 252):

> "(a) ----
>
> (b) Statutory words requiring things to be done as a condition of making a decision, especially when the form of words requires that something shall be done, raise an inference that the requirement is 'mandatory' or 'imperative' and therefore that failure to do the required act renders the decision unlawful.
>
> (c) ----
>
> (d) The courts in appropriate cases and on accepted grounds may, in their discretion refuse to strike down a decision or action or to award any other remedy."

54. In **Council of Civil Service Unions v Minister for the Civil Services**, 1985 AC 374, (at pg 410f-h) Lord Diplock, in discussing the principle of judicial review in relation to decision-making powers, spoke to three heads – illegality, irrationality and procedural impropriety with 'proportionality' as a possible fourth ground that may be applied in the future:

> *"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par-excellence a justiciable*

> *question to be decided, in the event of dispute, by these persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By 'irrationality' I mean what can now be succinctly referred to as '**Wednesbury** unreasonableness' (**Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.*
>
> *---- I have described the third head as procedural impropriety rather than 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. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred."*

55. In **De Smith, Woolf and Jowell**, **Judicial Review of Administrative Action**, 5th edition at para 111 – 003, pg 294, the authors state that there may be overlap in these grounds of review. For example, the failure to give reasons or the failure to base a decision upon any evidence could fall into the category of procedural impropriety or irrationality (based upon a broad **Wednesbury** approach rather than the narrow approach as discussed by Sykes J in **Pear Tree Bottom,** (supra). The authors also state that 'proportionality,' although not firmly entrenched in English Law (outside of European Community Law) is considered as a principle by which to evaluate different aspects of an unreasonable decision.

Construction of a four-lane Highway

56. The claimant has submitted that the modified design as discussed in the documents involves the widening of the road to accommodate four lanes and raising the road by 4.375 metres and has referred the court to the Design Summary Modified Design 2009. A perusal of

this document reveals an intention to increase the lanes from two to four in order to facilitate the development of Port Royal.

57. Such activity would require an environmental permit under Section 9 of the NRCA Act as discussed previously. This is not disputed by the defendants. The requirement is clearly mandatory and not discretional.

Mr. Knight has stated that there was no intention to construct a road of four lanes or more and that this was not in the design submitted by NWA. He further submitted that this was an erroneous statement from the Ministry of Transport and Works website that such a proposal was submitted to NEPA by NWA. It is his evidence that no such activity is to take place. The claimant, however, has referred the court to other documentary and oral evidence that indicates otherwise.

58. I am prepared to accept his evidence on the point, especially in light of the fact that the scope of works has continued and no such construction has taken place. I have therefore come to the conclusion that the defendants have not breached their statutory duty in this regard.

Port and Harbour Development

59. In relation to the above, the claimant has submitted that the construction of the sea wall, boardwalk and reclamation activity on the harbour side of Palisadoes would fall within the category of 'port and harbour development' and would therefore require a permit.

60. Counsel for the defendants, Mrs. Shand has submitted that 'port and harbour development' contemplates marine/maritime activity which is not included in the proposed scope of works and as such a permit would not have been required. She has stated that any scope of work to be done in relation to a port or harbour would involve the Port Authority. She directed

the court to the Port Authority Act which vests the Port Authority with certain duties and powers. Section 6 of the said Act reads as follows:

> "6. It shall be the duty of the Authority -
>
> a. to regulate the use of all port facilities in a port;
>
> b. to provide and operate such port facilities and other services as the Minister may require;
>
> c. to recommend to the Minister from time to time such measures as the Authority consider necessary or desirable to maintain or improve the port facilities;
>
> d. to operate such facilities as may be vested in the Authority ---;
>
> e. to maintain and improve, where practicable such port facilities as are vested in the Authority ----."

61. A perusal of the interpretation section of the above Act reveals that 'harbour' means a harbour of the island constituted under Section 3 of the Harbour's Act. 'Port' means the Harbour of Kingston and includes any other harbour declared to be a port pursuant to Section 3.

Section 3 of the said Act authorises the Minister to declare any harbour to be a port for the purposes of the Act.

62. Under Section 2 of the Port Authority (Declaration of Ports) Order 1974, the Harbour of Kingston is specified in the schedule to be a port.

Section 4 of the Harbours Act defines the boundaries of the Harbour of Kingston:

> *"--- the Harbour of Kingston shall include all the body of water between the shores in the parishes of Kingston, St. Andrew, St. Catherine, to the Northwest of the Palisadoes, from harbour Head to Port Royal, and of a straight line from the western most point of the land at Fort Charles, in Port Royal, to the southernmost point of the Twelve Apostles Battery."*

63. Mrs. Shand has submitted that the Palisadoes shoreline is within the Harbour of Kingston which has been designated a port and is subject to the jurisdiction of the Port Authority. She has further submitted that NWA would be usurping the authority of the Port Authority if they were involved in port and harbour development.

64. Ms. Andrade, counsel for the claimant, has submitted that 'maritime activity' is a narrow interpretation of the meaning of 'port and harbour development' and that there is no definition within the Act or limiting words to define this category. She has therefore requested that the court examine whether the defendants should apply a purposive construction, looking at the legislative intent and object of the Act, which is to regulate activities that may have a significant impact on the environment.

65. While the arguments of counsel for the claimant do possess a certain appeal when one considers the purpose for environmental control, it is lacking in substance and merit.

In coming to this conclusion, I consider that the Port Authority Act defines 'port facilities' to mean "facilities for the dry docking, birthing, towing, mooring or moving of vessels in or entering or leaving a port or its approaches, for the loading and unloading of goods or embarking or disembarking of passengers in or from any vessel, for the lighterage or the sorting, weighing, warehousing or handling of goods, and for the carriage of passengers or goods in connection with any such facilities."

66. I am of the opinion therefore that 'port facilities' carry a particular meaning and I am not of the view that the construction of a sea wall, or a boardwalk as described in the evidence of Mr. Knight could be made to fit within this category of port and harbour development.

Section 11 (4) of the Beach Control Act is also instructive when assessing the legislative intent in relation to 'port and harbour development':

> *"(4) When application is made under this section to the Authority for a licence for any use of the foreshore or floor of the sea, which involves the erection in a harbour, of an encroachment not referred to in Section 9, the authority shall not issue the licence unless the Port Authority certifies:-*
>
> *(a) that the encroachment is not likely to have an adverse impact on vessel traffic or other activities related to harbours; and*
>
> *(b) the plans, or other documents relating to the structure of the encroachment.*

Section 9 of the Act requires that a licence be authorized by the Minister for any future encroachments in relation to docks, wharfs, piers or jetty on the foreshore or floor of the sea.

A beach licence has been granted in relation to the construction of the revetment and a permit for wetland modification. I am of the opinion that it would be an unnecessary and artificial enlargement of the legislative intent to include such activities as described above under 'port and harbour development.' There is no evidence that either the boardwalk or the revetment would be an encroachment on the foreshore or the floor of the sea. I am therefore of the opinion that there has been no breach of statutory duty by the defendants in failing to issue such a permit.

Clearing and Reclamation of beach areas

67. The claimant also contends that the defendants breached their statutory duty and/or acted irrationally or unreasonably in failing to require an environmental permit for the clearing of the sand dunes and vegetation on the Palisadoes beach. Mrs. McCauley asserts that these activities fall under category C and would be included in the activities as listed at number 22 in the schedule under NRCA Act. (i.e. dredging, excavation, clearing and reclamation of riverine *et al*)

68. The defendants have justified their actions by submitting that the activities under category C would be subsumed in the permit granted for wetland modification.

In the alternative, it is also submitted that the revised project substituted the dredging of 1100 cubic meters of sand for dune rehabilitation which does not fall within the prescribed schedule of categories.

69. In relation to the first point raised by the defendants, an examination of the permit granted for wetland modification is necessary. The description of permitted activity, (pg 2) reads as follows:

> *"This permit is for the removal of mangroves and the replanting of approximately 6,396 mangrove seedlings of mixed species to mitigate against those that will be lost as a result of the construction works associated with the Palisadoes Protection and Rehabilitation Project Port Royal ----."*

70. Based on the evidence adduced, it is accepted that this permit relates to the activity of wetland modification along the harbour side. It is in relation to this activity that a 'proposed mangrove and sea grass relocation plan' was submitted by NWA. The descriptive activity is specific and the work on the Palisadoes side cannot be said to be subsumed under this permit. These are two distinct scopes of work.

71. The court will therefore have to consider whether the beach licences granted for coastal reclamation and construction of the revetment would cover the clearing of the sand dunes and vegetation and if not, whether the dune rehabilitation falls within the prescribed category.

72. Both beach licences granted were authorized under Section 11 of the Beach Control Act. They are described as licences for the use of the foreshore and the floor of the sea.

Beach licence dated August 23, 2010, describes the permitted activity in the first schedule as follows:

> *"To carry out coastline reclamation works using approximately 1500 cubic metres of material along*

the foreshore and floor of the sea, from the Harbour View Roundabout to Gunboat Beach."

It states that the licence is to undertake coastal reclamation on sections of that portion of the foreshore and floor of the sea at the Palisadoes strip.

73. Beach licence dated September 23, 2009 describes the activity as follows:

> *"The construction and maintenance of two (2) sea walls (coastline revetment works) of approximately 4000 metres each along the shoreline of the foreshore and floor of the sea on both sides of the Caribbean Sea and the Kingston Harbour from Harbour Head to Gun Boat Beach ----"*

74. In relation to the Beach Licence for coastline reclamation, an examination of the document reveals specific conditions attached including the following listed at number 12:

> *"Any sensitive organisms, including but not limited to corals, sea grass found within the proposed work area are to be relocated to an undisturbed area on the floor of the sea immediately adjoining the reclamation site prior to the initiation of any works to the satisfaction of the Agency."*

75. The Beach Licence dated September 23, 2009 has a similar condition attached and listed as No. 13. This relates also to its proposed work area. Mr. Knight has agreed that no permit was granted for the removal of the dunes but he has stated the licence granted for the construction of the revetments includes a condition for rehabilitation of the damaged dunes. He states that the ecological value will not be lost by virtue of the works being done.

He has exhibited the dune rehabilitation plan requested by NEPA and submitted by NWA dated December 17, 2010. He has stated that in keeping with this plan, the dunes are being re-vegetated.

Evidence of Illegality and/or Irrationality

76. In discussing the issue of illegality, the authors in **DeSmith** (supra) at paragraph 6-001, pg 295, state as follows:

> "An administrative decision is flawed if it is illegal. A decision is illegal: if-
>
> *(1) it contravenes or exceeds the terms of the power which authorizes the making of the decision; or*
>
> *(2) it pursues an objective other than that for which the power to make the decision was conferred.*
> *The tasks 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."*

77. In relation to the circumstances of the case under consideration, the issue for determination is whether 'dune rehabilitation' is an activity that falls within the category of clearing and reclamation of a beach and if so whether the defendants made a flawed decision in not requiring a permit for the activity.

The claimant is submitting that the scope of works does fit into that category.

78. In an effort to persuade the court of the correctness of her submissions, counsel for the claimant referred to definitions of 'beach,' 'foreshore' and 'floor of the sea' in the Draft Beach Policy for Jamaica 2000 (DM19) and the Beach Control Act. There is no definition of 'beach' under the Beach Control Act.

The Draft Beach policy adopts the following definition:

> *"The zone of unconsolidated material (sand or gravel) whether natural or manmade, that extends from the low water mark, landward to the vegetation line, or to the crest of the primary dune,*

> *or to a line of debris deposited by wave action usually the effective limit of storm waves or a combination of such factors."*

79. Both the Beach Control (safety Measures) Regulations 1957 and the Beach Control (Hotel, Commercial and Public Recreational Beaches) Regulations 1978 define 'beach' as:

> *"--- the licensed area including the area covered by water which is comprised in a licence granted under section 11 of the Act in relation to a hotel, guest house, boarding house 'proprietary or members' club with a beach or a commercial or public recreational beach."*

The policy document (supra) states that this (latter) definition without being confined to the parameters of licensed areas is that which is most commonly conceived of as a beach."

This latter definition is not helpful for the purposes of determining the issues in this case.

80. The Beach Control Act gives the following definitions of 'foreshore' and 'floor of the sea':

> "*Foreshore" --- that portion of land, adjacent to the sea that lies between the ordinary high and low water marks, being alternatively covered and uncovered as the tide ebbs and flows."*

> "*Floor of the sea" --- the soil and the subsoil off the coasts of the Island between the low water mark and the outer limits of the territorial sea of the island and shall be deemed to include the water column super adjacent to the floor of the sea and the natural resources therein---"*

81. The claimant is contending that the sand dunes at Palisadoes are part of a 'beach' according to the definitions, as stated above. The court was also referred to the EIA attached to Mrs. McCauley's supplemental affidavit which refers to the sand dune community at Palisadoes as 'strand beach,' 'strand dune' and 'strand thorn scrub vegetation':

> *"Zonation was observed in the sand dune community of Palisadoes and was defined as strand beach, strand dune and strand thorn-scrubs vegetation. The term Strand here is used to describe "the narrow littoral marine zone including beach, fore dune and remaining sandy habitat up to the edge of stabilized dune or inland vegetation ---."*

82. Mrs. McCauley has stated that the licences only cover the foreshore and floor of the sea and do not include any measures to control and mitigate the clearing of the sand dunes and vegetation along the Palisadoes Beach. She also stated that the sand dunes contain endemic and rare terrestrial species.

83. Based on the definitions in the Beach Control Act, I am of the view that the sand dunes would not have been included in the scope of works covered by the special conditions attached to the beach licences.

However, both Mr. Knight and Mrs. McCauley have referred to a previous beach licence granted by NEPA to NWA on June 24, 2008. This beach licence (3025) was referred to in the Revegetation Plan for Palisadoes Shoreline Protection and Rehabilitation Project dated December 12, 2010 issued by NWA. The licence itself (3025) was not exhibited in any of the affidavits before the court. However, the Revegetation Plan refers to Special Condition 22 of that licence which states that:

> *"22 The Licensee shall develop a dune vegetation plan which shall be submitted to the Agency for approval prior to implementation."*

There was therefore some consideration given in relation to the clearance of the sand dunes and vegetation.

84. It is to be noted also that Section 11(2) the Beach Control Act makes provision for the consideration by the Authority of 'land' adjoining the foreshore:

> *"(2) Where an application is made for a licence under subsection (1) the Authority shall consider what public interests in regard to fishing, bathing or recreation, in regard to the protection of the environment or in regard to any future development of that land adjoining that part of the foreshore in respect of which the application is made, require to be protected, and they may provide for the protection of such interest by and in terms of the licence or otherwise in accordance with the provisions of the Act."*

85. It appears therefore that a licence under the Beach Control Act, with relevant and sufficient conditions attached can be granted to provide for the protection of the sand dune adjoining the foreshore.

Based on the definitions of 'beach' in the Draft Policy and also the description of the sand dune community in the EIA it is arguable that part of the sand dune community could be considered to be a beach, the extent of which is not clear to this court. However, adequate protection could be required for the sand dune under the Beach Control Act as 'land' adjoining the 'foreshore' of the sea.

86. I am therefore of the view that the defendants did not breach their statutory duty in failing to require an environmental permit as conditions were attached to a previous beach licence granted in relation to the sand dunes. However, this is not the end of the matter. The remaining issue to be determined is whether NEPA acted irrationally or unreasonably in failing to require a permit as mandated by the NRCA. The point to be considered is whether the beach licence issued on June 24, 2008 presents proof of adequate consideration by NEPA of factors in relation to the protection of sand dune.

87. Counsel for the claimant has recommended the statement of my brother Sykes J in the **Pear Tree** case (supra), for my consideration in relation to the high level of scrutiny required when dealing with environmental issues (at para 21, pg 10):

> *"We are now at the stage where it is safe to say that the intensity or stringency of the review varies in accordance to the importance of the subject matter. Human rights issues therefore attract a very stringent review with lesser rights --- attracting a lower level of scrutiny. It would seem to me that environmental legislation ought to attract a fairly high level of scrutiny. The consequences of bad environmental management can be disastrous and in some cases fatal."*

No doubt these are the fears that crowd the mind of Mrs. McCauley and other members of JET.

88. Counsel for the claimant has submitted that a permit includes conditions specific to the aspect of the project that has been permitted and these serve to regulate the actions or mitigate any harmful aspects of the development. She further submitted that the impact of this failure means that certain aspects of the project were carried out without the regulatory safeguards provided by the permitting system.

I will agree that in relation to all the licences and permits granted, there are no conditions attached to direct the manner in which the dunes are cleared.

89. The classic decision dealing with irrationality and/or unreasonableness is **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223. It introduced the concept of what is now being termed as 'narrow **Wednesbury**.' Lord Green MR, in discussing the issue of 'unreasonableness' included the issues of bad faith, dishonesty, attention given to extraneous circumstances, disregard of public policy as being relevant to the question (pg 228 – 231). He also spoke to 'unreasonableness' in the following terms:

> *"--- It has frequently been used --- as a general description of things that must not be done for instance, a person entrusted with a discretion must --- direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.*
>
> *---Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority ---- It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."*

90. The court will therefore have to determine whether the defendants balanced all relevant considerations in dealing with this issue, or whether attention was given to extraneous circumstances. There is noting to indicate that bad faith or dishonesty played any role in NEPA's decision.

The balancing and weighing of relevant considerations is primarily a matter for the public authority. The courts are not a substitute for the authority (Lord Green MR in **Wednesbury** (supra), pg 231); **Chief Constable of the North Wales Police v Evans** (1982) 1 WLR 1155 (per Lord Hailsham, pg 1160h).

However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse. Examples of these include cases where there is a material defect in the decision-making process, in particular with regard to the motives or reasoning underlying or supporting the decision, the factors taken into account on the way to reaching the decision or the way the decision is justified or reasoned. (**DeSmith**, supra pg 551, para 13 -005)

91. Mr. Knight has stated the reasons involved in the decision not to require a permit. The court also bears in mind the following factors:

- NEPA did require from NWA in relation to the clearing of the dunes a revegetation plan. In examining this plan, the 'Purposes and Objectives' (pg 1) include the following:

    - protect dunes as they are formed;
    - stabilize dunes over time to improve the level of protection provided;
    - recreate/re-establish the ecology that has been disturbed by the execution of the Palisadoes Protection and Rehabilitation Project;
    - improve the local expertise in dune vegetation management;
    - properly store existing sand to ensure viability for re-use at the end of project;
    - collect and use the threatened dune and beach vegetation for replanting after construction has been completed;
    - solicit the involvement of the University of the West Indies in the implementation of the project.

92. In the same document, under NEPA's Concerns and Requirements, the following is stated (pg 8):

> *"NEPA's concerns include the importing of invasive species, damages to the coastal resources as a result of erosion of dunes and loss of the ecosystem that exists in this area. Therefore, the timely implementation and proper planning, utilizing the correct expertise for the re-establishment of vegetation cover is required to address these concerns."*

In light of all these circumstances, it does appear that there was a balancing of all relevant considerations, and it would appear, on the face of it, that to require a permit would be to duplicate what has already been done under the beach licence (3025). I am of the opinion,

therefore, that the defendants did not act irrationally or unreasonably in failing to require a permit for the clearing of the sand dunes.

Remedies

93. There is only a sole basis on which a declaration could be granted i.e., in relation to the construction of a four-lane highway.

While no declaration will be granted for the reasons outlined previously, it is to be understood that any major road improvement project along the Palisadoes Road including construction of a road of four or more lanes or realignment or widening of an existing road into four lanes (10km or more in continuous length) would require an environmental permit in accordance with the Section 9 of NRCA Act.

The court also grants the declaration that the NRCA and/or NEPA breached the legal standard for consultation and breached the legitimate expectation that all environmental information relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.