

Trinidad and Tobago
Supreme Court

Delay: Non-Compliance with Environmental Statutory Regime: Substantial Prejudice to Third Parties: Substantial Compliance: Public Consultation

Fishermen and Friends of the Sea v. (1) The Environment Management Authority and (2) BP Trinidad and Tobago LLC (2004)

Facts: BPTT applied for and received outline planning approval from the Town and Country Planning Division under the old planning regime. The Environmental Management Act 2000 (“EM Act”) provided by virtue of Section 39, for exemption activities to which final planning approval had been obtained from the Town and Planning Division. The Environmental Management Authority (“the EMA”), the governmental entity charged with implementing the new environmental legal regime, correctly insisted that BPTT had to obtain a Certificate of Environmental Clearance (“CEC”) under the new environmental legal regime but decided that the application would be fast tracked in as much as BPTT had already obtained outline planning approval. Fishermen and Friends of the Sea (“FFOS”) an NGO engaged in sustainable development/environmental activities adopted the position that this was procedurally incorrect and that the proposed activities of BPTT were not being properly assessed by the EMA. In particular, FFOS became concerned with the proposed onshore pipeline route which based on the records of the Central Statistical Office of the Ministry of Integrated Planning and Development of the Government of Trinidad and Tobago and in particular the 1990 Population and Housing Census, show that approximately 112,000 people live within a 2.5 kilometre radius of the existing 36" onshore pipeline to be constructed . FFOS felt the project had to be properly assessed in light of possible risks to human population due to the volume of natural gas that would be transported in close proximity to several communities. In filing its application, FFOS filed approximately 5 months after the decision of the EMA to grant a CEC to BPTT. The Judicial Review Act of 2000 requires that such applications be made promptly but not later than 3 months from the decision that is under review. There is a discretion to extend time but the judge before whom the application was made refused to extend time and this was approved by the Court of Appeal of Trinidad and Tobago.

Held: Delivered by Lord Walker of Gestingthorpe

“In this case, however, the procedural irregularities arose primarily from shortcomings in the transitional provisions of the EMA 2000. The Authority’s human and financial resources were no doubt limited and its officers were understandably reluctant to spend time and money in reconsidering EIAs which had already been carefully considered after their submission to the TCPD and the Ministry of Energy....In these circumstances the judge’s exercise of his discretion was not flawed. There is no reason to interfere with his decision not to grant an extension of time, and the appeal must be dismissed.”

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Cumulative Effects: Non-Compliance with Environmental Statutory Regime: Precautionary Principle: Public Consultation: Constitutional Right to a Healthy Environment

Fishermen and Friends of the Sea v. (1) The Environment Management Authority and (2) Atlantic LNG Company of Trinidad and Tobago Limited (2003)

FFOS challenged the issuance of a CEC to the Atlantic LNG Company Limited (“ALNG”). ALNG is a conglomerate of multinationals that originally included Amoco Trinidad (LNG) B.V., British Gas Trinidad LNG Ltd., Repsol International Finance B.V. and Cabot Trinidad LNG Limited. Amoco’s shareholding is now held by BP Trinidad (LNG) B.V. and Cabot’s by Suez (Trinidad and Tobago) LNG Ltd. ALNG was formed in July 1995 to develop a liquefied natural gas plant in Point Fortin, Trinidad and Tobago and includes a local state owned company, NGC Trinidad and Tobago LNG Ltd. ALNG commenced its operations with the establishment of three (3) liquefied natural gas processing facilities referred to as Trains I, II, and III. These LNG trains were established prior to the establishment of the CEC regime and therefore the EMA had no authority over its operations. In 2001, ALNG decided to construct a fourth LNG Train (“Train IV”) but was now required to apply for a CEC. FFOS met with residents concerned about the presence of the first three trains in their neighbourhood and the proposed Train IV and decided to challenge by means of judicial review, the decision of the EMA to grant a CEC to ALNG to permit the construction of Train IV.

Held: Justice Stollmeyer

“While I accept the existence of certain common law environmental rights (to which I have already referred), I am reluctant to elevate them or categorise them together with those rights entrenched in the Constitution, despite also accepting that the latter is a living document which should be interpreted generously. The position remains, however, as acknowledged in Europe and India, for example, that these "rights" are subject to other considerations. I do not wish to embark here on an investigation as to whether the rights of an individual should prevail over those of the society generally, or vice versa. It is sufficient to say that issues of environmental control often involve the delicate balancing of competing social and economic interests, as well as the application of specialised expertise...For the reasons I have set out I am unable to conclude that either the decision or the decision-making process was: illegal, irrational or procedurally improper; an abuse of power; biased; or otherwise liable to be set aside on any of the grounds set out in the motion. The motion is therefore dismissed. In arriving at this determination I do not wish to be seen as dismissive of the concerns expressed by FFOS and the residents. I accept that there was cause, for their complaints. The concerns as to safety, health and the environment are genuine - they are certainly not shown to be otherwise. My task, however, has been to review the decision of the EMA, and the process by which it was made, and decide whether in all the circumstances its decision was illegal, irrational or procedurally improper. It was not to decide whether it was perfect, or whether the views or wishes of the Applicant, the residents, or anyone else, should prevail.”

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Jurisdiction

Karan Ramlal & Simon Macon v. Indira Ramsanahie HCA No. 2812 of 2003

Arising out of a claim for damages for noise pollution, claimants sought to have damages in accordance with Section 66 of the Environmental Management Act which deals with Administrative Civil Assessment. Administrative Civil Assessment is expressly available only to the Environmental Management Authority.

Held: Ralph Doyle, Master of the High Court

The High Court has no jurisdiction under the Environmental Management Act with respect to administrative civil assessment

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Public Consultation: The EIA Process: The Precautionary Principle: Cumulative Effect: Substantial Compliance: Terms and Conditions of Certificate of Environmental Clearance

People United Respecting the Environment ('Pure') v. The Environmental Management Authority, Alutrint Limited and the Attorney General (2007)

In 2005, the Government of the Republic of Trinidad and Tobago (GORTT) approved the establishment of an aluminium complex capable of producing 125,000 metric tonnes per annum. Part of the proposed complex, that is, the aluminium smelter, anode plant and rod mill, wire and cable plant and associated infrastructure, is to be sited on approximately 100 hectares of land at Main Site North, Union Industrial Estate in La Brea. A local joint venture company, *Alutrint Limited*, was formed to manage the project development and ownership of this complex. Alutrint's equity ownership is 60% National Energy Corporation (NEC) and 40% Sural, a Venezuelan based company that specializes in the manufacture and retail of aluminium products.¹ The establishment of the proposed aluminium complex requires the applicant to apply for a CEC and this was received on April 02, 2007.

Held: Mira Deen-Armorer J.

“There is no evidence before this Court to suggest that the EMA omitted to apply the precautionary principle in the process of deciding whether to grant a CEC. In order to prove that the decision was illegal on account of an omission to apply the precautionary principle, the Claimant ought to have produced or have sought the production of such records of the decision-maker which tended to prove that it failed to apply the precautionary principle... In respect of the remaining two categories, I agree with Learned Senior Counsel, Mrs. Peake that the first two categories merge into each other and I venture to suggest that the reason for the merger is that one of the principal reasons for the preparation of the EIA is to alert the public to the effects of the activity on the environment....Another aspect of developer consultation has been queried by the Claimant that is to say, the admitted failure of the developer to conduct consultations at the formative stage of the EIA. While conceding that in fact there had been a failure on the part of the developer to comply with this very clear guideline, learned Senior Counsel for both the EMA and the Interested Party have sought to minimise the admitted flaw. In my view, the stipulation in the TOR for public consultation prior to the preparation of the EIA is

¹ Obtained from the Judgment of Justice Mira Deen-Armorer.

*reminiscent of the Sedly principle that consultations must be taken when the project is at a formative stage. Moreover, it is no answer to contend that this was not a requirement of statute but of the TOR which is merely a guide. According to the Sedly principles consultation, as long as it is undertaken, must be carried out properly. On the face of the facts therefore this aspect of the consultation process was flawed. The next step would be to consider whether this flaw in the consultation process means that the decision should be quashed...In assessing whether the admitted flaw deprived the process of efficacy, the flaw may be tested by considering what difference would have resulted had the developer complied with this requirement of the TOR. In that hypothetical situation, the developer would have received public comments prior to embarking on the preparation of the EIA. This in my view was substantially achieved by the use of questionnaires and the smaller cottage meetings. The failure of the developer to hold the public consultation prior to preparing the TOR in itself does not deprive the process of efficacy. However, the Claimants have also complained of the proximity of the first and the second public consultation meetings, the first having been held on the 9th November, 2005 and the second on the 14th November, 2005. The compound effect of the developer's failure to hold the meeting at the start of the EIA process and the proximity of the two meetings in my view would have operated to escape and therefore to frustrate the provisions of the TOR, which required the first meeting at an early stage to "sensitize stakeholders to the project and gather stakeholder concerns, ideas and perceptions...." Having done so, time must be allotted to allow stakeholder concerns to inform the data collection phase, after which the developer is required to return to the stakeholders to provide information on its findings and proposed management plans. The time was not allowed. It may very well be the case that strict compliance would have yielded no different result. However, in this regard the TOR places the stakeholder centre stage. The stakeholder must be sensitized; the developer must take into account stakeholder concerns and then return, reporting on its findings and proposed management plans. In my view, this was no minor flaw. The omission to comply with this aspect of the TOR deprived the developer of the time envisaged to take stakeholder views into account. This was a flaw which diminished the quality of public consultation. This Court is obligated to implement the caveat of Lord Walker in *FFOS v. EMA* that the Court should approach the doctrine of substantial compliance with caution, when public consultations are affected. Even if it could be argued that there may have been substantial compliance, in my view, it would have been procedurally irregular for the EMA to issue the CEC on the basis of flawed public consultation....*

The EIA is an information-gathering process...In considering the adequacy of the EIA, the Court does not employ a standard of perfection. The EIS should be comprehensive in its treatment of the subject matter, objective in its approach and alert the decision-maker and the public as to effects on the environment...The Court must ensure, by scrutinising the record that the agency took a "hard look" at all relevant circumstances. Once the agency has taken the hard look, the Court cannot impose its views.... A major ground of challenge in all three claims related to the issue of the CEC subject to stated conditions...It is accepted by the Claimants that the EMA was invested by s. 36

to issue the CEC subject to conditions. It follows very clearly then, that in themselves, conditions and their presence in the CEC do not vitiate the CEC. The Court is required however to consider whether the information sought by the conditions ought by law to have been included in the EIA thereby, subjecting such information to public scrutiny... it appears to me that having regard to the hazardous nature of the SPL [spent pot liner] and its potential to cause harm to human health. It was outrageous of the decisionmaker to leave such issues unresolved before the CEC was granted. A reasonable decisionmaker would have insisted that the information sought by conditions would have been settled before the Certificate was granted. The environmental control is iterative and the EMA continues to exercise control even when the Certificate is granted. The very obvious difference is that as long as the CEC is granted the door is forever shut to the public input, which must be factored in when the EMA decides to grant or withhold the CEC.

The Claimant contends that the Authority in granting the CEC failed to have regard for the cumulative impact of the three constituent part of the Smelter project, in respect of which three different applications had been made....In my view there was no evidence, transparent or otherwise to prove the hard look on the part of the EMA of the cumulative impact of the three parts of the project....”

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Jurisdiction: Environmental Commission: Direct Private Party Action

The Southwest Tobago Fishing Association Ltd. v. The Attorney General of Trinidad & Tobago; Tobago House of Assembly; The Environmental Management Authority and Petroleum Geo-Services Limited, HC CV2008-02926 (2008)

By this action filed on the 29th July 2008 the Claimant sought an injunction against Petroleum Geo- Service Ltd (“PGS Ltd”), the Fourth Defendant herein, restraining it from the conduct of seismic surveys in the traditional fishing grounds. In response PGS Ltd. disputed the Claimant’s right to an injunction and submitted that the Court has no jurisdiction with respect to this dispute. PGS Ltd. intended to conduct seismic surveys in the traditional fishing grounds and for that purpose was required by the Act to apply for a Certificate of Environmental Clearance (“CEC”) from the Authority. During the period the 1st to 6th June 2008 PGS Ltd. held meetings with Tobago fisherfolk, some of whom were members of the Claimant. At those meetings PGS Ltd advised that as part of the requirements to obtain a CEC it was required to hold consultations with fisherfolk, fishing communities and organisations. At those meetings PGS Ltd. made various presentations to the effect that the conduct of seismic surveys in the area would have no effect on the fishing in the area and that if it did compensation would be paid. The members of the Claimant were not satisfied with the representations made by PGS Ltd. and advised the meetings of their dissatisfaction. They were advised by PGS Ltd. that it would continue the discussions in an attempt to assuage their fears. On or around the 8th June 2008 the Claimant received from PGS Ltd. an e-mail of containing a CEC which it says was granted to it by the Authority allowing it to conduct a multi-client two dimensional seismic survey around Tobago. The Claimant’s case is based on a breach by PGS Ltd. of a condition in their CEC; the

failure of the Authority to properly monitor the licensed activities of PGS Ltd. and the negligence of the State and the THA in allowing the licensing of such activity.

Held: Madam Justice Jones

It is clear therefore that the Act provides that the primary responsibility for ensuring compliance with the requirements of the Act lies with the Authority. In this regard it is the Authority which is endowed with certain coercive powers to ensure compliance with the Act. In addition the Act vests the right to apply for a restraining or similar order in the Authority. In contrast while the Act allows for actions by private parties for claimed violations of certain environmental requirements such action is by the Act subject to certain constraints. In the first place the action must be brought in the Commission. In the second place the right of a private party to sue is limited to certain violations. Further, unlike damages awardable by the civil court, the compensation payable to the private party for the breach of an environmental requirement is limited with respect to the quantum allowable to a specific amount per day for each violation. While section 69 of the Act is not the best drafted section it is clear that the intention is that in order to pursue such an action, the private party must give the Authority sufficient notice of the alleged violation, at least 60 days, so as to allow the Authority the opportunity to assume the responsibility for taking enforcement action. It is only if the Authority fails to take enforcement action that the civil action can be pursued.

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Costs

In the case of **Fishermen and Friends of the Sea v. The Environmental Management Authority and BP Trinidad and Tobago**, the EMA sought to recover costs from the unsuccessful litigation launched by the non-governmental organisation, FFOS. Despite judges in the various stages of the **Fishermen and Friends of the Sea v. The Environmental Management Authority and BP Trinidad and Tobago** matter acknowledging the environmental pedigree of FFOS as a bona fide public spirited organization, the EMA still sought to argue that the organization was a façade for private individuals, namely its directors.

Held: Justice Pemberton:

[1]“The Claimant is a company duly incorporated under the Laws of Trinidad and Tobago. The Defendants are the Environmental Management Authority and BP Trinidad and Tobago LLC. [2] Fishermen and Friends of the Sea (FFOS) unsuccessfully challenged the decisions of the Environmental Management Authority (EMA) and BPTT all the way to the Privy Council. Suffice it to say that the Privy Council ordered the FFOS to pay costs. These costs were taxed by the Registrar and by Allocatur of 25th September 2003 the quantum of costs was notified to the parties. [3] There has been no movement by FFOS to pay these costs. The EMA, in order to recover its costs filed an application for the directors of FFOS to pay the costs. [4] The sole issue for my determination therefore is whether the directors of FFOS should be made to satisfy the Costs Order directed to the FFOS by the Privy Council. Thirdly, that FFOS was a "facade simply set up for the convenience of Gary Aboud and other members ..." There is no evidence to back up what clearly amounts to statements of opinion and not evidence to which any weight can be attached by the court. Even if the court were to grant the Order, who among the other directors should be named? There is no assistance or guidance on this issue and it seems that too much of this application has been left to the Court's fancies. I decline to accept this invitation to

proceed on a frolic of my own with no directions. [25] This is in stark contrast to evidence of Mr. Beddoe, a director of FFOS. "FFOS has always operated on a very limited budget. We have never asked our membership to pay fees. Our greatest resource has always been volunteerism. Over the years we have managed to attract a wide range of persons who were able to provide us with scientific advice, technical assistance, administrative and management assistance, fishery expertise as well as legal advice. [26] In addition, I accept that Fishermen and Friends of the Sea was a body satisfying the "public interest" component of the JUDICIAL REVIEW ACT. This is acknowledged and I daresay accepted by all concerned including the Defendants at every juncture of these proceeding. It would be foolhardy of this Court at this late stage to accept a proposition stating otherwise.
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Environmental Commission