NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1085 OF 2005

BETWEEN	PORTMORE CITIZENS ADVISORY COUNCIL	1ST CLAIMANT
A N D	PORTMORE JOINT CITIZENS ASSOCIATION	2ND CLAIMANT
A N D	MINISTRY OF TRANSPORT AND WORKS	1ST RESPONDENT
A N D	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

Lord Anthony Gifford Q.C. and Miss C. Hamilton instructed by Gifford, Thompson & Bright for the Claimants.

Mr. Michael Hylton Q.C. along with Mr. P. Foster, Miss A. Lindsay and Miss C. Rochester for the Respondents.

HEARD: 19th, 20th & 26th July 2005

G. SMITH, J.

1. The Claimants in this case are two broad based community associations representing the citizens of Portmore.

2. The Respondents are both representatives of the Government of Jamaica.

3. This action was brought as a result of an order - the **Toll Roads (Designation of Highway 2000 Phase I) Order** (the Order) made by the Minister of Transport and Works (the Minister) on March 12, 2002 and Gazetted on April 8, 2002 in accordance with the Powers given to him under the **Toll Roads Act**.

4. By that Order, the Minister designated that a toll road be built over the existing Portmore Causeway Bridge/Road. The Order stated: "Portmore Causeway/Dyke Road Upgrading (approximately 11.5 kilometres of 6 and 2 lane arterial roadway from 100 metres east and 100 metres north of Marcus Garvey Drive/Causeway Road intersection including upgrading and reconstruction of the intersection to the Dyke Road/Portmore Access Road interchange and including a new 6 lane crossing of Hunt's Bay and demolition of the existing bridge) and including a new 2 – lane road link through Portmore and along the existing Dyke Road" (hereafter referred to as Portmore Causeway Bridge/Road).

5. The alternative route to this toll road was designated to be the Mandela Highway – "along the Mandela Highway onto Dyke Road through Gregory Park and into Portmore and *vice versa*."

6. The residents of Portmore would be required to pay a toll to use the bridge when travelling to and from Kingston. However these residents

believe that the current selected alternative route is long, circuitous and would cause delay, wear and tear and inflated petrol costs. In addition, certain classes of travellers would not be allowed on the new Portmore Causeway Bridge at all and would therefore have to utilize the alternative route.

7. Despite this Order being made in 2002, the Claimants maintain that they knew nothing of the Minister's intention to designate the Portmore Causeway Bridge a toll road and the fact that it would be demolished, until July 2004. Further they were unaware that the Minister had made the Order until March 11, 2005 when they took advice from Leading Counsel.

8. As a result they applied for the following orders on April 18, 2005:

(a) an Order of *Certiorari* quashing the *ultra vires* designation of the Minister by way of the **Toll Roads Act (Designation of Highway 2000 Phase 1) Order 2002** (the Order) so far as it speaks to the Portmore segment;

(b) A Declaration that the designated alternative route (the Mandela Highway) is unlawful and not in conformity with Section 8(2) of the **Toll Roads Act**;

(c) an Order of Prohibition of the making of a Toll order in relation to the Portmore segment of Highway 2000.

9. **ISSUES**:

(1) Whether the Minister acted *ultra vires* in designating the alternative route as that via Mandela Highway under the **Toll Roads Act** specifically the **Toll Roads (Designation of Highway 2000 Phase I) Order 2002**;

(2) Whether the Court should refuse to grant the Claimants the relief they seek by reason of their delay in instituting these proceedings.

10. **THE LAW**

Section 8(1) of The **Toll Roads Act** provides that:

"The Minister may, by order –

(a) Subject to subsection (2) designate any road as a toll road for the purposes of this Act;"

Subsection 8(2) provides that;

> "No road shall be designated as a toll road under subsection (1)(a) unless in the area in which the toll road is to be established there is an alternative route accessible to the public by vehicular and other traffic."

11. Lord Gifford for the Claimants contends that subsection 8(2) of the Act is mandatory. He states that the Minister has a discretion as to what roads he chooses to designate as toll roads. However, his discretion is constrained by an absolute prohibition that whatever road he chooses there must be an alternative route and to this there is no discretion.

12. Mr. Hylton for the Respondents argued on the other hand that these sections mean that the Minister has a discretion as to which roads to designate as toll roads and which roads to designate as alternative routes and that the only statutory limitation is that the alternative route must comply with subsection (2).

13. The Court is of the view that section 8(1) of the **Toll Roads Act** gives the Minister a discretion as to which roads to designate as toll roads. This discretion is fettered by subsection (2), which imposes a mandatory obligation on the Minister to designate an alternative route to the designated toll road. This alternative route must be "in the area" of the toll road and must be accessible to other traffic.

14. One of the main issues to be determined in this case is whether the Mandela Highway satisfies the requirement of subsection (2) that the alternative route is "in the area" where the toll road is to be established and if it is accessible by vehicular or other traffic. The Claimants made no challenge to the accessibility of vehicular or other traffic to the Mandela Highway. The crucial questions therefore are – "What is the meaning that Parliament intended the words "in the area" to have?" and secondly, whether Mandela Highway falls within that interpretation.

15. Counsel for the Claimants submitted that the words are to be given their natural and ordinary meaning as was stated in the **Sussex Peerage Case** [1848-60] ALL E.R. Rep.55 where Tindal C.J. said at page 63:

> "If the words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense."

Lord Gifford for the Claimants did not offer a natural and ordinary meaning of the words "in the area" for the Court's consideration. Instead a formulation of what the meaning should not be was proffered:

> "in an area starting outside the area of the toll road but starting and ending at points adjacent to it".

The Courts attention was also drawn to:

(a) The Public Relations Officer of the Portmore Joint Citizen's Association – Miss Carrol McLean's affidavit where by her formulation, "in the area" must be inferred to mean:

> "Any area falling within the circumference of a circle, where the diameter of the latter is the length of the toll road as designated under the order".

An area that fits this description is the alternative route to the Kingston to Sandy Bay section of the Kingston to Williamsfield Toll Road.

(b) The Claimants' accepted alternative routes – the Old Portmore Causeway Bridge and the Bushy Park to Sandy Bay through Old Harbour section, both run parallel and are adjacent to their respective new toll roads. It can therefore be inferred that the Claimants are contending that the alternative routes must fall in such a place where they may run parallel and be adjacent to the particular toll roads.

The Court is therefore being invited by the Claimants to ascribe a narrow meaning to "in the area" in either case.

16. On the other hand, Counsel on behalf of the Respondents submitted that "in the area" is not defined in the Act because Parliament realized that these words must be necessarily imprecise in order to work in any possible situation, especially in a country as geographically and geologically varied

as Jamaica. The Respondents further submitted that "in the area" means "within a reasonable distance".

17. When the various dictionary and ordinary meanings of the words "in the area" were checked the definitions ranged from "immediately beside", "adjacent to", "reasonable proximity", "in the region of" and "in the vicinity of". These are not exhaustive. With these various meanings ranging from close beside to some distance away, it is clear that the words themselves are imprecise and ambiguous, therefore the literal interpretation of the **Sussex Peerage Case** will not be very helpful.

18. The Court therefore, as invited by the Claimants, examined the case of **The Attorney General v H.R.H. Prince Ernest Augustus of Hanover** [1957] 1 ALL E.R. 49 where Viscount Simonds said at page 53:

> "For words and particularly general words cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari-materia* and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

19. When looking at context in its widest sense, the intention of Parliament has to be considered. The purposive approach is that where words are unqualified and unequivocal such as "in the area" one could

impute to Parliament an intention not to impose a prohibition that is inconsistent with the object of the statute. This rule was stated by Lord Diplock in **Kammins Ballroom Company Limited v Zenith Investment (Torquay) Limited** 1971 A.C. 850 at 881 (H).

20. Applying the contextual and purposive approach, the Court must agree with the submissions of Counsel for the Respondents that the words "in the area" were used imprecisely because one could not state definitively what would be reasonable in every particular case. If narrow definitions such as: "adjacent to", "parallel to" or even "near to" were adopted by the Court, they would create practical difficulties for future applications based on the landscape of Jamaica.

21. In considering whether the Mandela Highway is "in the area" of the designated toll road along the Portmore Causeway Bridge/Road, the Minister must have regard to the surrounding circumstances to determine the route that is within a reasonable distance from the toll road. Distance however, should not be the only criterion when considering an issue of such public importance.

22. In making that decision the Minister must take the surrounding circumstances or context into consideration for example:

a) From an environmental standpoint, the existing bridge has to be demolished because if both are maintained there will be increased sedimentation in the area around the bridges, which is the outlet of Hunt's Bay. This would result in flooding to the Mandela Highway and surrounding communities.

b) The new road has to be constructed in the same orientation of the existing Causeway Road because the area on either side of the current structure is swamp or water.

c) The old bridge is no longer adequate to handle the volume of traffic generated by the burgeoning Portmore community.

d) The Mandela Highway is the current, customary and default alternative route utilized by Portmore residents for many years. The current tidal flow system has existed since 1995, where during peak hours Mandela Highway is the road used by traffic going in the opposite direction to the heavy flow on the Portmore Causeway Road. Mandela Highway is also the road that is used when the Portmore Causeway undergoes repairs or is out of commission for any reason.

e) The Port Authority has acquired a portion of the land consisting of the existing road for expansion of the ports.

f) The study done by Mr. Gillings, an Engineer at the National Road Operating and Construction Company (NROCC) and Mr. Lawrence, Signal Technician at the National Works Agency (NWA), do not support the Applicants assertions that the Mandela Highway is longer, more circuitous and involves increased wear and tear and increased costs. On the issue of wear and tear of vehicles, Dr. Wayne Reid, a Civil Engineer, gave unchallenged evidence that wear and tear on motor vehicles and petrol consumption are not purely a function of distance travelled. These are also affected by speed of travel and road conditions. He specifically stated that it is possible to consume less petrol and have less wear and tear on a vehicle travelling a "17 km distance in optimum conditions as against travelling a 7 km distance in unsatisfactory condition".

Taking all these factors into consideration as well as the distance of the Mandela Highway route from the proposed Portmore Causeway Bridge/Road, the Court finds that the Mandela Highway is indeed "within a reasonable distance" from the proposed toll road.

23. Where there is more than one contender for the alternative route, the Minister possesses an inferred discretion to determine which of the routes is more reasonable after consideration of all the circumstances. The Court

finds that the Port Henderson Road which was suggested by the Claimants as a possible alternative route, is not a reasonable alternative route for the following reasons:

a) On leaving the Port Henderson Road, one would have to enter onto the new toll road as it would be impossible to connect with the existing Portmore Causeway;

b) If the residents of Portmore are contending that they should be exempt from paying a toll, how then would the money expended for the building of the bridge be recouped? and;

c) How would the genuine residents of Portmore be determined?

24. The Court further finds that the Minister exercised his discretion to designate a toll road in the proper and lawful manner as there is indeed a lawful designated alternative route to the toll road. The designated alternative route is lawful as it is within the area of the toll road and is accessible to vehicular and other traffic as is required by the **Toll Roads Act**.

25. On the issue of whether the Minister acted illegally or unlawfully the law is aptly stated in **De Smith, Woolf & Jowell's "Judicial Review of Administrative Actions"** 5th Edition at paragraph 6 – 001, page 295:

> "An administrative decision is flawed if it is illegal. A decision is illegal if:

(i) it contravenes or exceeds the terms of the power which authorizes the making of the decision; or
(ii) it pursues an objective other than that for which the power to make the decision was conferred.

The task of the Court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within the four corners." Both sides have accepted this statement of the law..

26. Applying it to the present case - as already discussed, the Minister has the discretion to designate any road to be a toll road under section 8(1) of the **Toll Roads Act**. However, he is constrained by subsection (2) in that he shall not make any such designation unless there is an alternative route within the area of the toll roads, which is accessible to vehicular and other traffic. The basis of the legality is dependent on the interpretation "in the area". The Court has interpreted "in the area" to mean" "within a reasonable distance" of the toll road as is practicable in the particular circumstance. This interpretation has been applied to considerations of the Mandela Highway as the alternative route and that roadway has satisfied the criterion. Therefore, the Minister did not act illegally and the Court cannot overturn his decision.

27. The applicants began these proceedings under the auspices of Judicial Review. As a result the principles governing Judicial Review must be

utilized. The Claimants brought this action on April 18, 2005, three (3) years after the creation on March 12, 2002 and publication of **The Toll Roads (Designation of Highway 2000 Phase I) Order 2002** in the *Jamaica Gazette* on April 8, 2002.

28. Delay is a bar to the granting of Orders of *Certiorari* and Prohibition. However, the substantive proceedings will be considered despite that delay because of the nature of these proceedings and their importance and interest to the Jamaican public.

Rules 56.6(1) & (2) of the **Civil Procedure Rules** (CPR) provides:

> (1) "An application for leave to apply for Judicial Review must be made promptly and in any event within three (3) months from when grounds of the application first arose.
> (2) However, the Court may extend the time if good reason for doing so is shown".

In this case the Applicants did not make a move to apply until three (3) years after the grounds of the application arose.

29. Rule 56.6(5) of the **CPR** provides:

> "When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to
> (a) cause substantial hardship to or substantially prejudice the rights of any person; or
> (b) be detrimental to good administration".

The Court accepts the Respondents' submissions that the delay will cause both substantial hardship to and substantially prejudice the rights of third parties. However both sides must be considered. Some Portmore residents will undoubtedly suffer hardship and be prejudiced by the implementation of this toll road if they choose to use the toll road. These Portmore residents would have to pay approximately J$31,000.00 per year in toll fees plus the addition of increased petrol costs, wear and tear etc.

On a balance, NROCC, the Government of Jamaica and by extension, the taxpayers of Jamaica will bear the brunt of the fall out from the breach of contract between NROCC and Trans Jamaican Highway Limited (TJH). This breach and fall out will necessarily ensue should the Claimants be favoured in these proceedings. TJH has already spent over US$64 million on infrastructure only and the Government of Jamaica has guaranteed (as is possible under Section 19 of the **Toll Roads Act**) any loss to TJH as a result of Breach of Contract. In addition if the Applicants were successful, there would be an additional waste of resources that would have become virtually worthless. Substantial hardship therefore lies in greater abundance on the side of the Respondents, substantial prejudice on the side of third parties involved, being the companies constructing Highway 2000 as well as their employees.

30. The Court accepts the Respondents' submission that there would be detriment to good administration if relief were granted to the Applicants despite their delay in beginning these proceedings. It must be reiterated that it is essential to good public administration that the positions of all the parties concerned are known with certainty. **Tulloch Estates Limited v Industrial Disputes Tribunal** (unreported) M130/2001 Supreme Court of Jamaica, decided December 19, 2001 states at page 8 that:

> "It should be noted that because of the nature of these applications, expedition is an essential feature and delay should be avoided. The need for certainty in Public administration dictates that decision of public bodies be expeditiously reviewed".

or as Lord Diplock succinctly puts it in **O'Reilly v Mackman** [1983] 2 A.C. 237:

> "The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision".

31. The Claimants attempted to utilize the point above in their favour by saying that the Minister did not give enough, if any, notice and information of this planned project to the public as a good public body should do. The Claimants relied on the case of **R v Dairy Produce Quota Tribunal ex-parte Caswell** [1990] 2 A.C. 738 in which it was stated:

> "In asking the question whether the grant of such relief would be detrimental to good administration, the Court is at that stage looking at the interest in good administration independently of matters such as these. In the present context, the interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch, in citizens knowing where they stand, and how they can order their affairs in light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened".

32. The evidence shows that more than sufficient notice was given. Indeed even the Minutes of the meetings of the Applicants themselves do not reflect their alleged stance of ignorance. Moreover ignorance of the law is no excuse to not meeting the requirements of the law. Section 31 of the **Interpretation Act** clearly states that publication to the public is deemed once an Order has been Gazetted. Section 31(1) provides:

> "All Regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publications."

The Applicants are broad based community organizations with representatives whose positions are such that they would have or should have known of the procedure of publication by the Government. The alleged ignorance of the Order which the Claimants offer as an excuse for their delay in beginning these proceedings is not accepted as a good reason

as is required by Rule 56.6(2) of the **CPR**, for the Court to grant relief despite that delay.

33. It would be a detriment to good administration to allow relief in a case such as this. Public bodies and tribunals must be allowed to make their decisions and carry out their duties with reasonable dispatch as the case of **R v Dairy Produce Tribunal ex-parte Caswell** states and therefore any Judicial Review proceedings must be instituted promptly.

34. CONCLUSION

The Court on the basis of all the available evidence, concluded as follows:

a) There is and must necessarily be an imprecise definition of the words "in the area" to fit any and all circumstances as is necessary. Such a definition may be, but is not limited to "within a reasonable distance" or even "a reasonable distance from". In determining the location of the alternative route, each occasion must be looked at within all the surrounding circumstances by the Minister in designating an alternative route.

b) In this case it is the Court's considered view that the Minister chose the most reasonable route.

c) The Portmore Causeway Bridge/Road and the Mandela Highway are accepted as being in the same area for the purposes of the Order and by extension the **Toll Roads Act**.

d) The Minister did designate an alternative route - Mandela Highway, to the designated toll road - Portmore Causeway Bridge/Road route. Mandela Highway is and has always been the customary and default alternative route for Portmore residents.

e) The Minister did not act unlawfully in designating the Portmore Causeway Bridge/Road as a toll road because there is an alternative route in the same area which is accessible to vehicular and other traffic as required under the **Toll Roads Act** Section 8(1) and (2).

f) The Minister did not act illegally and thus did not make an *ultra vires* decision regarding the Portmore Toll Road.

g) The Application for the order of *Certiorari* must be denied, as the Claimants did not satisfy the Court that there is a basis on which to quash the Designation Order.

h) There is also no ground for the Declaration being made, as there was no unlawful action found in the designation of the alternative route.

i) The order for Prohibition of the making of a toll order must also be denied, as there is no act or omission barring the making of such an order.

35. There is no order as to Costs in this matter.