NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 H.C.V. 01436

CORAM: THE HON. MRS. JUSTICE MARVA MCINTOSH
THE HON. MR. JUSTICE MARSH
THE HON. MR. JUSTICE ANDERSON

BETWEEN	TEXACO CARIBBEAN INC.	1ST CLAIMANT
AND	ESSO STANDARD OIL S.A. LIMITED	2ND CLAIMANT
AND	SHELL COMPANY WEST INDIES LIMITED	3RD CLAIMANT
AND	TOTAL JAMAICA LIMITED	4TH CLAIMANT
AND	THE MINISTER OF COMMERCE SCIENCE AND TECHNOLOGY	1ST DEFENDANT
AND	BUREAU OF STANDARDS	2ND DEFENDANT

Heard on June 18, 19, 20, and 21, 2007

Appearances: Mrs. Georgia Gibson-Henlin and Ms. Catherine Minto instructed by Nunes, Scholefield DeLeon & Co for the Claimants;
Mr. Curtis Cochrane and Mrs. Amina Maknoon instructed by the Director of State Proceedings, for the Defendants

M. MCINTOSH J.

I have had the opportunity to read in draft the judgment of Anderson J and need only state that I agree with the reasons and conclusions therein. I would make the Order stated at the end of the judgment.

MARSH J.

Having read the draft of Anderson J., I can add nothing as I am in full agreement

ANDERSON, J:

At the end of the hearing in this matter, we gave judgment on the claim in favour of the Claimants with costs to be agreed or taxed, and we promised to put our reasons in writing. This written judgment is now given in fulfillment of that promise.

On or about November 2, 2004 the First Defendant (the "Minister") gazetted and thereby purported to enact **The Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations**. These Regulations were supposedly made pursuant to powers

granted to the Minister by Section 22 of the **Weights and Measures Act**, ("The Act") and, in order to ensure that there is "equity in all commercial Petroleum and Oil Fuel Transactions in Jamaica". The Claimants mount a challenge to the validity of these regulations on the basis that the Minister exceeded his authority under the relevant section of the Act, and/or failed to comply with conditions under the Act and they seek redress to the alleged infractions through judicial review of the Minister's action. In particular, the Claimants assert that there was procedural irregularity in that the challenged regulations were never published in draft; were not the subject of comments and objections by all person entitled to make such comments or objections nor was the period, if any and if relevant, allowed under the terms of the Act for such comments or objections given for the receipt of such comments or objections in writing.

The Defendants, on the other hand, contend that the Regulations were properly promulgated and that a draft of the challenged regulations was gazetted in February 2000, and that the Regulations accord with its powers to regulate as outlined in Section 22 of the Act.

Pursuant to the grant of leave to apply for Judicial Review granted on the 20th May, 2005 the Claimants filed a Fixed Date Claim Form on the 1st June 2005 seeking the following remedies as against the Minister and the 2nd Defendant, the Bureau of Standards ("The BS"):

1. Judicial Review by way of an Order of Certiorari to quash the unlawful act of the 1st Defendant whereby he purported to make The Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations, 2004 pursuant to Section 22 of the Weights and Measures Act.
2. Judicial Review by way of an Order of Prohibition to prohibit the 2nd Defendant from implementing and/or enforcing the unlawful Regulations, the 2nd Defendant being the body charged with the implementation of and monitoring compliance of the Regulations.
3. Further and/or in the alternative, a Declaration that the Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations, 2004 gazetted on 15th November 2004 is invalid, the 1St Defendant having acted *ultra vires* The Weights and Measures Act when he purported to enact the said regulation.
4. Further and/or in the alternative a Declaration that the Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations 2004 is invalid and

or otherwise null and void, the 1st Defendant having failed to follow the procedure laid down under Section 22 of The Weights and Measures Act for same to be lawfully enacted.

5. An Order that the regulations and/or the actions of the Respondents are in breach of Section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act 1999 in so far as:

   a. it purports to transfer the rights and/or benefits of the Applicants to third parties namely Gasoline Retailers; and

   b. The Applicants were denied the opportunity of being heard or to make representations on their own behalf in relation to making of the regulations.

6. An order that the said regulations are in breach of Sections 13 and 18 of the Constitution of Jamaica in so far as they purport to vary the Applicants' pre-regulation contractual rights relative to the subject-matter of the contracts.

7. A Stay of the implementation and/or enforcement of the Regulations pending the determination of this matter.

8. Costs

9. Such further and other relief as this Honourable Court deems just.

The first hearing of the Fixed Date Claim Form was held on the 6th November 2005 and the Pre-Trial review was held on the 10th of March 2006. An Order for an Expert Witness Report to be provided was complied with and the expert report, as well as questions raised thereon by the Defendants/Respondents, and the responses to those questions, are included in the bundle at pages 30-45 of Second Judge's Bundle.

In her opening, Mrs. Gibson-Henlin indicated that it was the view of the Claimants that the Minister had failed to comply with the procedural requirements of Section 22 of the Act when he purported to pass into law the *Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations 2004* which were gazetted on the 15th November 2004. Secondly, it was the Claimant's submission that the Minister had exceeded his powers, on an examination of the powers that he has, to make regulations for Weights and Measures under Sections 3, 4 and 22 of the Act. She noted that the Respondents would argue that they had complied with the terms of the Act. It is their case that there were draft regulations, namely the Weights and Measures (Motor Fuel for Trade) Regulations 2000 and they aver that this

draft was published in accordance with the requirements of Section 22 of the Act. In response to this the Claimants say that in substance, in any event, the two regulations are completely different things. The 2000 draft Regulations deal with the restricted subject matter of "motor fuel" and the 2004 Regulations deal with the broad subject matter of oil and petroleum. The Claimants were therefore entitled to make representations as provided for in the Act. It was her further submission that in substance, a critical new introduction under 2004 Regulations was that of measurement of temperature or temperature adjusted volume. This was clearly introduced in the 2004 Regulations and was absent from the 2000 Regulations. It was her submission that the Minister was not empowered to introduce measurement based on temperature by the regulation. It was therefore an Act in excess of the powers under Section 3 and 4 of the Act. Further, the Minister has mandated in the Regulations, the use of certain equipment in the trade whereas the statute provides for the approval and certification of certain equipment by the 2nd Respondent. In other words, it is for the 2nd Respondent, the BS to approve and certify the equipment used pursuant to the Act for measurement purposes whereas the Minister in the submission of the Claimants has purported to settle this matter by the promulgated regulations. This therefore was in excess of his authority.

Those in summary are the issues to which the submissions of the Claimants would be directed and having outlined those issues, Mrs. Gibson-Henlin then proceeded to review the affidavits which are before the Court in order to substantiate the factual sub-stratum upon which the submissions which she would make would be built.

The Evidence

The evidence in relation to this matter is contained in three (3) affidavits. The first is an affidavit on behalf of all the Claimants, sworn to on the 5th of August, 2005 by David Sterling, Brian McFarlane, Roger Bryan and Luc Maiche, (the "Claimants' Affidavit"). The other two (2) affidavits were sworn on behalf of the Defendants by Mr. Tweedsmuir Mitchell, Scientific Officer in the BS on the 29th November, 2005 and Mr. Conroy Watson, Senior Director of the Energy Division of the Ministry of Commerce Science and Technology, sworn on January 24, 2006. Interestingly, there are not substantial differences in the facts as outlined by the two (2) sides. Where the differences arise is in the conclusions drawn by them from any given set of circumstances.

The facts as outlined by the Claimants.

Counsel, Mrs. Gibson-Henlin referred extensively to the Claimants' affidavit. This affidavit sets out the factual position as understood by the Claimants. They aver in this affidavit that they are in the petroleum and oil marketing business and they operate in Jamaica and internationally and as such they have an interest in the subject matter of this claim in so far as it impacts on their operations locally and internationally. The affidavit acknowledges that the Minister is empowered under Section 22 of the Act to make regulations in respect of the matters specified pursuant to that section. It is also acknowledged that the 2nd Defendant is charged with the responsibility of administering the operation of the Act and generally receiving and considering representations made on behalf of interested persons. It also has responsibility, after hearing those representations, to make recommendations to the Minister/1st Defendant. In light of the central nature of the provision of Section 22 of the Act to these proceedings, I set out below the full test of that section of the Act:

Section 22.- (1) The Minister may make regulations –

(a) With respect to –
  (i) the materials and principles of construction of weighing or measuring equipment for use for trade;
  (ii) the purpose for which particular type of weighing or measuring equipment may be used for trade;
  (ii) the manner of erection, sitting or use of weighing or measuring equipment used for trade;
  (iv) the circumstances in which, conditions under which and manner in which stamps may be obliterated or defaced;
  (v) the abbreviations of symbols for units of measurement which may be used for trade;

(b) With respect to the inspection, testing and passing of any weighing or measuring equipment used for the purpose of, or in connection with, the computation of tolls, rates, taxes, charges or payments of any kind;

(c) With respect to the inspection, testing, passing as fit for use for trade and stamping or authentication of weighing or measuring equipment, including-
  (i) the prohibition of the stamping or authentication of such equipment in such circumstances as may be specified in the regulations;
  (ii) the circumstances in which an inspector may remove or detain any weighing or measuring equipment for inspection or testing;
  (iii) the marking of any weighing or measuring equipment found unfit for use for trade;

(d) Restricting or controlling the importation, manufacture, repairing or sale of any weighing or measuring equipment designed to be used for trade and providing for the issuing of licences for such importation, manufacture, repairing or sale;

(e) To prohibit the use for trade of any pattern of weighing or measuring equipment specified in the regulations unless a certificate of approval is granted in respect of that pattern;

(f) Requiring that weighing or measuring equipment of any type described in the regulations shall be tested and passed by an inspector before that equipment is sold or is used for trade;

(g) Prescribing what unit of measurement may be treated, for use for trade, as the equivalent of or of any multiple of fraction of, any unit of measurement included in the First Schedule;

(h) To prohibit the sale of any goods specified in the regulations except –

(i) by weigh or measurement or number expressed in such manger as may be so specified; or

(ii) in such quantities as may be so specified;

(hh) [Deleted by Act 2 of 1996]

(i) prescribing any matter or anything which may be, or is required by this Act to be, prescribed.

(2) Regulations made under this Act may contain –

(a) different provisions for different types of weighing or measuring equipment and for different classes or descriptions of goods;

(b) exemptions from any of the provisions of those regulations.

(3) Regulations made under this Act may provide in respect of the breach of any of the provisions thereof that the offender shall be liable to a fine not exceeding two thousand dollars and in default of payment to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.

(4) A draft of all regulations proposed to be made under this section shall be published in the Gazette so as to permit representations to be made to the Bureau by any person concerning any provision of the draft regulations to which that person objects.

(5) The Bureau shall consider any objection, made in writing within thirty days after the publication of the draft regulations concerning any provision of the draft regulations and shall submit to the Minister such recommendations in relation to that objection as it considers proper.

(6) The Minister shall, in making the regulations, consider any recommendations submitted to him in accordance with subsection.

The Claimants in their affidavit allege that contrary to the requirement of section 22 of the Act, no draft of challenged regulations was published in the Jamaica Gazette to facilitate persons making representations and lodging objections. Further, that there was a statutory requirement for the BS to consider such objections and objections and to make recommendations to the Minister who "shall consider these recommendations in the making of the Regulations". They claim that to this extent they were denied their rights under the Act as they were not given an opportunity to make representations. The affidavit further averred that the Claimants only became aware of the challenged regulations in January 2005 while they had purportedly come into force on November 15, 2004. They say that there were "no

press releases or any form of official statement pertaining to the Regulations subsequent to the date the Regulations came into effect and up to the time the Claimants became aware of it in January 2005".

The Claimants also aver that a letter dated March 8, 2005 was sent to the Private Sector Organization of Jamaica, Energy Committee, of which the Claimants concede, they were members inviting them to make comments on the challenged Regulations by March 18, 2005. They also concede that both by themselves and as members of the Energy Committee, they had had meetings with representatives of the Defendants to raise objections to the challenged Regulations, and that there were meetings convened by the BS with the stated intention that these would "facilitate a smooth implementation" of the Regulations. In other words, these meetings were not about the substance of the Regulations, but their implementation. Moreover, they aver that by the time of the holding of these meetings, the BS had already accepted that there was a need for amendments but "insisted that this would only be done after the implementation". There was thereafter, a second implementation programme which purported to set new dates for certain things to be done but continued to proceed on the basis that the challenged regulations were validly promulgated.

The Claimants further aver that the challenged regulations would impose obligations on the marketing companies to provide equipment and facilities to conduct temperature adjusted sales at every point where the Claimants transacted sales of bulk petroleum and they have been introduced in flagrant disregard for the Claimants' right, and legitimate expectation, to be heard on the draft regulations. The Claimants aver that there was an insistence upon the rights of the Gasoline Retailers which represent only approximately 20% of the petroleum and fuel trade and this was unfair. It is their view that these regulations are directed to satisfying concerns in this 20% share of the market and that makes it inherently unfair in relation to the other 80% of the trade. Because of this it was their view that this represented unfair treatment by a public authority and is in breach of Section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act of 1999. The unfair treatment is further underscored by the fact, that under the regulations, the Gasoline Retailers are required to sell to customers at 60°F. This was a clear case of transferring a benefit if one exists, from one class of person to another without regard for their prior contractual rights and without regard to the legal regime which governed their relationship. The Claimants further say that they

have accrued contractual rights which have been affected by the new regulations in breach of section 18 of the Constitution of Jamaica.

Affidavits in Response

The response of the Defendants to the allegations contained in the Claimants' affidavit is to be found in the affidavits of Mr. Tweedsmuir Mitchell, filed on the 30th of November 2005 and which is found at page 110 of the Judge's Bundle and that of Mr. Conroy Watson filed January 25, 2006 and found at page 189 of the Bundle.

Mr. Mitchell avers that he was a member of a committee called the "Standing Committee on Weights and Measures Legislation" and he makes the point that several others sat on that committee, including representatives of the Claimants as well as other marketing companies. There was no indication before us as to whether this "committee" had any statutory status. In his affidavit, he adverts to the publication in the Jamaica Gazette supplement dated Friday 18, 2000, which is captioned, "Draft of New Regulations: Re Delivery and Sale of Motor Fuel, Preliminary Publication" which was signed by the Minister of Technology & Commerce. The name of the regulations in that publication was given as, "The Weights and Measures (Motor Fuel for Trade) Regulations 2000". This, he averred, was a draft of the challenged Regulations which were subsequently published in November 2004. The affidavit has as an exhibit, a copy of an advertisement in the Jamaica Observer newspaper dated February 21, 2000 which extended an invitation "to participate in the development of the following standards". It then refers specifically to "Draft of New Regulations – Delivery and Sale of Motor Fuel". That the advertisement was consistent with the draft 2000 regulations as being addressed to those persons in the "motor fuel" trade, was emphasized by Mrs. Gibson-Henlin for the Claimants. She submitted it was clear that this advertisement was directed to those persons who were involved in "motor fuel" trade which, on the evidence available, contemplated only approximately 20% of the total trade in oils and fuels. It was noted in the advertisement that: "The closing date for comment is March 15, 2000" and that the 21st February to the 15th March is less than the 30 days which the statute mandates for responses or comments in relation to draft regulations.

These draft regulations were purportedly published pursuant to Section 22(4) of the Act. However, the Court noted that on its face, the copy of the Gazette which was in the

documents before the court referred to "Section 24" of the Act as the provision under which they were published. Counsel all seemed to have assumed that this was some typographical error which had been made in the Gazette at the time of the publication. However, it seems to us that this may have far reaching implications unless it can be demonstrated that this was in fact, a "mere typographical error" and *which was subsequently corrected*. In the absence of any evidence of this being the case, one may properly be allowed to wonder whether this whole trial is academic. We make on finding in this regard.

Tweedsmuir Mitchell sought to point out that comments had in fact been made by the Claimants on the draft regulations published in 2000. By paragraph 8 of the affidavit, he referred to certain written comments. In particular, he adverted to a document at page 141 of the bundle, a letter from Esso Standard Oil dated March 21, 2000 over the signature of Errol Hall, the fleet supervisor of that Claimant in which he addressed comments regarding "Draft: Re Delivery and Sales of Motor Fuels". He also averred that other "interested groups" tendered comments "by e-mail and orally at the several meetings of the committee following the publication of the Draft Regulations" In paragraph 10 of his affidavit, Mr. Mitchell says that "most of the comments that were made on the draft regulations were incorporated and the name was changed from Weights and Measures(Motor Fuel For Trade) Regulations to "Weights and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations, hence the differences with the Regulations published in the Gazette on November 2, 2004 and which came into force on November 15, 2004".

Mr. Mitchell in his affidavit also confirmed that "most sections of the (challenged) Regulations were adopted or abstracted from the many American Petroleum Institutes (API) manuals that exists and that the API is the institution that established the standards for the United States petroleum industry and these standards are recognized in the oil industry worldwide."

Mr. Mitchell defended the regulations as not being ultra vires because measuring of motor fuel "or any other commodity is understood to fall under the Act". He continued: "Tanker wagons are considered to be measuring equipment when used for the conveyance and delivery of motor fuel". It is perhaps instructive, however, that in his affidavit Mr. Mitchell accepts that there were differences between the so-called "draft regulations" of 2000 and the

challenged regulations of November 2004 and this was also conceded by Defendants' counsel, Mr. Cochrane. While there was no evidence of the extent of the differences, counsel for the Claimants was later to submit that the 2004 Regulations which are the subject of the Claimants' challenge in this matter are in fact wider than the 2000 draft. Mr. Mitchell's affidavit stated that consultations had also been had with the Bureau of Petroleum and the Director of Weights and Measures in Florida, as a result of which "international standards were incorporated into the Regulations.

In the context of Mr. Mitchell asserting that the challenged regulations were merely the outcome of the comments on the 2000 draft published, it is slightly puzzling to note the minutes of a meeting of the "Standing committee on Weights and Measures Legislation" held on January 30, 2003, which included the following under "New Business":

> "The recently revised draft of the Regulations was forwarded by fax on January 30, 2003 to the technical secretary who then made copies and distributed them to the members".

I say it is puzzling for the reasons that, firstly, the meeting which was called to order at 9:50 a.m. was being told that the "recently revised draft of the regulations" had been forwarded by fax on the same day as the meeting and that copies had been made and distributed to members on "January 30, 2003". Secondly, the question arises: Was there a revised draft of the 2000 Regulations and if so, to what extent was it revised and ought it to have been itself published in the Gazette and been the subject of the comments or objections as required by the Act. The matter is not purely academic because it is to be noted that the minutes of the meeting of the committee on February 24, 2000 under "Any Other Business" at page 161 of the Bundle, clearly stated the following.

> The Committee was advised that the "**Motor Fuels Regulation**" had been issued for public comments. Notification of this action appeared in the Daily Observer on February 22, 2000.

In looking at the agreed bundle of documents, it is to be noted that at page 173, there is an unsigned and undated letter purportedly addressed to Committee members and advising of an upcoming meeting of the Committee to be held on June 26, 2003. It is here, for the very first time, that the BS refers to a "re-titling" of "**The Weighs and Measures (Motor Fuels for Trade) Regulations**" and said that this title had now been changed to "**The Weighs and Measures (Measurement of Petroleum and Oil Fuel for Trade) Regulations 2003**". It

seems clear therefore that whatever discussions may have taken place up to this point, were in the context of "Motor Fuels" and "Petroleum and Oil Fuel for Trade". One question which Claimants' counsel asked and which is relevant for us to consider, is what regulations were these referring to because there was no regulation which was published in 2003. There were draft regulations published in 2000 in one name; other regulations published in 2004 with a different name and with unspecified changes to the 2000 draft regulations. It is not at all clear what "revised draft of regulations" was circulated pursuant to this note in the minutes.

Conroy Watson's affidavit sets the context of the challenged regulations as follows:

> "Following complaints from service station operators/dealers/retailers that they were showing losses in their petroleum inventories, they requested that the Government of Jamaica establish a system to ensure the correct measurement of fuel to retailers island-wide. The First Defendant instructed the Second Defendant to investigate the matter and it was referred to the Standing Committee on Weights and Measures Legislation ("The Committee").
>
> The Committee's discussions of the Weights and Measures Measurement of Petroleum and Oil Fuel for Trade) Regulations began prior to 2000.

Like Mr. Mitchell, Mr. Watson confirms that "most" of the comments arising from the Committee were incorporated into the "final" regulations and the "name was changed". He avers that the regulations "were made in the interest of the wider public" and he repeats the assertion of Mitchell that tanker wagons can be considered as "measuring equipment". The Watson affidavit also contains the identical paragraph as paragraph 11 of the Mitchell affidavit in the following terms:

> "That the Regulations were made in the interest of the wider public and some of the main features are as follows:
> (1) The setting out of useful definitions of terms which relating the measurement of motor fuels;
> (2) providing next of determining the accuracy of the equipment used in the measurement of fuels;
> (3) providing guidelines for the measurement and verification of fuel to tanker wagons and point of delivery."

Mitchell's "Further Affidavit" details the discussions which he had had with a Mr. Tomlinson of Petrojam concerning some of the technical problems which informed the decision to promulgate the challenged regulations and in particular dealt with the

implications of differing temperatures at different points along the supply chain. Again, he asserted the view that tanker wagons are to be considered "measuring equipment". But this further affidavit, with respect, does not in my view assist the court in determining the issues which it is required to do.

Counsels' Submissions

The judicial review sought by the Claimants rests on essentially two bases. These are that there was procedural irregularity in the passage and promulgation of the challenged regulations and that the regulations are ultra vires as being overbroad or outside the scope of the powers given under the Act. A third basis is claimed as a basis for a declaration; that is that the regulations are in breach of section 18 of the Constitution of Jamaica and Fundamental Rights (Interim Provisions) Act 1999. In this regard, procedural r=irregularity includes denying the Claimants the opportunity to be heard on the draft regulations as required by section 22 of the Act.

Procedural Irregularity

It was the submission of Mrs. Gibson-Henlin that the regulations came into being through a closed-door consultation process **rather than through public consultations and written representations as contemplated by the Act.** She referred to the affidavit of Tweedsmuir Mitchell and she said that it was clear that a brief look at the Petroleum and Oil Fuels (Landing and Storage) Act would demonstrate that "petroleum" encompasses a wider range of products than just "motor fuel". The representations made in relation to motor fuels would not necessarily include representations made in relation to petroleum products. It is clear that at least up to 2003, the representations made were in relation to "motor fuels" because that was all that was in contemplation in the 2000 draft.

One of the first complaints of counsel for the Claimants about the challenged regulations is that they do not indicate under which of the subsections or paragraphs of Section 22 the Minister purported to act. Mrs. Gibson-Henlin further submitted that the procedural requirements are set out in Section 22 (4), (5), (6) and that it is the breach of these

requirements that should lead to a finding that there is a procedural irregularity as alleged in relation to the 2004 Regulations. Those subsections are set out again below.

> (4) A draft of the regulations proposed to be made under this section shall be published in the Gazette so as to permit representations to be made to the Bureau by any person concerning any provision of the draft regulations to which that person objects.
> (5) The Bureau shall consider any objection, made in writing within thirty days after the publication of the draft regulations and shall submit to the Minister such recommendation in relation to that objection as it considers proper.
> (6) The Minister shall, in making the regulations, consider any recommendations submitted to him in accordance with subsection (5).

She submitted that the procedure was not followed in relation to the 2000 regulations which the Defendants are seeking to say were actually the draft of the 2004 Regulations. It was her submission that what should happen procedurally before the regulations could be made were the following steps:

(a) a draft of the proposed regulations is published in the Gazette to permit representations and objections to be made to be made by interested persons;
(b) the Bureau of Standards is then obliged to consider such objections made within a thirty day period from the date of publication and *shall make* the necessary recommendations to the Minister; and
(c) the Minister must consider these recommendations before making of the regulations.

She pointed out that in relation to the regulations published in 2000, it is common ground that it was published in the Gazette on February 18, 2000; a notice was placed in the Jamaica Observer on February 21, 2000 and invited comments by March 15, 2000. Clearly, this interval did not allow the thirty days required by the statute. Indeed, it is difficult to resist counsel's submission with respect to the 2000 regulations:

> "All documentary evidence stops at a final draft of the 2000 regulations which are, on the evidence, limited to Motor Fuel Regulationswhich stops short of compliance with the Act in any event and is also unlawful as there is no evidence that it was published and or considered within the 30 days required by the Act. There is no evidence that it was ever submitted to or was considered by the Minister. There is evidence of an intention to submit, but nothing else.
> The only regulation that has a name similar to the name in dispute is a 2003 regulation referred to at page 173 of the Judge's Bundle (see reference above) but which is not in evidence'.

With respect to the challenged Regulations, counsel further submitted that there is no evidence that a draft of those regulations had ever been published and representations and objections solicited as required by the Act. With respect to these challenged regulations she referred to a letter from the BS to the Chairman of the Private Sector Organization of Jamaica Energy Committee dated Mach 8, 2005 in which the BS sought to receive comments with a view to ironing out any ambiguities and concerns which arose from the making of the regulations in November 2004". Among the things stated in the letter is the following;

> "In addition the Bureau of Standards is inviting you to its offices to a presentation of the revised implementation programme that will be convened in the training room on Tuesday, March 22, 2005. This presentation will be the forum to outline the way forward. The Bureau looks forward to your kind cooperation as it seeks to bring clarity and fairness to all the parties that the new regulations may affect."

The point was made by Claimants' counsel that this letter actually was several months after the regulations purportedly would have come into effect. *Ergo*, it would not have been considered an invitation to make representation or raise objections on the regulations as contemplated by the Act. The import of the letter is reinforced by a copy of an article in The Observer newspaper of Monday, 2 May 2005 indicating the direction that the BS was intending to take. This article stated that the BS had put stringent new "guidelines" in place in order to "address gas retailers' concerns that they were losing more than $1.2 billion a year". The article quoted the Executive Director as follows: "We will continue to monitor the entire process *in the delivery and sale of motor fuel* (my emphasis) to determine compliance with the regulation....".

According the Claimants' counsel, citing the affidavit, there were several meetings either together with or through the Energy Committee of the P.S.O.J. with the BS in order to raise objections to the regulations. Counsel pointed out that the Claimants' affidavit confirmed that a series of meetings was convened by the BS in relation to the regulations, in order "to facilitate a smooth implementation of the regulation." According to the terms of the "implementation schedule" presented at the March 22, 2005 meeting, under "Amendments" it was stated: "These regulations being new will require amendments. It is expected that

these will be made after the Implementation by all concerned and after the need for these amendments has been recognized and become obvious".

One question which arises is whether this "implementation schedule" with specific dates for the achievement of specific tasks in 2005, months after the challenged regulations purportedly had taken effect in 2004, is not itself an acknowledgement that the regulations had not and could not have, taken effect at its publication in 2004. This view is strengthened by the averment in the Claimants' affidavit, and acknowledged on the face of the schedule, that there was the need for changes in the regulations themselves, but insisted that these could only be done after the regulations were in force.

Excess of Authority by The Defendants

Mrs. Gibson-Henlin submitted that not only had the Defendants failed to fulfill the procedural requirements of section 22 of the Act, but had exceeded the authority given by the Act in what the Defendants could or could not do. It was submitted that the Minister can only make regulations pursuant to that section to the extent it is not covered in any other the section. In other words, the powers of the Minister under Section 3, Section 4 and Section 22 of the Act are all mutually exclusive. Section 3 (3) allows the Minister to amend the First Schedule to the Act by adding to or removing therefrom any unit of measurement. Section 4 deals with reference standards. It provides in relevant part as follows:

> (1)The Minister shall cause to be maintained in accordance with the provisions of this section, standards which shall be collectively known as Jamaican reference standards.
> (2) The Jamaican reference standards shall consist of such measures and weights set out in the Second Schedule as the Minister considers to be proper and sufficient; .....
> (7) The Minister may from time to time by Order amend the Second Schedule by adding to it or removing from it any measure or weight.

It would appear from section 4 of the Act that in order to amend the reference standards ("i.e. the Jamaican Reference Standards") contained in the Second Schedule, the Minister must do so pursuant to this section. However, by providing for temperature related measurements, and in particular by the incorporation of the "API Formula", the Minister effectively varies the Jamaican Reference Standards in the Second Schedule, not under and in accordance with the appropriate section, section 4, but under section 22. This latter section does not deal with

standards at all. It follows that I disagree with Mr. Cochrane's submission that even if API standards have been adopted, this does not change Schedule Two under the Act.

Section 22 (1)(a)(i) to (v) set out earlier, empowers the Minister to make regulations in relation to weighing and measuring equipment. The paragraphs from 22(1)(b) to22(1)(h) deal with other discrete areas where the Minister may make regulations. These list specific instances where the Minister may make regulations. They do not encompass the areas which the Claimants say have been dealt with in these regulations. Section 22 (1)(i) provides: The Minister may make regulations prescribing any matter or anything *which may be, or is required by this Act to be prescribed*. Counsel submitted that notwithstanding the apparent breadth of paragraph 22(1)(i), the power to make regulations was limited to those things which under the Act may be prescribed. On this argument, section 22(1) (i) does not give a carte blanche power to make any regulations. Thus, goes the submission, if there is no specific provision saying that a matter may be prescribed by regulation, the Minister has no such power. The Claimants' counsel submits that the Minister cannot therefore use the power under section 22 to "fill in details" thereby adding extensive new powers as this will be ultra vires. Counsel cited **DAYMOND V SOUTHWEST WATER AUTHOITY [1976] AC 609 at 644**.

Similarly, the Claimants' counsel submits that the scope of the authority of the BS is also limited. Thus the BS is to provide inspectors for the inspecting, testing and approving weighing and measuring equipment, maintain or from time to time replace standards ("working standards"); approve patterns and stamping equipment.

It was the contention of the counsel for the Claimants that the BS was more focused on implementing the regulations in the "interest of the gasoline retailers" than on ensuring the validity of those regulations. Accordingly, it was submitted that the passage of the Regulations has now severely prejudiced the Claimants as, not only were they passed without the Claimants being allowed to make representations, but that the impact of the regulations had far reaching financial implications for the Claimants. In particular in order to comply with the regulations, the Claimants will have to incur considerable capital expenditure in providing equipment and meters in order to conduct temperature adjusted sale at every point where the Claimants transact sales of bulk petroleum products, (defined as a sale of 500 litres or more)..

It was also submitted that the regulations now introduced concepts of "gross and net volume" in petroleum sales which was hitherto unknown, and for which there was no statutory authority. Further, it was submitted that the Claimants had had rights based on their pre-regulation supply contracts with the retailers and that these contracts contemplate the sale of the products at ambient temperature, that's approximately 80°F. To the extent that the regulations now impose other temperature-related requirements, this was a derogation from their contractual rights which rights are in their view *choses in action*, protected by virtue of Section 18 of the Constitution of Jamaica.

Mrs. Gibson-Henlin submitted that the Act did not provide any basis for regulating tanker wagons. Thus, to the extent that the Minster now purported to regulate tanker wagons, this exceeded the power given to him under the Act. Further, that in any event, the regulations are "overbroad" as that the Act only confers jurisdiction on the Minister to regulate the *equipment* that is used for:

1) measurement and weights in the trade;
2) units of measurement,
3) reference standards of measures and weights; and
4) conversion from imperial to metric measurements.

However, counsel argues that 1st Defendant has, by virtue of the regulations, prescribed methods of measuring fuel or determining the accuracy of receptacles used in the measurement of fuels, or matters relating to the details of transferral of the product from the manufacturer or producers' storage tank to the tanker wagons, or the method of verifying the quantity of the product at the point of delivery by reference to some particular temperature. These actions, it was submitted, are outside of the scope of powers given under the Act to the Minister, as set out in the previous paragraph. Moreover, notwithstanding the views of he Defendants' affiants, the assertion that tanker wagons are "measuring equipment" is not supported by the statute.

Another submission by counsel for the Claimants is that the regulations are an interference with a branch of commerce and trade which is under the jurisdiction of the Fair Trading Commission. I do not think that this submission was pursued with any real seriousness and I

do not think it ought to trouble us as the matter can be decided without any reference to that submission.

Finally, counsel for the Claimants pointed out that the First Defendant has stated in reference to the Act and making of the regulations that the purpose of regulations is "to ensure that there is equity in all commercial petroleum and oil fuel transactions in Jamaica". It was suggested that this was an extraneous consideration which the First Defendant ought not to have had in his contemplation as it was not within the Act. However, this was stated in the implementation documents referred above published by the 2nd Defendant. It is not at all clear what is supposed to be the status of such a pronouncement by the 2nd Defendant for two reasons. Firstly, it was at a time well after the regulations had come "into force". Secondly, it is not at all clear that that was part of the recommendations which had been made to the Minister and upon which he purported to act so that it could be said to form part of the recommendations considered in making the regulations. In those circumstances it is not clear to us that we need to consider this submission further.

Defendants' Submissions

Counsel for the Defendants reminds the Court that Judicial Review is not an opportunity for a court to substitute its own discretion for the properly exercised discretion of the decision maker. See **Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155.**

It was submitted that the draft of the (challenged) 2004 regulations was published in the Gazette on February 18, 2000 and comments invited by a notice in the Observer newspaper on February 21. Counsel, however, while apparently willing to concede the fact that the evidence is that comments were to be provided by March 15, less than the thirty days required by section 22(5) of the Act, submits that: "There is no evidence that comments made beyond March 15, 2000, were not considered" With respect, apart from placing the onus to prove a negative and on the wrong person, this ignores the fact that judicial review has to do with form, **as well as**, substance. It is the 1st Defendant who must prove that the time mandated by the statute has been adhered to.

It was also submitted that there is evidence that at least the 2nd Claimant had made comments upon the 2000 draft and that meetings were held with some industry stakeholders within a committee set up by the BS. The status of this committee was not however clarified by counsel for the Defendants when such clarification was sought by the Court. The

Defendants' counsel also suggested that in light of the fact that the 2nd Claimant had made comments on the 2000 draft regulations and meetings to discuss it had taken place, then the regulations which were published in 2004 were the 2000 regulations as amended. The 2004 regulations were therefore properly brought into effect. However, this ignores the fundamental questions as to whether the regulations published in 2000 dealing with "motor fuel" are the same as ones dealing with "petroleum and oil fuel" purportedly brought into effect by publication in November 2004.

Defendants' counsel also submitted that tanker wagons fall within the definition of "measuring equipment" in section 2 of the Act. The submission was further bolstered by the proposition that the Minister had, in including tanker wagons in the regulations, done so based on a finding of fact that tanker wagons were properly within such a definition. It was further submitted that on the authority of **O'Reilly v Mackman [1983] 2 AC 237 at page 282** even if the exercise of the statutory power is based on a mistaken view of the facts, then provided that there was some evidential basis upon which the authority might reasonably have formed the view expressed, then certiorari will not be granted. In any event, counsel says that paragraph (i) of section 22 (1) is wide enough to allow the Minister to make regulations about tanker wagons which are an essential part of the petroleum trade.

The Defendants also submit in relation to the claims pursuant to section 5 of the Fundamental Rights (Additional Provisions) Interim Act that the Claimants have not alleged that there are no adequate means of redress other than making an application pursuant to the Fundamental Rights Act. Indeed, it was submitted that this could not be so stated in circumstances where judicial review proceedings are an appropriate remedy. As was opined above, I do not feel that it is necessary to make a ruling on this as it is possible to dispose of this case without doing so.

Finally, the Defendants' counsel submits that the Claimants' claim that the Regulations are in breach of the rights to property conferred by section 18 of the Constitution of Jamaica is not sustainable as there is no evidence of any property, including *choses in action*, or any interest in or right over property being compulsorily acquired or taken over by the Government of Jamaica. In fact on the Claimants' own case, the pre-regulation contractual rights, if such they are, have been "transferred" to another class of persons, to wit, the

retailers. I agree with the Defendants that the case **Donald Panton & Janet Panton v Minister of Finance and the Attorney General [2001] 59 W.I.R 418** provides a good answer to this claim and it must fail.

Court's Reasoning in arriving at Decision

There is no question that the acts of a Minister are subject to judicial review. The Claimants submit and the Court accepts that there is authority for this proposition in the case of **Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 A.E.R. 935.** Proceedings by way of judicial review are, of course, markedly different in character from an appeal, as counsel for the Respondents, Mr. Cochrane, repeatedly pointed out. They are concerned with whether a person entitled to act pursuant to a statutory power does act within the terms of the power, in a rational way, applying the law correctly and acting fairly. The reviewing Court's concern is therefore with the validity of legal processes and the Court is not entitled to substitute its own findings of fact as if it were rehearing the evidence.

I make bold again to refer to an article, "**Historical Trends and Key Principles in Judicial Review**" by Charles Chauvel, a New Zealand Attorney at Law written in 2002, to which I adverted in my judgment in another judicial review matter on which I had adjudicated in 2006[1].

There, the author submitted and I agree and adopt his proposition:

> The classic theory of judicial review is that it is an important restraint on the exercise of public power. By this theory, judicial review imposes upon all decision makers standards that are inherent in a democracy and embraced by the rule of law. The role of the Courts to uphold the rule of law and restrain the exercise of power has long been articulated. The primary purpose of judicial review was summarized by Lord Lindley M.R. in **Roberts v Gwyrfai District Council, [1899] 2 Ch 608, 614-615**
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> > "I know of no duty of the Court which it is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the injury and oppression of private individuals, and those persons are

[1] City of Kingston Cooperative Credit Union v Registrar of Cooperatives and Friendly Societies, Claim No: HCV 01658 of 2006

entitled to be protected from injury arising from such operations of public bodies."

Until the late twentieth century the basis for judicial review was generally thought to be that the act was ultra vires the powers of the person whose act is called into question. That is no longer the basis.

The clearest articulation of the modern English law of the principles or grounds of judicial review, were set out by Lord Diplock in **COUNCIL FOR CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1985] AC 374.** At pp. 410-411 of the judgment he defined these as "illegality", "procedural impropriety" and "irrationality". His Lordship said:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads, the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. This is not to say that further development on a case by case basis may not in the course of time add further grounds.... 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.... By 'irrationality' I mean what can by 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 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 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 even where such failure does not involve any denial of natural justice."

The Claimants and the Respondents articulate the issues which face this court in different ways. However, it is the view of the Court based upon the nature of the claim that the issues that engage it, may be briefly summarized as follows:

1) Did the Defendants or either of them exceed the powers given under the Act or take into account considerations which they were not entitled to do, so as to make the

regulations illegal? Or as Lord Diplock puts in Wednesbury: Did the Defendant Minister understand correctly the law that regulates his decision – making power and give effect to it?

2) Was there procedural impropriety in the sense that the procedure set out by the statute for the promulgation of valid regulations under the Act was not followed?
3) Was the decision so defiant of logic, so irrational that it reflected an unfair exercise of power by a public authority so as to make it totally unreasonable?
4) Have the Claimants substantiated their claims for relief under the Fundamental Rights (Additional Provision) (Interim) Act and/or Section 18 of the Constitution of Jamaica?

Excess of Authority

I accept that the following submission on behalf of the Claimants is a correct statement of the law.

> A Minister's power is derived from statute or a statutory instrument. There is no general or inherent rule making power. Therefore the Minister is required to act in accordance with the statute or statutory instrument. The Minister will be found to have exceeded his powers where he:
>
> a) fails to satisfy a condition precedent to his having jurisdiction or observe those formalities expressly provided for by statute;
> b) Has no power to perform the act in question;
> c) Has failed to observe the law including the Constitution in the course of his exercise of his powers; or departed from the rules of natural justice;
> d) Took into account, irrelevant or wrong considerations.

Based upon the evidence which was accepted by the Court, I agree with the submissions of the Claimants that the Minister has exceeded his powers given under the Act. I also agree that by these regulations he has purported to determine and impose new measuring equipment on the petroleum and oil fuel trade. I do not share the narrow view of paragraph 22(1)(i) of the Act that counsel for the Claimants contends for, that the provision only allows for the making of regulations where such regulation "*is required to be prescribed by this Act*". The wording of the paragraph itself says prescribing any matter or anything which *may be, or is required* by this Act". Nevertheless, I do believe that the powers given the Minister are critically circumscribed and the regulations must be kept within these parameters or they will be struck down. In that regard, I accept in particular the following submissions by Mrs. Gibson-Henlin.

In relation to units of measurement, section 3(2) of the Act provides for defining for the purposes of measurements falling to be made in Jamaica, the units of measurement set out in the First Schedule to the Act. Section 3(3) provides that the Minister "may from time to time by order amend the First Schedule by adding to or removing therefrom any unit of measurement. Similarly, section 4(7) allows the Minister from time to time, by order to amend the Second Schedule which sets out the "Jamaican Reference Standards" consisting of such measures and weights as the Minister considers to be proper and sufficient. Section 22(1) allows the Minister to make regulations with respect to "weighing and measuring equipment. I accept that the permissive paragraphs are mutually exclusive. I also accept that where the regulations purport to create new methods for measuring or weighing products, or new units of measurement, new measuring equipment or new reference standards (matters dealt with under sections 3 and 4) determined by reference to standards of the American Petroleum Institution pursuant to section 22, this is in excess of authority given by that section, is ultra vires and null and void.

With respect to the Second Defendant, the BS can only (a) test and approve by certification weighing and measuring equipment being used in the trade and (b) pass or certify as a weighing or measuring equipment, such equipment as has been submitted to it by a trader. (See sections 7 and 8 of the Act). It therefore has no basis for coming to a conclusion *without the appropriate submission of equipment by a person in the trade*, that a tanker wagon is measuring or weighing equipment.

Procedural Impropriety or Irregularity

It is clear that section 22 sets out a procedure for the promulgation. That procedure requires that the draft regulations be gazetted; that thirty days be given for the making of representations or objections; and that "any person" is allowed to make such representation during this thirty day period. Further, the BS is required to consider the representations and objections and must make recommendations to the First Defendant. The evidence clearly establishes that in the case of the regulations gazetted in 2000, the period allowed for comments was less than thirty days. Secondly, there is no evidence that the BS allowed for the comments or objections of "any persons" as contemplated by the statute as opposed to

the members of the Legislation Committee or the Energy Committee of the Private Sector of Jamaica. There is also no evidence that the BS made recommendations to the Minister who considered them in making the final regulations. In summary it would appear that the correct procedure for the making of the regulation was not followed, and this included a failure to follow the requirements of publication and consultation. Thus, in **Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd., [1973] 1 AER 280**, an Order was held not to be applicable to an organization which the Minister had a duty to consult, but whom he had failed to so consult.

Further and in any event, I would hold that there is sufficient evidence to come to the view that the purported regulations of 2004 were **not** merely the 2000 draft regulations in final form after consideration of the recommendations. It is clear that the 2000 regulations dealt with "motor fuel" (20% of the market) while the 2004 regulation dealt with petroleum and oil fuel for trade, the full market. Indeed, "motor fuels" are all that is defined in the 2000 regulations. However, there is no reference to "motor fuel" in the 2004 regulations. The 2004 regulations, substitute a definition of "petroleum fuels" for the definition of motor fuels. Motor Fuels are distinctly different from Petroleum, and merely represent a sub group of Petroleum, which includes other oils and lubricants. (See section 2 of the Petroleum and Oil Fuel (Landing and Storage) Act).

It is also clear that the two sets of regulations were differently named and I form the view that unless it was felt that the latter 2004 regulations were essentially different from the 2000 regulation, there would have been no need for the change of name. It will be recalled that it was submitted on behalf of the Claimants that the term "petroleum" is wider than motor fuel and that it was in 2003 that, for the first time, the "discussions" if such they were, contemplated any concept wider than motor fuel. I would hold accordingly, that there was no draft of the 2004 regulations published as required by section 22 of the Act. Further when it is recalled that, in any event the 2000 regulations were said, in the Gazette, to be made "pursuant to section 24" of the Act, and there is no evidence that this had ever been corrected, I am of the view that that is the end of the matter.

In these circumstances, the Claimants' submission in the following terms must also be accepted as a correct statement of principle concerning procedural impropriety.

> "Where there (is) published criteria governing the enactment of the regulation, and the affected party had a legitimate expectation that the Minister would follow the said criteria, and, the Minister has failed to do so, the act or decision is null and void".

See the **R v Secretary of State for the Home Department, Ex Parte Ruddock and Others, [1987] 2 AER 518**. In that case it was held that the doctrine of legitimate expectation imposed, in essence, a duty to act fairly and was not restricted to cases where the expectation was to be consulted or to be given the opportunity to make representations before a decision was made. See also **Council of Civil Service Unions and Others, v Minister For The Civil Service [1984] 3 AER 934**. In this regard I should also note a comment in "Judicial Review of Administrative Action" by De Smith, Woolf and Jowell, where the learned authors state that the importance of procedural propriety is: ".... to provide the opportunity for individuals to participate in decisions that affect them. Another is to promote the quality, accuracy and rationality of the decision-making process. Both concerns aim at enhancing the legitimacy of that process." It seems to me that anything which detracts from these ends, must invite the court's scrutiny as it has here. In fact, in the CCSU case above, it was the second holding of the Court according to the headnote that:

> "An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and an opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal..... The Minister's failure to consult prima facie entitled the appellants to judicial review of the minister's instruction....."

Finally I should observe that as was noted by Chauvel in the article referred to previously[2]:

> The grounds of review are not discrete and there may be overlap between them. Moreover, as a general principle of law, these "grounds" are not considered exhaustive.(**R v Secretary of State for the Environment Ex P Nottingham County Council [1986] A.C 240 at 249** Per Lord Scarman) They merely impose labels upon the broad framework of judicial review of the justiciable exercise of public power by a decision-maker. They reflect the variety of principles which govern the law of judicial review, which is summarised by Sir Robin Cooke's

[2] See page 20 above Re City of Kingston case

now well-known statement that "[t]he decision maker must act in accordance with law, fairly and reasonably" (**Sir Robin Cooke "Third Thoughts on Administrative Law" [1979] NZ Recent Law Cases**.)

I wish to comment briefly upon a submission for the Claimants to the effect that a decision of an authority may be impugned on the basis that the authority took into account irrelevant or wrong considerations. It was suggested that the regulations were premised upon irrelevant considerations of "balancing the equities among members of the petroleum and oil fuel trade" and to seeking to redress a perceived grievance on the part of the gasoline retailers. As a statement of law, that is correct and it is applicable even where the irrelevant consideration is one which is bona fide and with good intentions. Accordingly, a decision will not be in accordance with law if all mandatory relevant considerations have not been taken into account, or if irrelevant considerations have been allowed to influence the decision. That is, mandatory considerations of the statute must be given effect to by the decision-maker. The mandatory considerations of the statute may be either express or implied. The statutory requirement for publication and a thirty day period for the receipt of comments from the public would indicate that it was mandatory for the public at large, and not just the narrow interests, to be fully consulted. Here, it is sufficient to note that we have found that there had been non compliance with the conditions for publication, review and comments by "any person" wishing to make written comments and the time for such comments to be received. On the other hand, there is precious little by way of hard evidence to support the suggestion that the Minister took account of irrelevant considerations to wit, the "balancing of the equities" and the special interests of the retailers, in making the regulations and I do not believe that this finding can be made, nor is it necessary to be made, to decide whether to grant the relief sought.

Before concluding this judgment, I should like to make reference briefly to two relevant matters, one substantive and the other procedural. The first is the question of the claims under the Fundamental Rights (Additional Provisions) (Interim) Act and under Section 18 of the Constitution of Jamaica. I had averted above in reviewing the submissions of counsel for the Defendants, to the submissions that the Claimants had not, and could not have, averred that there was no other remedy save for an application under the Fundamental Rights Act as is required in claims under that act, since the Claimants were here pursuing another remedy,

namely judicial review. Similarly, I also suggested above that the claim under Section 18 of the Constitution would seem to me to be unsustainable in light of the Privy Council decision in the **Panton** case cited by counsel for the Defendants. I do not believe that it is necessary to make any definitive ruling on either of the claims in relation to the Fundamental Rights or the claim for constitutional relief as it will be apparent that I have formed the view that the real issues at stake can be decided without making any such determinations.

The other issue which I consider to be more of a procedural nature is the question of the Expert's Report which formed part of the bundle of document before the Court. In the course of his submissions counsel for the Defendants suggested that it was not appropriate to have an Expert Report in a case such as this involving a challenge to the validity of ministerial action. Counsel may very well be right but it seems to me that the time for objecting to the Expert Report was when the application had been made by the Claimants. In any event in the circumstances it has not been necessary to spend too much time considering that report given the decision and the bases upon which the court has arrived at it.

Let me end by citing again the Chauvel article[3]. The learned author, in discussing the reviewability of the exercise of powers by an authority in the context of fairness to individuals or the wider society, states:

> The modern approach (See for example: **Ridge v Baldwin, [1964] AC 40**) in New Zealand was summarised in Fowler & Roderique v Attorney General, **[1987] 2NZLR,56 at page74**) where Somers J stated:
>
> "If the exercise of the power is likely to affect the interests of an individual in a way that is significantly different from the way in which it is likely to affect the interests of the public generally, the person exercising the power will normally be expected to have regard to the interests of the individual before it is exercised."

It is an approach which ought to commend itself to those persons in the Executive when they direct their attentions to those matters where their actions may be called into question in the process of Judicial Review.

ORDER:

1. Application granted in terms of paragraph 1 and 2 of the Fixed Date Claim Form dated 12th June 2005.

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[3] See reference above at page 20

2. Costs to the Claimants to be taxed if not agreed.