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[2017] UKPC 37

Privy Council Appeal No 0028 of 2016

JUDGMENT

Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Mance

Lord Wilson

Lord Carnwath

Lord Hughes

Lord Briggs

JUDGMENT GIVEN ON

27 November 2017

Heard on 2 November 2017

Appellant	Respondent
Fyard Hosein SC	Thomas Roe QC
Rishi P A Dass	
Marina Narinesingh	
(Instructed by Simons Muirhead and Burton LLP)	(Instructed by Charles Russell Speechlys LLP)

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LORD CARNWATH:

The hearing

1.
The Board records that this is the first video-link hearing from its courtroom in Parliament Square, London, which has been newly equipped for the purpose. The hearing was attended in Trinidad and Tobago by counsel for the appellant, Mr Fyard Hosein SC, leading Mr R P A Dass and Ms M Narinesingh, and in the Board's courtroom in London by Mr Thomas Roe QC for the respondent. The Board invites parties to future appeals to consider using this means of hearing appeals (or oral applications), with a view to the potential savings of expense and time, and to liaise with the Registrar accordingly. The Board will seek to encourage the use of video-link facilities whenever appropriate, particularly where all or any of the parties wish to use such facilities.

The Polluter Pays Principle

2.
The Polluter Pays Principle ("PPP" or "the Principle") is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the "internalization of environmental costs", by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large (see eg OECD Council 1972 Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies; Rio Declaration 1992 Principle 16). Most recently, the Principle has been simply expressed in the Draft Global Pact for the Environment, presented by President Macron to the United Nations Assembly on 19 September 2017:

"Article 8 Polluter-Pays

Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator."

3.
Discussing the Principle (as it appeared in the EC Treaty, article 130r(2), now article 191(2) of the TFEU) Advocate General Léger identified "two aspects":

"93. It must be understood as requiring the person who causes the pollution, and that person alone, to bear not only the costs of remedying pollution …, but also those arising from the implementation of a policy of prevention …" (Case C-293/97) R v Secretary of State for the Environment, Ex p Standley [1999] QB 1279, paras 92-95)

Both aspects are relevant in the present case. He added (para 97) that the principle may take the form that "in return for the payment of a charge, the polluter is authorised to carry out a polluting activity".

4.
Although the Principle is well-established, such statements have been criticised as lacking precision:

"Despite the antiquity and strong ethical foundations of the polluter pays principle, its content is less easy to determine. Proclaiming that 'the polluter should pay' is a simple statement which is intuitively fair, but of necessity it requires an investigation into issues such as who is the polluter? For what should they be made to pay? How much should they be made to pay? And so on …" (Burnett-Hall on Environmental Law 3rd ed (2012), p 91, para 2-121)

5.

In Trinidad and Tobago an attempt has been made to tackle such questions in a more methodical way through the statutory National Environmental Policy ("the NEP") as applied to charges for licences, and, in the context of water pollution, through the Water Pollution Management Programme ("the WPMP"). Paragraph 2.3 of the NEP includes the following:

"**Polluter Pays Principle**

A key principle of pollution control policy is that the cost of preventing pollution or of minimising environmental damage due to pollution will be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources. Important elements of the principle are:

(a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and

(b) Money collected will be used to correct environmental damage."

6.
The central issue in this case is whether the Ministerial regulations by which charges were fixed were consistent with this aspect of the NEP (in particular sub-paragraph 2.3(b)). There is a further issue in any event as to whether the Minister, in formulating the regulations, gave proper consideration to the NEP and to the WPMP.

7.
The appellants are a non-profit organisation, concerned with the protection of the environment in Trinidad and Tobago. They have an impressive record of some ten years of giving advice, guidance and assistance to the national community. There is rightly no challenge to their standing to bring this case in the public interest.

The statutory and policy background

The Environmental Management Act 2000

8.
This statute ("the Act", it replacing an Act of 1995 in materially the same terms) provides the statutory framework for what is described in the preamble as the government's commitment to "developing a national strategy for sustainable development …". The preamble also states that sustainable development is to be encouraged by use of economic and non-economic incentives, and that "polluters should be held responsible for the costs of their polluting activities".

9.
Section 6 provides for the establishment of the Environmental Management Authority ("the Authority"). Section 16 defines the functions of the Authority, to include (inter alia) (a) making recommendations for a National Environmental Policy, (b) developing and implementing "policies and programmes for the effective management and wise use of the environment, consistent with the objects of this Act", (g) monitoring compliance with the standards criteria and programmes relating to the environment; and (h) taking "all appropriate action for the prevention and control of pollution and conservation of the environment". Section 20 gives the Authority power to do "all things necessary or convenient to be done" in the performance of its functions. Other provisions confer powers for specific activities, for example "Emergency response activities" (section 25) and "Environmental Incentive Programmes" (section 34).

10.
Section 18 provides for the submission by the Authority's board, following public consultation, of a "comprehensive National Environmental Policy", to be approved by the Minister and laid before Parliament. Section 31 provides:

"The Authority and all other governmental entities shall conduct their operations and programmes in accordance with the National Environmental Policy established under section 18."

It is not in dispute that this section applies to the functions of the Minister in respect of the making of the relevant rules and regulations in the present case.

11.
Section 26 (in a group of sections headed "Rules and Public participation") enables the Minister to make rules, subject to negative resolution of Parliament, for a number of matters, including (c) "procedures and standards" with respect to permits or licences required to install or operate any polluting process and (d) "the form and manner of … applying" for any licence or permit.

12.
In a part of the Act headed "Management of water pollution", section 52 requires the Authority to carry out investigations to ascertain the extent of water pollution and significant sources of pollution, to establish a register in accordance with rules under the Act, and to develop and implement a programme for management of such pollution. By section 53(1), the Authority "may require and grant permits to authorise any process releasing water pollutants subject to such terms and conditions as it thinks fit".

13.
Section 72 provides for the establishment of an Environmental Trust Fund ("the Fund"), which is to be used to fund "the operations of the Authority and for other purposes authorised under this Act …". The other purposes include -

"emergency response activities to address actual or potential threats to human health or the environment, including remediation or restoration of environmentally degraded sites …" (section 72(c))

The resources of the Fund are to include (inter alia) sums appropriated by Parliament, and "such amounts which the Authority may collect as payments for services rendered, fees due regarding permits, applications or licences under this Act …" (section 74(a) and (b)).

14.
By section 96 the Minister has power to make regulations for giving effect to the Act, including power to prescribe -

"(2)(a) the amount of charges and fees payable to the Authority for or in relation to applications, licences, permits …"

Unlike the rule-making power, this is not subject to any Parliamentary procedure.

Subordinate legislation

15.
In 2001, the Water Pollution Rules, 2001 ("the Rules" or "WPR") were laid before Parliament by the then Minister with responsibility for the environment. The Rules established a permitting system for

the regulation of water pollution in Trinidad and Tobago. By rule 8, the Authority may “notify … to apply for a permit” a person who releases a water pollutant outside the permissible level that is likely to cause harm to human health or to the environment. A person granted a permit is required to pay “the prescribed fee” (rule 8(2)). The “prescribed fee” is defined as the fee prescribed by the Minister under section 96(2) of the Act (rule 2). By rule 15(1), the Authority must impose conditions on the recipient of such a permit as to the pollutants so authorised to be released and their quantity, and as to other matters. By rule 15(2), the Authority may impose further conditions, including

“(a) that the permittee shall take all reasonable steps to -

(i) avoid all adverse environmental impacts which could result from the activity;

(ii) minimize the adverse environmental impact where the avoidance is impractical;

(iii) mitigate the impact where the impact cannot be avoided.”

16.
At or about the same time as the Rules were laid before Parliament, the Minister made the Water Pollution (Fees) Regulations, 2001 prescribing the various fees payable for applying for and maintaining a water pollution permit. They included a fixed annual permit fee of TT$10,000 (under rule 8(2)) for the term of the permit. The fee did not vary according to the type or amount of the pollution permitted.

17.
On 18 December 2006, the then Minister (Minister Penelope Beckles) laid before Parliament the Water Pollution (Amendment) Rules, 2006. The amendments did not materially affect the provisions relevant to the present appeal. The Water Pollution (Fees) (Amendment) Regulations, 2006 were made by the Minister at the same time. There was no change to the fixed annual permit fee of TT$10,000. However, there were other significant changes: notably, the fee on an application for variation of a permit under rule 17(4) was changed from a fixed fee of TT$4,000 to “$10,000 but not exceeding $150,000”.

Policy documents

18.
The NEP, under section 18 of the Act, was made and laid before Parliament on 2 September 1998. A revised policy was made in 2006. Chapter 2 (unchanged in the revised version) is headed “Goals, Objectives and Basic Principles”. It includes (under the general heading “2.3 Basic principles”) the “Polluter Pays Principle” in the terms already set out (para 4 above). A later section of the NEP deals specifically with “Water Resources” (para 3.7). It provides (inter alia) for the government (h) to develop “a registration programme for all facilities that are the sources of any release of water pollutants”, and (i) to control water pollution “through a system of permits for facilities that are the sources of any release of water pollutants”, adding -

“This control system will be based on the Polluter Pays Principle, which will set pollution limits or performance standards for water. The cost of pollution prevention or of minimising environmental damage due to pollution will be borne by those responsible for pollution.”

19.
The Water Pollution Management Programme (“WPMP”) was prepared by the Authority under section 52 and published in February 2005 (but see further para 24 below). The introduction noted that, while

the Act dealt separately with pollution management in air, water and land, the Authority had chosen water pollution management as the area that required immediate attention. There followed a survey of the main categories of water, both freshwater and coastal and marine, and of sources of pollution actual and potential. This led to section 5, dealing with the creation of a Register of Water Pollutants (under section 52(2) of the Act), and section 6 “the Water Pollution Management Programme”.

20.
Section 6 began by noting that the starting point for the development of the WPMP was “an Environmental Quality Workshop held with personnel from the US based Environmental Law Institute and the Authority’s staff”, followed by discussions with a legal expert from the United States Environmental Protection Agency. Section 6.4.2 was headed “Water Pollution Permitting”. It included (at para 6.4.2.8) a part headed “Analysis of Various Permit Fee Models”. Reference was there made to research into the various mechanisms used to calculate permitting fees, special regard being paid to the United States where permitting was said to be a feature of the legal environmental regime. It continued (para 6.4.2.8.1):

“In terms of the needs of Trinidad and Tobago, certain basic parameters were established and these are as follows:

1. The system should be relatively simple and easy to administer.

2. The permitting system should generate adequate revenue to cover the costs of the permit programme.

3. It should be equitable both in terms of ability to pay and [actual] levels of pollution.

4. Permitting fees should not only reflect the cost of granting the permit but also the impact on the environment. Basically, there should be consideration of the polluter [pays] principle so as to achieve ultimately a more responsible attitude towards the discharge of liquid effluents.”

21.
Six models were then examined. The three which have featured in argument in the present case are: the “Egalitarian Approach” (model 2), “Volume Intake/Discharge” (model 5), and the “Pollution Load Approach (model 6)”. Each of the six models was described, with an assessment of their respective advantages and disadvantages. Model 2 was treated by the Court of Appeal (judgment para 6) as equating with that adopted by the Minister in the regulations now in issue. It was described as follows:

“This model suggests an identification of the total permitting cost on a yearly basis and an estimate of the number of permits that the [Authority] anticipate will be issued. The total permitting cost is divided by the anticipated number of permits and the resulting figure is deemed to be the permitting cost.

This is a simple model that will be quite easy to administer. However, it suffers from several inherent deficiencies such as the failure to distinguish between ability to pay; lack of consideration of pollution profile and load profile; and impact of pollutant on the environment.”

22.
Model 5 involved looking at the volume of water used, either purchased or discharged, and basing the permitting fee on that volume. The advantages were said to be ease of administration, and “some

equity” by making larger users pay more. This was countered by the fact that the fees would not be related to actual pollution load.

23.
Model 6 was described as follows:

“The pollution load model is perhaps the most suitable one for ensuring that the environmental imperatives are satisfied together with the cost recovery requirement of the permitting agency. Basically, this model operates on several levels.

Essentially, the Fees paid are based on those pollutants included in the permit; the environmental harm caused by the pollutants discharged; the quantity of the pollutants discharged and the quality of the water receiving the discharge. This method of setting permit fees is big in Wisconsin and the state has been effective in achieving full recovery of its cost …

This Wisconsin model is quite useful as it provides equity in the sense that the polluter pays according to discharge load and is not penalised for merely being a company with a high gross revenue stream. In addition by considering where discharge is taking place, measures can be taken to protect more sensitive water zones. Finally, basing a model on load based pollution ensures full implementation of the polluter pay principle.”

24.
There followed a table in which the six models were scored by reference to four criteria: cost recovery, equity, simplicity and punitive. Model 2 had the lowest score at 47; model 6 equal highest at 72; model 5 came between them at 53. The study concluded:

“The above analysis is entirely subjective and it is the Authority’s expert opinion that Model 6 (ie the pollution load approach) is perhaps the most equitable and will be used as the basis for determining water pollution fees.”

Timing of the WPMP

25.
It is right to record that there is some uncertainty about the precise timing and status of the WPMP. The copy in the papers is undated, and contains no indication of when or how it was approved by the Authority, or made available to the public. The application for judicial review referred to it as being dated February 2005, a date which was not contradicted in the Minister’s evidence in reply, and was repeated in the agreed Statement of Facts before the Board (para 25).

26.
However, it is clear from the other evidence that the preparation of the programme began long before. Mr Rajkumar, in evidence for the Minister filed in April 2012 (in response to an order of the judge seeking more information about the six models) spoke of it as having been “produced over twelve years ago” (para 6). He indicated in particular that the research for the section entitled “Analysis of the Various Permit Fee Models” was “a subset of the entire Programme”, and was carried out by a Dr Ramlogan, who worked as a Consultant with the Authority between 1998 and 200l. However, the witness did not contradict the apparently agreed position that the WPMP as such was not completed, or at least made available to the public, before February 2005. The Board will proceed on that basis.

The dispute, the proceedings and the evidence

27.
By letter to the Minister dated 2 March 2007, the appellants' attorneys referred to the fee of TT$10,000 fixed by the 2006 amendment regulations. The letter asked first the reasons for using a "flat fee/fixed fee structure", and secondly whether the polluter pays principle was used in the development of the annual permit fees. In a further letter dated 2 April 2007 they asserted that the regulations were unlawful in that respect and should be withdrawn.

28.
The Minister's reply dated 16 April 2007 referred, in answer to the second question, to the importance given to the Principle in the NEP and the Act. The Minister had been informed by the Authority that "a full cost recovery analysis" had been used in determining the fee structure, evidenced by the fact that "charges are levied for the processing of such applications as well as sampling and analysis of effluent". The first question had been forwarded to the Authority for comment.

29.
After a meeting in July 2007 and some further inconclusive exchanges, the appellants' attorneys sent a letter dated 21 August 2008, under the heading "pre-action protocol". The letter set out in more detail the background to the appellants' case, referring (inter alia) to PPP "as set out and applied in [the Authority's] Water Pollution Management Programme". This was followed by a "supplemental pre-action protocol", dated 15 October 2008. The Minister's response dated 3 September 2008 (to the first letter) indicated simply that the matter had been referred to the Authority "so that we may prepare an appropriate response". There appears to have been no further response from the Minister before the present proceedings were commenced by application for leave on 21 November 2008. Leave was granted without objection from the Ministry. The claim form and supporting affidavit were filed on 31 December 2008.

30.
The grounds for judicial review included (ground 1) the claim that the fixed fee permit fee structure was in breach of PPP as expressed in paragraph 2.3 of the NEP (which was set out), and (grounds 3 and 4) contrary to the policies of the Ministry and the Authority. In the latter context, specific reference was made to the "Analysis of Various Permit Fee Models" in the WPMP.

31.
The Ministry's evidence in response, filed on 30 September 2009, consisted of affidavits by Glen Goddard, Manager, Technical Services with the Authority, responsible for water pollution (an employee of the Authority since 1996); and Dr Reeza Mohammed, Minister of the Environment between October 1999 and December 2000. Mr Goddard spoke of his work with Mr Rajkumar (as assistant manager) on the preparation of the WPMP, which "was developed and is being implemented pursuant to section 52(3) of the Act" (para 7). He gave no dates, nor other details, of the process of preparation, approval by the Authority or publication. He spoke also of the Rules, first made in 2000 and amended in 2006, but implemented only since February 2007. Responding to the criticisms of failure to apply PPP, he observed (albeit without express reference to the terms to paragraph 2.3 of the NEP):

"the fees … are intended to make the Programme self-sufficient and sustainable and for that purpose to recover the cost of operating the Programme from those who discharge pollutants into the country's water resources …

The permit fees are intended to cover the costs of administering the management of water pollution and include the PPP. They stand as one standard fee, which only polluters exceeding the permissible levels contained in the said Second Schedule of the WPR may be required by the Authority to pay." (paras 10-11)

Later in the affidavit (para 18) he said that the fees regulations provide for "full cost recovery of processing, administration and auditing of WPR". He noted that, in addition to the permit fees, each permittee will have to incur the substantial costs associated with the implementation of the terms and conditions in the permit (para 14).

32.
As to the model to be used for the permit fees, he recorded (para 16) that he had made recommendations to the Authority's Chief Executive Officer, Dr McIntosh, who had communicated with the then Minister Dr Mohammed. (Although the affidavit gives no date for this exchange, it is must have been before December 2000 when Dr Mohammed ceased to be Minister: see below.) He had subsequently received instructions from Dr McIntosh that they should use "the model that was the simplest to administer". Of the six models reviewed in the WPMP, Mr Goddard observed that "despite its deficiencies, Model 2 is a model easy to administer" and so "reasonable to the state of institutional development" of the country. By contrast model 6 would require "extensive field studies of the operations of the proposed permittees and as a result a long lead time to establish". A study of 25 states in the USA ("far more mature in its industrialization and regulatory regime") had shown that the models 2 and 5 were most commonly used, with only three states using model 6 (para 17). (Somewhat confusingly this section of his affidavit draws no distinction between his consideration and advice to the Minister in 2000, and the contents of the WPMP published in 2005.)

33.
With reference to the challenge to the current fees regulations, Mr Goddard observed (para 21) that "the policy underlying those fees had long ago been set" by the rules and regulations made in 2000 by the then Minister, so that "the WPR process was complete before the Defendant Minister was assigned to her office". He noted that at the time of his affidavit only two permits had been issued under the Rules and that eight others were pending (para 22). He appended an example of a permit, with the attached conditions.

34.
Dr Mohammed's affidavit indicated that he had been the responsible Minister between 22 October 1999 and 10 December 2000. He confirmed his role as the then Minister in the approval of what became the 2001 rules and fees regulations. His "firm view" had been that "having regard to the state of economic development and the level of institutional development of the country" the most appropriate model would be the one which was "user friendly and the simplest to administer". He had given instructions accordingly. His affidavit makes no reference to the (1998) NEP, and gives no indication that he was aware of the six models later proposed in the WPMP or what other information he was given about the possible alternatives. The only other evidence for the Minister was the affidavit of Mr Rajkumar, referred to above (para 25). That adds little information as to the process of approval of the Programme or the setting of fees. As already noted, it attributed the analysis of the models to Dr Ramlogan, who had left in 2001. By the time of the affidavit, Mr Goddard had also left the Authority, and was no longer available to comment.

35.

The proceedings came before Rampersad J, who gave judgment on 18 October 2012 allowing the claim. He made various orders including a declaration that the methodology used for calculation of the fees was illegal. He did not quash the fees regulations as such, but made an order that the 2006 amendment regulations were -

“not [to] be implemented and/or enforced by the Authority unless the [Minister] has adequately and properly considered and applied the polluter pays principle in calculating and/or determining and/or fixing the annual permit fees.”

36.
On 18 July 2014, the appeal by the Minister came before the Court of Appeal (Bereaux Smith and Mohammed JJA). Judgment was given on 16 July 2015 allowing the appeal. The single judgment was given by Bereaux JA, with whom the other members of the court agreed. On 15 February 2016 the Court of Appeal granted final leave to appeal to the Privy Council.

The interpretation of the NEP

37.
The first issue, as it has emerged from the submissions before the Board, comes down to a relatively narrow issue of interpretation of the “important elements” of the PPP as identified by paragraph 2.3 of the NEP:

“(a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and

(b) Money collected will be used to correct environmental damage.”

Is it sufficient that the fees are assessed on the basis of full recovery only of the operating costs of the authority, including the administration of the permit scheme? Or should they also allow for an additional amount to be used by the Authority itself “to correct environmental damage”?

38.
The appellants submit that the simple model adopted by the Minister, equating to model 2, is inconsistent with PPP as applied by paragraph 2.3. As Mr Hosein SC explains in his written case (para 85):

“As a result of the flat fee model which has been selected, no fees collected are being used to correct environmental damage. This also has a consequential effect in respect of proportionality, as there is no ability to tailor the fee to meet the degree of damage which might be caused by different permittees. The costs associated with rectifying environmental damage will obviously vary according to the pollution load, pollutant profile, sensitivity of receiving environment and toxicity.”

He points to a sample Water Pollution Permit, exhibited by Mr Goddard, as an example of how the permitting system leaves environmental damage uncompensated. The permit allows an interim limit for discharge of effluent (suspended solids) of 3390 mg/L for the first two years from the date of the permit, compared to a permissible level under the Rules of 50 mg/L. Mr Hosein accepts that the precise manner by which sub-paragraph (b) is to be given effect is a matter for the Minister, but to charge a fee which does no more than offset the administrative costs of operating the permitting system is not compliant with the NEP (case para 90).

39.

Bereaux JA acknowledged that the relevant paragraphs of the NEP contemplated the use of money collected to correct environmental damage (para 47), and found it a difficult question to determine whether that requirement was satisfied by the flat-fee structure (paras 51-52). He noted Mr Goddard's statement that the fees were intended to cover "the costs of administering the management of water pollution", and that "to that extent" the principle was complied with "albeit very simplistically". He relied also on the conditions to which a permit would be subject, and the fact that breach of the conditions would trigger the enforcement provisions of the Act (para 53). He commented:

"These permit conditions constitute provisions for the correction or minimization of environmental damage which may result from the release of pollutants which are authorised by the permit. To the extent that the permittee is required to take steps to avoid, minimize or mitigate, he bears the 'costs of pollution prevention'. The PPP seeks not only to prevent pollution but to minimize it. Minimization is relative. It is a function of the state of economic development of any given country and of the resources available to it to manage pollution control." (para 54)

Finally, he noted Mr Goddard's acceptance that there were deficiencies in the model, but that pollution management was "work in progress". The court must "defer to the views of the officials of the [Authority] and suppress its own misgivings about the unsophisticated nature of the model." (para 56)

40.
In his submissions for the Minister before the Board, Mr Roe QC adopts a similar approach. As he puts it in his written case, at para 43:

"In thus requiring polluters to become regulated (if they wish to continue to pollute) and in setting such limits and requirements and in imposing such conditions, the Authority is acting 'to correct environmental damage'. Such activity by the Authority is funded by money collected from fees. One of the features of the 'polluter pays' principle is 'cost internalisation' and the permit conditions can be crafted to ensure that costs relating to mitigation measures and other pollution prevention measures are borne by the permittee in addition to the payment of the annual permit fee of $10,000 and costs associated with compliance measures. The permit conditions thus capture the cost of reduction of environmental damage over a period of time. It follows that the letter of the Policy is being complied with."

He makes a more general point that paragraph 2.3 is not intended to be prescriptive, but gives "basic principles" by which government policy is to be "guided". They are drafted in broad and imprecise terms, which make it inappropriate to treat them as laying down any hard-edged rule.

41.
With respect to the Court of Appeal, the Board is unable to accept their interpretation of paragraph 2.3 of the NEP. Even allowing for the fact that the paragraph is intended by way of "guidance" only, sub-paragraph (b) must be given separate effect in accordance with its natural meaning. It is in terms directed, not to the general purpose of the permitting system nor to the implementation of permit conditions, but to the use by the Authority itself of the "money collected" by way of fees for the correction of environmental damage. (Mr Roe accepts that there is no other relevant source of "money collected" in this context.) Thus, it is not sufficient that the polluter will necessarily expend its own money in complying with the permit conditions, and so contribute to the "correction" of environmental damage. The fees are to be used to finance or contribute to correction activities by the Authority itself.

42.
This view is supported by reference to the functions of the Authority under the Act (section 16), and to the purposes of the Fund set up under section 72, the resources of which include amounts collected as permit fees (section 74(b)). The functions are not limited to the oversight of polluting activities by others, but include all “appropriate action for the prevention and control of pollution”, which would naturally include remediation or correction works by the Authority. Similarly, the purposes of the Fund extend to the operations of the Authority and other purposes authorised under the Act, and specifically for “emergency response activities” by the Authority itself including “remediation”. Providing for such work to be funded out of permitting fees is consistent with the PPP, in that it ensures that the cost is attributed at least in part to those responsible for polluting activities, rather than to the community at large.

43.
As Mr Hosein accepts, the NEP does not specify the extent of provision to be made for future correction activities of the Authority, nor its form. Those are matters for the judgement of the Minister. However, sub-paragraph (b) is identified as an important aspect of the NEP, which cannot lawfully be ignored. As far as can be judged from the material available to the Board, it was left wholly out of account in setting the prescribed fee, both in 2000 and in 2006. There is no reference to this aspect of paragraph 2.3 in the evidence filed on behalf of the Minister, nor specifically in Mr Goddard’s account of the matters taken into account in setting the fees. The only reasonable inference is that it was ignored. It follows that to this extent the regulations fail to comply with the NEP and are therefore in breach of the Minister’s duty under section 31 of the Act.

44.
For completeness, it should be added that this conclusion does not, as Mr Roe suggests, conflict with rule 8(2) of the Rules. This requires a person granted a permit to pay “the prescribed fee”, which is defined by rule 2 as “the fee prescribed by the Minister” under section 96(2). The reference to a “prescribed” fee as a matter of language, so Mr Roe submits, necessarily implies a fixed fee structure such as was adopted by the Minister. The Board cannot accept this argument. A “prescribed” fee does not need to be limited to a single, fixed figure. The word “prescribed” is flexible enough to allow, for example, for prescription by reference to a formula which allows for different situations to be treated differently. Even a fixed fee may be calculated so as to include an element designed to finance future correction activity. In any event, the argument takes the Minister nowhere. If the Rules had the effect of constraining the proper application of the NEP, then they would themselves involve a breach of the Minister’s duty under section 31, and would need to be amended.

45.
For these reasons, the Board concludes that the prescribed fee for a permit application, as fixed by the 2006 regulations, is in breach of the NEP, and thus of section 31 of the Act, and that the appeal must be allowed on this ground. The form of remedy will be considered at the end of this judgment.

Consideration by the Minister

46.
The conclusion reached in the previous section makes it strictly unnecessary to determine the legality of the process by which the fee was set. However, since the reasoning of the Court of Appeal on this issue may have implications in other cases, it is appropriate for it to be addressed by the Board.

47.

The appellant's complaint is two-fold: first, that the Minister in 2006 exercised no judgement of her own on the application of PPP, but treated it as a matter delegated to the Authority; secondly, and in any event, that at that time the 2001 prescribed permit fee was re-adopted, without any reconsideration in the light of paragraph 2.3 of the NEP or of the analysis and recommendation of the 2005 WPMP. The Board considers that both aspects of the complaint are well-founded.

48.
There is no doubt that, under the Act, the Minister and the Authority have distinct statutory functions and responsibilities. The Minister, in exercising his or her functions under the Act, may properly take account of the expert advice of the Authority, but the exercise of judgement rests with the Minister. That division of functions appears to have been observed in 2000, when the then Minister was asked to confirm the policy to be used in setting the fees. However, there is no evidence of any equivalent consideration by the Minister at the time of the 2006 regulations. As has been seen, when questions were asked of the Minister in the pre-action correspondence, they were referred to the Authority. The only evidence before the Board relevant to the consideration of the issue at that time is that of Mr Goddard, an officer of the Authority. He treated the policy as settled in 2000, and no doubt for that reason made no reference to any attempt to seek further input from the current Minister in 2006.

49.
The Court of Appeal seem to have proceeded on the basis that, while the Authority had in the WPMP recommended model 6, "the then Minister, Reeza Mohammed" had chosen "model 2 which used the flat fee structure" (para 6); "continuation" of that policy in 2006 was to be inferred from Minister Beckles' letter of 16 April 2007 (paras 68-70). They relied also (para 71) on the "presumption of regularity" (citing words of Lord Carswell in Bhagwandeen v Attorney General of Trinidad and Tobago [2004] UKPC 21, para 22); and (para 72) the "almost symbiotic relationship" between the Minister and the Authority under the Act, which they equated with the relationship between a government minister and his department, as explained by Lord Diplock in Bushell v Secretary of State for the Environment [1981] AC 75, 95F-H).

50.
With respect to the Court of Appeal there are a number of flaws in this reasoning. In the first place, it ignores the sequence of events. Minister Mohammed was considering the matter in 2000, whereas the Authority's recommendation came in the WPMP as published in February 2005. Even if (as seems possible) the analysis leading to that recommendation was already in existence in some form in 2000, there is no evidence that it was before the Minister nor that he was given a choice between alternative models, nor that the recognised deficiencies of model 2 were drawn to his attention. If there was a failure at that stage, it is not enough to infer continuation of the policy by Minister Beckles in 2006. Nor is it possible to rely on a presumption of regularity at that stage, if, as appears to the Board, the only reasonable inference is that she also failed to consider the implications of paragraph 2.3(b) or the merits of the alternative models. Lord Carswell's comments were made in a quite different context. Finally, Lord Diplock's comments in Bushell have no application to the relationship of two agencies with distinct statutory identities and functions.

51.
Accordingly, the appeal must be allowed on this ground also.

Remedy

52.

The consequence is that, as far as relates to the prescribed fee for an application for a permit, the 2006 regulations are unlawful. However, this is clearly not a case where it would be appropriate to quash the regulations, or to declare them invalid. Nor, as the Board understands, is that the remedy sought by the appellants - understandably so. Such an order could create great uncertainty as to the status of the permits issued since the Rules were first applied in 2007, and any enforcement action taken in respect of them. It might even lead to claims for return of the fees already paid.

53.
Accordingly, in the Board's view, subject to any further representations from the parties, the appropriate order is a simple declaration as to the unlawfulness of the permit fee as prescribed by the 2006 regulations, combined with an order of mandamus directed to the Minister to reconsider on the proper basis the fee to be prescribed and to make amended regulations accordingly. That is to be done as soon as practicable and in any event within a time to be fixed by the order. Subject to any representations, the Board would be minded to set a limit of three months from the date of this judgment. For the avoidance of doubt the order should indicate in terms that it is made without prejudice to the validity of anything previously done or fees collected under the Rules, or to their continuing operation pending the taking effect of amended regulations. Again, subject to any representations, the Board is minded to order that the Minister pay the appellant's costs here and below. Any representations on the matters mentioned in this paragraph should be made within three weeks of this judgment, and a further week allowed for any response.

Conclusion

54.
For the above reasons, and to the extent indicated, the appeal will be allowed.