IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF

GUYANA

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

2023-HC-DEM-CIV-FDA-456

In the matter of an Application for Orders of Administrative relief under Sections 4(1) (a), 5 and 8 of the Judicial Review Act (Cap 3:06)

BETWEEN:

1. Vanda Radzik
2. Elizabeth Deane Hughes

Applicants

-and-

1. Environmental Protection Agency, a body corporate established under the Environmental Protection Act (Cap.20:05)

Respondent

2. Esso Exploration and Production Guyana Limited
3. Attorney General of Guyana

Added Respondents

Appearances:

Mrs. A. Wong-Inniss and Ms. M. Janki for the Applicants

Ms. F. Carryl for the 1st Respondent

Mr. A. Pollard, S.C. with Mr. E. Luckhoo, S.C., for the 2nd Respondent

Mr. M. Nandlall, S.C. for the 3rd Respondent

Decision by the Honourable Justice Priya Sewnarine-Beharry delivered via electronic mail on 5 October, 2023.

1. This is an application for judicial review challenging the decision of the Environmental Protection Agency ('EPA') to grant Esso Exploration and Production Guyana Limited ('Esso Guyana') an environmental permit to undertake a Gas to Energy Project in the Co-operative Republic of Guyana.
2. On 27th March 2023, Ms. Vanda Radzik, and Ms. Elizabeth Hughes ('Applicants') instituted proceedings against the EPA seeking an administrative order of certiorari and various declarations. Subsequently, Esso Guyana and the Attorney General made applications to be added as a Respondent to these proceedings. After consideration of the oral and written submissions of the parties this court determined that both Esso Guyana and the State demonstrated *'sufficient interest'* to be added as party to these proceedings.[1] The rubric was amended accordingly and on 22nd June 2023, an amended Fixed Date Application filed by the Applicants seeking inter alia:
    a. An order of Certiorari to quash the decision of the Environmental Protection Agency (the "Respondent") made on 25th November, 2022 to award an Environmental Permit, numbered 20210528-NGPLE, dated the 25th November, 2022 and entitled "Environmental Permit" to Esso Exploration and Production Guyana Ltd (the '" Esso"). To undertake the Gas to Energy Project and the activities more particularly described therein, including but not limited to the installation and operation of riser tie-ins at two Floating Production, Storage, and Offloading (FPSO) vessels for supply of gas, subsea equipment, offshore pipeline and onshore pipeline, on the grounds inter alia the decision was in breach of the provisions of the Environmental Protection Act (Cap 20:05), and particularly the Environmental Protection (Authorisation) Regulations, unauthorised and contrary to law, in excess of jurisdiction, failure to satisfy or observe conditions or procedures required by law, unreasonable, irregular or improper exercise of discretion, abuse of power, conflict with the police of the Act, error or law, breach of/omission to perform a duty;

[1] See page 7 of Justice Sewnarine-Beharry's ruling delivered via electronic mail where it was held that Esso being the holder of the Environmental Permit being impugned *'undoubtedly [had] an economic interest in the proceedings*'; The Court also found that the Attorney General owing to his unique position as the Government's principal legal advisor would be '*privy to relevant facts and information (of which the Respondents/Applicants are in no position to speak) and may be able to offer a different, useful or practical perspective'* which ought to be taken into consideration by the Court.

3. The EPA is a public body corporate empowered by the **Environmental Protection Act**,[2] ('EPA Act') to grant environmental permits to various compliant project developers.[3]
4. On 24th June 2021, Esso Guyana filed an application with the EPA seeking leave to be granted an environmental permit facility. On 25th November 2022, the EPA granted environmental permit **no. 20210528-NGPLE** ('environmental permit') to Esso Guyana. That environmental permit, in unornamented terms, allows Esso Guyana to develop a Gas to Energy Project pipeline from Nouvelle Flanders to Wales Estate on the West Bank of Demerara.
5. The Applicants, both citizens of Guyana, seek to have the decision by the EPA to grant the environmental permit to Esso Guyana judicially reviewed on the basis that Esso Guyana's application failed to conform with the requirements set out in **Regulation 17(2)(c)(ii)** of the **Environmental Protection (Authorisations) Regulations** ('EPAR').

Amended Fixed Date Application

6. The thrust of the Applicants case is that the EPA was not empowered to grant the environmental permit to Esso Guyana because at the time of granting the permit, Esso Guyana's application was devoid of any proof of ownership, lease, or other agreement with the landowners and occupiers of the affected areas of the pipeline in violation with **Regulation 17 (2) (c)(ii)** of the **EPAR**. The Applicants noted that it was only in January 2023 that the Honourable Bishop Juan A. Edghill, M.P., Minister of Public Works, passed various orders to acquire lands for the purpose of the project pursuant to the **Acquisition of Lands for Public Purposes Act**[4]. The Applicants contend that the EPA's decision to grant an environmental permit notwithstanding the noncompliance of Esso Guyana with **Regulation 17 (2) (c)(ii)** of the **EPAR** violated the **EPA Act** and its subsidiary regulations. For this reason, the Applicants seek to have the decision made by the EPA quashed.

Affidavit in Defence for the Respondent

7. The EPA took issue with the Applicants evidence, believing that it did not establish that Esso Guyana failed to comply with **Regulation 17(2)(c)(ii)** of **EPAR**. The EPA asserted that the procedure for applying for an authorisation of an environmental permit is not restricted to **Section 11** of the **EPA Act** and **Regulation 17 (2) of EPAR** but also includes **Regulation 9**

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[2] Cap. 20:05
[3] See Section 3 of the EPA Act.
[4] Cap. 62:05

and **Regulation 10** of **EPAR**, as well as other relevant portions of the **EPA Act** and **EPAR**.[5] The EPA advanced that **Regulation 10(1)** of **EPAR** provides for instances where an applicant omits to provide information required under **Regulation 17** and makes provision for a subsequent request and submission of the outstanding information.

8. The EPA maintains that Esso Guyana was compliant with **Regulation 17(2)(c)(ii)** of **EPAR** prior to the grant of the environmental permit. Asserting that after the submission of the initial application and in accordance with **Regulations 9**, **10 and 17** of **EPAR**, Esso Guyana submitted proof that it '[had] *the legal right and ability to conduct the activity without the consent of the landowner[s] and occupier[s]'*.
9. The EPA stated that whilst considering Esso Guyana's application, request was made for additional oral information from the Head of the Gas to Energy Task Force, Mr. Winston Brassington. The EPA maintains that upon a consideration of the application submitted, and all the ancillary information provided including the letter dated 18th October 2021 and the oral assurances from the Mr. Brassington regarding Esso Guyana's legal right or ability to conduct the activity without the consent of the landowner or occupier, it determined that Esso Guyana met compliance with **Regulation 17** of **EPAR**.
10. Counsel added that to date no purported occupier or landowner has indicated to the EPA that they have suffered prejudice, or a deprivation of their property rights associated with the grant of the environmental permit. Counsel argues that the Applicants have failed to show that they have any property interest or deprivation of property rights, on their own part or on the part of any other person flowing from the grant of the environmental permit.

Affidavit in Defence for the First Added Respondent

11. Esso Guyana argued that the Applicant's interpretation of **Regulation 17(2)(c)(ii)** of the **EPAR** ignores its clear language. Esso Guyana averred that as part of its application process for the environmental permit, it was enjoined to provide proof to the EPA that it has the legal right or ability to conduct the activity without the consent of the landowner or occupier, which it did. Esso Guyana asserted that on 24th June 2021, it submitted an updated application to the EPA which included the Gas to Energy Project application for Environmental Authorisation, Gas to Energy summary, a letter dated 23rd June 2021 from Mr. Winston Brassington, Head of the Gas to Energy Task Force to Mr. Alistair Routledge,

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[5] None of the other 'relevant' portions of EPA Act or EPAR were cited.

President of Esso Guyana, which indicated that the government would be acquiring the lands necessary to complete the Gas to Energy Project. Esso Guyana averred that on 25th June 2021, the EPA acknowledged receipt of the updated application and indicated it had determined that the project required an Environmental Impact Assessment(EIA)in accordance with **Section 11** of the **EPA Act**. Esso Guyana contended that the letter referenced several approvals that were required to be submitted as well as a reserved right by the EPA to require submissions of such other documents as may be required pursuant to **Regulation 17** of **EPAR**.[6] Counsel for Esso Guyana advanced that **Regulation 9** and **Regulation 10** of **EPAR** allows an Applicant to furnish additional information to the EPA. He argued that **Regulation 9** and **Regulation 10** contemplate consideration by the EPA of extensive oral and written information from various sources and the granting of extensions of time to provide information required under **Regulation 17**. Esso Guyana in paragraphs 13, 16 to 22 of its Affidavit in Defence deposed details of several correspondences, Orders and extracts from EIA (exhibited) which, they aver, clearly sets out their legal right or ability to conduct the Gas to Energy Project without the consent of the landowner or occupier.

12. Counsel also argued in the alternative that the language in **Regulation 17 (2) (c) (ii)** of **EPAR** is *'directory'* in the sense that non-compliance with the Regulation, if the Applicants' interpretation is correct, would not have been intended by Parliament to result in the invalidity of the environmental permit. Counsel advanced that the EPA is the sole authority vested by Parliament with the discretion to grant an environmental permit and to determine compliance with the Regulations. Counsel assessed that the question of any proof required by **Regulation 17 (2) (c) (ii)** is a matter within the remit of the agency and in the absence of illegality, irrationality or procedural impropriety on the part of the EPA, the Court should defer to the decisions of the EPA and not substitute its own determination of whether the application for the environmental permit meets the requirements of **Regulation 17**.
13. Counsel also advanced that the order to quash the decision is discretionary and implores the court to take cognisance of the fact that the Project is one of significant government expenditure well in excess of $50.67M (fifty million six hundred and seventy thousand United States Dollars). Counsel argued that an order by the court to have the EPA reexamine the issue would be an unnecessary exercise and waste of resources, as the acquisition of

[6] T.A.M. AT-3

all the subject land has been formally completed by the Government of Guyana and the second grant of the permit in any event will follow.

Affidavit in Defence for the Second Added Respondent

14. The State filed an Affidavit in Defence sworn to by Mr. Winston Brassington which expands much of the averments made by the other Respondents.
15. Mr. Brassington deposed that he serves his country as the Head of the Gas to Energy Task Force. He said the Task Force was established under the auspices of the Ministry of Natural Resources in September 2020 with the objective of managing and implementing the Gas to Energy Project. His duties include oversight and project management of the Gas to Energy Project and matters ancillary thereto. He asserted that the Gas to Energy Project was conceptualised by the Government of Guyana as a national transformational project which would lower the cost of electricity, reduce the cost of energy, and enable the expansion of the manufacturing and industrial sectors while promoting economic diversification and reduction on the overall cost of living.
16. Mr. Brassington deposed that the Gas to Energy Project includes the construction and operation of a 12-inch, 225km pipeline from the Liza Phase 1 and Phase 2 Floating, Production, Storage and Offloading (FPSO) vessel. This, he asserted, will transport a volume of natural gas to an onshore integrated natural gas liquids fractionation plant and combine cycle plant in Wales, West Bank Demerara, which is expected to generate 300MW of electricity.
17. Further, in December 2022, the Government of Guyana contracted for the Engineering, Procurement and Construction of this integrated power plant and natural gas processing facility. Mr. Brassington asserted that as part of the Gas to Energy Project and in preparation for the integrated facility, Esso Guyana was responsible for the laying and construction of the offshore and onshore pipelines, the performance of the initial enabling works at the site including site preparation, construction of material offloading facility and construction of access roads and bridges.
18. Mr. Brassington asserted that the Government of Guyana was responsible for acquiring lands pursuant to the **Acquisition of Lands for Public Purposes Act, Cap. 62:05** to enable the construction of the onshore gas pipeline. These lands, he averred, stretch along the pipeline route from Plantation Nouvelle Flanders to Wales Estate, West Bank Demerara. He

related that pursuant to his duties as the Head of the Task force, he invited Mr. Kemraj Parsram, the Executive Director of the Respondent in June 2021, to meet to discuss the Gas to Energy Project where he informed Mr. Parsram that the Government of Guyana was engaged in the process of reviewing the route for the pipeline and provided an overall understanding of the Gas to Energy Project. He further deposed that following that meeting and upon his recommendation, a site visit was conducted along the pipeline route on 4th June 2021 by EPA, Esso Guyana, and the Ministry of Natural Resources. Mr. Brassington asserted that a general route for the pipeline was confirmed for further surveying and works on 23rd June 2021 and a letter was issued to Esso Guyana confirming the finalisation of the route.[7] He said he was aware that on 24th June 2021, Esso Guyana had applied to the EPA for an Environmental Authorisation relative to the Gas to Energy Project, as Esso Guyana reports to the Task Force on all relevant actions regarding the Gas to Energy Project. Mr. Brassington asserted that by letter dated 29th July 2021 issued by Mr. Enrique Monize, Commissioner of State Lands, at the Guyana Lands and Survey Commission pursuant to **Guyana Lands and Survey Commission Act, Cap. 59:05** under the **State Lands Act, Cap 62:01**, Esso Guyana was appointed as an agent of Guyana Lands and Survey Commission to access and enter upon public lands in the pathway of the Gas to Energy Project.[8] This letter also indicated that Guyana Land and Survey Commission would seek permission from the Minister of Public Works to appoint Esso Guyana as agents of the Commissioner of State Lands and of the Guyana Lands and Survey Commission, to enter upon land to be acquired for the Gas to Energy Project in order to survey or otherwise examine the lands and to conduct other technical works. Mr. Brassington averred that the permission was gazetted on 7th August 2021 in accordance with the **Acquisition of Lands for Public Purposes (Gas Pipeline Route) Order No. 18 of 2021**[9] and following the Gazetted order, Esso Guyana was appointed an agent of Guyana Lands and Survey for the purposes of surveying and examining the lands pursuant to letter dated 3rd September 2021.[10] Mr. Brassington deposed that around April 2022, Mr. Kemraj Parsram contacted him and requested information regarding Esso Guyana's legal permission or ability to conduct activities along the Gas to Energy pathway and he confirmed that the pipeline route was

[7] T.A.M. WB 1
[8] T.A.M. WB 2
[9] T.A.M. WB 3
[10] T.A.M. WB 4

finalised with the consequence of certain lands being compulsorily acquired by the Government of Guyana and the public acquisition process, which required compliance with statutory procedure had begun.

19. Mr. Brassington also asserted that landowners of the compulsorily acquired lands for the Gas to Energy project were informed of the Project and of the requirements associated with it during every phase of the project development. A bundle was tendered which exhibits a sample copy of a letter signed by the Attorney General and Minister of Legal Affairs, Mr. Anil Nandlall, S.C., which was dispatched to landowners informing of meetings to discuss the project and Government's intended acquisition of lands for the project.[11] He asserted that the landowners were provided with legal representation and all agreed to accept the compensation offered by the Government to purchase their lands through the **Acquisition of Lands for Public Purposes Act**. He further asserted that all the lands associated with the Gas to Energy Project have been acquired by the Government and exhibited copies of the relevant Orders to substantiate this assertion.[12]
20. The Attorney General contends that the Applicants are neither landowners, occupiers nor possessors of any legal title or equitable interest in respect of any of the relevant lands. Further the Applicants are meddlesome busybodies in the vein of *'obstructionists'* to a project of high national import. The Attorney General submitted that the application places the public's interest in jeopardy, as the Gas to Energy Project is intended to produce a reliable source of electricity for the people of Guyana and involves significant public expenditure.
21. The Attorney General argued, as have all the other Respondents, that the Applicants have relied on a narrow construction of **Regulation 17(2)(c)(ii)** of **EPAR** to justify the administrative orders sought. He pointed out that **Regulation 17** speaks to having the requisite *'legal rights or ability to conduct the activity'* in respect of which the Environmental Authorisation is sought and contended that at all material times, Esso Guyana had the requisite permission, legal rights, or ability to conduct the activities associated with the Gas to Energy Project. As such, the application is wholly misconceived.
22. The Attorney General argued that the series of correspondence tendered aggregate to provide proof of Esso Guyana's legal rights or ability to conduct the activities associated

[11] T.A.M. WB 5
[12] T.A.M. WB 6

with the Gas to Energy Project without the consent of the landowner or occupier, thereby satisfying the requirements of **Regulation 17(2)(c)(ii)** of **EPAR**. Moreover, the decision to grant the environmental permit to Esso Guyana emanated from a decision-making process by the **EPA** that ensures that it is provided with all the requisite information before it grants the application for Environmental Authorisation and therefore the application process is not static and limited to a one-off or isolated submission of the Applicant. The Attorney General submitted that the EPA is empowered to request the submission of addition documents and/or information as proof of eligibility at various stages of the decision-making process prior to the grant of a permit in accordance with **Regulation 9** and **10** of **EPAR**. Further, the request for additional information from Mr. Brassington, as Head of the Gas to Energy Task Force was done in accordance with **Regulation 9 (1) EPAR** as it provides *"the Agency may, while considering an application for environmental authorisation, request additional oral…information…from a local authority or other government agency."*

23. The issues that fall for the determination of this Court are:
    - **(i) Whether the Applicants have *locus standi* to institute and maintain these proceedings;**
    - **(ii) Whether the EPA issued the Environmental Permit to Esso Guyana in breach of Regulation 17(2)(c)(ii) of the EPAR;**

(i) Whether the Applicants have locus standi to institute and maintain these proceedings

24. Counsel for the Respondents have, in varying degrees, challenged the Applicants' standing to maintain these judicial review proceedings. The EPA advanced a tangential line that the Applicants have failed to show sufficient *'proprietary interest'* in the impacted lands to be granted the reliefs sought in the Application. Counsel for Esso Guyana and the Attorney General asserted that the Applicants are *'obstructionists'* in the vein of meddlesome busybodies. These assertions invite the court to be satisfied that the Applicants have sufficient *locus standi* to maintain this action.
25. It is trite law that any party who wishes to activate the supervisory jurisdiction of the High Court in administrative matters must exhibit *'sufficient interest'* in the subject matter of the

proceedings. **Part 56** of the **Civil Procedure Rules 2016** ('CPR') and **Judicial Review Act**,[13] ('JRA') governs proceedings seeking administrative orders.

26. **Rule 56.01 (4) CPR** provides (emphasis added):

> (4) **<u>Where the proceeding is for judicial review, it may be made by any person</u>**, group or body **<u>having sufficient interest in the subject matter of the proceeding</u>** including,
>
> (a) a person who can show that he has been adversely affected by the decision which is the subject of the application; or
>
> (b) any body or group,
>
> (i) acting at the request of a person or persons who would be entitled to apply under sub-Rule (a);
>
> (ii) that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
>
> (iii) that can show that the matter is of public interest and that the body or group possesses expertise in the subject-matter of the application;
>
> (c) any statutory body where the subject matter falls within its statutory remit;
>
> **(d) <u>any other person or body who has a right to be heard under the provisions of any relevant enactment or the Constitution</u>**

27. **Section 4** of the **JRA** provides (emphasis added):

> (1) The Court may on an application for judicial review grant relief in accordance with this Act –
>
> (a) to a person whose interests are adversely affected by an administrative act or omission;
>
> **(b) <u>to a person or group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case</u>**

28. Moreover, **Section 7 (4) JRA**

> (4) In determining whether an application is justifiable in the public interest the Court may take into account any relevant factor, including –
>
> (a) the need to exclude a mere busy body;
>
> (b) the importance of vindicating the rule of law;
>
> (c) the importance of the issue raised;
>
> (d) the genuine interest of the applicant in the matter;

[13] Cap. 3:06

(e) the expertise of the applicant and the applicant's ability to adequately present the case; and

(f) the nature of the decision against which relief is sought.

29. It is quite apposite to note that the issue of *locus standi* in judicial review cases are particularly nuanced. Caution must always be taken when deciding issues of sufficiency of interest. It is for this reason that the House of Lords in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd**[14] expressed open dissatisfaction in the lower court's course of resolving such issues exclusively as a preliminary point. Noting that in many cases, which are not as elementary, there may be a need to consider the power and duties of the purportedly errant bodies before concluding one way or another. Lord Wilberforce in delivering the decision for the majority opined (emphasis mine):

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. **But in other cases, this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates**. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the respondents complain."

30. Lord Diplock, in the same case, proffered a more permissive minority view of the court:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

31. In the years following the **Inland Revenue Commissioners**, the permissive minority view of Lord Diplock received substantially more support in our regional jurisprudential landscape,

[14] [1982] AC 617

see: **The Attorney-General v. Payne**[15]; **Lionel v Attorney General**[16]; **Benjamin et al v The Honourable Minister of Information and Broadcasting et al**[17]; **Dumas v the Attorney General of Trinidad and Tobago.**[18] Jamadar, J.A., (as he then was) in **John Dumas v the Attorney General of Trinidad and Tobago**[19] at paragraphs 89 to 92 after comparing and examining the provisions of Section 6 of the Administrative Justice Act of Barbados and Section 5(2)(b) and Section 7(1)(4)of the Trinidad and Tobago Judicial Review Act 2000 (equivalent to Section 4 and 7(4) of the JRA) found a clear policy statement that public-spirited citizens who can demonstrate that a public law administrative review is "justifiable in the public interest" can bring actions for judicial review of administrative actions even though such a person may not be directly or adversely affected by the impugned decision. As such he found that standing may be granted to a person if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case.

32. Our **CPR** and **JRA** permits a conjunctive reading to establish sufficient standing in public law cases. It is noteworthy that **r. 56:01(1)(a) CPR** makes explicit reference to our **JRA**.
33. As alluded to before, a party seeking administrative orders must have established sufficient interest in the subject matter of the proceedings. What amounts to sufficient interest is itemised in non-exhaustive fashion through **r. 56.01(4)(a) –(d)CPR**. It includes, but is not limited to,a person who can establish that they have been adversely affected by a decision; a body or group under the specified categories of **r. 56:01(4)(b) CPR**;[20] statutory bodies where the subject matter of the proceedings fall within its statutory remit; or any other person or body who has a right to be heard pursuant to a relevant enactment or the Constitution.
34. Through **r. 56:01(4)(b) CPR,** the court is directed to **Section 4** of the **JRA,** which affords standing to (i) persons whose interests are affected by acts of public bodies and (ii) persons or groups of persons who have satisfied the court that the matter is justifiable in the public interest given all the circumstances of the case. The court in determining whether an action

[15] (1982) 30 W.I.R. 88 (St. Christopher and Nevis)
[16] Action No. 357 of 1995, H.C. (St. Lucia)
[17] AI 1998 HC 3 (Anguilla)
[18] Civil Appeal No. P 218 of 2014 (Trinidad and Tobago)
[19] Ibid
[20] It must be noted that our Civil Procedure Rules does not provide for a 'person' but a *'body or group'* who can show that the matter is one of public interest under Rule 56.01 (4) (b) CPR. Therefore, spirited litigants cannot be availed of this rule of civil procedure to institute public interest litigation.

is justifiable in the public interest must consider the non-exhaustive list of considerations under **Section 7(4)** of the **JRA**.

35. Counsel for Respondents have not advanced the argument that the Applicants failed to activate the public interest limb of judicial review in the Fixed Date Application. However, the Respondents arguments appear resigned to a restrictive assessment that the Applicants do not have sufficient proprietary interest in the subject land to be adversely affected by the decision of the EPA to grant the environmental permit to Esso Guyana. This argument clearly challenges the Applicants' entitlement to institute these proceedings on the basis that they failed to satisfy **Section 4 (1) (a)** of the **JRA**.

36. At first blush, the Applicants Amended Fixed Date Application neither expressly states that these were judicial review proceedings justifiable in the public interest nor that these proceedings were being instituted pursuant to **Section 4 (1) (b)** of the **JRA**. However, upon further perusal of the Applicants pleadings, it is made pellucidly clear what class of judicial review proceedings the Application sought to activate.

37. In both the Amended Fixed Date Application and the Affidavit in Support, the Applicants have identified themselves as being citizens of Guyana. The deponent, Ms. Vanda Radzik, sought the courts assistance in reviewing the discretion of the EPA on the basis of upholding the rule of law, ensuring the proper regulation of environmental enforcement, and safeguarding the health, welfare, and sustainable existence of the wider Guyanese populace. It is therefore made sufficiently clear that the Applicants instituted these proceedings under the public interest limb and have not claimed to be personally adversely affected by the decision of the EPA. See Paragraphs 2.i. and xi of the Amended Fixed Date Application with Notice and paragraphs 2 and 13 of the Affidavit of Vanda Radzik..

38. Before the **JRA**, Bernard C.J., as she then was in **Re Carl Hanoman**[21], was sympathetic to a more liberal approach to standing in public law matters.[22] Taking instruction from the authors of **Wade on Administrative Law**, the learned Chief Justice noted:

> Counsel for the applicant referred the court to "Wade on Administrative Law", 7th Edition, which I have found most instructive. At page 623 the author states that unlike private law remedies, the prerogative remedies have never been dependent on the applicant showing a specific personal right. Application for judicial review was introduced in the courts of England in 1977

[21] GY 1999 HC 1

[22] Chang, C.J. (Ag.) in Re Ramon Gaskin GY 2010 HC 16 (unreported) also supported a more liberal approach to standing utilizing the considerations in Wade on Administrative Law.

with new rules of procedure. Therefore, the old procedure is more relevant to our practice, and in this regard, I refer to an excerpt on page 702 of Wade with regard to standing under the prerogative writs of certiorari and prohibition:

> "The prerogative remedies being of a "public" character have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown, as the title of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully … Consequently, at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public. Every citizen has standing to invite the court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busybody but as a public benefactor."

39. The Court has remained resolute in the permissive application of standing in public interest litigation. Recently in **Collins and Whyte v EPA and Esso Exploration and Production Guyana Limited**[23] Sandil Kissoon, J., noted:

> The Court found and held that age old pitfalls and archaic arguments on locus standi, premised on narrow, restrictive approach and interpretation that ought not to have survived the prerogative writs have no place in Judicial Review proceedings commenced under the Judicial Review Act No. 23. Of 2010. The Act mandates a broad approach to standing, public interest litigation and, in particular, public interest matters pertaining to the environment as enshrined at Article 149(J)(2) of the Constitution of the Co-operative Republic of Guyana which does not attract the application of narrow common law orders as to standing.

40. These proceedings raise important issues of compliance with the **EPA Act** and **EPAR**. The Applicants in seeking to vindicate the rule of law ought to be viewed as public benefactors and not meddlesome busybodies who have instituted these proceedings as obstructionist to the pipeline.
41. Given the foregoing discussion, I am of the view that the Applicants have sufficient standing as public interest litigants to maintain these proceedings.
42. It must be noted that in applications filed under **Section 4(1)(b)** of the **JRA**, the Registrar is enjoined to immediately cause notice of the application to be published on two Sundays in any daily newspapers circulating in Guyana pursuant to **Section 7(1) JRA**. This is a procedural matter and a duty reposed on the Registrar. There has not been any argument by counsel for the Respondents that such a notice was not published. There remains a

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[23] 2022 HC DEM CIV FDA 1314

presumption in the absence of evidence to the contrary that something which should have been done, was in fact done in compliance with the relevant technicalities.[24]

(ii) Whether the EPA issued the Environmental Permit to Esso Guyana in breach of Regulation 17(2)(c)(ii) of the EPAR;

43. It is a trite that judicial review is concerned not with the merits of the decision but the decision-making process.[25]

44. The court in the matter at bar has been called upon to exercise a supervisory jurisdiction to review the process by which the EPA granted an environmental permit facility to Esso Guyana. It is not the role of the court to ever substitute a decision made by a competent tribunal or administrative body for its own when engaged in public law review. As noted by Singh, C (Ag) in **Re Rutherford Neville**[26]**:**

> "A judicial review court has no jurisdiction to substitute its own opinion for that of the statutorily identified person or authority to determine the question.

45. Consequently, it is the duty of the court to determine whether the EPA granted or issued an environmental permit to Esso Guyana in breach of the requirements imposed by the **EPA Act** and its subsidiary regulations.

46. **Section 2** of the **EPA Act** defines *'environmental permit'* to mean *'the permit required under Section 11'* of the **EPA Act.** Section 11 defines *'environmental authorisation'* to include an *'environmental permit, a prescribed process licence, a construction permit or an operation permit'*. Therefore, for the purpose of the **EPA Act**, an environmental authorisation and an environmental permit are subsumed under the same general considerations.

47. Every project developer in Guyana, who either falls under the fourth schedule of the **EPA Act** or who is responsible for any project which may have significant impact on the environment is enjoined to apply to the EPA for an environmental permit/environmental authorisation which is to be submitted with the prescribed fees and a summary of the project including relevant information set out in **Section 11 (1) (i)-(iv)** of **EPA Act**. Where

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[24] See Mangaroo v Jamohan Civil Appeal No. 80 of 1990 (unreported) *per* Chancellor Bernard; Vanessa Shiwratan v Hand in Hand Trust Corporation 2022-HC-DEM-CIV-FDA-533 (unreported) *per* Justice Harnanan

[25] See O'Reilly v. Madman [1983] 2 A.C. 237, 282 *per* Lord Diplock; Chief Constable of North Wales Police v. Evans [1982] 1 W.L.R. 1155, 1160 *per* Lord Hailsham, considered and applied.

[26] Civil Appeal No. 21 of 2010 (unreported); GY 2011 CA 2 (vlex citation)

the project is one that will likely have a significant impact on the environment, the project developer will be required to submit an environmental impact assessment.

48. The **EPAR** was made pursuant to **Section 68 (1)** of the **EPA Act** and give effect to the **EPA Act**.

49. The Regulations relevant to this case provide:

1. The Agency may, upon the evaluation of an application for an environmental authorisation require the applicant to furnish any document, information, or environmental impact assessment pursuant to section 11 of the EPA Act.

9.(1) The Agency may, while considering an application for an environmental authorisation, request additional oral or additional written information from –

(a) an applicant or an agent of the applicant or developer

(b) a person who is directly affected by the application;

(c) a local authority or any other government agency; or

(d)any other source which the agency considers appropriate

10. (1) Where the Agency considers that the applicant has omitted to provide any of the information required under regulation 17, the Agency shall notify the applicant in writing of the omission within fifteen days of receipt of the application and shall request the applicant to furnish the requisite information within fifteen days

(2) The Agency may at the request of the applicant allow an extension of the time limited fixed under paragraph (1).

(3) Without prejudice to the generality of regulation 18, where the applicant does not supply the information under paragraph (1) or (2), the Agency may refuse to rant an environmental authorisation.

17. (1) An application for an environmental authorisation shall be made to the Agency pursuant to section 11, 19 or 21 of the Act.

(2) An application for an environmental authorisation –

(a) shall be competed in triplicate and shall be submitted to the Agency together with the fee as specified in the Schedule;

(b) shall be in respect of one project or facility;

(c) shall contain the following information

(i) the company or corporate name, the names of directors if any, the name and position of the applicant, the name of the owner or occupier and exact location of the facility.

(ii) Proof that the applicant either owns the facility or has a lease or other agreement with the landowner or occupier to enable the applicant to conduct the activity on the facility or has the legal right or ability to conduct the activity without the consent of the landowner or occupier.

(iii) …

Analysis of the EPA Act and Regulations

50. The starting point for statutory interpretation is always upon a literal and ordinary construction of the textual document. It is only where such a construction would lead to an absurd or irrational outcome that the court is permitted to take a more purposive approach to interpretation. Tindal, C.J., in **The Sussex Peerage Case**[27] spoke to this issue thus:

> "My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to

[27] (1844) 11 Cl & F. 85; 8 ER 1034

expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (Stowel v. Lord Zouch, Plowden, 369), is " a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.""

51. This approach to construction was endorsed by our courts.[28] Ramson, J. A, noted(emphasis added) in **Trotman et al v Attorney General**[29] :

> **The starting point in any statutory consideration is to consider the ordinary meaning of the word or phrase in question, that is, its proper and most known significant usage. The basic principle in the use of the words "shall" and 'may" in a legislative sentence is that 'shall' imposes a duty or an obligation and 'may' confers a discretionary power. Thus 'shall' is mandatory while 'may' is discretionary."** However, there are cases where the Courts have construed 'shall' to mean 'may' and 'may' to mean 'shall', or 'shall' to be directory only and not mandatory.

52. It is apparent that the EPA has a discretionary power to request more information from an Applicant when considering an environmental authorisation. It is for this reason that it cannot be said that the application for an environmental authorisation or environmental permit is a static regime that ends upon the first submission by the project developer of a proposal. The very essence of the **EPA Act** and **EPAR** envisages a more kinetic process of application which ebbs and flows upon the exercise of discretion of the EPA's functionary to request more information. Parliament intended for the EPA to be armed with as much information as may be required to come to a decision regarding the grant of environmental authorisations. It is for this reason that **Regulation 3** of **EPAR** sets the stage for the EPA to request further documentation, information, or an environmental impact assessment pursuant to **Section 11** of the **EPA Act**. **Regulation 9** of **EPAR** also gives broad discretion to the EPA to request additional oral or written information when considering the environmental authorisation/environmental permit. This includes requests for information from (i) the Applicant or its representative; (ii) a person who is directly affected by the Application; (iii) local authorities and government agencies; and (iv) any other source which the Agency considers appropriate. The dynamic nature of the application process is evident upon

[28] See R v Fillington and Mathias GY 1960 HC 7 (vlex citation) *per* Justice Miller; Enmore Estates Ltd v Singh Civil Appeal No. 21 of 1974, GY 1976 CA 3 (vlex citation) *per* Chancellor Haynes; Re Ramon Gaskin 101-M of 2010, GY 2010 HC 16 per Chief Justice Chang, applied.

[29] Civil Appeal No. 79 of 2006; GY 2009 CA 5 (vlex citation)

examination of **Regulation 10 EPAR**, which permits the EPA to request additional required information from an Applicant who has submitted, what the marginal notes categorises as, an *'incomplete application.'*[30] The EPA must be satisfied that the project developer is properly entitled to conduct the project activity as set out in the Application. It is for this reason that the procedure for applying for an environmental permit cannot be said to be confined exclusively to **Section 11** of **EPA Act** and **Regulation 17 (2)** of **EPAR** considerations.

53. **Regulation 17** of **EPAR** imposes a mandatory requirement on all Applicants seeking an environmental authorisation or environmental permit under **Section 11, Section 19,** or **Section 21** of **the EPA Act** to submit certain relevant information to the EPA. **Regulation 17 (2) (c) (ii)** directs the project developer or Applicant to prove an entitlement, of some sort, to conduct the activity on the lands iimpacted by the project development. If the Applicant does not have a legal right of ownership to the property or the consent of the landowner, the Applicant is enjoined to submit information to the EPA which would evince a legal entitlement to conduct the activity without such consent from the landowner or land occupier.
54. The Respondents relied on various correspondences, Ministerial Orders and other documents which they say aggregate to be sufficiently probative in establishing Esso Guyana's legal rights or ability to conduct the activities associated with the Gas to Energy Project without the consent of the landowner or occupier, thereby satisfying the requirements of **Regulation 17(2)(c)(ii) of EPAR**.
55. In **Application by Chandresh Sharma** reported in Ramlogan's **Judicial Review in the Commonwealth Caribbean,** It was held that "The action must be predicated upon facts and circumstances existing and which the decision maker knew or ought to have known at the time the decision to be impugned was made. Subsequent events cannot be taken into account."
56. The Respondents relied upon a letter dated 23 June 2021 in which Winston Brassington related the Government of Guyana's intention to acquire lands for the activity. This

[30] The use of *'incomplete application'* is a phraseology emanating from the marginal notes. The marginal note was not used to construe legislative intent because it is settled law that marginal notes cannot be referred to for the purposes of construing the Act because it is not an act of parliament. *See* the decision in Thakurain Balraj Kunwar and Another v Rae Jagatpal Singh [1904] UKPC 26; In R v Kelt [1977] 1 WLR 1365 per Lord Justice Scarman; Nixon v Attorney General [1930] 1 Ch. 566 per Lord Justice Baggallay

statement of the government's intention has no legal impact on the owners and occupiers of the lands and does not authorize Esso Guyana to carry out the activity on the land.

57. Reliance was placed on a letter dated 29th July 2021 which states that GLSC will seek permission to appoint Esso as an agent of GLSC for the purpose of surveying or otherwise examining certain land with a view to acquisition the whole or part of such land. It authorizes Esso to carry out geotechnical surveys and environmental studies for the Gas to Energy Project .It does not authorize Esso to carry out the activity in the application.
58. The Respondents relied on Order No 18 of 2021 made on 7th August 2021 which declared the land to be a public work. It only refers to a 30 meter corridor and authorizes the Guyana Lands and Surveys Commission (GLSC) to *survey* and *examine* lands. It does not authorise Esso Guyana to carry out any activity particularly construction, commissioning and operations of onshore natural gas pipeline, natural gas processing and natural gas liquids storage therein.
59. By letter dated 3rd September 2021 GLSC appointed Esso as its agent. This authorization was strictly for the purpose of surveying, save and except cadastral survey or otherwise examining the lands in the schedule attached to Order 18 of 2021.
60. The letter dated 18th October 2021 from Esso to the EPA merely sets out Esso's assertion that GLSC has authorized it to access 'privately owned lands" that the Government is acquiring by compulsory purchase. The need for compulsory purchase shows that Esso Guyana did not have a lease, arrangement with the land owner or occupier or any other legal right or ability to carry out the activity in the application.
61. Extracts from Esso Guyana's EIA were relied on as proof that Esso has a legal right /ability to conduct the activity, In the EIA extracts Esso Guyana asserted that the Government will acquire lands for the activity.
62. Orders 3, 4, 5, 6, 7 of 2023 which relate to the proposed gas pipeline route clearly establish that at the 4th January 2023 the lands described therein were privately owned hence the need to compulsory acquire them.
63. It therefore cannot be said, that at the time of grant of the permit on 25th November 2022, that Esso Guyana had submitted all the relevant documents which could potentially evince a legal right or ability to conduct the proposed project without the consent of the landowner or occupier.

64. It can be concluded therefore that the decision by the EPA to grant the permit to Esso Guyana was contrary to law and improper.

65. The court is cognisant of the fact that *certiorari* is a discretionary remedy of the court. Parker, L.J., in **R v Thames Magistrates Court, ex parte Greenbaum**[31] provided insight(emphasis mine) on this issue:

> **<u>One starts with this, that the remedy by way of certiorari is a discretionary remedy</u>**. Anybody can apply for it - a member of the public who has been inconvenienced, or a particular party or a person who has a particular grievance of his own. **<u>If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary</u>**. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies ex debito justitiae, and that, I think, has always been the position from 1869 (cf. Reg. v. Surrey Justices (supra) and Reg. v. Manchester Local1 AUT Committee, ex parte R. A. Brand and Co., Ltd. [1952] 2 Q.B. 413). **<u>The remedy will be granted whenever the applicant has shown a particular grievance of his own beyond some inconvenience suffered by the general public</u>**.

66. In **The Queen v the Justices of Surrey**,**[32]** the Court of Queen's Bench also proffered a salient assessment on the discretionary nature of the remedy:

> "It is quite clear that, except when applied for on behalf of the Crown, the certiorari is not a writ of course. **<u>The Court must be satisfied on affidavits that there is sufficient ground for issuing it, and it must in every case be a question for the Court to decide, whether, in fact, sufficient ground exists</u>**.
>
> …
>
> In the very analogous case of probation a distinction is taken, thus expressed by Cockburn C.J., in Forster v Forster (1): *'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet it is not ex debito justitiae, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief ex debito justitiae, if he suffers from the usurpation of jurisdiction by another court'*
>
> The same distinction been an application by a party aggrieved and by one who comes merely as a stranger to inform the court, is taken as to certiorari in Arthur v Commissioners of Sewers (1),

[31] [1957] LGR 129

[32] [1870] LR 466, 472 per Blackburn, L.J.

where one of the judges said *'that a certiorari was not a writ of right, for if it was it could never be denied to grant it, but it has often been denied by this Court, who, upon consideration of the circumstances of the case, may deny it or grant it at discretion; so that it is not always a writ of right. It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction who proceed in a summary way, in such case he is entitled to a certiorari ex debito justae, because he has no other remedy, being bound by the judgment of the inferior judicature.'*

…

In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as ex debito justitiae; **but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person.**"

67. The apt assessment of Sir John Donaldson, M.R. in the celebrated case of **R v. Panel on Take-overs and Mergers, Ex parte Datafin Plc**.[33] also provides clarity:

"I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely that **however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction. Furthermore, the court has an ultimate discretion whether to set them aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made ultra vires**: see, for example, Reg. v. Monopolies and Mergers Commission, Ex parte Argyll Group Plc. [1986] 1 W.L.R. 763. **That case … further illustrates an awareness that such decisions affect a very wide public which will not be parties to the dispute and that their interests have to be taken into account as much as those of the immediate disputants**."

68. The cases of **Thames Magistrates' Court** and **Surrey Justices** have all been considered by our local courts in refusing to issue certiorari writs in proceedings brought by spirited public citizens. In **Re Ramon Gaskin**[34] Chang, C.J. (Ag.) refused to exercise the court's discretionary power to issue certiorari to quash a tender decision made by the government of Guyana to award Synergy Holdings Inc., a contract to build and design a road from Linden to Amaila Falls. Chang, C.J. (Ag.) opined:

[33] [1987] Q.B. 815, 840
[34] 101-M of 2010, GY 2010 HC

> "It should further be noted that the court can refuse the prerogative writ remedies if the court takes the view that the applicant as a private citizen has instituted the proceedings for motives which are not primarily of the public interest or that no good would be done to the public if the writ(s) were to issue."

69. In the present case, there is no evidence that the Applicants were personally aggrieved by the EPA's decision to grant a permit to Esso Guyana. The Fixed Date Application took issue with compliance to the law and sought, in essence, vindication through various orders and declarations the effect of which would bring the project works to a halt. Judicial review is not concerned with vindication in the public sphere. The origins of the prerogative writs envisioned a discretionary remedy for real injustices. It was never intended to be a sword for satisfaction but rather a shield against excesses of public functionaries. It is precisely this consideration that the Queen's Bench division noted in **R v Aston University Senate, ex p Roffey**[35]

> '[…] prerogative writs are a discretionary remedy designed to remedy real and substantial injustice rather than to give satisfaction, however legitimate. In the circumstances his claim must fail upon grounds of discretion whatever its substantive merit and I need say no more about it.'

70. The Applicants have not cogently articulated what real or substantial public wrong occurred to them or the wide Guyanese populace upon the grant of the environmental permit facility, which would justify quashing the decision of the EPA. Cognisance must be paid to the fact that significant fiscal expenditure has been injected into the Gas to Energy pipeline. A quashing order would disproportionately disadvantage Esso Guyana and the State by halting significant project development already underway. Moreover, it may also have an unintended consequence of impacting innocent third parties to the project development, all while proving to be a *brutum fulmen* in the way of substantive relief for the Applicants.
71. It is upon a delicate balancing exercise, that I am of the view that no good to the public can be done by granting the reliefs sought in the Amended Fixed Date Application. Consequently the Orders sought in the Amended Fixed Date Application with Notice filed on 22 June 2023 are refused.

Priya Sewnarine-Beharry

Puisne Judge

[35] [1969] 2 Q.B. 538