BELIZE ALLIANCE OF CONSERVATION NON-GOVERNMENTAL ORGANISATIONS v THE DEPARTMENT OF THE ENVIRONMENT

PRIVY COUNCIL

(Lords Steyn, Hoffmann, Rodger of Earlsferry, Walker of Gestingthorpe and Sir Andrew Leggatt): January 29, 2004[1]

[2004] UKPC 6; [2004] Env. L.R. 38

LT Belize; Construction projects; Dams; Environmental impact assessments; Hydroelectric power

1 *Environmental impact assessment—Belize hydroelectric dam project—adequacy of environmental impact assessment—whether information that EIA contained error as to geology and resultant design changes required to be placed in public domain*

2 The appellant ("BACONGO") was an organisation opposed to the proposed Chalillo dam, a major and controversial hydro-electric project in Belize. The project had potential impacts in an exceptionally rich environment, but there was also great public interest in the contribution the project would make to the country's energy problem. Belize had EIA legislation which was "not wholly dissimilar" to that of the UK and EC. BACONGO argued that the environmental impact assessment ("EIA") provided in relation to the project, whilst a massive document of 1500 pages and prepared by consultants, was incomplete and deficient, and brought proceedings challenging the decisions authorising the project on this ground and that a public hearing had not been held, as required by the relevant regulations. Whilst the matter was under consideration by the Belize Court of Appeal, contracts were entered into for the work, a "ground-breaking ceremony" was held, and the Macal River Hydroelectric Development Act 2003 was passed to facilitate the project. Prior to the Court of Appeal hearing, a public hearing regarding the EIA was held. The Belize court held that it had no jurisdiction to grant an injunction to restrain the works pending an appeal on the substantive issues to the Privy Council. BACONGO then asked the Privy Council to exercise its inherent jurisdiction to preserve the subject-matter of the appeal by granting an injunction to order a halt to the construction works. That application was dismissed, and the substantive issue of whether to quash the decision of the Belize Department of the Environment ("DoE") to grant environmental clearance for the project was then considered by the Privy Council,

[1] Paragraph numbers in this judgment are as assigned by the court.

following the rejection of an appeal against an original application for judicial review by the Belize Chief Justice.

H3 The procedure for undertaking environmental assessment under Belize law was that an EIA in prescribed format was required, which was then considered by the National Environmental Appraisal Committee (NEAC). NEAC then advised the DoE as to the adequacy of the EIA. The criticisms made by BACONGO included a number of matters where it was said that information had been incomplete, and where surveys or mitigation measures on matters such as population, archaeology, wild life and rare plants had been unlawfully left until a later stage. A further alleged deficiency was that it contained an error as to the geology of the site for the dam. The EIA stated that although the sides of the valley were of sandstone, the floor was granite. This had provoked discussion within NEAC as to the accuracy of classification of the rock as 'granite'. The course agreed was to make the decision in principle subject to further assessment as part of the Environmental Compliance Plan (ECP) which would inform the issue of the conditions to be imposed. If the rock was in fact sandstone, then issues with respect to adjustments of design would be addressed in the ECP. A further independent report was then commissioned which concluded that the rock was in fact sandstone, but that subject to taking this into account in the detailed design, the site was geologically suitable for dam construction. This independent report was not referred to by the DoE or the Dam developers in the earlier proceedings, and was only disclosed very shortly before the Privy Council hearing.

H4 The three grounds of appeal were:

(1) that either the EIA had not complied with the provisions of the Act and Regulations, and there had consequently been no EIA within the meaning of the Act, or, alternatively, that given the deficiencies of the EIA, it had been unreasonable or irrational for the DoE to treat it as an adequate basis for approving the project;
(2) that the DoE had acted unlawfully in not holding a public hearing before making its decision; and
(3) that the Belize authorities were biased in favour of the project.

H5 Ground (1) included submissions that the approach of undertaking further assessment as part of the ECP denied the opportunity for public debate on the relevant information.

H6 **Held,** in dismissing the appeal:

H7 (1) Although the project would have severe environmental consequences, the decision to approve construction was one that Belize, as a sovereign state, had been entitled to take as a matter of national policy. Adopting the observations of Cripps J. in the Land and Environment Court of New South Wales in *Prineas v Forestry Commission of New South Wales* ((1983) 49 LGRA 402, 417) that the 'determining authority' was not under a standard of absolute perfection, but rather there was a concept of reasonableness, and provided that an EIA was comprehensive in its treatment of the subject matter, objective in its approach, and

met the requirement that it alerted the decision maker and members of the public to the effect of the activity on the environment, and to the consequences to the community inherent in the carrying out or not carrying out of the activity, it met the standards imposed by the regulations. The fact that the EIA had not covered every topic and explored every avenue advocated by experts, did not necessarily invalidate it, or require a finding that it did not substantially comply with the statute and the regulations. It was impossible to say that the EIA was inadequate to meet the requirements of the relevant legislation. This was not only common sense but was contemplated by the terms of the Belize legislation itself: reg.5(f) stated that an EIA should include an indication of "gaps in knowledge and uncertainty which may be encountered in computing the required information", and reg.19(b), prescribing the form of an EIA, said it should contain a summary which highlighted the "conclusions, areas of controversy and issues remaining to be resolved".

(2) As to the geology error in the EIA, the issue was whether the DoE had acted lawfully in approving the project when there was substantial doubt as to whether the EIA was correct in saying the floor was granite. The classification as sandstone or granite would not have made any significant difference as to the safety of the dam, and although it had been argued that a dam built on sandstone would have been different to one envisaged by the EIA as being built on granite, there was no evidence as to how it would have been different.

(3) The allegations as to bias, which were now against the DoE, rather than NEAC as had originally been made, could not now be raised and, in any event, were unsustainable.

Per Lords Walker and Steyn (dissenting):

(4) The onus on not only the Government but also the developers had been to conduct the judicial review litigation with 'all the cards on the table', and effectively they had filed affidavits which had misled the lower courts into believing that the EIA provided complete and accurate geological data when the NEAC met and voted for environmental clearance.

(5) The method of rolled concrete construction referred to in the EIA might or might not be appropriate for a dam built on sandstone. There was no evidence on the matter, which was not one for the Privy Council in any event. But it was a matter highly relevant to the competence and adequacy of the EIA. Thus the geology in the EIA had been seriously wrong. The predominantly sandstone bedrock was probably capable of providing a satisfactory foundation for a dam, but only if the new geological information was taken into account in the design, and under the Act and the Regulations the design of such an important public works project was required to be included in the EIA. Thus it should have been the subject of public consultation and public debate before approval, and before work started on the project. Instead there were to be changes in the design, but the nature of the changes had been withheld from the public. Thus the case was stronger than in '*Berkeley v Secretary of State for the Environment*' [2001] 2 A.C. 603, as the rel-

evant information had not been in the public domain even if the public embarked on the most protracted and determined 'paper chase'.

H12 (6) Belize had enacted comprehensive legislation for environmental protection and direct foreign investment, and if it had serious environmental implications, it had to comply with that legislation. The rule of law must not be sacrificed to foreign investment, however desirable, and it was no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize were entitled to be properly informed about any proposals for alterations in the dam design before the project was approved and before work continued with its construction.

H13 **Legislation referred to:**

Directive 85/337/EEC on environmental assessment
Directive 92/43/EEC on habitats
Canadian Environmental Assessment Act S.C. 1992
(Belize) Environmental Protection Act 1992, ss.3, 20, 21 and 22
Environmental Impact Assessment Regulations Belize 1995 (S.I. 1995/107), regs 5, 7, 15, 16, 18, 19, 22, 23, 24, 25, 26 and 27

H14 **Cases referred to:**

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16; (2001) 81 P. & C.R. 35; [2000] 3 P.L.R. 111; [2001] J.P.L. 58; [2000] E.G.C.S. 86

Bow Valley Naturalists Society v Minister of Canadian Heritage [2001] 2 F.C. 461

Prineas v Forestry Commission of New South Wales (1983) 49 LGRA 402

R. v Cornwall CC Ex p. Hardy [2001] Env. L.R. 25; [2001] J.P.L. 786

R. v Lancashire CC Ex p. Huddleston [1986] 2 All E.R. 941; (1986) 136 N.L.J. 562

R. v Rochdale MBC Ex p. Milne (No.2) [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note); [2001] J.P.L. 470; [2000] E.G.C.S. 103

JUDGMENT

[MAJORITY JUDGMENT DELIVERED BY LORD HOFFMANN]

122 **DISSENTING JUDGMENT BY LORD STEYN** I am in complete agreement with the judgment of Lord Walker of Gestingthorpe.

Commentary

C1 This was always going to be a highly controversial decision, which is probably evidenced by the 3:2 split on the Committee. The approach taken by the Privy Council in the hearing of the application for an interim injunction gave the financial consequences of delaying or preventing the project great weight, together with the compromising of Belize's economic development through security of energy supply. It would appear that the substantive decision as to the merits of the case have been undertaken in that context, at least by the majority, despite the lyrical description of the exceptionally rich environment which would undoubtedly be equally compromised. Equally, the differences between the legislative schemes in force in Belize and under domestic and European law should be borne in mind, whereby the Belize authorities appear to be under less rigid duties, and to have more discretion.

C2 The impossibility of imposing requirements for 'perfect' environmental impact assessments is fairly unarguable, although the difficult issue remaining is where to set the threshold that such assessments must reach. The latest case where this would appear to be tested is that of ' *R.(Burkett) v London Borough of Hammersmith and Fulham*' ([2004] EWCA Civ 105), where leave has been granted to appeal to the Court of Appeal to consider a not dissimilar situation where the defects identified in an environmental impact assessment were said to have been 'rectified' through subsequent meetings and submissions within the planning authority, with the claimant submitting that insufficient effort had been made to make the results of those findings available to the public for consultation. The claimant in *Burkett*, not surprisingly, bases the challenge on the approach of the House of Lords in *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* ([2001] Env. L.R. 16). However, the contrast between Lord Hoffmann's strict approach to, and elevation of the importance of public participation within environmental impact assessment in *Berkeley*, and that taken in the present case, does appear rather stark. In the present case the public was completely denied the opportunity to participate in the discussion of the impacts of a change in design required from the realisation that the geology information was incorrect in that the floor of the valley was granite, and not sandstone as had been believed. Despite this error being known for almost two years without the public or judiciary being informed, which would appear to compound the procedural failures, the majority on the Judicial Committee considered that there was no evidence as to the differences that would result for the dam project. This contrast is unlikely to prove of help to the claimant in *Burkett*, to say the least, although Lord Walker's statement that the present

case was stronger than that of the claimant in *Berkeley* may provide some comfort. On the issue of the geological error, the approach taken by the majority of the Privy Council appears to be based upon limited evidence, which suggested that the age of the sandstone meant that it was very similar in load bearing capacity, permeability, etc, to granite. However, there seems to have been limited opportunity to counter this evidence (given the Belize authorities' conduct), and there was no evidence that the difference between a granite and a sandstone floor could not have affected the design of the dam, even if it suggested that it need not in view of the age of the sandstone (and resulting properties). This then left open the possibility that (a) changes might be required, and the impacts of such changes could not have been have been properly assessed, or (b) if there was no design revision, that the impacts would have differed. Nor could the significance or otherwise of design or impact changes have been assessed until they were known and evaluated. The factor which seems to have proved most important is the age.