BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C1007-2/15

In the matter of:

Yan Hookoomsing & Ors

Applicants

v/s

Le Chaland Hotel Ltd

Respondent

In the presence of:

District Council of Grand Port

Co-Respondent

JUDGEMENT

1. This judgment follows my ruling dated 27th May 2016 whereby all points in law raised by the respondent and co-respondent were adjudicated upon as per request of all counsel. The application was then argued on the merits, which is the subject matter of the present judgment. Therefore this judgment should be read in the light of the ruling delivered. For reminders, the present matter relates to an application for an injunction 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'.

2. We have reached the stage where the merits of the application is to be determined following the application made by the applicants by way of proecipe and affidavit which was followed by the exchange of a series of affidavits. I have also delivered 2 rulings on matters relating to the present application to which I shall make reference where the need arises.

3. It is also worthy of note that a similar application has been made against the same proposed development by other applicants in the case of **Ah Yan & Ors v/s Le Chaland Hotel Ltd IPO District Council of Grand Port [ELAT C995-3/15]** which I have dealt with and have previously delivered a judgment whereby some of the issues raised were similar. I am therefore taking the liberty of reproducing relevant parts of the said judgment for the present purposes, wherever I deem it fit to so do.

4. I will not overburden this judgment with the lengthy submissions of each counsel except where I deem it necessary to do so, it suffices to say however that I have duly considered the submissions of all counsel and all evidence placed before me. From the volume of affidavits and documents exchanged and the lengthy submissions of counsel at both sittings, there are a number of legal and factual issues which have led to this BLUP being contested. Counsel appearing for the respondent, Mr. Ramburn, reiterated a point in law which has already been raised as a preliminary objection to the application and addressed by me in my previous ruling dated 27 May 2016. Since the issue has been raised again, I shall address it before considering the merits of the application.

LOCUS STANDI

5. Counsel appearing for the respondent renewed his submissions on the issue of *locus standi* of the applicants namely that the applicants must have a legitimate personal interest in the matter. The mere fact that he would be an inhabitant in the region would

not be sufficient. Since I have dealt with this issue at length in my ruling dated 27 May 2016, I do not propose to reiterate all the issues I have taken on board to come to a conclusion. Bearing those issues in mind and having considered the point further, I am not convinced by any submission put forward that would justify reconsidering my position. I therefore maintain my view that the applicants have *locus standi* for several reasons. I had considered this aspect rather lengthily in the case of **Ah Yan & Ors v/s Le Chaland Hotel Ltd IPO District Council of Grand Port [ELAT C995-3/15]** which I shall take the liberty of reproducing hereunder since the legal reasoning remains unchanged.

6. "Reference has been made to English and Mauritian case law in the course of submissions when the case was argued on the preliminary objections. Whilst I do take these on board, I believe what also needs to be looked at is the source of our legislation. This is not to be found under English law but rather Australian Law since our planning legislation and principles are largely borrowed from the Australian system. Infact our Planning instruments such as the *Planning Policy Guidance* and the *National Development Strategy* are mostly based on the Australian system and principles. The legislation in some states of Australia such as Queensland and Victoria make allowance for third party/objector appeals. **Section 63-65 of the Planning and Environment Act 1987** of the State of Victoria, has for effect the freezing of the granting of a permit pending the determination of the objection. The situation is similar under **s.339 of the Sustainable Planning Act 2009** of Queensland, where objectors are referred to as submitters. The applicants in the present case have objected to the decision of the Council under the **Local Government Act 2011**. Conversely, in this country, objections are allowed by third parties but there is no "stay" as such pending the determination of their objection. The objectors, in an attempt to seek redress, must seek injunctive relief so that their objections are not rendered futile by the development which has otherwise been given the green light to proceed.

7. Infact the application of the law in Australia with regards to standing has evolved considerably over the decades. The principle developed from the *Boyle rule* in the 1980s, which was to essentially safeguard against objections by "busybodies", in a number of landmark cases culminating in the decision of **Environment East Gippsland Inc v Vic Forests [2010] Victoria Supreme Court 335**. In this case the Supreme Court found that the plaintiff had *locus standi* as it had a special interest in the matter by virtue of the fact that it had been engaged on an ongoing basis in the consultative process regarding the formulation of the relevant Forestry Management Plan, it had made submissions to the Department of Sustainability and Environment and it had received from government a financial grant in recognition of its status as a body representing a particular sector of the public interest. "

8. Now, even if I have to consider the position solely under English law, given that counsels have been essentially submitting on English caselaw, the outcome does not differ. In the case of **Turner v Secretary of State for the Environment (1973)** 28 Planning and Compensation Reports 123, heard before the Queens Bench Division and also reported at (1973) 72 LGR 380, it was held that where an individual has participated in a particular decision-making process that in itself will normally be sufficient for him/her to establish a sufficient interest in any subsequent judicial review. The facts of this case very briefly are that the owner of a land had applied to the local planning authority for outline permission for the erection of two single-storey dwellings on the land and a local preservation society appeared at the hearing and made representations. The application of the owner was subsequently approved but the preservation society appealed and applied for the order to be rendered void. A preliminary point was taken that the preservation society was not a *"person aggrieved"* within the relevant legislation, namely, **s. 245 of the Town and Country Planning Act 1971** (repealed). The Court held that the society did fall within the meaning of aggrieved person and that no distinction is to be made between a person who appeared and made representations at an inquiry under notice at the insistence of the Secretary of State and a person who appeared and made representations at the discretion of the inspector.

9. In the case of **R V Her Majesty's Inspectorate of Pollution and the Minister of Agriculture, Fisheries and Food exparte Greenpeace Ltd (No.2) [1994] 4 All ER 329,** Greenpeace challenged the decision of the Secretary of State and the Minister to allow the company British Nuclear Fuels Ltd ('BNFL') to commence new nuclear operation at the same site. In that case it appears that the question of standing and the merits of the case were inextricably linked. Justice Otton decided to grant Greenpeace standing and in so doing he took in account the number of supporters in favour of Greenpeace and he observed that the issues were no doubt serious ones worthy of determination by the Court.

10. In **R V Secretary of State for Foreign Affairs, exparte World Development Movement ltd [1995]1 All ER 611**, a pressure group sought to challenge the decision of the Secretary of State to grant overseas development funds for a Malaysian Dam project which they qualified as 'economically unsound'. On the issue of whether the pressure group had any standing, the Court took into account several factors including *" the importance of vindicating the rule of law, the importance of the issue being raised; the likely absence of any other responsible challenger; the prominent role of the applicants in giving advice and assistance in that particular area of policy."*

11. The respondent submitted that the applicants here have no legitimate personal interest since the project does not affect their livelihood except for their right to have access to the public beach. The minutes of proceedings before the Permits and Business Monitoring Committee on the 14th August 2015, borne out from the record at page 2 of Annex C of Co-respondent's affidavit dated 20th November 2015, penultimate paragraph is as follows:

"The Chairperson District Council welcomes everyone. He explained that according to the BLP Guide, a hearing was normally held whenever objections were raised against a proposed development. Consequently, following application from Le Chaland Hotel Limited c/o Chaland management Ltd and after public notification, 1377 persons had

signed respective objection letter. However, only 320 individuals with proper names/surnames and addresses could be convened. 13 associations represented by one person had been convened for the hearing. The objective of the hearing was that the applicant was to describe the project and the objectors could voice their objections arising from the proposed development. The hearing would help the Council as a public body in its decision making process."

The applicants, with the exception of one, were amongst the objectors who were convened for a hearing at the Council. The applicants nos.1, 5 and 6. participated and their views were heard by the Council with a view to assist it in the ***decision making process***, to use its own words: **Turner v Secretary of State for the Environment (1973)** *supra.* The applicants do qualify for standing if such reasoning is to be followed under English caselaw as well. Furthermore, when the BLUP was finally granted, they were personally informed by the Council of its decision, specifically Mr. Hookoomsing, and given the option to appeal against the decision. It is hence surprising that the decision-making body which issued the applicants with the letter notifying them of its decision and informing them of their right to appeal against the decision, subsequently contests their *locus standi* to do so.

12. I am of the view that in the present case, the question of standing is also inextricably linked to the merits of the case since the importance of the issue at hand, and whether there is any other challengers, as in the case of **R V Secretary of State for Foreign Affairs, exparte World Development Movement ltd [1995]** *supra*, all the factors need to be considered in its totality to see whether injustice will be caused whichever way my decision goes. In the present case, if we are to go by the submissions of the respondent, it would appear that there cannot be any challengers to the proposed development except for those who have sufficient interest in the matter which is personal to them. It was submitted by the respondent that there is no legitimate personal interest of the applicants except for their right to have access to the beach because it does not affect their livelihood. This approach seems to be too restrictive in my view. Group actions

promoting or protecting a specific cause are usually brought by NGOs under the guise of 'public interest litigation' are not recognized in our judicial system since neither *class action* is recognized nor is *public interest litigation*. Does that leave us with the only option of private actions by individuals only? That means that an individual or group of individuals can only bring in an action if he/they has/have a legitimate personal interest in the matter. It seems to be contrary to the concept of Environmental Law and Environment protection which very essence is encapsulated in **section 2 of the Environment Protection Act 2002** that *every person in Mauritius shall use his best endeavors to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius.*

13. According to Jonas Ebbesson in his book entitled **'Access to Justice in Environmental Matters in the EU'** Page 479, *"the liberalization in standing rules evident from this succession of cases is not the consequence of any legislative change, but rather represents an evolution of judicial policy."* The Law Commission [at paragraph 10.6] has considered standing and has proposed that the present standing rule should be altered to allow for, amongst others, challenges to be made *'in the public interest'*. In the meantime the matters rest within the discretion of the courts.

14. It is also important at this juncture to mention that "public interest" is very much an issue when it comes to planning and environment. It is a widely accepted legal concept. Our planning instruments, which are the tools of all planners, also make reference in several parts to the national/public interest. Therefore public interest in the context of planning and environmental law is far from a fallacy.

15. In this context, it is worthy of taking note that Council's stand on the issue of 'public interest' differed substantially from what is borne on record. Annex C of Miss Bosquet's affidavit dated 20th November 2015 shows that some objectors raised the issue of what was in the public interest, at the hearing of the PBMC on the 14th August 2015. This

issue was considered at a subsequent hearing of the PBMC on the 28th August 2015 [DOC D] at point 7 of the table and the remarks recorded were *"The issue of public interest was irrelevant for the Council because it was only the government which had been elected by the people which could decide for the public interest."* But at point 12 of the same document where the Council considered the issues that were raised regarding the **'National Development Strategy'** which talks of the vision on how development should be done. The comment of the Council is *"Therefore, it depends on the public interest and the economy, etc."*

16. At Annex E, which is the minutes of proceedings before the Executive Committee of the 8th September 2015 at page 8, the record shows when the present matter was under consideration "The Chairperson DC stated that the project would be in the *public interest* and it would create job opportunities. He also highlighted that around 1500 inhabitants living in the region had signed a petition in favour of that development." [stress is mine] The application was approved. The co-respondent's counsel also submitted at the sitting of the 11th January 2016 that 'public interest' litigation does not exist in this country. The point being here is that this does raise an issue that needs to be addressed in the main case on whether the Council took into account all relevant considerations in granting the BLUP.

17. The applicants have expressed their fear for the loss of enjoyment of the beach, should there be beach erosion with the disruption of the sand dune. They have expressed concern about any potential erosion affecting and being detrimental to the Blue Bay Marine Park, a listed Ramsar site, and this was not only of concern for the applicants but it would appear that it was an issue of concern also for the Chief Health Inspector of the Co-respondent notably at paragraph 2 of Page 4 of Annex D to Miss Bosquet's first affidavit dated 20th November 2015, where the record shows that he informs the planning committee should take into consideration the fact that nearby the beach and the marine park there is already an existing hotel which was closer to the shore line.

SERIOUS ISSUE TO BE TRIED

18. According to the principles of the **American Cyanamid,** when an application is made for an interlocutory injunction, in the exercise of the court's discretion, an initial question falls for consideration, that is, whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, where does the balance of convenience lie?

19. Counsel for respondent, Mr. Ramburn submitted that the applicants have failed to meet that threshold. He submits that the applicants have *no locus standi* as they have no right that is being infringed and that the applicants main contention is that the construction of the hotel will be done on the dunal system, which according to the Applicants' affidavit dated 3rd November 2015 was indicated in the topographical map shown at Page 17-18 in chapter 2 of the Respondent's own EIA licence, where as there is clear evidence from Page 322 of the EIA report that the sand dune on that specific zone no longer exists as it had been modified long ago when the National Coast Guard occupied the site. He also submitted that all relevant clearances were obtained and that the competent authorities are to monitor the construction and that the EIA report highlighted every aspect of the project backed up by appropriate expert evidence but that the applicants never objected to the EIA licence at the relevant time.

20. Counsel for the applicants Mr. Ramsohok submitted that the contention of the applicants is that the project is going to be detrimental to the environment and the reasons they have advanced for saying so are that they are going to suffer loss of

enjoyment of the beach because of erosion, as per paragraph 20 (c)of the applicants' first affidavit which quotes Page 23 of the Appendix G of the EIA report of the respondent where mention is made of coastline recession if the stability of the sand dune is affected. As per Mr.Ramsohok's submissions, it is hotly contested that the project will not be carried out on the sand dunes. The applicants have made extensive reference to the EIA Report of the respondent to show that the latter's own EIA report addresses the impact of the project on various features including the sand dunes and the considerable amount of earth works involved [paragraph 6.2.3 of EIA report] and that it is likely to cause atmospheric pollution, amongst other things as per appendix G of the EIA report. Annexes I, J and L to the applicants' affidavit dated 9th December 2015 seem to suggest that the topography of the land varies in height, which could possibly indicate the existence of sand dunes. In fact the applicants do indeed make an in-depth analysis based on facts obtained from the respondent's own EIA report prepared by their consultants coupled with some facts as they perceived them on the locus, as per their affidavit, to come to the conclusion that the project will be done on the sand dunes. Since I cannot make an absolute finding on such issues at this stage, it is best left to be decided before another forum where evidence can be adduced and tested in cross-examination. This being said, however, I do find that there is a serious issue to be tried because it would appear that the issues are contested and they go to the crux of the matter to be decided, which is whether the BLUP was rightly granted.

21. Mr. Ramsohok further quotes the last sentence of paragraph 1.4.3 at Page 10 of the EIA report which deals with the **National Development Strategy** ['NDS'] which states *"Although the proposed development does not fall within the specifically identified tourism zones of the Development Strategy Map, it can arguably be referred as an extension of the Mahebourg Tourism Zone which includes Blue Bay."* He argues that whether **Mahebourg Tourism Zone** can be extended is another serious issue to be tried.

22. I had addressed this issue in the case of **Ah Yan & Ors v/s Le Chaland Hotel Ltd IPO District Council of Grand Port [ELAT C995-3/15]** and I am hereunder reproducing an extract of the analysis I had made since it remains unchanged. As per my reading of the **National Development Strategy**, the **Tourism Zone** in that part of the island, according to my reading of this Planning Instrument, is the **Mahebourg Tourism Zone** (including the Mahebourg Waterfront, Grand Port Waterfront and Blue Bay areas).

"The NDS, under the subheading "**Tourism Development and Growth**" provides

"A series of 27 Action Plans are also proposed to guide tourism and related development within these Zones. Not all areas are proposed to accommodate tourism development, with the South Coast Heritage Zone and the South West Natural Zone encouraging the protection of nature reserves, the National Park and forested areas....."

23. The **South Coast Heritage Zone** is defined under the subheading "**Heritage and Conservation**"

*" The South Coast Heritage Zone (covering an extensive area from Blue Bay to Baie du Cap inclusive of Surinam, Souillac and Bel Ombre); and that the South West Natural Zone...incorporate strategies to protect the natural environment."*The development in the South Coast Heritage Zone should normally be focused, as per the NDS, to protect the coast from any development, controlled development within Pas Geometriques and to encourage high quality small hotel/guest house developments in village centres. Under **Policy TM3** which sets out the tourism development strategy within the South Coast Heritage Zone, it is expressly stipulated that only limited development should be encouraged there and that *"it is pertinent that strategic tourism development be confined to Tourism Zones to ensure that remaining coast line is retained in its natural state, that some protection to Environmentally Sensitive Areas be provided ...and so that infrastructure provision can be more efficient by making best use of existing services and minimizing demand for new infrastructure investment."*

24. In the NDS, the development for the **Mahebourg Tourism Zone** (including the Mahebourg Waterfront, Grand Port Waterfront and Blue Bay areas) as identified by the Ministry of Tourism, has to maintain luxury hotels in the BlueBay area whilst making environmental protection a priority and encouraging high quality small hotel developments in Mahebourg. There is also **Policy TM1** on *Tourism Zones* which outlines *"the concept of a sequential approach to tourism development which first focuses in existing settlements resorts and major campement sites within designated Tourism Zones. Outside of these clusters, but within Tourism Zones, only limited development should be permitted where it supports and complements strategic development or sustains local needs"*...(the stress is mine)."

25. The definition provided in the NDS suggests that Le Chaland falls under the **South Coast Heritage Zone** and not within the Tourism Zone. This raises the question of whether there was potentially a breach of planning control by the Council in this case. I believe that these can only be aptly determined in the main case.

26. One aspect which was made a live issue is the proximity of the subject site to the location of the Blue Bay Marine Park which is a protected Ramsar site as mentioned in the EIA Report. Mr. Ramburn submitted that the Marine Park came about purely as a creation of law with specific limitations and that the site adjoins the Blue Bay Marine Park but is not part of the Marine Park as such. The monitoring report will cover the Blue Bay Marine Park according to his submissions and that the institutions will all ensure that there is no degradation of the environment. The fact remains that it adjoins an Environmentally Sensitive Area and the risk of irreversible environmental impact is very much present. It may not be through any fault of the respondent but it may well be as an unintended consequence of the activities related to the project.

27. The evidence presented by the respondent in its EIA report at Page 10 at the last line states "...it can arguably be referred as an *extension* of the Mahebourg Tourism Zone which includes Blue Bay" (*stress is mine*). It is questionable whether the EIA report can simply state that the area is an extension of the Mahebourg Tourism Zone when there is no such provision in the NDS. Conversely, it was argued by counsel for the respondent, Mr. Ramburn, on the location of the Blue Bay Marine Park that the site adjoins the Marine Park but that it is not part of it. The implication is that the respondent may then choose to decide when an area can be extrapolated and when it should be limited in order to suit its argument.

28. Mr. Ramburn also submitted that another complaint of the applicants was that they would suffer loss of enjoyment of the public beach as Mauritian Citizen should any such erosion occur. This according to the respondent has not been substantiated because the way the applicants have presented it seems to be on a hypothesis. He submitted that the applicants seem to be making mere and unsubstantiated averments of possible damage to the environment without any evidence in support and that they have chosen to cherry pick parts of the EIA report to essentially suit their convenience and use it against the respondent. He cited a few examples of statements made in the affidavit of the applicants to show that they did not bring in any expert evidence but instead chose to make statements basing themselves on the EIA report of the respondent and that at Pages 338-341 of the EIA report there is an Environment Monitoring Plan which has been approved by the Ministry of Environment which contains stringent conditions to be abided by the respondent during construction and that several bodies will have to send monitoring reports to the ministry which will include a summary of the monitoring carried out including the environmental problems encountered or complaints received and remedial actions taken.

29. I am not in a position at this stage nor am I being called upon to decide whether there will be degradation in the ecosystem just as I do not know if the Council was right to have granted the BLUP or not. The applicants have not brought in any expert evidence, but since this is not the stage where matters are being decided with finality I have to consider the averments and evidence presented by the applicants, which incidentally stem from the respondent's own EIA report. They have made extensive reference to the peculiarity of the site and have contested the application of the planning instruments as applied by the Council to the facts of this case. They have expressed their concern regarding issues of environment pollution and imminent danger of environmental harm especially to the sand dunes that is likely to occur with the implementation of the project of Le Chaland Hotel Ltd on the site *in lite*.

30. There are a number of issues to be considered in the main case when judging whether the council was right in its assessment namely the aims and provisions of the **Outline Scheme of Grand Port**, whether the relevant provisions of other planning instruments such as the **National Development Strategy** ['NDS'] and **the Planning Policy Guidance** ['PPG'] have been duly considered, any approved environmental protection policy under the **Environment Protection Act** as well as conservation of the place under the **National Heritage Fund Act 2003**.

31. I cannot see on record if there is a fresh EIA licence submitted as per lease agreement dated 22.06.15. I see that there is a recommendation for a desalination plant since the site is close to the Blue Bay Marine Park which is a protected zone. However, the PBMC of the Council at the sitting of the 28th August 2015 stated that it was premature to discuss the issue of desalination. These may or may not be relevant matters for consideration for the purposes of knowing whether the respondent holds a valid BLUP, hence the derivative right they claim to have accrued to proceed with the project. At this stage, I am not dealing with the merits of the main case. My findings are on the basis of certain averments made and some documents put in. I have also considered several points, mainly at paragraphs 42 and 43 of my ruling dated 27th May 2016 which

has also motivated me in my finding. It is clear from the volume of affidavits and documents exchanged that there are a number of issues which are contested. I am therefore satisfied that there is a serious issue to be tried before the Environment and Land Use Appeal Tribunal.

DAMAGES AN ADEQUATE REMEDY

32. The position in law is that no injunction should be granted, if damages would be an adequate remedy to the applicants and the respondent would be in a financial position to pay the applicants. The applicants mentioned in their affidavit that the disruptions caused to the sand dune system and the wrong that will be caused will be irreparable and would not be adequately compensated in monetary terms. It is clear from their averments that damages would not be an adequate remedy in this case because the issue at stake here is the alleged negative impact on our ecological system, the undue prejudice and irreparable environmental damage that is likely to occur should the injunction not be granted such that it cannot be adequately compensated in monetary terms. What can be gathered from counsel's submission is that if the works are to proceed on site, it will render the applicants' case obsolete in that the debate will be purely an academic one since their battle is in favour of nature conservation at the site *in lite* in view of its peculiarity.

33. The respondents' contention is that there were a number of assertions made by the applicants without adducing any expert evidence and they have simply picked up negative points from the EIA report of the respondent to support their case. Whilst it would appear that the applicants have used the respondent's own evidence against them, these matters of expert evidence will be more aptly canvassed in the main case when witnesses will be called and cross examined. At this stage, by reason of its very nature, that is alleged environmental harm, monetary compensation is a non-issue for the applicants' case. Damages would therefore not be an adequate remedy in this case.

BALANCE OF CONVENIENCE

34. In order to ascertain where the balance of convenience lies, I have to consider whether there will be a substantial non-compensable disadvantage to one party whichever way my decision goes. The respondent's case is that in view of the fact that the Respondent has already obtained its EIA Licence implying that it had complied with all the legal requirements imposed by the authorities concerned, any prohibition for the project to take off will be prejudicial to the respondent hence the balance of convenience tilts in favour of the respondent. Mr. Ramburn submitted that no prejudice will be caused to the applicants since it has complied with all safety measures, various authorities will be monitoring the development and the project will in fact enhance the locality by going beyond what they had to do in terms of the hotel development. It has fully complied with the laws and procedures with regards to obtaining the BLUP and it has obtained all relevant permits and clearances whereas the applicants are mere busy bodies who have brought no independent evidence but relied on the EIA report of the respondent.

35. I have taken note of the clearances obtained by the respondent. However, evidence of some of the clearances obtained and referred by the respondent in its affidavit was not placed before me such as the clearance from the Ramsar Committee and that from the National Heritage Fund. I cannot therefore take cognizance of the conditions attached, if any, in view of the proposed development site's proximity to environmentally sensitive areas.

36. Counsel appearing for the applicants submitted in essence that the balance of convenience tilts in favour of the applicants because if the development is allowed it will cause irreparable damage to the environment which cannot be compensated in

money's worth where as the respondent will suffer only pecuniary loss. Their case is that a failure to restrain the respondent from proceeding with the works on the site pending the hearing of the main case will result in damage to the environment, is likely to be irreparable and will render the case of the applicants at the hearing of the main case nothing but an academic debate.

37. It is the case for the applicants that the construction of the hotel is likely to be done on the sand dune system as can be gathered from the EIA report of the respondent. The construction works will entail removal of existing vegetation thereby disrupting the dynamics of the sand dunes hence leading to beach erosion. The applicants claim that they will suffer loss of enjoyment of the beach including the public beach should such erosion occur and hence contribute to loss of recreational interest. This is pertinent in the context of this island where enjoyment of the beach is the most common recreational activity of Mauritians.

38. The respondent raised the point that the applicants did not furnish any undertaking in damages. In my ruling dated 27th May 2016 I had addressed the issue and considered the case of **Sport Data Feed Ltd v Play On Line Ltd IPO The Gambling Regulatory Authority [2014] SCJ 161**. The point to be made here is that the issue of undertaking in damages is to be considered as one of the factors to be placed on the balance when considering the "balance of convenience". In the respondent affidavit dated 20th November 2015 at paragraph 24 a list of the expenses of several million rupees already incurred by the respondent has been enumerated namely payments to the Tourism Fund, for the construction of the National Coast Guard, as lease rentals and registration duty, in the construction of roads and re-routing of services and of hotel planning, design, project and professional fees amongst others. A breakdown was provided in the respondent's second affidavit as well. The prejudice to be caused to it, according to the respondent, would therefore far outweigh that of the applicants and that the balance tilts in its favour.

39. I am alive to the fact that it was averred by Mr. Hookoomsing in the first affidavit sworn on behalf of all appellants that he was not in a financial position to provide any undertaking in damages. It might be useful at this juncture to summarize the sequence of events as borne out by the proceedings. In the course of submissions on the 11th January 2015, submissions were made by counsel for the respondent and co-respondent regarding the averment of Mr. Hookoomsing in the applicants' first affidavit that he did not have the financial means to give an undertaking in damages. Consequently, a motion was made by Me. Ramsohok for all the applicants to put in affidavits to disclose their financial status and assets, which was granted. However, the respondent or the co-respondent did not make a motion for the applicants to be ordered to provide an undertaking in damages in the light of the assets of the applicants, despite being given time to take a stand on the affidavits regarding disclosure of assets filed on behalf of the applicants. It was submitted that no undertaking in damages had been provided by the applicants but there was no formal motion that they do so.

40. It is a settle principle that the undertaking in damages has grown as a matter of practice and it is meant to be as a form of security in case the claimant loses his case ultimately. In the 10th edition of Bean on ***Injunctions*** at paragraph 3.03, it is provided

"If the claimant obtains an interim injunction, but subsequently the case goes to trial and he fails to obtain a final order, the defendant will meanwhile have been restrained unjustly and will generally be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where an interim injunction is to be granted, or requiring the claimant to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial". (stress is mine)

41. The decision of whether to finally grant the injunction depends on the circumstances of the case. It is to be borne in mind though, that this undertaking is to be given to the

court, not to the respondent. The undertaking in damages is a very material consideration which the applicants have failed to give although they all disclosed their assets in the last affidavits filed. I cannot lose sight of the fact that this is a multi-million rupee project and delays in such cases may result in cost escalations. This being said, the value of the assets of the applicants is not comparable to the investment of a project of this magnitude. It is a drop in the ocean in monetary terms. But the flip side to this same argument is that whenever there is a challenge, which can be legitimately expected in view of the magnitude of the development, this will necessarily entail increased costs regardless of the merit of the application and this is a fact that any promoter must bear in mind.

42. The state of affairs being thus, the Tribunal must have regard to the interests of the applicants as well as those of the respondent. It has to weigh up the position of the applicants against the position of the respondent to see in whose favour the balance tips. There is on the one hand a costly project of the respondent that risks coming to a halt if an injunction is granted pending the determination of the main case and pecuniary losses may be incurred as a result of the delay and on the other hand there is the case of the applicants which if the injunction is not granted is likely to cause serious prejudice to its case since it may render the main case purely an academic exercise.

43. The question of injunctive relief is an important one in many environmental cases. It is often the case that a decision having environmental consequences cannot be revoked once it is executed. Irreversible measures will likely result if the determination of the main case is to be awaited to bring the execution of the decision of the Council to a halt thereby rendering the whole enforcement of the final decision ineffective. Therefore, an effective injunctive relief procedure, in my view, should ascertain that the decision can still have an impact on the actual situation.

44. The position in law in this country is such that it does not provide for an appeal from the decision of the local authority to have any suspensory effect on the decision when an appeal is lodged, that is, an automatic stay pending the determination of the Tribunal. Hence, the applicants had to resort to the present application before me for the purpose. In the present case the construction project is on a site of high ecological importance and that is one of the reasons why the respondent wants to carry out its project of having a hotel there is because it is in line with its vision of attracting eco-tourism. Mr. Burrenchobay in his affidavit dated 30th December 2015 talks of the respondent's equal need to protect the environment since *"environment forms part of the philosophy which will guide the running of the hotel."*

45. The respondent submitted that there will be monitoring from several authorities. We should not lose focus, the moment it becomes a construction site, the natural state of the site will not be conserved. There is bound to be degradation. Many of the clearances obtained by the respondent talk of the company ensuring that precautions are taken, underlying reasoning being that there are real risks of pollution and destruction of some form to the environment is bound to happen. I had already addressed in my ruling dated 27th May 2016 part of which I deem fit to reproduce below

"There is on record documents which show that there will be a lot of digging, since the correspondences from the CWA and CEB show that there will have to be re-routing of the water pipes and that the electricity cables will all be underground. There would have to be sewage and waste disposal pipes, construction materials and heavy duty vehicles on the construction site, to name a few. All these are likely to have impacts. Now since, it has been submitted by the applicants that it is hotly contested that the Hotel will be constructed on the sand dunes, as a matter of common sense, the possibility of all the digging being done on the sand dunal system is a live issue which will be determined in the main case."

46. I agree with submission of learned counsel appearing for the applicants that at this stage if the project is allowed to start and all the digging and earthworks are allowed to start, it will render the case of the applicants obsolete so that the case will simply be an academic argument before the Tribunal when hearing the main case. The applicants will be placed before a *fait accompli* and the debate on whether the Council was right to have granted the BLUP or wrong to have done so would have no sense whatsoever. One must bear in mind that we are here dealing with a site that has a certain peculiarity, compared to any other site with a beach front. It is on record that Le Chaland is within a conservation zone, the site adjoins a Ramsar Protected site of international importance and of high conservation value.

47. It stands to reason that what the respondent company can do is simply try to mitigate the harm. The alteration to the natural environment is bound to happen with the site turning into a construction site and in the process harm is bound to happen (as mentioned in the EIA report).This is the case of the applicants; the potentially irreparable damage that would be caused should the construction proceed on the site *in lite*. I have considered this extensively in my ruling dated 27th May 2016.

48. A point on inordinate delay raised by Counsel for the co-respondent. I am of the view that this point has no merit since I had already considered it in my ruling dated 27th May 2016 and found that the application was injunction was not time barred. The applicants' appeal was lodged on the 15th September 2015 and their application for injunction was on the 3rd November 2015. The applicants having taken cognizance in a press article dated 14th November 2015 that the respondent was to start the construction works imminently on the site, it cannot be said that there was inordinate delay on the facts of this case. The applicants' apprehension of irreversible harm being done to the sand dunes and environment was not unjustified. Nor can it be said that there was no urgency or likelihood of prejudice. This Tribunal is mandated under **s.4 (2) of the**

Environment and Land Use Appeal Tribunal Act 2012 to grant an injunction if there is a "*likelihood of undue prejudice*". Despite the submissions of Mr. Ramburn and I quote,

" It is therefore submitted that the guarantee offered by participation of all agencies, each one mandated with the preservation, conservation and protection of our environment and with securing compliance with the strict conditions provided in the EIA Licence make it unnecessary for any intervention of the Tribunal, unless of course, there is an ulterior, ideologically motivated, purpose for blocking the project so that the resulting losses for which there has been no security or fortification given or offered discourages the contribution of the project." In the present case, it will unduly prejudice the main case of the applicants if the injunction is not granted pending the final determination of the Tribunal and the construction of the hotel starts since this is the very basis of their case for which they have lodged an appeal contesting the BLUP granted to the respondent. The respondent's case on the other hand will not be prejudiced at the trial of the main case whichever way my decision goes. The prejudice caused to the respondent is pecuniary. When placed on a balance, it tips in favour of the applicants.

STATUS QUO

49. If the interlocutory order is not made, the respondent will carry on with a construction, the lawfulness of which is being challenged. I am therefore convinced that such a situation would result in irreparable prejudice to the applicants, which cannot be adequately compensated by damages. It is accordingly appropriate and desirable that the status quo be maintained before any construction works be commenced pending the determination of the appeal case.

50. For all the reasons set out above, I therefore grant the interlocutory writ of injunction against the respondent as prayed for by the applicants. The decision of the local authority is stayed pending the determination of the appeal before the Environment and Land Use Appeal Tribunal.

I certify as to counsel.

JAYSHREE RAMFUL-JHOWRY

Vice Chairperson

31 JANUARY 2017

For Applicants: Me. Ramsohok, Me. Ematally, Me. Panchoo, Me. Ramjan

For Respondent: Me. Ramburn appearing with Me. Aboobaker,SC , Me. A. Moollan, and Me. Carrim

For Co-Respondent : Me. Dodin and Me. Churitur