

**Briefing Paper on Claim No. HCV 3022 of 2005:
Judicial Review, Legitimate Expectation, Unreasonableness and Delay**

Applicants: Northern Jamaica Conservation Association
Jamaica Environment Trust
Cecile Carrington
Eleanor Grennan
Annabella Proudlock
John de Carteret

Respondents: Natural Resources Conservation Authority
National Environment and Planning Agency

Hearing Dates: April 27th, 28th; May 4th, 5th, 11th, 16th, 26th; June 2nd, 6th.

Counsel : Mr. Dennis Morrison, QC and Mrs. Julianne Mais Cox of
DunnCox for the Applicants
Mr. Patrick Foster, Acting Deputy Solicitor General and Mrs.
Symone Mayhew, Assistant Attorney General for the
Respondents

Judge: Justice Bryan Sykes

Background

In 2003, the Northern Jamaica Conservation Association (NJCA) became aware from press reports that there were plans to build a large hotel at Pear Tree Bottom in Runaway Bay. NJCA began to seek information from JAMPRO and the Minister of Development through the St. Ann Parish Development Committee, but received no response. NJCA had been involved in earlier efforts to have this ecologically important area declared protected since the early 1990s. Then in early 2005, the Jamaica Environment Trust (JET) realized there were plans by Hoteles Jamaica Pinero Ltd. (HOJAPI) to build a 1,918 room hotel on the site. The two groups joined forces to oppose the scale and type of the hotel development, which they believed was inappropriate for the area and contravened the St. Ann Development Order. NJCA mobilized community input and the two groups collaborated on a review of the Environmental Impact Assessment (EIA) with the help of the Environmental Law Alliance Worldwide. The EIA review was eventually signed by 22 groups and 81 individuals. NJCA and JET also attended a public meeting held on April 28th to discuss the project. However, at the time of the public meeting, the National Environment and Planning Agency (NEPA) had already given permission to HOJAPI for "limited site clearance." Despite the terms of the site clearance letter, large trees were burned and marl was spread. The environmental groups received no response to their many concerns and the environmental permit was issued for Phase 1 of the project (734 rooms) on July 26th, 2005. JET, NJCA and four individuals from the Runaway Bay area then formed an alliance to file a judicial review action on the decision to grant the environmental permit to HOJAPI. Leave to apply for judicial review was granted in November 2005. By the time the judicial review hearings began in April 2006, the hotel was fully under construction.

What The Applicants Wanted

- (1) An order of *certiorari* to quash the decision to grant a permit granted pursuant to Section 9 of the NRCA Act to HOJAPI to construct the Bahia Principe Resort at Pear Tree Bottom, Runaway Bay
- (2) An order of *mandamus* to direct the NRCA to reconsider its grant of a permit to HOJAPI Ltd.
- (3) A declaration that procedures of the NRCA were not complied with in granting this permit
- (4) Such further or other relief as may be just.

Main Points of the Applicants' Case

That the NRCA acted irrationally and unreasonably when it granted the permit to HOJAPI because:-

- (1) It failed to take into account all relevant considerations when deciding to grant the permit
- (2) It acted outside its statutory mandate stated in Sections 4 and 9 (5) of the NRCA Act which says a permit shall not be granted if the development to which an application relates is or is likely to be injurious to public health or to any natural resource
- (3) It failed to take into account and properly address the material concerns of the Water Resources Authority (WRA) and the St. Ann Parish Development Committee before granting the permit
- (4) It failed to meet the legitimate expectations of the applicants that:-
 - a. The public meeting which is part of the consultation process would be conducted in accordance with the guidelines for holding public meetings published by NEPA
 - b. A second public meeting would be held before any permit would be granted to HOJAPI

What the Judge Ruled

Justice Bryan Sykes concluded that the order of *certiorari* should be granted quashing the permit for the following reasons:-

- (1) That NRCA failed in its statutory duty to consult according to law with the relevant government department and agencies by failing to circulate the marine ecology report to them and in particular to the Water Resources Authority
- (2) That NRCA failed to take into account the issues relating to the set back distance raised by the Water Resources Authority in its letter of June 21
- (3) That the NRCA and NEPA failed to meet the legal standard of consultation by not circulating the marine ecology report to members of the public and the applicants and also by failing to inform members of the public and the applicants that the document circulated was incomplete, thereby increasing the real possibility that the public and the applicant might make incorrect conclusions about the impact of the development at Pear Tree Bottom

- (4) That the NRCA and NEPA failed even after receiving the marine ecology report to put that information in the public domain without advancing any overriding public interest why this was not possible or even desirable
- (5) That the NRCA and NEPA failed to give adequate weight to the obvious empirical failings of the EIA, thereby depriving themselves of the opportunity to put in place adequate controls in light of the circumstances that actually existed in the ecologically sensitive area. Unless there was reasonably accurate empirical data in the EIA in light of the fact that neither NEPA nor the NRCA nor anyone else undertook such studies to submit to NEPA or the NRCA, there was no evidence upon which the NRCA and NEPA could act in determining the proper terms to include in the permit. Without a proper evidential basis, it would be difficult to see on what basis an effective monitoring programme could be developed, since one would need to know the true ecological state of Pear Tree Bottom at the time the monitoring programme is implemented.
- (6) That the NRCA and NEPA failed to demonstrate that they conscientiously considered the issue of the adequacy of the setback raised in the July 21 (sic) [should be June 21] letter from the WRA

Justice Bryan Sykes also directed an order of *mandamus* to the NRCA to reconsider its decision to grant a permit to HOJAPI.

Justice Sykes further declared as follows:-

...that the NRCA and NEPA breached their own stated standards of consultation in that they failed to give the public and the applicants all information required for them to make a fully informed and intelligent decision when it withheld the marine ecology report and caused the public to deliberate on a document which to the certain knowledge of the NRCA and NEPA was incomplete; further, the NRCA and NEPA continued the misleading picture in that at the public meeting when an additional thirty days was given to comment on the EIA the NRCA and NEPA even then did not disclose to those present the document they were deliberating on was incomplete. This was a breach of the legitimate expectation of the applicants that when they were invited to participate in the consultation, either as members of the public or in their own right, the information provided would be full, fair and accurate and that any defect in the information provided would have drawn (sic) to the attention of the public and the applicants.

The consultation process was flawed because an important part of the EIA was not placed in the public domain and the public was not told about this omission. The public were led to believe that the EIA was all that there was when this was not the case and this was known to the NRCA and NEPA. The public was therefore deprived of participating in a consultation process that was based on full and complete information. The NRCA and NEPA did not give sufficient weight to the empirical weaknesses of the EIA and this weakness was all the more significant when the proposed project was to take place in an ecologically sensitive area. That fact alone ought to have suggested that a relatively high quality of empirical work needed to be undertaken. The NRCA therefore failed to act in accordance with its mandate given in the NRCA Act.

The above is drawn from the written judgment handed down by Justice Bryan Sykes. Interested persons should read the entire Judgment to get the full details of Justice Sykes' reasoning.

Justice Sykes imposed a 21-day stay on the quashing of the permit, to give the Attorney General time to review the written judgment. Construction on the hotel can continue during this period.

Some Interesting Paragraphs in the Judgment

“It would seem to me that environmental legislation ought to attract a fairly high level of scrutiny. The consequences of bad environmental management can be disastrous and in some cases fatal. Those of us who have lived in this region where hurricanes travel with great and increasing frequency have seen the damage that can be wrought.”

“The law has matured enough for us to conclude that the process of decision making is just as important as the decision itself and may be, depending on the subject matter, even more important than the decision.”

“...the aim is not a demand for perfection in human affairs but rather about ensuring that the executive behaves lawfully. No one has argued or indeed could argue that the executive has the right to breach the law (even if the law is “merely” procedural) when making a decision it is authorized to make. This way of looking at the matter benefits the citizen or stranger who will know that he is not subject to whimsical and irrational decisions. This is not encroaching on the domain of the executive. It is about ensuring that executive power is used in accordance with the law. It enhances the rule of law and does not derogate from it which in turn can only enhance the quality of life of the citizenry.”

“...it is beyond question that the Environmental Impact Assessment has significant empirical shortcomings that might not have mattered but in the context of an ecologically important area these shortcomings loom unimpressively large.”

“I now examine the permit to see if there is evidence the concerns raised by the Water Resources Authority were conscientiously considered... sewage is mentioned in specific condition 10. It is hard to see what that this condition adds to the permit if the development will or is likely to result in the discharge of effluents. The specific condition, in my view, simply restates the legal requirement. To date, there is no evidence about the precise plan for the disposal of sewage. This is in a context where during saturation the ground water is less than three metres below ground. It seems to me that the matter was not conscientiously considered. I do not see how telling the permittee what the law already requires him to do shows conscientious consideration... Condition 10 could not be described as evidence of conscientiously taking into account the risk of contamination of ground and marine water in an ecologically sensitive area. All the condition does is to postpone the day of reckoning.”

“There are more than enough deficiencies highlighted that ought to have raised serious doubts about the quality of the empirical work of the EIA. What strikes me is that the things that required observation and measurement over a period of time were not measured or observed adequately.”

“No one could say that adhering to the rule of law is inherently bad for administration.”

“No one in this case has sought to argue that protection of the environment is a matter of relative unimportance. While it is not a first generation right on par with human rights

which attract the highest level of scrutiny, it is certainly an issue that has far reaching consequences that reverberate long after the decision maker and his generation have passed on and for that reason ought to attract a relatively high degree of scrutiny and where there are serious errors in procedure the law ought to say so and grant the appropriate remedy.”

What happens next?

HOJAPI has now made an application to the court to be heard on the question of hardship which will be caused to them if construction has to cease. Environmental Solutions Ltd. (the EIA consultants) have also applied to the court to be heard. On May 26th Justice Sykes agreed to postpone the hearing for HOJAPI appeal for one week, until June 2nd, to allow time for discussions between the parties towards a negotiated settlement. He also extended the stay on the quashing of the permit to June 27th. On June 2nd the parties asked for a further extension of time as they had not managed to arrive at a mutually acceptable agreement. Another hearing is scheduled for June 6th at which Justice Sykes will hear the appeal of HOJAPI in the event a settlement is not reached.

Do the Applicants Want the Hotel to Stop?

Not necessarily. We want the order of the court carried out; that is, a new permit issued which takes into account the missing information, puts in place a proper monitoring regime for the important natural resources at Pear Tree Bottom and enforces the conditions of the permit.

If the existing permit is to be reinstated, we need assurance in the form of a legally binding contract with NEPA/NRCA that they will take into account the relevant factors and technical advice that were not considered previously, ensure that a qualified technical team will adequately monitor this project, and provide timely access to the results of the environmental monitoring programme for all interested citizens.

Item 18 of the Environmental Permit granted to HOJAPI Limited on July 26, 2005 states, “The Permittee shall strictly implement all mitigatory measures outlined in Section 5 of the Environmental Impact Assessment report dated February 2005.” **Adequate monitoring of all permit conditions, including those referred to in Section 5 of the EIA, is not being done and is urgently required.**

For example, Section 5.2.9 of the EIA includes the specific requirement that the developer “institute and support a coral reef monitoring programme for Pear Tree Bay.” To the best of our knowledge, this condition has not been complied with, and we are very concerned at recent reports from visiting scientists that the reefs are covered with silt and suffering from a bleaching event.

Summary Prepared by:
Jamaica Environment Trust
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Updated by:
Northern Jamaica Conservation Association
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