

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2020/0005

BETWEEN:

**[1] JOHN MUSSINGTON
[2] JACKLYN FRANK**

Appellant

and

**[1] DEVELOPMENT CONTROL AUTHORITY
[2] THE ANTIGUA AND BARBUDA AIRPORT AUTHORITY
[3] THE ATTORNEY GENERAL**

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Thomas, QC with him, Ms. Michelle Sterling for the Appellants
Mr. Anthony Astaphan, SC with him, Ms. Gail Christian for the 1st Respondent
Mr. Hugh Marshall for the 2nd Respondent
Mr. Anthony Astaphan, SC with him, Dr. David Dorsett and Ms. Carla Brookes-Harris for the 3rd Respondent

2021: February 10;
April 29.

Civil appeal – Judicial Review – Civil Procedure Rules 2000 – Part 56.2 – Locus standi - Whether appellants had standing to apply for judicial review – Sufficient interest – Applicant for judicial review must show sufficient interest in the subject matter of the decision challenged – Interim Injunction – Refusal to grant interim injunction – American Cyanamid principles – Considerations to be taken into account when application for an

interim injunction involves a public law element – Adequacy of damage – Balance of convenience

In 2017 the Government of Antigua and Barbuda decided to build a new airport on the island of Barbuda. Later that year, the developer of the airport project applied to the first respondent, Development Control Authority (“DCA”), for a development permit. This application was accompanied by an environmental impact assessment study (“2017 EIA”). The Department of the Environment (“DoE”) which advises the DCA on environmental issues and projects, was not satisfied with the 2017 EIA and recommended only approval in principle of the development subject to submission of an updated EIA. An updated EIA was subsequently submitted by the developer in May 2018.

On 18th July 2018, the DCA granted a development permit for the construction of the airport. However, the permit was granted before receiving the recommendation of the DoE following its review of the updated EIA. On 10th September 2018, the DCA wrote to the second respondent, the Antigua and Barbuda Airport Authority (“ABAA”), granting conditional approval of the project. During this period, the appellants, who are citizens and residents of Antigua and Barbuda residing in Barbuda, applied to the High Court for leave to file judicial review proceedings challenging the DCA’s approval of the project and seeking an interim injunction to stop construction of the work on the airport runway. In August 2018, the learned judge granted both applications. However, the injunction was set aside by the Court of Appeal on 11th September 2018.

On 18th September 2018, the appellants made a fresh application to the High Court for an interim injunction restraining the respondents or their servants or agents from causing or permitting any further work on the construction of an airport runway on the island of Barbuda until the determination of the appellants’ claim for judicial review. The learned judge heard the application and delivered her judgment refusing the injunction on 7th February 2020. The appellants being dissatisfied with the learned judge’s decision appealed to this Court, relying on six grounds of appeal. All the respondents opposed the appeal and the second respondent counter appealed challenging the learned judge’s finding that the appellants had standing to apply for judicial review of the DCA’s decision to approve the development. The main issues that arise for determination before this Court are: (i) whether the appellants had standing to apply for judicial review; and (ii) whether the learned judge erred in her decision to refuse to grant the interim injunction sought by the appellants.

Held: allowing the counter appeal; dismissing the appeal and the claim in the High Court; and making no order as to costs, that:

1. In order to have standing to apply for judicial review under Part 56.2 of the **Civil Procedure Rules 2000** an applicant must have a “sufficient interest” in the subject matter of the application. The court should adopt a liberal and relaxed approach as to what constitutes a “sufficient interest” under CPR 56.2. However, not every interest will qualify under the rule. Part 56.2 is qualified by the word “sufficient”. Therefore, a person who applies “simply as a citizen” who

has a grievance cannot use the judicial review process to question the decisions of a public body.

Part 56.2 of the **Civil Procedure Rules 2000** applied; **Walton v Scottish Ministers** [2012] UKSC 44 considered; **Attorney General v Martinus Francois** [2004] ECSCJ No. 46, (delivered 29th March 2004) considered; **Treasure Bay (St Lucia) Limited v The Gaming Authority et al** [SLUHCV 2011/0456] (delivered 25th September 2014, unreported) considered; **Neville Pole v Licensing Magistrate** [2018] ECSCJ No. 80, (delivered 27th March 2018) considered.

2. At the leave stage, if it is clear that the applicant does not have even a prima facie case that he has a sufficient interest in the subject matter of the application, permission should not be granted for the matter to proceed to trial. However, if there is a prima facie case that the applicant has a sufficient interest, or if the evidence on standing is unclear, the matter should go forward and be determined at trial. From the evidence presented in this case the appellants do not have sufficient interest in the subject matter of the application within the meaning of Part 56.2. As such, the respondents are not obliged to disclose the EIAs to them and they cannot rely on the absence of those documents as a way to bolster their claim for standing in this matter. The claim must therefore be dismissed.

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 applied.

3. In considering an application for an interim injunction in which there is a public law element, the court should follow the guidelines in the **American Cyanamid** case, with the necessary modifications appropriate to the public law element. As it relates to the issue of the adequacy of damages, this is rarely featured in a judge's decision whether to grant or refuse an interim injunction. This is also true in this case. In considering the balance of convenience, the public law element is a special factor and the court has a wide discretion to take the course which seems most likely to minimise the risk of an unjust result. The learned judge in the court below carried out the balancing exercise as required by **American Cyanamid** and although she found that there were serious issues to be tried and that the adequacy of damages did not arise, she concluded that the balance of convenience weighed in favour of refusing the application for the injunction, thereby allowing the airport project to continue. The learned judge's decision to refuse the injunction did not exceed the generous ambit within which reasonable disagreement is possible.

Beryl Isaac and others v The Grenadian Hotel Limited [2017] ECSCJ No. 299, (delivered 15th December 2017) applied; **Belize Alliance for Conservation Non-Governmental Organisation v Department of the Environment of Belize (BACONGO)** [2003] 1 WLR 2839 applied; **Michel**

Dufour and others v Helenair Corporation Ltd and others [1996] ECSCJ No. 11, (delivered 12th February 1996) applied.

JUDGMENT

- [1] **WEBSTER JA [AG]:** This is an appeal against the judgment and order of the learned trial judge (“the Judge”) by which she dismissed the appellants’ application for an interim injunction restraining the respondents or their servants or agents from causing or permitting any further work on the construction of an airport runway on the island of Barbuda until the determination of the appellants’ claim for judicial review of the decision to approve the airport project or further order.

Background

- [2] Barbuda is the smaller of the two islands comprising the State of Antigua and Barbuda. The island measures approximately 62 square miles and has a population of less than two thousand persons. Transportation to the island has traditionally been through the Codrington Airport. In February 2017, the Government of Antigua and Barbuda (“GOAB”) decided to build a new airport on the island. In November 2017, the developers of the airport project, BHM International Ltd. (“the Developer”), applied to the first respondent, the Development Control Authority (“DCA”), for a development permit. The application was accompanied by an environmental impact assessment study (“EIA”) dated 26 June 2017. The Department of the Environment (“DoE”) which advises the DCA on environmental issues and projects, was not satisfied with the June 2017 EIA and recommended only approval in principle of the development subject to submission of an updated EIA. The Developer produced and submitted a revised and updated EIA in May 2018.
- [3] On 18th July 2018, the DCA granted a development permit for the construction of the airport. The permit was granted before receiving the recommendation of the DoE following its review of the revised EIA. The revised EIA was reviewed

by the DoE and by letter dated 10th August 2018, the DoE recommended to the DCA that the project be approved on condition that certain mitigation measures be identified and implemented. On 10th September 2018 the DCA wrote to the second respondent, the Antigua and Barbuda Airport Authority (“ABAA”), granting conditional approval of the project in line with the DoE’s recommendations in its letter of 10th August 2018.

- [4] In the meantime, on 6th July 2018 the appellants, who are citizens and residents of Antigua and Barbuda residing in Barbuda, applied to the High Court for leave to file judicial review proceedings challenging the DCA’s approval of the project and seeking an interim injunction to stop construction of the work on the airport runway. On 2nd August 2018, the Judge granted both applications. However, the injunction was set aside by the Court of Appeal on 11th September 2018.
- [5] On 18th September 2018, the appellants made a fresh application to the High Court for an interim injunction and for directions for disclosure of the EIAs that had been submitted by the Developer. The appellants later buttressed the application with a report by a firm of environmental consultants from Washington DC, Deborah Brosnan & Associates. The Brosnan report was commissioned by the Barbuda Ocean Club, a private organisation, in collaboration with the GOAB. The report is a comprehensive review of the environmental and other features of the airport project. One of its findings is that the proposed runway will be built on karst limestone which could result in sinkholes forming during and after construction, and that there are risks that stormwater runoff or construction activities could affect the groundwater flow in the area. The report made recommendations for addressing and mitigating these issues.
- [6] The Judge heard the application for the interim injunction on various dates in 2019 with a final hearing on 17th December 2019. On 7th February 2020, the

Judge delivered her judgment refusing the injunction. The appellants were dissatisfied with the Judge's decision and appealed to this Court. This is the decision on the appeal.

The Appeal

[7] The notice of appeal lists six grounds of appeal. The first four grounds relate to the Judge's handling of the DCA's decision-making process for processing and granting the development permit. The sixth ground is that the Judge made errors and as a result of the errors her decision exceeded the generous ambit within which reasonable disagreement is possible and was plainly wrong. The fifth ground relates to the Judge's failure to deal with that part of the application that was before her for directions including directions for the disclosure of the EIAs.

[8] All the respondents opposed the appeal and the second respondent, the ABAA, went further by filing a counter notice of appeal alleging that the Judge erred by finding that the appellants had standing to apply for judicial review of the DCA's decision to approve the development. The ABAA's position is that the appellants do not have standing to bring judicial review proceedings and the entire claim should be struck out. This is a threshold issue and I will deal with it first.

The Appellants' standing

[9] The starting point in the analysis of the appellants' standing to apply for judicial review is part 56.2 of the **Civil Procedure Rules 2000** ("CPR"). Part 56.2 reads –

“56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes –

- (a) any person who has been adversely affected by the decision which is the subject of the application;
- (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph

- (a);
- (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
- (d) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;
- (e) any statutory body where the subject matters falls within its statutory limit; or
- (f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.”

The rule speaks for itself. To have standing to apply for judicial review the applicant must have a sufficient interest in the subject matter of the application. Part 56.2 does not define what is a “sufficient interest”. This is not surprising because such interests cover an infinite number of situations. Each case must be decided on its facts. What the rule does is that it lists six categories of persons or bodies in sub-paragraphs (a) to (f) of sub-rule (2) who are persons who have an interest in the subject matter of the application, once they satisfy the criteria in the sub-paragraph that they are relying on. The list is not exhaustive¹ but the Court has not been directed to any case where an applicant did not rely on one of the six sub-categories in Part 56.2 to prove that it has a sufficient interest. In this case the appellants relied on sub-paragraph (a) and submitted that they are persons who are adversely affected by the proposed development and therefore they have a sufficient interest in the subject matter of the application and standing to apply for judicial review.

[10] The Judge dealt with the issue of the Appellants’ standing at paragraph 26 of the judgment. She referred to section 25(2)(a) of the **Physical Planning Act, 2003**² (“the Act”) which provides that the DCA shall give consideration to any representations made by any person with regard to an application or the probable effect of the proposed development. As the appellants had made

¹ *Treasure Bay (St. Lucia) Limited v The Gaming Authority et al* (SLUHCV 2011/0456) (delivered 25th September 2014, unreported) at paragraph 73 per Ramdhani J.

² No. 6 of 2003 of the Laws of Antigua and Barbuda.

representations to DCA (and other Government officials) about the development before it was approved, the Judge found that they were captured by section 25(2)(a) and reserved any further consideration of the issue of standing for the trial. In effect, the Judge made a preliminary finding that the appellants had standing based on their interaction with the DCA and a final decision on the issue will be made at the trial. The Judge did not cite any authority to support her finding that a person making representations to the DCA during the approval process has standing to apply for judicial review of the DCA's decision.

[11] At the commencement of the hearing of the appeal, the Court heard submissions from learned counsel for the ABAA, Mr Hugh Marshall, on the ABAA's counter notice of appeal that, the appellants did not have standing to apply for judicial review. Mr. Marshall submitted that the Judge erred in finding that the appellants fall under section 25(2)(a) of the Act and by extension had at least limited standing to apply for judicial review. I agree with Mr. Marshall's submission. Section 25 of the Act deals with matters that the DCA should consider in an application for development, including representations made by any person regarding the application or the probable effect of the proposed development. A representation *per se* does not give a person standing to apply for judicial review under Part 56.2 of the CPR. It would establish standing only if it shows that the person has a sufficient interest in the subject matter of the application.

[12] What then is a sufficient interest for the purpose of Part 56.2 of the CPR and how should the court deal with the issue when it arises.

[13] Mr. Leslie Thomas, QC, who appeared for the appellants, submitted that the issue of the appellants' standing should not be decided at this stage. It is only in simple cases that the issue should be considered at the leave or pre-trial stage. Further, the issue of the appellants' standing is not simple and it should be considered in the full legal and factual context of the case at the trial. However, if the matter is considered at this stage a liberal approach to the meaning of

“sufficient interest” should be used. On the evidence the appellants have sufficient interest in the subject matter of the application and the case should be allowed to go to trial (where the issue of standing can be revisited against the full legal and evidential background).

[14] Mr. Marshall submitted that in this case the issue of standing is a threshold issue that should be resolved now because the appellants do not have a sufficient interest in the subject matter of the application. They may be aggrieved by the DCA’s decision to approve the project and unhappy with the development, but they do not have a sufficient interest in the project and they fall into the category of persons described pejoratively in the cases as “busybodies”.

[15] The issue of what constitutes a “sufficient interest” was considered in detail by the House of Lords in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.**,³ a decision that was referred to both parties to the counter appeal. The opinions of their Lordships, in particular Lord Diplock and Lord Roskill, referred to the background to the requirements for standing in judicial review applications. Prior to the introduction of Order 53 in 1977 in the United Kingdom, there were varying rules relating to the three prerogative writs of certiorari, mandamus and prohibition. Order 53.⁴ did away with what Lord Diplock described as the outdated rules relating to standing for bringing the prerogative writs and introduced a single requirement that the applicant must have a sufficient interest in the subject matter of the application. In commenting on the new rule Lord Diplock said:

“Rule 3 (5) specifically requires the court to consider at this stage whether “it considers that the applicant has a sufficient interest in the matter to which the application relates.” So this is a “threshold” question in the sense that the court must direct its mind to it and form

³ [1982] AC 617.

⁴ RSC Order 53 is now contained in section 31(3) of the Senior Courts Act 1981 (UK) and is substantially the same as Eastern Caribbean CPR 56(2) which is set out in paragraph 9 above.

a prima facie view about it upon the material that is available at the first stage.”⁵

Lord Roskill commented on the continued need for the court to find that an applicant has a sufficient interest in the subject matter of the application –

“[T]he court is enjoined by rule 3(5) not to grant leave unless the applicant has “sufficient interest” in the matter to which the application relates, plain words of limitation upon an applicant’s right to relief.”⁶

[16] Their Lordships also dealt with the timing for addressing the issue of standing. Their position was summed up by Lord Wilberforce -

“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to 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. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context.”⁷

[17] The relevant principle that I extract from the opinions expressed by their Lordships is that the requirement for establishing an applicant’s standing to apply for judicial review is still a part of the procedure in England. Part 56.2 of our **Civil Procedure Rules** Part 56.2 contains the same requirement of a sufficient interest in the subject matter of the application as in RSC 53(5), and the same considerations relating to standing apply in the Eastern Caribbean. The court should review all the available material at the leave stage. If it is a simple matter and it is clear that the applicant does not have even a prima facie case that he has a sufficient interest in the subject matter of the application, permission should not be granted for the matter to proceed to trial. The courts should not be burdened with trials brought by

⁵ [1982] A.C. 617 Page 642.

⁶ Ibid at page 658.

⁷ Ibid at page 630.

persons who do not have a sufficient interest in the subject matter of the application. However, if there is a prima facie case that the applicant has a sufficient interest, or if the evidence on standing is not definitive either way, the matter should go forward and be determined at trial.

[18] The modern cases also show that in considering the issue of standing the court should adopt a liberal and relaxed approach as to what constitutes a sufficient interest under CPR 56.2. Mr Thomas, QC relied on decisions of the courts of the Eastern Caribbean that support this approach in **Attorney General v Martinus Francois**;⁸ **Treasure Bay (St. Lucia) Limited v The Gaming Authority and others**;⁹ and **Neville Pole v Licensing Magistrate**.¹⁰

[19] Mr. Thomas, QC submitted further that any member of the Barbudan community, including the appellants, could apply to challenge the development because of their concerns about the degradation of the environment for themselves and future generations – proof of a financial interest is not necessary. He referred to the speech of Lord Reed in **Walton v Scottish Ministers**¹¹ and cited the following passage –

“In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.”¹²

⁸ [2004] ECSCJ No. 46, (delivered 29th March 2004).

⁹ SLUHCv2011/0456 (delivered 25th September 2014, unreported).

¹⁰ [2018] ECSCJ No. 80, (delivered 27th March 2018).

¹¹ [2012] UKSC 44.

¹² *Ibid* at para 94.

[20] In my opinion this case does not alter the requirement in Part 56.2 for an applicant to show that he has a sufficient interest in the subject matter of the application for the following reasons:

- (a) The Walton case is not a judicial review case. The complainant claimed to have been affected by decision of the Scottish Ministers to build a new highway close to his home. He appealed to the Court of Sessions under the appeal provisions in the Roads (Scotland) Act, 1984 which required him to show that he was a “person aggrieved” by the Ministers’ decision. On appeal to the Supreme Court their Lordships considered the meaning of the expression “person aggrieved” in the context of a statutory appeal under the Roads Act. The case had nothing to do with the requirement for an applicant to have a sufficient interest to apply for judicial review under the UK equivalent of Part 56.2.
- (b) The case did not alter the accepted common law position that a busybody or a person who is applying “simply as a citizen”¹³ cannot question the decisions of a public body using the judicial review process. This is apparent from the first two sentences in the dictum of Lord Reed cited in the preceding paragraph. An applicant must have a sufficient interest in the subject matter of the decision challenged.
- (c) Not every interest will qualify under Part 56.2. The rule makers chose to qualify the required interest with the word “sufficient”. None of the cases cited to this Court says that an applicant for judicial review does not have to have a sufficient interest in the subject matter of the application.

[21] Mr. Marshall did not dispute that the court should apply a liberal and relaxed approach to the issue of standing and that the threshold at the leave or pre-trial stage is a very low one. Bearing all this in mind he submitted that on the evidence

¹³ Ibid.

the appellants had not established that they have a sufficient interest in the subject matter of the application. He emphasised that beyond the fact that they are living in Barbuda, there is no evidence that they have been adversely affected by the development. They do not live nor work in the area close to the airport development and they have no interest in the land on which the development is taking place. Their interest is limited to the fact that they are citizens who are concerned with the possible effects of the development on the environment. They brought an individual action and there is no claim that they are representing any other persons or group of persons, and there is no evidence that they have expertise in the subject matter of the application. There is evidence that the first appellant, Mr. John Mussington, is a marine biologist but the land-based airport development has nothing to do with the sea. In short, Mr. Marshall's position is that the appellants may be upset about the development and have private grievances, but that is not the same as having a "sufficient interest", even on a prima facie basis, to apply to the court to prevent the GOAB from carrying out the development of the new airport in Barbuda.

[22] I will deal with Mr. Thomas's response to this issue on two levels. Firstly, he pointed out that on the evidence that is available the airport runway will be built on cavernous, karst limestone, endangering aircraft and passengers, and there is also the risk of groundwater contamination. The appellants live and work in Barbuda, a small island community, and are concerned about the degradation of the environment for themselves and future generations. As such they have a sufficient interest to apply for judicial review.

[23] Secondly, Mr. Thomas, QC complained stridently about the unavailable evidence, namely, the two environmental impact assessment studies and related documents that have not been disclosed to the appellants. The factual background to this issue is set out in paragraphs 2 and 3 above. Mr Thomas submitted that the absence of the information contained in the reports puts the appellants in the untenable position of not being able to prepare a proper application that could

assist in showing that they have a sufficient interest in the development. I do not see how the reports can assist on the issue of standing. It is common ground that the first EIA was defective and the second EIA was requested by the respondents to address the shortcomings in the first report. The second EIA was considered and accepted by the DoE which in turn recommended that the DCA approve the development on the condition that the Developers adopt and implement specified mitigation and monitoring measures.

[24] The content of the second EIA is speculative and I do not see that the appellants can rely on the non-disclosure of that document, or any other document, to give them standing to apply. At best, the second EIA may disclose that the concerns in the first report were not properly addressed. This may give a person with standing a stronger basis for challenging the EIA and the permission to develop the airport, but it does not help the appellants to prove that they have standing to apply under Part 56.2. They are and continue to be concerned citizens residing in Barbuda who are aggrieved by the airport development, but they are not adversely affected by it in the sense contemplated by Part 56.2. Further, they are not persons with the appropriate qualifications for bringing this application on behalf of other persons who have a sufficient interest in the application within the meaning of Part 56.2. In short, I find, with the utmost respect, that they fit the legal description of “busybodies”.

[25] In the absence of a finding that the appellants have standing to apply for judicial review, the respondents are not obliged to disclose the EIAs to them and they cannot rely on the absence of those documents as a way to bolster their claim for standing in this matter.

The Appeal

[26] My findings on the counter notice of appeal that the appellants did not have standing to bring the claim and that the claim must therefore be dismissed are such that the Court is not required to consider the issues in the substantive

appeal. However, the appeal was fully argued and in deference to the very able and complete submissions of counsel I will deal summarily with the Judge's refusal to grant the injunction sought by the Appellants.

[27] Grounds (a), (c), (d) and (e) of the notice of appeal are matters that would be ventilated if the case were to proceed to trial. For the purpose of the injunction application, Mr. Thomas, QC submitted that they are serious issues to be tried and the Judge's treatment of these issues affected her assessment of the balance of convenience. Ground (b) challenges the Judge's finding that the balance of convenience favours the refusal of the interim injunction.

[28] The Judge referred in her analysis to the well-known and accepted principles for granting interim injunctions in **American Cyanamid Co v Ethicon Ltd**¹⁴ and found that there are serious issues to be tried regarding the construction of the airport development without development approval and a proper EIA as required by sections 17 and 23 respectively of the Act.¹⁵

[29] On the issue of the adequacy of damages the Judge relied on the principle that in public law cases, the adequacy of damages rarely features in the decision whether to grant or refuse an interim injunction, and concluded that this was such a case.¹⁶ This finding is consistent with the settled principles in several cases including this Court's decision in **Beryl Isaac and others v The Grenadian Hotel Limited**¹⁷ and the decision of the Privy Council in **Belize Alliance for Conservation Non-Governmental Organisation v Department of the Environment of Belize (BACONGO)**.¹⁸

¹⁴ [1975] AC 396.

¹⁵ Paragraphs 28 and 29 of the judgment in the court below.

¹⁶ Paragraph 30 of the judgment in the court below.

¹⁷ [2017] ECSCJ No. 299, (delivered 15th December 2017).

¹⁸ [2003] 1 WLR 2839.

[30] The Judge's findings on the first two issues (serious issues and damages) are not adverse to the appellants and I will restrict my comments to the third issue - the balance of convenience.

[31] The grant or refusal of an injunction is an exercise of discretion by the judge hearing the application and this Court has endorsed on numerous occasions the guidance of Chief Justice Sir Vincent Floissac in **Michel Dufour and others v Helenair Corporation Ltd and others**¹⁹ for reviewing the exercise of discretion by the trial judge:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."²⁰

[32] The Chief Justice's guidance applies with greater force in public law cases for the obvious reason that the Government, through its agencies and bodies, should be allowed to administer the law and its policies without interference unless there are exceptional circumstances. In the **Beryl Isaac** case, Thom JA, writing for the Court of Appeal, referred to the leading authorities on the approach of the courts in cases involving issues of public law and set out the following principles:

"(a) In considering an application for an interim injunction in which there is a public law element in issue, the approach to be adopted is the application of the guidelines outlined in *American Cyanamid* with the necessary modifications appropriate to the public law element.

(b) The public law element is a special factor in considering the balance of justice and the court has a wide discretion to take the course which seems most likely to minimize the risk of an unjust result.

¹⁹ [1996] ECSCJ No. 11, (delivered 12th February 1996).

²⁰ *Ibid* at para 8.

(c) Where the dispute is between a public authority and a quasi-public authority, an injunction may be granted to the quasi-public body without any undertaking in damages.

(d) It is an exceptional course for the court to restrain a public authority from enforcing an apparently valid law. A court would only take such course where having regard to all of the circumstances of the case the court is satisfied that the challenge to the validity of the law is *prima facie* firmly based and adoption of such an exceptional course is justified.

(e) A public authority acting within the law should be permitted to exercise its functions and duties for the benefit of the public.”²¹

The reference to the balance of justice in sub-paragraph (b) above undoubtedly includes the balance of convenience and the dictum of the learned justice of appeal emphasises the court’s wide discretion in considering applications for injunctions against public bodies.

[33] The Judge addressed the balance of convenience in paragraphs 31 to 44 of the judgment. She noted that the DCA was not satisfied with the first EIA and granted approval in principle subject to the submission of a further EIA. Work on the project stopped and was only resumed after the submission of the second EIA and associated reports, and the grant of conditional approval by the DCA. The Judge paid careful attention to the professional evidence of the Chief Environmental Officer, Diane Black-Layne, and the independent report of Dr. Deborah Brosnan of Brosnan & Associates, which she found to be “very instructive”. The Judge noted that the Brosnan report did not recommend that the project be stopped because of its impact on the environment, but the monitoring and reporting plan provided by the Developer to the DCA should be rigorously adhered to and a component should be added to address storm water management. The Judge concluded at paragraph 44 that “[T]he Court is of the view that the balance of convenience lies against granting interim injunction sought.”

[34] The Judge referred to the public law element in the case when she was dealing with the damages issue²² and she must have been mindful when considering the

²¹ Supra note 17 at paragraph 12

balance of convenience that the development of the new airport was an important socio-economic project that was important to the people of Antigua and Barbuda, and that substantial public expenditure had already gone into the project. Also, there was no evidence of irremediable harm to the appellants and the potential harm to the environment was addressed by the Developer in the second EIA and related documents and was considered by the respondents in approving the project, and by the Judge in refusing the injunction.

- [35] The Judge carried out the balancing exercise that is required by the American Cyanamid case and although she found that there were serious issues to be tried and that the adequacy of damages did not arise, she concluded that the balance of convenience weighed in favour of refusing the application for the injunction, thereby allowing the airport project to continue. The Judge's decision to refuse the injunction does not exceed the generous ambit within which reasonable disagreement is possible and may not therefore be said to be clearly or blatantly wrong. Even if the case was proceeding to trial, I would not interfere with the Judge's decision to refuse the interim injunction.

²² See paragraph 29 above.

Disposal

[36] In all the circumstances, I would allow the counter notice of appeal and dismiss the appeal and the claim in the High Court. I would make no order as to costs.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal

By the Court

Chief Registrar