THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2016/0822

BETWEEN:

AMARNA CONSULT LIMITED

Claimant

and

DEVELOPMENT CONTROL AUTHORITY

Defendant

APPEARANCES:

Mr. Horace Fraser for the Claimant
Mr. Adrian Etienne and Ms. Khadya Florius for the Defendant

2017: May 24, June 7;
September 20.

JUDGMENT

[1] **SMITH J.:** Amarna Consult Limited ("Amarna") says that the Development Control Authority ("the DCA") wrongfully rejected its Environmental Impact Assessment ("EIA") for a proposed residential housing development at Belair, Castries and that, consequently, its application for approval of change of land use from agricultural to residential was denied and it cannot proceed with its intended project.

[2] Amarna, in judicial review proceedings, asked the Court to set aside the DCA's decision on the grounds that: (1) the reasons for the decision were unintelligible and Wednesbury unreasonable; (2) the DCA's procedure was improper and unfair; (3) it failed to have regard to relevant considerations and took irrelevant considerations into account; and (4) it was motivated by bad faith.

[3] The DCA denies these allegations and contends: (1) that it properly followed the statutory process and came to a decision, on the merits, that the EIA was incurably deficient; (2) that it was entitled to reach such a decision; (3) the decision was not irrational and the Court should not set aside the decision simply because it would have come to a different decision than the DCA.

Issue to be Determined

[4] Regardless of how the grounds have been crafted and however the argument is put, the issue in this case comes down to this: was the EIA inadequate and did the DCA act unreasonably or irrationally in rejecting it?

[5] In Saint Lucia the **Physical Planning and Development Act** ("the Act") governs the law and procedure concerning applications for approval to develop land and the EIA process. It provides that no one shall commence development of any land in Saint Lucia without the prior written permission of the head of the Physical Planning and Development Division,[1] unless the development falls within the classes of development specified in Schedule 3 of the Act.[2] It is not in dispute that the proposed development in question required that permission.

[6] The Act also provides that a person who intends to undertake development of land may apply to the head of the division for *approval in principle* before preparing detailed plans and that the head may grant approval in principle, with or without conditions, or may refuse to grant approval in principle.[3] The Act also provides that approval in principle may be revoked without compensation if in the opinion of the head a situation has subsequently arisen which constitutes a danger to public health, safety or welfare. The facts of this case involved an application for the grant of approval in principle, which was given subject to the submission of an EIA.

[1] Section 16.
[2] Section 18.
[3] Section 20.

Relevant Chronology

[7] In order to place the decision of the DCA in its proper context, it is necessary to recite some background detail insofar as relevant to the issues that arise in these proceedings.

1. On 9th January 2015, Amarna sought approval in principle for a change of land use from agricultural to residential on Block 0642B and Parcel 261 located in Belair, Castries.

2. On 19th March 2015, the DCA informed Amarna by letter that, at its meeting on 12th March 2015, Amarna's application was deferred pending receipt of comments from the Ministry of Agriculture, Food Production, Fisheries and Rural Development; Water Resource Management Unit; and the Ministry of Infrastructure, Port Services and Transport, and that upon receipt of the comments the application would again be considered.

3. By letter dated 20th April 2015, DCA informed Amarna that the application was deferred pending a presentation by the developer to the DCA board.

4. On 20th May 2015, Amarna made its presentation to the DCA board.

5. On 26th May 2015, the DCA advised that the determination of the application was deferred pending a site visit with technical staff and research material to guide the DCA.

6. On the 23rd June 2015, the DCA granted approval in principle for land use only subject to: (i) the submission of an EIA to be done by an independent consultant sourced by the DCA and paid by the developer and (ii) terms of reference to be approved by the DCA.

7. On 13th July 2015, Amarna, sought clarification on the selection process of the independent consultant to serve on the EIA team.

8. On the 29th July 2015, the DCA clarified that Amarna was to identify the consultant to undertake the preparation of the EIA for the proposed development and the DCA would undertake the formulation of the Terms of Reference (TOR) to guide the preparation of the EIA.

9. Amarna subsequently submitted correspondence containing the names of the persons who would constitute the EIA team.

10. By letter dated the 25th August 2015, the DCA provided Amarna with the TOR.

11. On 10th February 2016, Amarna submitted its EIA without the DCA having approved the EIA team.

12. By letter dated 24th March 2016, the DCA informed Amarna that the EIA team was approved subject to the removal of three named persons (D. Cudjoe, A. St. Rose and N. Jn. Pierre) and their replacement with another locally registered engineer.

13. On 11th April 2016 the DCA approved the reconstituted EIA team provided by Amarna, with Mr. Calvin George as the independent consultant.

14. On 12th April 2016 Amarna re-submitted the EIA Report.

15. On 2nd December 2016 the DCA informed Amarna that the EIA was rejected and the application was accordingly determined.

[8] In summary, before granting approval in principle, the DCA: (1) obtained comments from several entities including the Ministry of Agriculture, Ministry of

Infrastructure and the Water Resource Management Unit; (2) had the benefit of a presentation from the developer; and (3) had the benefit of a site visit with technical staff. It then granted approval in principle subject to the submission of an EIA done by an independent consultant and in accordance with TOR approved by the DCA. It is noted that Amarna re-submitted its EIA within one day after being informed that the EIA it previously submitted did not comprise a team approved by the DCA.

The Decision under Challenge

[9] The DCA's decision was stated as follows:

> "Kindly be informed that the decision of the Board at its meeting on 9th November 2016 was Rejection on the basis that the Environmental Impact Assessment (EIA):
>
> i. was not done to an acceptable professional standard.
> ii. did not comprehensively address the issues which are expected to be dealt with in the preparation of the EIA.
> iii. was sufficiently deficient as a tool which can be used to identify the environmental, social and economic impacts of a project prior to decision-making and identify environmental and economic benefits which can be achieved such as reduced cost and time of project implementation and design, avoidance treatment/cleanup costs and impacts of laws and regulations.
>
> Please be advised that since the grant of AIP for land use only was on condition of the conduct of the EIA, the application is now determined accordingly."

The Statutory Scheme

[10] Before examining the DCA's decision, it is perhaps useful to set out the applicable provisions of the Act:

> **19. Application for permission to develop land**
>
> An application to the Head of the Physical Planning and Development Division for permission to develop land shall be made on the prescribed form and shall be accompanied by—
>
> a) a map sufficient to identify the land to which it relates and such plans, drawings and other materials as are necessary to describe the development which is the subject of the application;
> b) notice in writing signed by the owner or agent of the owner of

the land to which the application relates acknowledging that the owner has knowledge of and does not object to the making of the application;

c) any statutory consent which the applicant is required to obtain for or in connection with the development prior to applying for the permission of the Head of the Physical Planning and Development Division;

d) in cases where this is required by regulations made under this Act, the certificate of an engineer registered under the Engineers (Registration) Act; and

e) proof of payment of such fees as may be prescribed by regulations made under this Act.

20. Approval in principle

(1) Any person who intends to undertake the development of land may make application in the prescribed form to the Head of the Physical Planning and Development Division for approval in principle of the proposed development before preparing detailed plans.

(2) The Head of the Physical Planning and Development Division may grant approval in principle, with or without conditions, subject to the subsequent approval of any matters reserved until detailed plans have been submitted, or may refuse to grant approval in principle.

(3) Approval in principle granted under subsection (2) shall not be deemed to be permission to commence development and the applicant must comply with the provisions of section 19(1) before permission to commence development can be granted.

(4) Where only approval in principle is granted the Government shall not be liable for any loss suffered as a result of commencement of development or preparations for commencement of development undertaken.

(5) Approval in principle granted under this section may be revoked without compensation, if in the opinion of the Head of the Physical Planning and Development Division a situation has subsequently arisen which constitutes a danger to public health, safety or welfare.

(6) Where an approval in principle is revoked under subsection (5), the Head of the Physical Planning and Development Division shall specify the nature of the danger to public health, safety or welfare.

21. Requirement for further information

(1) In addition to the information required in an application form under this Part, the Head of the Physical Planning

and Development Division may request in writing that the applicant provide such further information as may be necessary to determine that application.

(2) Where further information is requested by the Head of the Physical Planning and Development Division under subsection (1), the application shall be treated for the purposes of section 24 as having been made on the date when the information requested from the applicant is received by the Head of the Physical Planning and Development Division.

(3) Where the applicant does not furnish the further information requested by the Head of the Physical Planning and Development Division within a reasonable time of the request being made, the Head of the Physical Planning and Development Division may give the applicant notice that the application cannot be determined and has been cancelled; whereupon the Head of the Physical Planning and Development Division shall return the cancelled application to the applicant.

22. Environmental impact assessment

(1) Without prejudice to the generality of section 21, the Head of the Physical Planning and Development Division may require that an environmental impact assessment shall be carried out in respect of any application for permission to develop land in Saint Lucia, including an application for approval in principle, if the proposed development could significantly affect the environment.

(2) Unless the Head of the Physical Planning and Development Division otherwise determines, an environmental impact assessment shall be required in respect of an application for a development of any kind mentioned in Schedule 4.

(3) The Head of the Physical Planning and Development Division shall not grant permission for the development of land under an application to which this section applies unless the environmental impact statement has first been taken into account.

(4) Without prejudice to the generality of section 56, the Minister in consultation with the Head of the Physical Planning and Development Division may make regulations providing for—

(a) the criteria and procedures for determining whether an activity is likely to significantly affect the environment so that an environmental impact

assessment may be required in addition to the information that the applicant is ordinarily required to submit to the Head of the Physical Planning and Development Division;

(b) the procedures for settling the scope of works of the environmental impact assessment to be carried out by the applicant in respect of any development;

(c) the minimum contents of the environmental impact statement to be submitted to the Head of the Physical Planning and Development Division in respect of the environmental impact assessment carried out by the applicant;

(d) the qualifications, skills, knowledge or experience which must be possessed by persons conducting environmental impact assessments for the purposes of this Act;

(e) the procedures for public participation in the environmental impact assessment process and public scrutiny of the environmental impact statement submitted to the Head of the Physical Planning and Development Division;

(f) the consideration by the Head of the Physical Planning and Development Division of an application in respect of which an environmental impact assessment has been required, including the criteria and procedures for review of the environmental impact statement.

23. Determination of Applications

(1) Where application is made for permission to develop land under section 19, the Head of the Physical Planning and Development Division shall have regard to the provisions of the physical plan for the area within which the land is situated, if any, and to any other material considerations and may, subject to subsection (2), grant permission either unconditionally or subject to such conditions that appear to be fit, or may refuse permission.

(2) The Head of the Physical Planning and Development Division shall not grant permission where an application for any development mentioned in Schedule 4 is made, unless the application has been submitted to the Advisory Committee for review and the Advisory Committee has submitted its advice to the Head of the Physical Planning and Development Division in accordance with section 7(5).

(3) The Head of the Physical Planning and Development Division shall give the applicant notice in writing of the decision made under subsection (1) and, in the case of an application for permission to develop land where such permission is granted subject to conditions or is refused, the notice shall state the reasons for that decision.

(4) If after consideration of the application and examination of the plans submitted therewith, the Head of the Physical Planning and Development Division considers it desirable so to do, the plans may be referred to the applicant for amendment and, where this is done, the running of time for giving a decision on the application will be suspended for the purposes of section 24 until the amended plans are resubmitted by the applicant.

(5) Where the permission granted to any person to undertake any development is granted subject to conditions, the Head of the Physical Planning and Development Division may, if this appears to be necessary, enter into an agreement with such person in order to give effect to such conditions.

(6) The Head of the Physical Planning and Development Division may require any developer to provide a bond in such sum, or any other instrument of guarantee of performance, as may be necessary to give effect to any permission to undertake development.

(7) Despite the provisions of subsections (5) and (6) and anything that may be done thereunder, the Head of the Physical Planning and Development Division may at any time revoke any permission to develop land or any part thereof, without compensation, if any fundamental condition attached to the permission to develop the land is not complied with.

The Parties' Arguments

[11] Mr. Fraser, counsel for Amarna, submitted that: (1) the EIA had complied with the TOR and the DCA had failed to show in what way the EIA had failed to comply with the TOR; (2) the decision was unreasonable and irrational; (3) the DCA took irrelevant matters into consideration.

[12] The DCA was represented by Mr. Etienne and Ms. Florius. Mr. Etienne presented arguments on how the Act should be interpreted. He submitted that: (1) an application for approval in principle under section 20 of the Act was different from an application for permission to develop land under section 19 of the Act; for example, even where approval in principle is granted, a developer must still make application and comply with the provisions under section 19 before permission to commence development can be granted; (2) the requirement to state reasons for decision set out under section 23 is applicable only to applications made under section 19 and not to applications for approval in principle under section 20; (3) section 21 of the Act under which the head of the division may request further information from the applicant/developer was applicable only to section 19 applications and not to applications for approval in principle under section 20.

[13] Ms. Florius presented arguments on the substantive issue of the deficiency of the EIA. She submitted that: (1) there was no requirement on the DCA to request any further information if it was satisfied that the EIA was deficient; (2) the EIA was so defective that no further information would have cured the defect; (3) the EIA had inadequately addressed the environmental implications of the proposed development and as such the DCA board was entitled to reject it; (4) the independent consultant, Mr. Calvin George, had only reviewed the EIA for an hour; (5) it could not be said that the decision of DCA was so outrageous that it defied logic or accepted moral standards and that no reasonable authority could have arrived at such a decision.

The Approach to Resolving the Issue

[14] Of particular interest to the court is section 22 (4) (c) and (f) of the Act. Section 22 (4) (c) provides for the making of regulations governing the minimum contents of an EIA. Section 22 (4) (f) provides for the making of regulations governing "the consideration by the Head of the Physical Planning and Development Division of an application in respect of which an environmental impact assessment has been required, including the criteria and procedures for review of the environmental

impact statement." Apparently, no such regulations have been promulgated. This is a great pity since the contents of the EIA and the consideration to be given to it by the head of the department are precisely the two matters upon which this court is required to make a determination. In the absence of such regulations, the court will: (1) examine the EIA vis-à-vis the TOR to determine whether the rejection of the EIA was unreasonable or irrational; and (2) avail itself of the guidelines laid down in the decided cases dealing with adequacy of EIAs. The DCA, having provided reasons for rejecting the EIA, the Court can examine those reasons against the established heads of judicial review.

[15] When the DCA granted approval in principle it did so subject to two conditions: (1) the submission of an EIA to be done by an independent consultant; and (2) the EIA was to be prepared in accordance with TOR approved by the DCA. Were these conditions complied with?

The Independent Consultant

[16] Amarna initially submitted an EIA prepared by a team that had not been approved by the DCA. The DCA then instructed that the three engineering experts (D. Cudjoe, A. St. Rose and N. Jn. Pierre) be replaced by a locally registered expert. Amarna re-constituted the team with a locally registered engineer, Mr. Calvin George, and re-submitted the EIA. The DCA did not raise any objection to Mr. George as an independent expert. In any event, the DCA, in its reasons for rejection of the EIA, did not cite failure to utilize an independent consultant as one of its grounds. The court therefore finds that Amarna was in compliance with this condition.

The TOR

[17] On the 24th August 2015 the DCA wrote to Amarna informing it that it had approved a TOR "to guide the preparation of the EIA". The six-page TOR was attached to the letter as appendix 1.

[18] How should the Court go about auditing the EIA against the TOR, how involved should such an exercise be and what should the Court be looking for and asking itself?

[19] From the outset, it should be stated that this Court appreciates that it is a fundamental principle that it is concerned with the procedure followed in arriving at the decision and not with the merits of the decision itself. The former is within the province of this Court, the latter is squarely within the province of the DCA. As Linden JA said in **Bow Valley Naturalists Society v Minister of Canadian Heritage**[4]:

> "The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities."

[20] In **Tesco Stores Ltd. v Secretary of State for the Environment**[5] Lord Keith put it this way:

> "It is for the courts if the matter is brought before them to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, the decision cannot stand and must be required to think again. But it is entirely for the decision-maker to attribute to the relevant consideration such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense …regard must be had to [material consideration] …but the extent, if any, to which it should effect the decision is a matter entirely within the discretion of the decision-maker."

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[4] [2001] 2 FC 461.
[5] [1995] 2 All ER 636.

[21] The Court is satisfied that procedural steps set out in the Act were followed. But that is not the end of the matter. Amarna is saying that when the DCA looked at the EIA it took irrelevant considerations into account and ultimately came to an unreasonable and irrational decision.

Adequacy of EIA – Guidelines

[22] In **Belize Alliance of Conservation NGOs v Department of the Environment and Belize Electricity Company Ltd**[6] (Bacongo), the Judicial Committee of the Privy Council considered the adequacy of an EIA. In the case at bar, the claim is that the EIA was adequate and ought not to have been rejected. In the **Bacongo** case, the claim was that the EIA was inadequate and ought not to have been accepted. Nevertheless, the factors to be considered are equally applicable.

[23] The Privy Council approached its determination by considering each of the grounds on which the EIA was alleged to be deficient (geology, archeology, wildlife, rare plants, public hearing and bias) and came to a conclusion on each of the grounds. This clearly involved more than a skimming of the EIA. It adopted the observations of Cripps J in **Prineas v Forestry Commission of New South Wales:**[7]

> I do not think the [statute] … imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness … [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and

[6] (2004) 64 WIR 68
[7] (1983) 49 LGRA 402, 417.

explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations."

[24] Sykes J, in **The Northern Jamaica Conservation Association and Others v The Natural Resources Conservation Authority and Another**,[8] extracted and applied the following guidelines from the leading judgment of Lord Hoffman in the **Bacongo** case, which this Court will similarly rely upon**:**

i. an EIA is part of the information taken into account by the decision-maker when deciding whether to grant permission to conduct any activity that might adversely affect the environment;
ii. the EIA is not expected to resolve every issue raised and indeed it could not since by its very nature it does not purport to explore every single possibility and advance solutions;
iii. it is wrong to look at the EIA as the last opportunity to exercise any control over any project to which the EIA is relevant;
iv. an EIA is satisfactory if it is comprehensive in its treatment of the subject matter, objective in its approach and alerts the decision maker and members of the public of the effects of the proposed activity.

Was there Compliance with the TOR?

[25] I have therefore reviewed the TOR and the EIA, keeping in mind the approach advocated in **Bancongo** and **Prineas**. The TOR required a full description of the location and the extremities of the proposed development site. This was contained in the EIA at page 8. It required a full description of the existing site and its surroundings including relevant data on environmental conditions. This was contained in the EIA at pages 10-13. It required a full description of the proposed operations to include areas to be excavated, methods of construction, site preparation, solid waste management and traffic management. This was dealt with at different parts of the EIA where the relevant subject matter was being addressed. It required overall management and monitoring plan to ensure effectiveness of mitigation measures proposed and wastewater treatment. This was addressed in the EIA at page 15 for example and other parts of the EIA. It required that the potential environmental and social impacts of the proposed

[8] Jamaica, Claim No. HCV 3022 of 2005

development and an indication of the significance of these impacts be addressed. The EIA addressed this at page 20-21 and at other parts of the EIA.

[26] The TOR listed a number of areas which it required the EIA to address, namely: air quality, noise and vibration, water supply/quality, sewerage/drainage, solid waste, landscape, site and environmental management, traffic generation, human environment, employment, public safety, pest and vector control. In relation to each of the listed heads, the TOR required of the developer that it identify the impact, effect, implication of the proposed development on each of the heads in question and how and what steps could be taken to manage or mitigate impacts.

[27] In its letter to which the TOR was attached, the DCA set out, under the heading "Deliverables", the following:

> "The consultant team is expected to prepare a clearly written EIA which will be presented to the Development Control Authority for consideration. The main text should be written in a manner that is understood for the most part by persons with non-technical background.
> Very technical material should be provided as appendices or annexes. The format of the report should be as follows:
> (a) Executive Summary;
> (b) A description of the physical environment of the development;
> (c) Data necessary to identify and assist the main components which the development is likely to propose
> (d) A comprehensive plan to monitor the implementation of mitigation measures for the development during construction and operation of the development."

[28] The Court finds that the EIA comports with the above requirements of the TOR. In **Bacongo**, Lord Hoffman observed of the EIA that: "*With appendices it ran to some 1500 pages and was plainly not a superficial study*." I do not think that in the case at bar the EIA could in any way be considered superficial. It appears to be clearly written and was understood by the Court. It contained an executive summary; a description of the physical environment touching on climate, topography, geology, land capability, natural drainage, flora and fauna. It set out the components that would be involved in the development including proposed development and its

elements, phasing, proposed access, proposed water supply, proposed electricity supply, sewage management. It contained an entire section (section 3) on environmental management and monitoring plan.

[29] The technical material such as the certificate of analysis of the water testing report from the Caribbean Public Health Agency and the conceptual design of the proposed housing development are set out in separate appendices. There is even a biological study of the proposed housing development site which deals with the topography, climate vegetation and land use, identification of the 14 species of birds seen in the area. It notes candidly that while "*no mammal species were seen during the study …the general area is known to have mammals such as mongoose, opossum, rats …bats species ... therefore failure to observe certain species does not necessarily suggest their absence*." It lists the mammal, reptilian and amphibian species known to inhabit the area as well as plants.

[30] The EIA's biological study ends with recommendations:

> "special soil and water conservation measures must be considered and must be put in place before, during and after construction of roads, houses, utilities…The wider portion of the property that will remain untouched should be kept as vegetation reserve. This will serve as refuge for birds and other wildlife that use the area for food and shelter…at least two rows of trees should be planted along the main drain or to protect the stream bank."

[31] The Court examined each of the specific heads listed in the TOR to see if it was addressed in the EIA to the extent required by the TOR. Suffice it to say that it appears to the Court that each and every head under the two headings of "Physical Environment" and "Human Environment" was addressed in the EIA pointing out potential impacts, issues, demands, implications, management and mitigation.

[32] The DCA's substantive ground for rejecting the EIA was that it "*was deficient as a tool to identify the social, environmental and economic benefits and impacts*" of the

proposed development and to "*identify environmental and economic benefits which can be achieved such as reduced cost and time of project implementation and design, avoidance treatment/cleanup costs and impacts of laws and regulations*". Appendix 5 of the EIA contains the "Social and Economic Impact Assessment". This addressed issues like likely direct and indirect employment set out in tables, (a table setting out responses by members of the community to expected benefits to the community from the project); the possibility of the establishment of new businesses; impact of the development on property values, amenities such as transportation; impact of infrastructural development on the community; impact on agricultural production and animal grazing; drainage problems; siltation arising from bulldozing; noise; traffic; safety and security. As Cripps J observed in **Prineas**, the fact that the EIA does not cover every topic does not require a finding that it does not comply with the statute and regulations.

[33] It therefore seems to this court that the EIA in fact addressed both the benefits and impacts from a social, environmental and economic perspective as well as management and mitigation issues. When one keeps in mind the **Bacongo** guidelines – that the EIA is not expected to resolve every issue; is not the last opportunity to exercise control over the project and that it is satisfactory if it is comprehensive in its treatment of the subject matter, objective in approach and alerts the decision maker of the effects of the proposed activity – it is difficult to see on what rational basis the DCA rejected the EIA.

[34] **Kildare County Council v An Bord Pleanala**[9] referred to **Blewett v Derbyshire County Council**[10] in which Sullivan J made observations which I find to be flush with an excess of commonsense:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an Applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations

[9] [2001] 1 AC 397.
[10] [2004] JPL 751.

> are not based upon such an unrealistic expectation. They recognize that an environmental statement may well be deficient and made provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulation …but they are likely to be few and far between."

[35] I do not think the Act was based on such an unrealistic expectation either. At section 23 (5), for example, it provides that even where approval is given for development, conditions may be imposed and the DCA may enter into agreement with the developer in order to give effect to such conditions. The EIA is not the last opportunity to exercise any control over the project. It is a process. This was acknowledged in the DCA's very own Application Appraisal (Exhibit KA 14 of the Affidavit of Karen Augustin) which stated:

> "An EIA is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local and environment and present the predictions and options to decision-makers." (emphasis provided).

[36] In any event, under section 23 (7) of the Act, the Head of Physical Planning may at any time revoke any permission to develop land or any part of it, without compensation, if any fundamental condition attached to the permission to develop the land is not complied with.

[37] According to the affidavit evidence of Karen Augustin, executive secretary of the DCA, the DCA received comments from the Ministry of Sustainable Development, the Ministry of Infrastructure, Ports and Energy and the Ministry of Agriculture, Physical Planning and Natural Resources prior to granting Amarna approval in principle. The Ministry of Sustainable Development's views was that "*An application for the approval for a change of land use can be considered on the*

grounds that an environmental and socioeconomic impact assessment is carried out to determine the overall potential impacts …adequate consultation with adjacent communities …is made a mandatory condition".

[38] The Ministry of Infrastructure Ports and Energy similarly did not oppose the application but noted that "*The developer should therefore ensure that the drainage system(s) are adequate; particularly in terms of intake capacity and the evacuation of water from the development to the water course… geotechnical investigation/testing should be done to determine the suitability of slope stabilization measures*." It goes on to recommend what the size of circular culverts should be and minimum drain width of 450mm should be used for each of the drain types.

[39] The Ministry of Agriculture opposed the application on the ground it "*supports the retention of this parcel for agricultural purposes*" because the limitation of that class of land "*are that of slope and erosion and are recommended for the cultivation of tree crops such as mango, cocoa, timber and avocado…the removal of vegetation for the construction of buildings and pavements will result in the removal of natural filters, increase the velocity and composition of the runoff*"

[40] Notwithstanding the opposition from the Ministry of Agriculture, the DCA went on to receive a presentation from the developer and conducted a site visit after which it granted approval in principle. If the DCA had refused the approval in principle on the ground that the land in question should be retained for agricultural purposes that might have been the end of the matter. It is no business of the court to tell the DCA or the Government of Saint Lucia whether to utilize land for agricultural or development purposes. Regardless of which way the DCA decides, it is no business of the court to say whether or not it made the right decision. But the court can be asked to determine whether the reasons stated by the DCA for rejecting an EIA are rational or reasonable.

Was the Conduct of the EIA unprofessional?

[41] At the hearing of this matter, counsel for the DCA was at pains to point out that the EIA made reference to a quarry which was no part of the proposed project, contained evidence of "cut and paste" from another EIA and that Mr. Calvin George (the independent consultant) looked over the EIA in one hour and submitted it. This, counsel submitted, especially the one hour review, spoke to the unprofessional conduct of the EIA. Indeed the first stated ground for rejection of the EIA was that it had not been conducted to a professional standard.

[42] Amarna did not deny that it took Mr. George one hour to review and sanction the EIA. In his affidavit, Mr. Akhnaton St. Rose explained that at the time it received the DCA's request in March 2015 for it to make a presentation to the DCA, it had engaged Mr. George as an independent consultant. Mr. St. Rose deposed that "*At the time, my team felt it appropriate to engage an independent consultant at that stage since the DCA had requested us to make a presentation to it*." Mr. George, according to the evidence of Mr. St. Rose, was engaged specifically as an independent consultant to present the project to the DCA. Mr. Rose stated that when it received the DCA's correspondence dated 14th April 2016 approving the re-constituted EIA team with Mr. George, Mr. George's "contribution to the EIA team was seamless, took about an hour and [Amarna] was able to re-present the EIA to the [DCA] shortly after his formal inclusion in the EIA team."

[43] If Mr. George was indeed involved with the project since March of 2015 (which was not denied by the DCA) then it is reasonable to expect that he would have a sufficient degree of familiarity with the contents so as to be able to review it and sanction it in the time that he did. In any event, the court is concerned with the substance of the EIA and whether it complied with the TOR. I consider the evidence of some sloppy drafting and cutting and pasting to be *de minimis* if the EIA is otherwise comprehensive, objective and flags up areas of concern, and substantially conforms to its TOR. By citing as one of the reasons for rejection the unprofessional conduct of the EIA (which, in any event, there was not sufficient

evidence to support) the DCA took an irrelevant consideration into account and fell into error.

[44] The DCA further complained that (1) Amarna used a very low sample in its social survey which made the conclusions drawn from the assessment unreliable; and (2) there was no independent verification for their community profiling and no evidence of attendance by a government or non-government agency during the conduct of the community profiling. Firstly, the TOR does not appear to have stipulated a minimum sample ratio nor that the community profiling be attended by an independent person. In any event, these are matters that Amarna could have been called upon to remedy or do over. Such omissions ought not to have rendered the EIA incurably deficient in the eyes of the DCA.

[45] I am unable to arrive at the conclusion, urged upon the Court by the DCA, that the EIA was so deficient that it could not be cured and therefore any request for further information would have been pointless. Neither am I convinced that the EIA substantially failed to comply with its TOR and therefore ought to have been rejected.

The Further Information Point

[46] The argument that section 21 of the Act relating to further information is not applicable to approval in principle is devoid of any logical force, and any superficial attractiveness is stripped away when regard is had to the compelling fact that the EIA is a process, an iterative process. Unless it is wholly deficient, the thinking behind it is that the developer would be called upon to address deficiencies so that all available information identified as relevant to the project is before the decision-maker. This is the approach borne out by the cases referred to above.

[47] The finding of the Court is therefore that, in arriving at the decision it did, the DCA took irrelevant considerations into account. Further, by concluding that the EIA

was deficient in failing to identify the social, economic and environmental benefits and impacts, when these were clearly addressed in the EIA in a substantial way, the DCA arrived at an irrational decision which no reasonable body having reviewed the EIA could have arrived.

[48] Amarna, in its fixed date claim, asked that the DCA be ordered to consider the EIA in accordance with guidelines provided by this Court. I do not think that it is part of the function of this Court to direct the DCA how to do its job. All that the Court can do, when its jurisdiction is invoked, is to determine whether the DCA erred under one of the established heads of judicial review in coming to its decision. The Court therefore makes the following orders:

(1) An Order of Certiorari is granted quashing the decision of the Defendant, the Development Control Authority, rejecting the Claimant's EIA;

(2) Prescribed Costs are awarded to the Claimant in accordance with Part 65 of the CPR 2000.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR