COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FP/PUB/jrv/5/2005

IN THE MATTER of an application for Judicial Review

B E T W E E N

THE QUEEN

AND

WENDELL MAJOR
As Secretary to the National Economic Council
The First Respondent

THE MINISTER RESPONSIBLE FOR CROWN LANDS
In the person of The Honourable Perry Gladstone Christie, Prime Minister of The Commonwealth of The Bahamas

The Second Respondent

AND

THE TREASURER OF THE BAHAMAS

The Third Respondent

Ex parte

SAVE GUANA CAY REEF ASSOCIATION LIMITED

The Applicant

Before: The Hon. Mr. Justice Stephen G. Isaacs

Appearances: Mr Fred Smith and Mr George Missick for Applicant

Mr. Leif Farquharson, Miss Kayla Green and Mr Loren Klein for Respondents

Mr. Michael Barnett and Mr Robert Adams for Developers

18 May 2005

J U D G M E N T

1. This matter was commenced by an Originating Notice of Motion filed 4 April 2005. The applicant secured leave to bring judicial review proceedings on 5 April 2005 relative to a Heads of Agreement between the respondents and Passerine at Abaco Holdings Ltd., Passerine at Abaco Ltd. Baker's Bay Club Ltd., Baker's Bay Hoa Ltd, Baker's Bay Foundation Ltd and Baker's Bay Marine Ltd. (The Developers).

2. The reliefs sought are as follows:-

> "**1.** A declaration that neither the First Respondent nor any member of the National Economic Council had power or authority to enter into the Heads of Agreement and/or to bind the Government or any part thereof under the terms of Heads of Agreement and that the Heads of Agreement is a nullity and void;
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> **2.** A declaration that, in any event, the Heads of Agreement was entered into by the Respondent ultra vires and is thereof void and not binding;

3. An order of prohibition prohibiting the Second and Third Respondents from granting the leases of any part of the Crown Land and the Treasury Land (as defined at clauses (E) and (F) of the Heads of Agreement) to the Developers for the purposes of the Development;

4. An order of prohibition prohibiting the First Respondent from granting or permitting the granting of any of the rights, concessions, exemptions or grants set out in clause 6 of the Heads of Agreement to the Developers;

5. In the alternative to the relief sought above, an order of mandamus that the Respondents conduct a process of full and proper public consultation prior to the granting or issuing of any leases, approvals, permits, rights, concessions, exemption or grants as set out above.

6. Costs."

3. The hearing of the substantive application was fixed for 26 April 2005 and adjourned to 13 and 14 June on an application for an adjournment made by the respondents.

4. The Court also agreed to hear an application for an interlocutory injunction made by the applicants by an Amended Notice of Motion filed 28 April 2005 in anticipation of the above mentioned adjournment.

5. By the Amended Notice of Motion the applicant has sought nineteen (19) reliefs which are sufficiently summarized by the respondents as follows:

"1. Entering into various leases of Crown and Treasury land (**see Amended Notice of Motion, paragraphs a-e**);

2. Granting specific approvals, concessions, licenses etc. to the Developers (***supra*, paragraphs f and p**);

3. Granting two temporary construction easements to the Developers (***supra*, paragraphs h and o**); and

4. Permitting the Developers to carry out certain identified activities and generally permitting the Developers to undertake "the several works contemplated by the Heads of Agreement until the final determination of this application for judicial review". (***supra*, paragraphs g, i-n and q-s**)"

6. The respondents and the Developers, executed the Heads of Agreement on 1 March 2005, for the Developers to develop a private community at Guana Cay in the Abaco chain of islands, inclusive of a hotel, private residences, a golf course and a marina. The Developers expect to commit approximately M$500 to the development over a ten (10) year period.

7. The applicant, a company limited by shares and registered on 11 March 2005, as amended on 11 April 2005, having issued two shares to nominal shareholders, was formed for the objects or purpose of engaging in any act or activity not prohibited under any law for the time being enforced in The Commonwealth of The Bahamas.

8. The applicant has not been capitalized save for the issuance of two $1.00 shares out of $5,000.00, and has no discernable assets. Troy

Albury of Guana Cay is the President and Director, Frederick Smith, counsel for the applicant, is Secretary and Director and Coraine E. Rolle, a legal secretary, is Assistant Secretary.

9. It is noted that none of the landowners at Guana Cay, the core supporters of the applicant, have exposed themselves to costs, or have taken any shares in the company making the application. They have however publicly demonstrated against the development in the print media, outside of Parliament and outside of the Supreme Court building. Those residents number less than 200 persons, and obviously support the efforts of the applicant.

10. Both shareholders are employees of Callenders & Co. and reside in Grand Bahama. The shareholders, Beth Chatelain and Michelle Brown do however, purportedly hold the unissued shares under declarations of trust dated 1 April 2005 for those residents of Guana Cay whose names appear on a petition exhibited to the affidavit of Troy Albury filed 12 May 2005. It is seen from the case of Re Perkins, Ex p Mexican Santa Barbara Mining Co (1890) 2 QB 613 at 616:

> "that companies have nothing whatsoever to do with the relationship between trustees and their cestui que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is on the register."

Any cestui que trust herein can therefore only turn to one or both shareholders regarding the management of the purported trust.

11. The Developers, although not a party to this matter, successfully applied on 26 April 2005 to be heard at the substantive application, as well as at any interlocutory hearing, being directly affected by the proceedings under the principle enunciated in *R. v. Inspectorate of Pollution, Ex parte Greenpeace Ltd* (1994) 1 WLR 570.

12. The applicant has submitted that this is a proper case in which the injunctive relief sought ought to be granted, otherwise the entire proceedings would be rendered pointless.

13. It is not disputed that the Court has jurisdiction to grant the relief sought under s. 21(1) and (2) of The Supreme Court Act Cap. 53, and under R.S.C. O. 53 r. 3(10).

14. S. 21 gives the Court jurisdiction to issue an injunction either unconditionally or on terms and conditions.

15. R.S.C. O. 53 r. 3 (10) (a) gives the Court jurisdiction to direct that its leave to apply for judicial review shall operate as a stay of the proceedings to which the application relates where the relief sought is prohibition as it is here.

16. The case of *R. v. Secretary of State for Education and Science Ex parte Avon CC* (1991) 1 QB 558 decided that the words *"proceedings to which the application relates"* in R.S.C. O.53 r. 3 (10)(a) includes both executive decisions and also the implementation of those decisions, and is not limited to proceedings in court.

17. As there are other reliefs sought, R.S.C. O. 53 r. 10(b) gives the court jurisdiction to issue an interim injunction pending the final determination of

the judicial review, as it has in actions began by writ. *M. v. Home Office* (1994) 1 AC 377 demonstrates that an injunction may be granted against the Crown and its Ministers.

18. Both the respondents and the Developers have raised the issue of standing. At the hearing the Developers adopted the submissions of the respondents in their entirety, and made further submissions of their own.

19. The respondents have correctly submitted that by the provisions of s. 19 (3) of the Supreme Court Act and R.S.C. O. 53 r.r. 3(1) and 7(3) the applicants have to show a sufficient interest in the matter in order to succeed in a judicial review application.

20. *R. v. Commissioner of Inland Revenue, Ex parte National Federation of Self-employed and Small Businesses Ltd.* (1981) 2 AER 93 shows the following:

1. The Court which hears the ex parte application for leave ought still to examine whether the applicant has a sufficient interest.

2. A sufficient interest is not purely a matter of discretion in the Court.

3. Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute. To rule otherwise would be to deprive the phrase *"a sufficient interest"* of all meaning.

4. The mere fact that thousands of people join together and assert they have an interest does not create one.

5. The mere fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest.

6. A direct financial or legal interest is not required.

21. In De Smith, *Wolf & Jowell*, Judicial Review of Administrative Action 5th Ed. at para 2-021 to 2-024 the authors opine, which opinion is adopted by this court, that the language of the Rules make it clear that the statutory requirement that the applicant has a *"sufficient interest"* is a threshold test of standing which applies when the applicant is seeking leave. If there is insufficient interest the court is prohibited from granting leave. It is submitted that the Heads of Agreement which the applicant challenges does not interfere directly with the applicants' personal or public rights or has adverse financial consequences for it, and therefore this is not a case where leave should be granted.

22. Relying on *Belize Alliance of Conservation Non Governmental Organizations (Bacongo) v. Department of the Environment of Belize* (2003) 1 W.L.R. 2839, the Developers have added that the court, in considering whether to grant injunctive relief, is required to consider the following issues:

1. Does the application raise a serious issue to be tried?

2. If so, will there be irreparable harm if an injunction is not granted?

3. Taking all factors into consideration where is the balance of convenience?

23. The Developers have also submitted that the leave to proceed does not prevent the court from considering on an inter parties application whether there is a serious issue to be tried, as this is a fundamental threshold issue on the question whether or not to grant interlocutory relief. This position is supported by the case of *Ex parte National Federation of Self-Employed and Small Business Ltd* (*supra*), and this court accepts the submission.

24. It is submitted that there is no important issue of law raised by this application.

25. Both the respondents and the Developers have referred to *Council of the Civil Service Unions v. Minister for the Civil Service* (1985) AC 734 in which Lord Diplock stated that at the outset the court must be satisfied that the decision being challenged *"qualifies as a subject for judicial review,"* in so far that the decision must have a direct and immediate consequence. It is not enough that the decision being challenged might lead to some future decision or action which would have an effect on the applicant.

26. Both the respondents and the Developers have submitted that the Government's decision to enter into a Heads of Agreement or an agreement in principle, subject to legally required approvals and permits, has no direct or immediate effect on any right of the applicant, and therefore does not qualify as a subject for judicial review.

27. The affidavit evidence of the applicant is contained in two affidavits of Troy Albury, filed 4 April 2005 and 12 May 2005.

28. The April affidavit essentially serves to adopt the facts set out in the Statement filed herein together with the Originating Notice of Motion.

29. The Statement itself mirrors the grounds set out in the Originating Notice of Motion and in effect both documents are submissions that the first respondent as Secretary to the National Economic Council has no authority to bind the Government by the Heads of Agreement as the Council is not a statutory body, but merely an ad hoc committee.

30. Both documents then delve into submissions on various clauses contained in the Heads of Agreement.

31. This first affidavit also serves to exhibit the Heads of Agreement and the Environmental Impact Assessment.

32. The second affidavit was filed in Answer to affidavits of Joseph Arenson a director of the Developers, the first filed on 2 May 2005 underlines the damage that the Developers will suffer if the injunctive relief is granted.

33. A second affidavit of Joseph Arenson filed 3 May 2005 documents the monthly expenditure of the Developers in preparatory work as being just under $750,000.00.

34. It also responds to affidavits of Shelia Carey filed 3 May 2005, Permanent Secretary to the Ministry of Financial Services and Investments which seeks to underline the benefits of the Development to The Bahamas generally.

35. It also responds to the affidavit of Wendell Major filed 3 May 2005 which explains essentially that the National Economic Council is in fact

comprised of members of Cabinet, and that as Secretary to the Cabinet he is also Secretary to the National Economic Council.

36. It also responds to the affidavit of Alonzo Lopez, Deputy Registrar General, filed 3 May 2005 which exhibits the documents incorporating the applicant and goes on to reveal the creation of the Declarations of Trust referred to earlier relative to the unissued shares of the applicant.

37. This second affidavit of Troy Albury in its 31 pages is replete with submissions, and as stated by Hall CJ in the consolidated actions of 21 through 26 inclusive/PUB/con/2004, is thinly disguised as "the deponents beliefs held on the advice of Council" and as such is hereby struck out. For this same reason the affidavit of Shelia Carey will not be referred to, notwithstanding its contents of a factual nature.

38. This court accepts the position of Wendell Major that the N.E.C. is not an ad hoc committee, but is in fact the entire Cabinet, and is therefore effectively the Government.

39. There is also an affidavit of Erin Lowe a property owner and resident of Guana Cay filed 25 April 2005 in support of the application for injunctive relief, but it takes the arguments of the applicant no further than the other affidavit evidence already referred to.

40. It is accepted by all of the parties hereto that the principles of *American Cyanamid Co v. Ethicon* (1975) H.L at 396 apply to the instant case, as was applied to the *Belize Alliance* case.

41. Turning to the first issue as to whether the substantive application raises a serious issue to be tried, in the case of *The Siskina* (1979) AC 210 Lord Diplock at page 256 said:

> "A right to obtain an injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a preexisting cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction in merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the courts of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

42. There does not seem to be invasion, actual or threatened by the Developers of a legal or equitable right of the applicant.

43. Considering the structure of the applicant company there appears to be no pre-existing cause of action against the respondents, for if there were that would mean that any person form any part of The Bahamas would have the same right, which is clearly a wrong conclusion.

44. Even had the property owners of Guana Cay been properly before the Court, it would be impossible, based on the material before the court, to show that their property was going to be directly affected by the development, as did a jungle lodge and a hotel in the *Belize Alliance* case that would have been submerged when the development proposed in that case was completed.

45. Although much weight was attached to the Environmental Impact Assessment by the applicants, it is not a document on which the Court can

adjudicate, because *"it is not a decision making end in itself, it is a means to a decision making end. Its purpose is to assist the decision makers"* as stated at page 61 of the *Belize Alliance* case.

46. In order words the policy makers are armed with the Environmental Impact Assessment for the purpose of deciding what ought to be allowed and what ought to be prohibited with regard to the development.

47. There is no need to go further apart from pointing out that the applicant has stated that they make no cross undertaking in damages on its application. Further the balance of convenience would lie heavily in favour of the respondents who have the responsibility of governing the country, and ought not be prevented from so doing without some extremely special circumstances existing, no injunction could be granted in the circumstances at hand as was discussed in *Smith and Others v. Inner London Board of Education* (1978) 1 AER 411.

48. Briefly on the issue of public consultation, there is no statutory requirement for such consultation, although it may amount to good governance and good business practice where a company is embarking on a large scale project. The suggestion that such a requirement can be imported from another jurisdiction is rejected in the strongest terms, as such a requirement can only be established by the legislature, and not by a court of law.

49. Although the applicant and its supporters may feel passionately that their pristine and idyllic island paradise ought not to have on it such a large development as proposed, the current application has no more effect than the demonstrations staged by them earlier.

50. In the result application for injunctive relief is denied, the leave to bring judicial review proceedings is revoked, and the entire action is dismissed.

51. There is no order as to costs.

Dated the 26th May A.D., 2005.

Stephen G. Isaacs, J.