NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV 3022 OF 2005

IN THE MATTER OF THE NATURAL RESOURCES CONSERVATION AUTHORITY ACT

AND

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT

AND

IN THE MATTER OF PART 56 OF THE CIVIL PROCEDURE CODE

NO. 2

BETWEEN	THE NORTHERN JAMAICA CONSERVATION ASSOCIATION	FIRST APPLICANT
AND	THE JAMAICA ENVIRONMENT TRUST	SECOND APPLICANT
AND	CECILE CARRINGTON	THIRD APPLICANT
AND	ELEANOR GRENNAN	FOURTH APPLICANT
AND	ANNABELLA PROUDLOCK	FIFTH APPLICANT
AND	JOHN DeCARTERET	SIXTH APPLICANT
AND	THE NATURAL RESOURCES CONSERVATION AUTHORITY	FIRST RESPONDENT
AND	THE NATIONAL ENVIRONMENT AND PLANNING AGENCY	SECOND RESPONDENT

Mr. Dennis Morrison Q.C. and Mrs. Julianne Mais-Cox instructed by DunnCox for all the applicants

Mr. Patrick Foster, Acting Deputy Solicitor General and Mrs. Symone Mayhew, Assistant Attorney General, instructed by the Director of State Proceedings for both respondents

Mrs. Sandra Minott-Phillips and Mr. Dave Garcia instructed by Myers Fletcher and Gordon for Hojapi Limited

Miss Carol Davis for Environmental Solutions Limited

JUNE 6, 7, 14 and 23, 2006

APPLICATIONS TO VARY ADMINISTRATIVE ORDER

SYKES J

1. There are two applications before me to vary my order made on May 16, 2006 (see ***NJCA and others v NRCA and another*** (May 16, 2006)). The applications are from Hojapi Limited ("Hojapi") and Environmental Solutions Limited ("ESL"). I shall deal first with the application by Hojapi. I shall refer to the Natural Resources and Conservation Authority as the "NRCA", the National Environmental Protection Agency as "NEPA" and "NJCA" to refer to all six applicants

Hojapi's application

2. By notice of application for court orders dated May 26, 2006 Hojapi applied for an order in these terms:

a. The order made of this Court on May 16, 2006 be discharged and the hearing re-opened on a future date to be agreed or determined by the Court or the Registrar to allow for representations to be made on the part of the Applicant;

b. Alternatively, that the order is varied to delete there from any order made which has the effect of halting the construction of the Bahia Principe Club & Resort Hotel at Pear Tree Bottom, Run Away Bay in the parish of St. Ann; or

c. Alternatively, that the stay of execution of the order granted on May 16, 2006 be extended;

d. Such further or other relief as the Court deems appropriate in the circumstances.

3. The application rested on a number of grounds. Hojapi raised three main issues, namely, whether proportionality was part of the law of Jamaica, delay on the part of the applicants for judicial review in applying for judicial review and lack of service. Mrs. Minott-Phillips focused her energies on non-service on Hojapi as required by rule 56.11 (1) of the Civil Procedure Rules ("CPR").

The service point

4. Rule 56.11 (1) of the CPR provides as follows:

*The claim form and the affidavit in support **must** be served on all persons directly affected not less than 14 days before the date fixed for the first hearing.* (My emphasis)

5. It is agreed between Hojapi and the applicants for judicial review that Hojapi was not served. The evidence of Miss Wendy Lee, sworn on behalf of NJCA, is that their attorneys sent to Mrs. Minott-Phillips a letter dated December 14, 2005, which was accompanied by (a) the order granting leave for judicial review and (b) the affidavit evidence in support of the application. The order indicated in paragraph 3 that the first hearing was to be held on February 21 and 22, 2006.

6. Mrs. Minott-Phillips properly made the technical but correct point that even assuming that she or her firm was the attorney for Hojapi in relation to other matters that provided no basis for concluding that she or the firm was the attorney for judicial review proceedings. She further submitted that rule 5.6(1) of the CPR indicated that when an attorney is authorised to accept service that attorney has to notify the claimant in writing of that fact. It is only if this is done that the claimant can properly serve the documents on the attorney-at-law. These prerequisites, she said, were never met in this case. This point is unassailable on the facts of the case before me. Additionally, the CPR provides for service on companies. The provisions are not onerous.

7. Mr. Morrison Q.C. sought to parry these submissions by saying that the case was well publicized locally through the media and Mrs. Minott-Phillips was sent the documents to which I have already referred. He submitted that judicial review proceedings are sui generis where the emphasis is on substance not form and the court should find that Hojapi had ample opportunity to turn up and participate in the proceedings. He referred to rule 56.15(1) of the CPR which provides for a person with sufficient interest in the subject matter to make submissions whether or not they were served with the claim form. This provision he said demonstrated the unique nature of judicial review in that even a person who is not served provided he knows about the proceedings can turn up and participate.

8. Queen's Counsel observed that Hojapi did not and could not allege that they were unaware of the proceedings. He added that Hojapi could have applied to be a party even if it was not served and it is somewhat curious that it seeks to rely on this purely technical point which is, in all the circumstances here, not a matter of substance but form. I would say that there is

certainly authority for the view that persons who feel that they ought to be part of the proceedings may apply to the court to have themselves so declared and thereafter participate fully in the hearing (see ***R v Rent Officer Service, ex parte Muldoon*** [1996] 3 All ER 498).

9. Mr. Morrison is certainly correct when he says that judicial review proceedings are unique but that, in my view, does not provide an adequate answer to the lack of service point. As counsel for Hojapi, pointed out, assuming Hojapi was a person with a sufficient interest, that does not relieve NJCA of the obligation imposed on them by rule 56.11(1) if Hojapi falls within the meaning of "persons directly affected". In short, every person directly affected must necessarily be a person with a sufficient interest but the converse is not always true.

10. It appears that the seemingly straight forward phrase, "persons directly affected", is not as clear as it seems. In ***R v Rent Officer Service, ex parte Muldoon*** [1996] 3 All ER 498 two persons applied for judicial review of the Rent Officer's and a local authority's refusal or failure to determine their respective claims to housing benefit. Under the relevant legislation, the Secretary of State for Social Security was required to reimburse up to 95 percent. of the local authorities' housing benefit qualifying expenditure. He applied to the High Court for an order that he be joined as a respondent to both applications as a person "directly affected" by the decision within the meaning of R.S.C., Ord. 53, r. 5(3). On the face of it the Secretary of State had good reason to think that he was a person directly affected. Lord Keith held (with concurrence of the other members of the House) that "a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency" (see page 500 d). He added that while the Secretary of State would be affected by the decision of the local authority that was not inevitable or necessarily so. The Secretary would be affected indirectly by reason of his "collateral obligation to pay subsidy to the local authority" (see page 500 f). Applying this understanding to the case before me, Hojapi would be a person directly affected without any intervention by anyone. Hojapi is the beneficiary of the permit that has been challenged. It is therefore within the phrase "persons directly affected".

11. The next step in the analysis is whether "must" in rule 56.11(1) means must or may. It would seem to me that the obligation to serve is mandatory. Service of the claim form and affidavit in support is the accepted means, laid down by the rules, by which persons who are defendants or persons directly affected are notified of the challenge to the decision from which they benefited. This must be so because a person directly affected ought to be given the opportunity to make such representations as he sees fit. The representations may affect the

remedies granted even if the applicants for judicial review are successful in establishing their case.

12. Mrs. Minott-Phillips referred to the fifth point made by Lord Mustill in the case of ***Regina v Secretary of State for the Home Department, Ex parte Doody*** [1994] 1 A.C. 531, 560 where he said:

> *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*

To this I would add the sixth which impacts the service point also found at page 560:

> *Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.*

13. These are natural justice principles and once it is clear that a party who ought to have been served was not served then it matters little whether or not the party knew of the proceedings. The party not served may decide not to take the point.

Delay

14. The issue here is whether in determining the time at which grounds arose that could precipitate an application for judicial review, time is measured from the date of the decision to issue the permit or when the permit was finally issued. Hojapi submitted that had they been served they could have mounted the argument that NJCA was late in applying for judicial review because the decision to grant the environmental permit was taken on June 22, 2005, and by that calculation the application for leave was out of time, the application being made on October 10, 2002. Hojapi canvassed the view that July 5, 2005, the date on which the defective permit was issued, might be another possible date for the purpose of determining when the grounds for judicial review arose. Hojapi says that on either date, NJCA is out of time. This view omits the important fact that the NRCA did not regard the July 5 permit as the permit issued to Hojapi because an error had been made regarding the number of rooms that Hojapi was being given permission to build. The amended permit was issued July 26, 2005. This was date used to calculate time for the purpose of the application for judicial review. These submissions are not sustainable for the reasons given in ***Regina (Burkett) v Hammersmith and Fulham London Borough Council*** [2002] 1 W.L.R. 1593. A similar argument was made in that case

where the council passed a resolution to issue a permit to a developer. The application for judicial review was dismissed at first instance and also in the Court of Appeal on the basis that it was out of time. Both courts used the date of the resolution as the date on which grounds for judicial review first arose. The House of Lords corrected this view by holding that the date on which grounds for judicial review arose was the date the permit was issued. The reason for this was that a resolution or a decision to grant a permit or licence does not create any rights or obligations. Rights and obligations arise when the permit or licence is issued. The fact that a decision was taken to grant the permit does not necessarily mean that a permit will or must be issued. Lord Steyn pointed out that a challenge to resolution to grant the permit may itself be challenged on the basis that it is premature. When these reasons are added to the reasons given in my earlier judgment it is plain that the argument that the application was made too late is not sustainable. The decision of the House was applied in ***The Queen (on the application of Frank Hampson) v Wigan Metropolitan Borough, Greenbank Partnerships Limited*** [2005] EWHC 1656 (Admin) (delivered Wednesday July 27, 2005).

Whether proportionality is part of the law of Jamaica in judicial review

15. Hojapi suggested that the principle of proportionality is not part of the law of Jamaica in judicial review proceedings. I would not say that this is the first time proportionality is being applied to judicial review proceedings in Jamaica. What I would say is that I am not aware of any case where it has been applied. Unless precluded by the Court of Appeal or a decision of the Judicial Committee of the Privy Council on appeal from Jamaica any sensible development in the law should be considered and if found to be useful, applied. We do not live in a closed intellectual universe and it is certainly appropriate to look at other common law jurisdictions to see the developments there and if on examination those developments are sound and can be applied in Jamaica then there is no good reason not to do so. The point I made in my previous judgment was that it was becoming increasingly difficult to distinguish between the traditional grounds of judicial review and proportionality. Proportionality is a more refined technique of judicial review that enables the court to examine executive action in a more comprehensive manner without trespassing on the domain of the executive. I would have thought that was a good thing. In any event I applied proportionality principles as well as the "normal" administrative law principles.

Detriment to good administration

16. Mrs. Minott-Phillips pointed out that there can be little doubt that re-opening the grant of a permit to Hojapi would have a serious impact on Hojapi directly and investor confidence in Jamaica and on Jamaica's economy, generally. I can only respond by noting the observation of a member of Jamaica's highest court in the ***Belize Alliance of Conservation Non-Governmental Organization v The Department of the Environment and Belize Electricity Company Ltd*** (2004) 64 WIR 68. Lord Walker said at paragraph 121

> *The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). ... The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction.*

17. There are not many persons who would venture to suggest that economic development can take route and flourish in the absence of the rule of law. Recent history is replete with examples of what can happen to countries when the rule of law breaks down.

The evidence from Hojapi

18. There is unchallenged affidavit evidence from Señor Jesús Castellanos Ortega that the construction of the buildings to which the environmental permit relates is 85% complete. He refers to the current construction as phase one of the project. He also swore that Hojapi has spent US$62,000,000 to date. These to my mind are the only material considerations that I may consider on the question of hardship for third parties. Much of the other evidence concerning perceived economic gains is much too speculative to be taken into account and in any event do not amount to hardship to Hojapi. This evidence was not before me when I made the order of May 16, 2005. I said in my first judgment that simply to say that Hojapi had spent millions without specific evidence of this was simply not good enough. Neither was assertion that phase 1 of the hotel was "well advanced". There was no challenge to Hojapi's affidavit that the project is 85% complete and there is no reason to reject it so I accept it as correct.

The applicable law

19. It is well established law that in judicial review proceedings where a person has been

granted a permit or licence and pursuant to that permit or licence that individual has expended significant resources on the permitted activity that fact will have an impact on the remedy granted. The facts of any given case may have the additional circumstance that the permitted activity is near to completion. This too would be a very important consideration when determining the appropriate remedy, assuming the applicants have made good their case. This is demonstrated in the case of ***The Queen on the Application of Andrew James Graham v. London Borough of Greenwich*** [2002] EWHC 2713 Admin, delivered November 26, 2002, by Sullivan J. His Lordship said at paragraph 17:

> *There is a further reason why, in practical terms, it would be quite impossible to grant any relief, even if there had been any procedural error: that is to say, the extent to which the development was allowed to proceed before any challenge was made. I bear in mind the decision of the House of Lords in R v London Borough of Hammersmith and Fulham, ex parte Burkett [2002] UKHL 23, which makes it clear that one does not have to challenge the resolution to grant planning permission in order to act promptly, one is entitled to wait until the actual grant of planning permission itself. But that does not absolve a claimant from the need to act promptly, for the purely practical reason that, if a claim is not made promptly then work [may] have been carried out on site (sic). So much may have been done that the horse will have bolted and it will be too late to get it back. This, in effect, is what has happened in the present case. The claimant, for whatever reason, did not choose to notify the recipient of the planning permission, the Housing Association, of the proceedings until the beginning of September, by which time a substantial amount of work had been done: the garages had been demolished, foundations had been laid and considerable sums of money had been expended on the site. In those circumstances, it is quite unrealistic for him to expect the court to grant any relief by way of quashing the planning permission. Even if there had been some procedural error, there would be grave prejudice to the housing association as a result of the delay in notifying them of the proceedings for judicial review.*

20. Richard J., to whom I referred in my previous judgment bears quoting again. He said at paragraph 83 in the case of ***R. (on the application of Gavin) v. Haringey LBC*** [2004] 2 P. & C. R. 13:

> *I do not doubt the importance of certainty in the context of planning decisions, for reasons of the kind mentioned in Chieveley. Third parties are entitled to rely, and do in practice rely, on the information contained in the planning register, and to quash a planning decision long after it was made will undermine the basis upon which people have acted in the meantime. The developer who undertakes work in reliance on the permission is likely to be the person principally affected, though is also likely to be the person best placed to establish substantial hardship or prejudice. But it would be wrong to focus on the developer alone. Others may also have relied on the planning permission and have ordered their affairs accordingly, e.g. in negotiating the price of property near the development. It is very unlikely that all those affected could be identified or that specific hardship or prejudice could*

be proved in relation to each. Nevertheless it is contrary to the interests of good administration to undermine the basis upon which they have acted (and at the same time to create uncertainty as to the reliance that can safely be placed on apparently valid planning permissions in the future). I therefore consider that detriment to good administration ought to be taken into account as a separate and additional factor relevant to the exercise of discretion to quash. But it is of only secondary significance as compared with the hardship or prejudice to the developer.

21. I agree with Richards J. that hardship to third parties and detriment to good administration can be looked at separately as free standing bases on which to deny relief in certain cases. I also agree that hardship to third parties takes precedence over detriment to good administration.

22. The factors to consider in Hojapi's application are whether (a) Hojapi acted on the permit and expended large sums of money erecting buildings that are 85% complete; (b) Hojapi's contributed in any way to the procedural breaches committed by the NRCA and NEPA and (c) there may be any detriment to good administration. In assessing these factors, I do not find any evidence that Hojapi contributed to the procedural errors made by NEPA and NRCA. There is, now, clear evidence of the hardship that would be caused to Hojapi if the quashing order stands. In the context of this case I do not give much weight to the detriment to good administration because there is no evidence before me of what the detriment is or is likely to be. I have concluded that it would be appropriate in this case, if I have the power so to do, to vary the order I made on May 16, 2006. Is there the power to vary the order?

Variation of order

23. Mrs. Minott-Phillips submitted that I have the power to vary the order under rule 42.12 of the CPR. Mr. Morrison contended that rule 42.1(2) sets out the scope of part 42. He said that part 42 does not apply to the extent that any other rule makes a different provision in relation to the judgment or order in question. Based on this he submitted that part 56 is "any other rule" which makes a different provision. I do not agree with Mr. Morrison. Part 56 does not say what happens in the event the court makes an order in the absence of a person directly affected who ought to have been served and was not. There is nothing that I have seen in the CPR that suggests that the power conferred on the courts by rule 42.12 does not apply to orders made under part 56. He also submitted that the court had made no order directing service on Hojapi as required by rule 42.12(1). In my view rule 42.12 is permissive and does not prescribe the

only way a matter can be brought to the attention of a person directly affected. To be fair, Mr. Morrison did not press this argument strongly. He was prepared to accept, consistent with his view that judicial review proceedings are sui generis, that a judicial review court had an inherent power to do so. I need not resolve this point. I conclude that I have the power under rule 42.12 to vary the order. I now turn to ESL's application.

The application of Environmental Solutions Ltd ("ESL")

24. By notice of application for court orders dated June 2, 2006, ESL has applied for a variation of my reasons for judgment (not the order). ESL did the environmental impact assessment ("EIA") in question. They wish that paragraph 120(1)(e) be deleted. This paragraph contains part of my reasons for my order of May 16, 2006. ESL says that it was not given an opportunity to defend its work and the comments were not justified. These reasons, ESL submits, are sufficient for it to make this application. Alternatively, they ask that the matter be reopened so that ESL may be heard. At the hearing, Miss Davis concentrated her efforts on the variation submissions. The arguments presented to vary the order were also used to support the application for re-opening the judicial review.

Standing of ESL

25. Part 56 of the CPR speaks to four classes of person: (a) applicants for judicial review; (b) defendants; (c) persons directly affected and (d) person or body with a sufficient interest. ESL has not applied for judicial review and neither is it a defendant. Applying the learning from ***Rent Officer*** I do not see how ESL could be described as a person directly affected. It is not directly affected by the challenge to the permit because it did not issue the permit and neither is it a beneficiary of the permit and it certainly has not acquired any right or benefit under the permit. ESL is not bound by any obligation imposed by the permit. This means that NJCA did nothing wrong by not serving ESL. The question is whether it has a sufficient interest under rule 56.15(1).

26. Miss Davis submitted that ESL was a person with a sufficient interest in the subject matter of the claim. I must confess that despite the non-opposition by the other parties to the matter, I do not agree that ESL has sufficient interest in this matter to be heard. The expression, sufficient interest, is found also in rule 56.2(1). This provision deals with persons who have locus standi to apply for judicial review. Rule 56.2(2) lists some of the persons who fall within the

expression, "person, group or body which has a sufficient interest in the subject matter of the application". This phrase cannot be interpreted in the abstract. It has to be looked at in the context of the nature of the application and the remedy sought. As one judge has put it, the sufficiency of interest cannot be determined without looking at the person's complaint (see Lords Scarman and Roskill in ***Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Limited [1982] AC 617***, 653 and 656, respectively). It may be said that the cases on sufficient interest have arisen mainly in the context of an application for judicial review and are not applicable to the instant application. Assuming that argument to be correct the cases nonetheless provide some framework in which to view the current application.

27. ESL's application is not concerned with the merits of the judicial review itself. It is not concerned with result of the case since I have been assured by Miss Davis that her complaint is only in respect of one of the reasons I gave for quashing the permit. ESL's lack of standing can be demonstrated in this way: if the reasons stated in paragraph 120(1)(e) of my earlier judgment were not there, on what basis could they say they had a sufficient interest? ESL is not saying that the NRCA did not have the power to do what it did. It is not challenging the issuing of the permit. It is not complaining about the consultation process. In short, but for paragraph 120(1)(e) ESL could not begin to mount a credible argument that it had sufficient interest in the judicial review application to be heard to say nothing asking for a reopening of the hearing. I cannot see how the reasons for an order or judgment can provide a basis to argue that it has a sufficient interest to be heard. A careful reading of rule 56.15 (1) makes it clear that when the word *interest* is used it cannot possibly mean that one looks at the reason for a decision and then decides that a person has sufficient interest. In other words, sufficient interest is not an ex post facto determination but is to be determined before or during the hearing by looking at what the person who is claiming sufficient interest is saying and, as Lord Wilberforce said in the ***Inland Revenue Commissioners*** case, "consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed" (see page 630).

28. What we have here is that something has happened that is of interest to ESL but that is not the same thing as having a sufficient interest in the subject matter of the application by NJCA. ESL's interest is not in the application but in the reasons for decision given by the judge. ESL is not complaining about how the NRCA or NEPA exercised their powers. ESL is not even saying

that they wish to support the position of either party to the judicial review. What they are saying is that the judge said something with which they disagree. Such a situation is not within rule 56 of the CPR. The reasons for decision do not have any power in themselves to confer standing where none existed before.

29. This application is quite late in the day. It is said that the reason for the delay was that ESL was told by the NRCA that the matter did not affect it in any way. This caused ESL not to take any further steps in the matter. That is not a good reason. The lesson from this for the future is that persons who believe they have sufficient interest should get the documents and seek legal advice. In any event the response of NRCA would in my view be correct legally so that NRCA cannot be blamed for ESL's lack of action.

30. I have dealt with the question of ESL's standing at some length because this case is not to be used as precedent for the future that persons in ESL's position have sufficient standing to make the application it has made. There is therefore no proper basis in law for ESL to make this application. I consider the application in the event that I am wrong on this point.

The affidavit and submissions

31. The application is supported by an affidavit from Dr. Barry Wade, Chairman and Consulting Principal of ESL. He states his qualifications. The focus of his affidavit was that ESL produced an adequate EIA which highlighted the major impacts of the proposed development in accordance with the terms of reference agreed by NEPA. He added that the court "did not appear to have appreciated the technical role of the EIA in the process of granting environmental approvals" (see para. 11 of Dr. Wade's affidavit). He accepted that there are "shortcomings in the existing process for granting environmental permits and approvals" (see para. 12 of Dr. Wade's affidavit). According to Dr. Wade the EIA is a tool to inform the decision makers and not the decision making instrument itself. He said that there are inherent limitations on an EIA "to address all of the environmental issues underlying a major development, both with empirically and up-to-date information" (see para. 19 of Dr. Wade's affidavit). Thereafter he takes issue with a number of paragraphs in the judgment of May 16, 2006, and advances his explanations and rebuttals. I shall deal with the issues that he raised.

32. The issues raised by ESL has to be considered against the backdrop of two important paragraphs. These are paragraphs 17 and 18:

17. As regards empirical data, an EIA is not an academic exercise in which much effort is expended in the collection of primary data but rather the assessment is based on the knowledge and experience of the assessment team using existing information where available and to the extent that is scientifically appropriate.

18. In this context, it is also important to note that conduct of an EIA is bound by the constraints of time and cost. The adage 'time is money' applies very much in the case of development projects and there is always the urgency to carry out the EIA as efficiently as possible and in a time-frame that is 'forced' by the calendar of NEPA's EIA review cycle (i.e. public hearing process and meetings of the Internal Review Committee, the Technical Review Committee and the Board of the National Environment & Planning Agency). Thereafter that begins the physical planning approval cycle.

(a) Current information

33. In my previous judgment of May 16, 2006, I indicated that Pear Tree Bottom is an ecologically sensitive area rich in biodiversity and one of the last remaining areas of its kind along the Jamaican north coast. The affidavit of Dr. Dale Webber makes this point. ESL does not demur on this assessment. I would have thought that if an EIA is going to be done for this area, it would require as much current detailed information as possible. The importance of accurate information is hard to overstate. It is the information provided that is going to play a large part in the decision making process. There is no doubt that in the decision making process the EIA produced by the developer goes a far way in providing the factual basis for any decision made. No one has contended otherwise.

34. Dr. Wade speaks to the apparent practice that in EIAs the emphasis is not on current data but to provide an assessment of significant impact and how they can be mitigated if that is possible. If the terms of reference of the NRCA allows the use of information that is over a decade old without much emphasis placed on obtaining current information that seems to me to be an unhealthy practice. This clearly opens the real risk of making decisions on possibly inaccurate information. I would have thought that some serious thought would be given to the age of the information relied on. This is another of the complaints made by NJCA. NJCA suggested in the documentation put before me that there ought to be some "statute of limitations" (to use their phrase) on the information used to prepare an EIA. I see nothing wrong with this suggestion and it ought to be given serious consideration by the decision makers.

35. Dr. Wade adds at paragraph 19 that an independent strategic environmental assessment of north coast tourism had been commissioned by the PIOJ and it was anticipated that the findings would have been released before the public meeting in April 2005. This report has not been released to the public. I now quote: "This points to the inherent limitations of an EIA to address all of the environmental issues underlying a major development, both with empirically and up-to-date information". I infer that Dr. Wade is saying that this study may have provided relevant information that the public might have considered when discussing the Hojapi project.

36. In my previous judgment, I referred to the ***Belize Alliance*** case. In that case a dam was proposed to be built on a particular site. A recent survey had shown that the bedrock was granite. This was doubted by some persons. A later survey was done that established that the bedrock was sandstone. This became important because the fact that the bedrock was sandstone and not granite meant that the design of the dam had to be changed (see paragraph 91 of dissenting advice of Lord Walker). This finding was concealed from the public and the admission that an error had been made was withheld from the Honourable Chief Justice of Belize and the Court of Appeal and from the Judicial Committee of the Privy Council. The case first to the Board on the issue of whether an injunction should be granted pending final hearing on the substantive issue (***Belize Alliance of Conservation Non-Governmental Organization v The Department of the Environment and Belize Electricity Company Ltd*** [2003] 1 W.L.R. 2839 where the only judgment was delivered by Lord Walker). By this time the substantive matter had been determined by the court in Belize.

37. In the second appeal to the Board, this time on the substantive merits of the case, the majority took comfort from the fact that none of the engineers said the site was unsuitable for a dam. As I indicated, I prefer the emphasis of the minority which as I understood it gave greater emphasis to disclosure and the decision making process than the actual decision itself. The judgment of the majority details the intense work that went into the EIA. It ran, in that case, to some 1500 pages. This shows that every effort was made to have current information. I am not saying that one necessarily has to undertake the kind of work in the ***Belize Alliance*** case, in every case in which an EIA is required, but the correct balance has to be found and met. I cannot help but note that in that case the area was "described as having a unique vegetation which makes it 'one of the most biologically rich and diverse regions remaining in Central America' " (see Lord Hoffman at para. 7).

38. The ***Belize Alliance*** case inferentially underscores the need for accurate current information. What would have happened if the design for the dam had been based on the erroneous fact that the bedrock was granite?

39. Miss Davis relied heavily on the ***Belize Alliance*** case to submit that once the major impacts have been identified in accordance with the terms of reference then the EIA is adequate. The submission overlooks the very important point that the EIA in that case conducted detailed studies of the area. For example, the EIA told the decision makers that proposed area for the dam construction had the highest concentration of surviving big cats (jaguars, pumas and ocelot). It was known that a rare species of crocodile lives in the rivers. The rare macaw lived there. Tapirs were also present. These rare species were monitored by the preparers of the EIA for three months (see paragraph 22 of Lord Hoffman's advice). From that case it seems that the substantial costs of the EIA were met by the Canadian Government. When one looks at paragraphs 59 – 66 of Lord Hoffman's advice, one sees the extensive detail provided by EIA. No doubt this was thought necessary because it was known that the area was among the last that provided a rich biodiversity that was an end in itself but contributed to the well being of the ecosystems. In other words the decision makers in the ***Belize Alliance*** case were fully informed about the current state of the proposed dam site despite the initial error about the type of bedrock.

40. If Miss Davis is correct then it really does not matter what data go into an EIA because all the EIA consultant would need to do is to look at the proposed development and state in a very generic way the impacts. It would not require much work to say that concrete is an impervious surface. Neither does it require much work to say that making a number of buildings with concrete and clearing the site will result in irreversible damage. I would have thought that specific information is needed about the area in which the proposed development might take place so that the decision makers determine whether the development should go ahead in spite of the known consequences. The more current the information the more likely it is that the decision makers would have all relevant matters in their minds. For this to happen then surely sufficient time and resources must be donated to the exercise. If it is that the time constraints imposed by the decision makers impairs this process then it is not unreasonable to say that the circumstances under which the EIA is produced may result in a document that is not as thorough as is desirable. It must not be forgotten that the NRCA is given the power to refuse environmental permits.

paragraph 16). This is what Dr. Wade calls the marine survey report. Mr. Smith said that this document was received by the NRCA. It was not circulated to the public. This is why I said that it is common ground that the document was not circulated to the public. The two addenda were not made public. Significantly, Dr. Wade says at paragraph 20 of his affidavit that the June addendum incorporated the May addendum and he formed the view that the two addenda combined as a single document formed part of the EIA. He said that the omission to place, what is described as the marine survey report did not "materially constrain the ability of the public to be informed of the marine resources potentially at risk from the impacts of project activities" (see para. 31). That is a conclusion to which he may legitimately form but he is not to be the judge of that. Had the information been made public as required by proper consultation then those consulted may very well agree with Dr. Wade or they may have a legitimate basis to disagree. The public may very well say that the list of fishes in the EIA was based on a decade old document. Dr. Wade said the marine survey report corroborated the decade old study. Again that may be true but those consulted did not have the opportunity to say aye or nay. The EIA speaks to verbal confirmation that current status of the reef had not changed much. In this context, based on what was available to the public I do not think that the complaint of NJCA is unjustified. Dr. Wade swore that reference was made to the marine survey at the public meeting held on April 28, 2005. He refers specifically to two slides. I would believe that there is a difference between referring to the report in slides and putting the document in the public domain, as required by proper consultation, so that the public can read its contents, think about it and make an intelligent response.

The Water Resources Authority and the EIA

55. One of the complaints of Miss Davis is that ESL was not made aware of the letters from the Water Resources Authority ("WRA") to which I referred in my earlier judgment. She submitted that had her clients known of them they could be addressed. It was submitted by her that ESL cannot be blamed for this omission. I cannot see any reason why a litigant cannot make such submissions as is appropriate to his case and ask the court to make an assessment of them. What, if anything this points to, is the omission by NEPA and NRCA to bring these matters to the attention of the EIA consultants and ask for a response. I now deal with the more important matters raised by Dr. Wade and put them in the context of the WRA's response.

(a) Set back distance

56. In response to the issue of the set back distance, Dr. Wade said that set back distance is to be determined by the planning authorities (see paragraph 34). That may well be true but the issue here is whether the EIA addressed the issue adequately. Page 77 of the EIA said that the buildings will be set back 50m from the high water mark with ground floor levels at 3m above sea level. This issue was raised in a letter to the consultants and their response was as follows:

> *The main issue here is vulnerability to storm induced surge or tsunami. It was stated in the EIA (page 77) that buildings would be set back 50m from the shoreline and that the ground floor of buildings would be set at 3m asl. Also note that the buildings would be located in areas on the site that exceed 2m asl.*

Mr. Basil Fernandez of the WRA in his letter of June 21, 2005 (the letter that Mr. Smith said arrived too late to be considered by the Board) said:

> *The 50-metre setback at 2-3 metre elevation is in fact useless against storm surges and tsunami. UNESCO in a recent review of coastal zone development is Asia (post tsunami) pointed out that "rules must be made to cover the construction and development of coastal areas and there must be checks to ensure that the rules are being respected.*

57. Mr. Fernandez is saying that what is stated in the EIA is not a sufficient set back distance. Given Dr. Wade's evidence that EIAs are now required to include health and safety concerns as well as vulnerability to natural hazards, it is not unreasonable for readers of the EIA with the knowledge of Mr. Fernandez to take issue with the set back distance. Thus while the actual decision of the set back distance is one for the planning authorities I would think that the EIA would have indicated whether that set back distance is sufficient given that Jamaica is prone to hurricanes with consequential storm surges.

(c) Sewage treatment

58. Dr. Wade takes issue with my characterization of ESL's none response to the WRA's concern about the proposed methods of dealing with sewage as a deficiency. He says that these matters were not brought to the attention of ESL. I have already set out the important parts of the WRA's letter of March 24, 2005, in my judgment of May 16, 2006. I have already said in this judgment that this suggests a break down in the process (there is no evidence from NEPA or the NRCA to say otherwise). If my impressions are correct then this reveals a serious breakdown in the consultation process between the relevant government agencies, the EIA consultants and

NRCA. The letter of March 24, 2005, could hardly speak more plainly. I quote from other portions of the letter:

> *We are in receipt of the abovementioned report (sic) [RE: BAHIA Principe Hotel, Pear Tree Bottom, St. Ann – Environmental Impact Assessment] and have the following comments. There are a number of critical issues which have not been adequately addressed by the EIA document and before any further consideration of this proposal, these must be addressed.* ***The scale and intensity of this development requires that these issues be carefully and adequately reviewed.*** (My emphasis)

Then there is the heading **MAJOR CONCERNS** followed by the subheading ***Threat of Contamination of Groundwater and Marine Water***. This is followed by the paragraphs cited in my previous judgment.

59. The June 10, 2005, letter from the WRA states quite explicitly that "[w]ithin the EIA the hydrogeology was poorly done and failed to deal with the drainage area, the bluehole and the wetlands." I find it quite remarkable that the NRCA or NEPA could have failed to bring the letters of March 24, 2005, and June 10, 2005, to the attention of the EIA consultants. This is the assertion of Dr. Wade. It is a matter of regret WRA's letters were not presented to the EIA consultants so as to allow them an opportunity to respond, if they could, to the WRA's disquiet.

60. The affidavit concludes with the statement that what was stated in my earlier judgment as empirical failings has been rebutted. My judgment did say that I did not deal with every single matter in the written judgment and what I set out were examples of the allegations made.

61. The picture painted by NJCA which I accepted and still accept is this: there is a symbiotic relationship between the various organisms in any eco-system. Any major disturbance of the eco-system, especially fragile ones such as Pear Tree Bottom, should be preceded by careful study. In this context, accuracy is paramount. Accuracy in terms of fauna, flora, water quality, hydrologic information and so on. The accuracy of the data about the fauna and flora is not about excessive concern about bugs, ants, bats, birds and insects as an end in itself but rather about the current state of the eco-system. All these animals and plant life play their part in maintaining the balance of nature. There is no question that after all is known a decision can still be taken to destroy the area. That is not the issue. The issue is unless the information is reasonably current and reasonably accurate, the decision maker cannot say that he has all relevant information about the likely impact of the development. If as Dr. Wade says whether all is known about the area, the impact will quite likely be the same, then it really begs the question

of why require an information about the ecology of the area? Why would the terms of reference ask for information on the biological environment of the area?

Conclusion

62. I accept the evidence from Hojapi that it would suffer severe hardship if the quashing order stands. The evidence is that the construction is 85% complete. I now have to take this evidence into account as well as the lack of service.

63. The impression may be given that Mr. Patrick Foster and Mrs Symone Mayhew did not advance argument similar in kind to that of Miss Davis on behalf of ESL. That is not so. They did and I did not accept them. They had submitted that the EIA was adequate and in the alternative, even if it was not it was not so deficient that the decision makers could not rely on it. I need to say this lest it be thought that the attorneys who represented the respondents were less than thorough in their response to NJCA's submissions.

64. I understand ESL to be saying that given all the time "forced" on them by the NRCA's approval and reviews procedures they produced an acceptable EIA in accordance with the terms of reference. What this means is that if there is any problem with the EIA the source of it is the shortcomings in the existing procedures and not with the consultants. While past studies ought to be taken into account there has to be some limit on how far back one can go without raising serious questions about the reliability of the information even if the EIA complies with the terms of reference. In so far as it was stated or implied in my previous judgment that the consultants deliberately produced a questionable EIA, I say that is not the case, in light of Dr Wade's explanation. However, this is only an explanation for the EIA produced and is not sufficient to disturb my conclusion that the WRA ought not to have acted on the EIA as it was.

65. It is hereby ordered that

a. The order of May 16, 2006, is varied in the following manner
    1. paragraphs (1) and (2) are excluded.
    2. The following declarations are granted:
        a. the NRCA and NEPA breached their own standards of consultation and failed to meet the legal standard of consultation by not circulating the marine ecology report and the May and June addenda to members of the public and the applicants and also by failing to inform members of the public

and the applicants that the document circulated was incomplete thereby increasing the real possibility that the public and the applicants might make incorrect conclusions about the impact of the development at Pear Tree Bottom;

b. the NRCA and NEPA failed after receiving the marine ecology report and the May and June addenda to put that information in the public domain without advancing any overriding public interest why this was not possible or even desirable;

c. NRCA and NEPA breached their own stated standards of consultation in that they failed to give the public and the applicants all information required for them to make a fully informed and intelligent decision when it withheld the marine ecology report and the May and June addenda and caused the public to deliberate on a document which to the certain knowledge of the NRCA and NEPA was incomplete;

d. the NRCA and NEPA failed to demonstrate that they conscientiously considered the issue of the adequacy of the setback raised in the July 21 letter from the WRA which raised serious health and safety issues;

e. the NRCA has failed in its statutory duty to consult according to law with the relevant government department and agencies by failing to circulate the marine ecology report to them and in particular the WRA;

f. there was a breach of the legitimate expectation of the applicants that when they were invited to participate in the consultation, either as members of the public or in their own right, the information provided would be full, fair and accurate and that any defect in the information provided would have drawn to the attention of the public and the applicants.