**IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**[IN CHAMBERS]**

**ELAT C995-3/15**

**In the matter of:**

1. **Georges Chin- Fee AH-YAN**

**acting in his personal name and as spokesperson of "Forum Des Citoyens Libres",**

2. **Bruno SAVRIMOOTOO**

**acting in his personal name and as spokesperson of "Mouvement Vag Divan Borlamer".**

**Applicants**

**v/s**

**Le Chaland Hotel Ltd**

**Respondent**

**IPO:**

**District Council of Grand Port**

**Co-Respondent**

**RULING**

This is an application for interlocutory injunction sought by the applicants against the construction of a hotel by the respondent at Le Chaland. The co-respondent is the authority that granted the Building and Land Use Permit ("BLUP") to the respondent for what was described in the permit as 'Proposed Construction of Phase one of Le Chaland Resort Hotel comprising of 164 rooms, central facilities and related amenities'. The matter is yet to be heard on the merits, all counsel having elected that I hear the preliminary points in law first and

deliver a ruling. On the 20th November 2015, the applicants made an application before me for an order of injunction against the respondent company. I granted an interim injunction on the 24th November 2015 and further issued a summons upon the respondent and co-respondent to show cause as to why the abovementioned order should not be made interlocutory. The first affidavit filed on behalf of the respondent contained preliminary objections in law, which are the issues at hand. It is the respondent's contention that the application for injunction made by the applicants on the 20th November 2015 is flawed in law and should be set aside and that my order dated 24th November 2015 should be discharged. I have heard the lengthy submissions of all counsel appearing for the respondent, counsel for the co respondent and for the applicants and their replies, the counsel for the co-respondent having essentially joined in the submissions of the respondent. While I do not intend to overburden this ruling with the submissions of each of them except where I deem it necessary to do so, it suffices to say that I have duly considered the extensive written and oral submissions of all counsel.

**A. (i) A previous application was rejected.**

At the outset, the respondent's counsel raised a point that as per the written submissions of the applicants, the application was for an interlocutory injunction and it does not contain a prayer for an Interim order. Therefore, according to the respondent, the Chairperson cannot of her own volition make an Ex-parte order where it has not been prayed for. While submitting orally however, counsel for the applicants stated that the prayer in the Proecipe included an additional limb for the Chairperson or Vice Chairperson to make such other orders as she may deem fit. He also submitted that the law gives the power and discretion to the Chairperson sitting alone to make any such orders as he/she thinks fit once an application is made.

The Proecipe of the applicants lodged by the attorney of the applicants before the Chairperson, sitting alone, stipulates clearly that it is seizing the jurisdiction of the Chairperson under **s. 4(2) of the Environment and Land Use Appeal Tribunal Act 2012.** This section, hereunder reproduced, essentially gives the power to the Chairperson or the Vice Chairperson to act and make orders in cases where there is an urgency to do so:

***"The Chairperson or, in his absence, the Vice-Chairperson, may, in respect of any matter which is due to be heard by the Tribunal, on application made to him by a party, sit alone for the purpose of making such orders, including an order in the nature of an injunction, as he thinks fit, where he is of the opinion that, for reasons or urgency and the likelihood of undue prejudice, it is necessary to do so pending the hearing of the matter."***

The prayer contained in the Proecipe of the applicants is as follows:

*"For a Summons to be issued calling upon the above-named Respondent and Co-Respondent to show cause, if any, why:-*

*(a) An Order in the nature of an interlocutory injunction should not be granted (on the returnable date of the summons or such other date as may be ordained by the Chairperson or Vice-Chairperson) restraining and prohibiting the Respondent from proceeding with the construction....*

*(b) Such other orders as Chairperson or Vice Chairperson may deem fit to be made. "*

Common sense demands that the wording of application as couched, clearly cannot be read in one breath as *"For a Summons to be issued calling upon the above-named Respondent and Co-Respondent to show cause, if any, why....such other orders as Chairperson or Vice Chairperson may deem fit to be made."* It stands to reason that the applicants have requested an Inter Partes order to be made under limb (a) but that their intention to have the prayer under limb (b) was for the Chair sitting alone to make any order she may deem fit. They were 2 clearly distinct prayers which the applicants have demanded. Since, the powers under **s.4 (2)** allows the Chairperson *"for reasons of urgency and the likelihood of undue prejudice"* to make any order as she deems fit, the order clearly falls within the ambit of **s.4 (2)** *supra* for which an application has been duly made by the applicants before the Vice Chairperson sitting alone.

This being said, the powers vested upon the Chairperson by virtue of this section are akin to those of the Judge in Chambers, who incidentally previously dealt with such applications when cases were heard before the Town and Country Planning Board. The power to grant an interim order and subsequently call upon the parties to show cause as to why it should not be made interlocutory is very much the procedure in our judicial system. This is what took place in the present case. The reason for which the order was granted *ex-parte* was to restrain possible imminent danger of environmental harm being caused due to a potential damage to protected natural features such as sand dunes as well as potential breach of planning control. The applicants averred that the works would start within a week of the application as per a public statement made by the respondent and since the issue at hand being one of environmental damage, it was of utmost importance that the interim order be issued immediately pending its determination. Justice Balancy stated in the case of **Balakrishna Boolauky v Lutchmeeparsad Suraj Bai & Ors [2008]SCJ 221** that the Judge in Chambers in dealing with applications for interim relief does not review any authority's decision *"but merely decides, on a balance of risks, what state of affairs prevail until an eventual occurrence which will give to the applicant an opportunity of having his complaint duly considered. That eventual occurrence is, usually, the determination of the relevant question in Court, but may also be some other even which will have a similar effect."*

Having now taken cognizance of all the affidavits on record, I am fortified in my view that there may be a potential breach of or non compliance with the process in that the lease agreement signed and dated 07/07/15 between the State and the respondent reveals that one of the conditions attached to the validity of the lease is that a fresh EIA licence be submitted. The only EIA licence of the respondent on record is dated 23rd January 2013. This ground therefore fails.

**(ii) Application is time barred.**

It is the contention of the respondent and the co respondent that the application is time barred. Their contention is grounded on the fact that the co respondent having granted a BLUP to the respondent dated 9th September 2015 and the date of notification of the Council's decision to the applicants being the 23rd September 2015, the present application, made on the 20th November 2015, fails to satisfy the 21 days time delay which is a mandatory requirement to enter the application under **s. 5 (4) (c) of the Environment and Land Use Appeal Tribunal Act 2012**. Counsel for the respondent set out the chronology of events concerning the applicants' earlier application for an injunction lodged before me. In essence, the applicants entered a first application and prayed for an interim order. This was declined. Subsequently when the case was mentioned, the applicants chose to withdraw their application and reserved their right to enter a fresh application. Counsel for the Respondent and Attorney for the co-respondent were both present and stated that they had no objection. The applicants subsequently entered the present application.

While I do understand that parties are here to fight for their cause, one has to act with fairness as borne out by our code of ethics. If the legal representatives of the parties had no objection, and this was borne out in the record, it is nothing but unfair to now object that the application has been entered outside the time limit. This application is seeking an equitable remedy and although the duty of the applicants is to come with clean hands, any submission made by any other party to this equitable process should be made with hands with no lesser degree of cleanliness. I do not subscribe to the reasoning of Counsel on the present issue to the effect that it is against public order in that the applicants should know the procedure. Fairness and equality of arms demand that if advance notice has been given by a party of their intention to re-enter a fresh case, to the opposing party with the latter not objecting then *prima facie* that is a clear waiver of any right to object. I am therefore satisfied that the application is not time barred. I need not therefore consider any other points that were raised on the issue.

The contention of the Respondent is that the Chair having previously rejected a first application for interim relief entertained a second application from the Applicants. I am neither bound by my previous order nor my previous decision with regard to a file has that been closed; the

applicant having chosen to withdraw the first application. The second affidavit, which averred certain new elements, makes it perfectly legitimate for me to make any order I deem fit under the circumstances.

The submission of counsel for the respondent seems to suggest that if one looks at what I had decided in the first application and compares it to the decision of giving an *ex-parte* order that I took in the second application, my stand differs. For reminders, I do not sit on appeal of my own decision. I am infact duty bound to judge every application on its own merits. The new application made by the applicants spoke of the irreparable damage to the environment which cannot be adequately compensated in monetary terms. It also spoke of the negative impact on our ecological system in support of their contention. I believe I was perfectly entitled to take on board while deciding whether there was a likelihood of imminent danger of environmental harm being done should the respondents commence works on the site which was averred to be an extension of the Ramsar site, a protected area of the Bluebay marine park and which contains sand dunes and dodo fossils. The respondents' contention is that there were a number of assertions made by the applicants which have simply been lifted off the internet. I shall deal with that under **limb E** below.

**B. Application constitutes a colourable device to appeal outside delay against the EIA licence granted on 23rd January 2013.**

The applicants are under no legal obligation to appeal against the EIA licence. The law neither explicitly nor impliedly imposes such a requirement. The EIA licence is simply a licence granted by the Minister of Environment on the basis of an EIA report submitted by the promoter for any listed undertaking under the Environment Protection Act 2002. The EIA licence by law expires within 3 years of its obtention if works have not started. The likely reasons behind the time limit are that there may have been changes in the circumstances or in the area or even in government policy over a period of time. That is why the law makes provision for the promoter to apply for a fresh EIA licence should the works not have started within the prescribed time frame. Appealing against the obtention of the EIA licence or rather a failure to do so does not in any way preclude an aggrieved party from bringing a subsequent action to appeal against the obtention of the BLUP. I fully agree with submissions of Counsel for the applicants on this issue in that if the respondent decided after having obtained the EIA licence not to go ahead with the project and hence not apply for any BLUP, the need to appeal would then not arise as there would be no grievance as such. At any rate, the obtention of EIA licence does not rubber stamp the obtention of a BLUP. The Council needs to consider many other factors apart from a valid EIA licence before issuing a BLUP. Therefore I find no merit in this argument.

The respondent also raised a point with regard to the tenor of the application as supported by the affidavits, that the applicants' complaint seem to lie in relation to Plot 1 at Le Chaland whereas the project of the respondent lies on Plot 2. I believe the applicants cannot be penalized for some lack of proper communication which happened through no fault of theirs. Miss Bosquet for the Council clarified the situation by stating that she as the Head Planner of the District Council of Grand Port only took cognizance of the fact that the project was on Plot 2 at the previous sitting.

**C. "Forum des Citoyens Libres" and "Mouvement Vag Divan Borlamer" are not parties to the present case and the Applicants have no locus standi.**

The Constitution of many countries provide for the right to have a clean environment. Others contain provisions with an implied right to a clean environment. Assuming enforceability and justiciability, environmental concerns may be presented in fundamental rights suits. Mauritius is no different from any other jurisdiction in this respect. In a country where we have not only a Ministry responsible for Environmental issues but we also have as enforcement agencies a Director of Environment, the Police de L'Environnement and a Tribunal with wide powers to hear environmental and land use issues, shows how far the government is willing to go to ensure the protection and safeguard of its land and environment. The purpose for which the **Environment Protection Act 2002** has been legislated is

**"to provide for the protection and management of the environmental assets of Mauritius so that their capacity to sustain the society and its development remains unimpaired and to foster harmony between quality of life, environmental protection and sustainable development for the present and future generations; more specifically to provide for the legal framework and the mechanism to protect the natural environment.....for the protection of human health and the environment of Mauritius."**

Furthermore, **Section 2 of the Act** provides **"It is declared that every person in Mauritius shall use his best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment."**

Justice Domah made a pertinent observation in the case of **Tacouri and Others v Mohamud and Others [2010]SCJ 132** with regard to this section by stating *" Section 2 in the House Rules of the drafting of Mauritian laws is the definition section. The legislator's decision to make an exception thereto and replace it by a national pledge and move the definition section to section 3 is indicative of the high importance he attached to the commitment...Both the citizen and the State have taken that pledge...."*

An acceptable definition of "Public nuisance" is "an activity which materially affects the reasonable comfort and convenience of a section of the public". Environmental issues can be distinguished from other issues in that following the RIO Convention and the COP21, to which Mauritius had participated and become a signatory, there has been a more forceful approach to the protection and conservation of what our natural environment offers. There has been a more aggressive attempt at sensitization on a global level. Increasingly, the right of the public to participate in environmental decision-making is viewed as a fundamental notion of justice and essential to the rule of law. In Mauritius also, the jet skis have been banned in our seas for fear that alongside being a source of danger for swimmers and divers, they may harm our coral gardens and aquamarine life.

While agreeably, standing rules tend to limit the access of applicants unless they can show that they have a personal interest in the matter, some courts have embraced innovative procedures to give people greater access to courts. Some jurisdictions allow for public interest litigation or even class actions by a representative on behalf of a group of plaintiffs. It is a settled principle however that a class action does not find its existence in our jurisdiction. In this context, I find that since there is no evidence on record to show that **"Mouvement Vag Divan Borlamer"** is a recognized legal entity, it cannot *de facto*, be a party to a case. **"Forum des Citoyens Libres"** is a registered association, therefore a legal entity but does not appear to be a party to the case from the way the heading of the Proecipe is couched. The applicants will have to take a stand on this. Their counsel's submission on the issue seems unclear.

The standing of applicants/appellants, or *locus standi*, be it private individuals or recognized legal entities, have often been the subject of contention before Courts and Tribunals. There is an array of cases on the issue of *locus standi* whereby the Supreme Court has given its deliberations but I find it particularly apt here to refer to the case of **Kishan Quedou v The State of Mauritius [2005] SCJ 70**, a judgment delivered by the former Chief Justice,Y.K.J Yeung Sik Yuen sitting with Justice S. Peeroo. This was an appeal against the judgment delivered by a Judge in Chambers for an application for interlocutory injunction which the judge had set aside on the ground that the applicant had no *locus standi*, the ground having been raised ***'ex proprio motu'.*** The facts of the case before the Judge in Chambers was that the applicant had entered an injunction against the respondent, the State Of Mauritius, prohibiting it from going ahead with the erection of a Hindu Shrine on part of the **"domaine public"** at Grand Bay and from using public funds for this purpose. The Judge rejected the application on the ground that the applicant did not have locus standi to ask for the remedy prayed for since it was in the nature of a public interest litigation which was not applicable in Mauritius. The reasoning of the judge was that the applicant must have a personal interest in the matter and relied on **section 17(1) of the Constitution**. The Learned Judges on appeal took on board the fact that the appellant had stated in his affidavit that the illegal acts and doing of the respondent were causing and

would cause grave prejudice not only to me but also to the citizens of the State, and that every citizen had a right and interest in the 'domaine public' and finally the appellant being a resident of Grand Bay had a sufficiently strong and personal interest in ascertaining the rights of the citizens in this country and in particular his own rights over the "domaine public' of Grand Bay. Their lordships considered these in the light of the evolution of the law on the issue, to reach the conclusion that the Judge in Chambers had erred in setting aside the application on the basis of the preliminary point of *locus standi*. The appeal was allowed.

I find it of particular importance here to reproduce an extract of the judgment:

*"The term "locus standi" is normally related to applications for judicial review. The case before the Judge in Chambers for an injunction/declaratory order pending the determination of a main case, was strictly speaking, not an application for a judicial review, although the aim and purpose of the two prayers was to obtain a stay and ultimately a review of an administrative/executive decision. Locus standi has an indirect bearing and in that respect its purport must be considered."*

They then considered the origin of notion of *locus standi* and how it evolved in England in judicial review matters and cited its application in the local case of **Betsy v Bank of Mauritius [1992] MR 231** where the Court quoted **Wade's Administrative Law (6th Edition) at Pages 702-703**, which I deem necessary to reproduce below:

*"The testing of an applicant's standing is thus made a two-stage process. On the application for leave (stage one) the test is designed to turn away hopeless or meddlesome applications only. But when the matter comes to be argued (stage two) the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it...*

*The novel aspect of the second stage test, as thus formulated, is that it does not appear to be a test of standing but rather a test of merits of the complaint. The essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have insufficient interest to be allowed to pursue it. The House of Lords' new criterion would seem virtually to abolish the requirement of standing in this sense. However remote the applicant's interest, even if he is merely one taxpaper objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest."*

The above principle and the reasoning of their Lordships in the case of **Quedou** *(supra)* can be applied to the present case. The applicants' counsel submitted that any damage that will be caused to the environment and the pollution likely to be generated by the project of the respondent will not only affect the applicants personally but also the public at large. I agree. Environment is and should be an issue of concern for every citizen. In any event, the applicants'

first affidavit sworn by Mr. Ah Yan states that he is a resident of Mahebourg. This in my view, applying the reasoning in the case of **Quedou**, brings him within the realm of at least one of the applicants having a "sufficiently strong and personal interest" to vindicate his rights over the enjoyment of the natural beauty of the beach at La Cambuse and its sand dunes and the preservation of it hence the eco-system. This being said, I believe that the issues addressed by the applicants, through the affidavit sworn by Mr. Ah-Yan, are also of concern and interest to all the islanders whose social life depend to a very large extent on the enjoyment of the beach. The affidavit addressed important issues such as "'retrecissement de notre plage' if the project is maintained", the irreparable damage that will be caused to the environment which cannot be atoned by any monetary consideration, the project will entail major digging which will disturb the sand dunes. They also stated that La Cambuse is not only a unique site in Mauritius for its Palmerie but more importantly it is where the dodo bones have been preserved and is a prolongation of the Blue Bay marine park which is renowned for its coral garden. The surrounding land is designated a wetlands site under the Ramsar Convention. Furthermore, they stated that very close to the site, tortoises (turtles) lay their eggs. I am fortified in my view that until the matter is properly thrashed out, precautions should be taken no to disturb our natural environment which includes in the present context the beach, the surrounding eco-system, the trees and any existing sand dunes. In addition, at paragraph 25 of the applicants' first affidavit, there is an averment that the project will block the flow of rain water which normally runs from underground in a natural way from surrounding villages to La Cambuse hence the possibility of flooding.

The respondent's counsel cited the case of **Mirbel and others v The State of Mauritius [2010] UKPC 16** to say that it was recognized that public interest litigation does not exist in Mauritius. My reading of the case is that on the facts of that case since the appellants were relying on **section 17 (1) of the Constitution**, they had to show that they were unfairly prejudiced. The point which I found to be relevant in this case is that the Board identified *'locus standi'* as a distinct issue. The Lawlords stated there was no need to demonstrate specific harm or prejudice over and above that which the population might suffer. This merely supports the view that there is no need for the applicants to show harm being caused to them specifically. Secondly, they identified that there were certain types of rights that can be vindicated, although that aspect was not dealt with. The judgment covers private property and economic rights.

Counsel for the respondent also raised an issue concerning the way the applicants were couched in the heading of the application. I am of the view that this is an unduly legalistic approach to be taken before a Tribunal where the procedural matters are meant to be less technical. Given my above finding that at least one of the applicants has 'sufficiently strong and personal interest' in the matter, this ground fails.

**D. Undertaking in damages /No urgency**

It is the contention of the respondent that the application having been entered some two months after the grant of the BLUP, it fails the test of urgency required in an application for injunction and that the applicants having failed to provide an undertaking in damages without justification, renders their application flawed in law. At paragraph 50 of the applicants' first affidavit there is an averment that the applicants withdrew their first application only to lodge a fresh one. This is not disputed by the parties and the issue of it not being time barred has been addressed above. This being said, the fact that applicants lodged their application before any construction works began on site gives lie to the point on urgency by the respondent.

This brings me to the next point of whether an application for injunction is flawed at the outset as per the contention of the respondent, if there is no undertaking in damages provided by the applicants. The submission on behalf of the respondent in essence seems to suggest that the application being short of an undertaking in damages on the part of the applicants renders it flawed in law and should hence be set aside. In this context I have been referred to an array of cases and the English principles which essentially advocate the point that the Court will most probably not grant an application for interlocutory injunction if the claimant/applicant has failed to provide an undertaking in damages. I believe that this being a vast subject does call for some clarity although I will restrict myself to the context of the present case.

It is important to understand that the principle of providing an undertaking in damages has grown as a matter of practice. It is not found in any law and is a judicial creation in Equity. In the **5th Edition of Steven Gee QC's Book** on **"Commercial Injunctions" at page 285** it is stated that an undertaking in damages is usually required from the applicant when an injunction is issued-

*"The practice of the court* (stress is mine) is *to require the applicant for an injunction or a search order to give the court an undertaking to abide by any order for damages which may be made if the defendant suffers loss as a result of the order, and the court is of the opinion that the applicant should compensate him."*

The practice of requiring the claimant to undertake to pay any damages has therefore grown, in applications for injunctions, in case the respondent subsequently wins his case and the injunction cannot be justified at trial. And since this has grown as a matter of practice, it cannot *per se* be said to be flawed in law if ever an application does not contain such an undertaking. Furthermore, injunctions being an equitable remedy, there are likely to be exceptions to rule. Therefore the point I seek to make here is that the application if it falls short of a provision for undertaking does not *per se* vitiate the application.

**The question that begs an answer now is when does the undertaking in damages become important?**

In order to answer this one has to understand the process. An application for injunction is normally two fold- the interim stage and the interlocutory stage, the former stage running prior to the latter in the lifetime of the application. When assessing an application for injunction the test to be applied are the settled principles set out on the case of **American Cyanamid Co v Ethicon Ltd [1974] HL 396,** namely that there is a serious issue to be tried, the adequacy of damages, the balance of convenience and (possibly also) the status quo. It is important to note that the provision for undertaking in damages becomes relevant for the purposes of considering the balance of convenience to see in whose favour the balance tips. It stands to reason that if the claimant has provided such an undertaking, this may add weight to the application. I pause here to make the point that undertaking in damages may also be considered at the interim stage in certain circumstances since it is part of the process through which the application goes. The Court will assess this against the prejudice that is being or likely to be caused to the respondent if same is not quantifiable.

This issue was clearly considered in the case of **Sport Data Feed Ltd v Play On Line Ltd IPO The Gambling Regulatory Authority [2014] SCJ 161**. At page 16 of the judgment, Justice Caunhye considered the issue of 'Adequacy of damages and Balance of Convenience' and it is at that juncture he addressed his mind to the provision of undertaking in damages. He considered the principles set out in **Morning Star Co-Operative Society Ltd v Express Newspapers Ltd [1979] F.S.R 113**, that if the claimant could furnish an undertaking in damages that would satisfy the defendant's losses (provided they are quantifiable) should he succeed at trial, the injunction may then be granted.

In the case of **Morning Star Co-Operative Society Ltd** mentioned above and also cited by the respondent, the issue of undertaking in damages was assessed in the last part of the judgment. The Learned Judge having brushed on the factor of whether there was a serious issue to be tried, in his concluding paragraph, addressed the issue of adequacy of damages and balance of convenience. As far as adequacy of damages was concerned the judge found that the defendants were likely to suffer unquantifiable losses in the form of loss of free publicity and loss of confidence in the venture if an injunction were granted. The Learned judge then proceeded on a balancing exercise. He weighed up the unquantifiable damage to the defendants should the injunction be granted against the financial position of the claimants who were unlikely to be able to pay damages, he decided not to grant the interlocutory relief. What tipped the balance in favour of the respondents was the damage that would be caused to them. He stated "If then the plaintiffs have an arguable case, I would not grant them interlocutory relief because of the certainty of unquantifiable damage to the defendants." Finally, he stated

"..where the damage cannot be quantified and it is clear that the plaintiff is unlikely to be able to pay any appreciable damages, no interlocutory relief should be given."

The first point to be made here is that the undertaking in damages is considered, not at the outset, but when the Court is dealing with the actual merits of the application. Secondly, the plaintiff's inability to pay damages per se does not automatically result in the refusal of the interlocutory relief. It is only when weighed up against the harm to the defendant, the nature of the harm being of importance, that the Court will normally reject the application. The Learned Judge also took on board the likely outcome of the applicants' seemingly weak case.

If the application does not provide for an undertaking in damages, the Court has discretion whether or not to order the applicants to provide so. Normally the applicants voluntarily provide the undertaking in damages due to its importance in the assessment of their case. Provision of such an undertaking adds weight to their application, which the Court considers when balancing the risks attached to both parties. Conversely, the Court will normally tend not to make such an order where the claimants have made submissions, and it is satisfied, that there are special circumstances which will warrant them from being dispensed from so doing.

In their first affidavit dated 20th November 2015, the applicants stated at paragraph 51 that they were not prepared to give an undertaking if the interlocutory injunction was granted but that if the Chairperson or Vice Chairperson ordered otherwise then they would submit that it is not a necessity to fortify the undertaking. They have given no reason as to why they are not willing to provide an undertaking. There is no indication as to their means or assets within the jurisdiction. This by no means imputes that they have not come with clean hands. The respondent on the other hand has simply have put a figure of Rs 100000 in its first affidavit in terms of damages suffered per day without any evidence in support thereof. This supports the view that the damage suffered by the respondent is likely to be in terms of pecuniary loss.

Since it is within my discretion whether or not to order the applicants to provide an undertaking in damages, I decide to maintain my decision of not ordering the applicants to provide an undertaking at their own risk and peril. Save that their stand is that even if an order is granted it need not be fortified, I am in the dark concerning their financial means and any special circumstances that may dispense them. The damage to the respondent seems quantifiable as it is mostly pecuniary in nature and the applicants may have an arguable case: **Morning Star** *supra*. By not providing an undertaking, however, the applicants need to be well aware that this may weaken their application. For reminders, the undertaking in damages is but one consideration, albeit a major one, to be taken into account in a subsequent exercise when assessing the balance of convenience, hence the balance of risk involved in ultimately granting or refusing the application.

**E. No cause of action-case based on incorrect or flawed statements/perception and not on scientific basis.**

The applicants have stated that they will prove on a balance of probability that the proposed development will have a negative impact on the ecological system. The respondent's contention is that there has been no disclosure of any evidence for me to have come to an informed opinion such that the Order dated 24th November 2015 was on the basis of assumptions which were not replied by the other party. On this issue I fully subscribe to the arguments put forward by Learned Counsel appearing for the appellants, Me. Ramsahok. These are matters which may become relevant, if at all, when considering whether there is a serious issue to be tried. These points are pre-mature at this stage. Any Judge in Chambers dealing with an application at the interim stage is never in possession of all the facts and the decision is made on the basis of an incomplete picture. Yet Interim Orders are granted, the test being one of 'imminent harm'. Since all the evidence for such an application is presented by way of documents and in affidavits, it cannot be subjected to the test of cross-examination so that one can say it can be safely relied upon. That would equally apply to the evidence presented by the respondent and the co respondent, not merely the applicants. I agree with Learned Counsel that at this stage it is simply the version of Mr Ah-Yan against that of Mr. Lan and Mr Burunchobay. At this stage, I am not dealing with the merits of the main case. Certain averments have been made by the applicants and some documents have been put in which on the face of it motivated my decision to issue the order. This ground therefore also fails.

Save for the issue on which the applicants have been invited take a stand, for all the reasons set out above, I find that the points raised are devoid of merit. The motions of the respondent and co respondent are accordingly set aside. The matter will be mentioned on a convenient date.

**Jayshree RAMFUL-JHOWRY**

**Vice Chairperson**

**29 March 2016**

**For Applicants: Me. Ramsahok appearing with Me. Mooneeapillay and Me. Hematally**

**For Respondent: Me. Aboobaker,SC appearing with Me. A. Moollan, Me. Ramburn, MeCarrim**

**For Co-Respondent : Me. Jhowry-Lallah**