COUNTRY REPORT:
The Problem of Unpermitted Development and Fragmented Environmental Laws

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Introduction

This report is a brief overview of two cases which appeared before the courts in The Bahamas concerning improperly permitted developments. The first case involved a captive marine mammal facility on Blackbeard's Cay, and the second case involved the dredging of almost 1,000,000 cubic feet of seabed, including the destruction of coral reefs and other marine resources, in Bimini and the building of a 1,000 foot dock, to accommodate a fast cruise ferry from Miami. Both cases demonstrated a misunderstanding of the requirements of national statutes by government departments and, in the second case, the courts. In a small jurisdiction it is unusual to have such a busy year of environmental litigation. The second case, involving Bimini Bay, garnered both national and international attention. Jurisprudence in the Bimini Bay case relied heavily on the Belizian BACONGO case, covered in the IUCN eJournal's 2014 national report of The Bahamas,[1] further illustrating the regional importance of the majority decision in that case. Very little attention was paid to lack of public consultation in both cases, further highlighting the need for comprehensive legislation requiring EIAs, public consultation, a freedom of information act, and a statutorily incorporated environmental protection agency to enforce environmental legislation.

[1] 'Country Report: The Bahamas, Access to environmental information, EIAs and Public Participation in Development Decisions' by Lisa Benjamin, IUCN eJournal 2014(5), http://iucnael.org/en/component/docman/doc_download/1137-iucn-academy-of-envionmental-law-ejournal-issue-5-2014.html

Captive Marine Mammals on Blackbeard's Cay

In July 2014 the Bahamian environmental NGO, reEarth, brought an action against Blue Illusions Ltd and certain government officials to quash the issuing of permits to house dolphins on Blackbeard's Cay.[2] The cay is situated close to New Providence, the most populated island in the archipelago. Blue Illusions constructed a destination facility for cruise passengers, including a captive marine mammal facility. The dolphins had been imported from Honduras under permits obtained under CITES in June 2013, and the facility began operations on 23 July 2013. reEarth claimed that the facility did not have the proper premises licence to operate *under the Marine Mammals Protection Act (MMPA)* (s6(1)(b)), nor have site approval under *the Planning and Subdivision Act (PSA)* (s14). reEarth claimed that the site did not provide sufficient depth to house dolphins, was too close to cruise operations risking exposure to the leakage of fuel and other oil into their enclosures, had no proper separation between pens risking infection and disease, and provided for neither sun protection nor adequate hurricane protocols.[3] The NGO obtained 64,631 signatures through a petition to close the facility; a significant number in a country of just over 350,000 people. Blue Illusions had plans to dredge the area to deepen the pens. This, however, would have caused damage to coral reefs and other marine resources in an area that The Bahamas National Trust was due to designate as a major marine protected area.[4]

Justice Isaacs reviewed the matter in the Supreme Court and determined that two necessary permits under two statutes were missing. He stated that although an import licence, and a licence to operate had been obtained under CITES and the MMPA, a premises licence had not been obtained under the MMPA by the date the facility opened in July 2013. Blue Illusions subsequently applied for a premises licence in January 2014, six months after the dolphins had arrived. Justice Isaacs reviewed *Regulation 4 of the Marine Mammal (Captive Facilities) Regulations* which prohibit a premises licence being issued under stipulated circumstances. These include where there exists odours, dust, or other air contamination, where no potable water or sewage system exists, or in a facility which is not well-drained or

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[2] The Queen Minister of Agriculture and Marine Resources, Director of Fisheries and Marine Resources, Town Planning Committee, Minister responsible for Crown Lands, and Blue Illusions Ltd ex parte reEarth 2013/PUB/jrv/00034, 17th July 2014

[3] Ibid paragraph 26

[4] Ibid

subject to flooding. He stated that in the circumstances it was reasonable to conclude that the premises would not have obtained a premises licence.[5]

Justice Isaacs also determined that Site Approval had not been obtained *under the Planning and Subdivision Act (PSA).* The developers had obtained Preliminary Site Approval under the Act with four conditions attached, but there was no evidence that the four conditions had been fulfilled, and no environmental impact statement or Site Approval had subsequently been issued. The developers only had a Building Permit, and under the PSA, a Site Approval is a precondition for a Building Permit to be issued. In addition, the lease granted for the operation of a facility on Blackbeard's Cay had been issued to Blackbeard's Cay Ltd, not Blue Illusions Ltd. The seabed lease was limited to the operation of a stingray facility, and could be terminated if any other use of the seabed was employed. Any sublease necessitated consent of the Prime Minister, as Minister for Crown Lands. No evidence of variation of the lease or consent of the Prime Minister was provided to the Supreme Court.

As a result Justice Isaacs quashed the approval of the facility. The case illustrates that the authorization of the project was inadequate, and the necessary approvals had not been issued by government officials under the PSA or MMPA. The facility was in fact operating without the requisite permits, and it is unlikely that this would ever have come to light unless the judicial review had been undertaken. The government planned to appeal, but no appeal records or documents were filed by the requisite date, and reEarth has filed to dismiss the appeal.

The Bimini Bay Judgments: 'Machiavellian' Decision Making by Developers or Excessive Legislative Fragmentation?

A coalition of residents in Bimini formed the Bimini Blue Coalition, and took action against government officials and a number of respondent companies, including Resorts World Bimini, to stop the dredging of almost 1,000,000 cubic feet of seabed, including the destruction of coral reefs and other marine resources, as well as the erection of a 1,000 foot dock and manmade island, to accommodate a fast cruise ferry from Miami. The development was intended to deepen the shipping channel into Bimini Bay to enable passengers to step directly from the cruise ship onto a dock, instead of ferrying them in small boats from the cruise ship to the island of Bimini. The dredging would take place in an

[5] Ibid

area rich with coral reefs and marine biodiversity. As a result, the case garnered both national and international attention, eliciting a number of divers, scientists and fishermen to caution that the destruction of such a fragile eco-system could jeopardise diving and fishing industries, as well as important ecosystems in Bimini.[6]

The case took a tortured route through the courts, involving a number of decisions regarding violation of an undertaking, judicial review of the decision authorizing development, and security for costs. A number of the decisions question whether a permit is required for the development under *the 1997 Conservation and Protection of the Physical Landscape of The Bahamas Act (CPPL).*

On 23rd January 2014 a letter was provided by the Minister Responsible for Lands and Surveys granting approval to the developers to carry out dredging activities removing 220,000 cubic yards of seabed, in exchange for a permit fee of $110,000. On 24th January 2014 the Supreme Court heard the initial action requesting an injunction to stop the development due to the negative environmental effects set out in the EIA, lack of public consultation on the project, and to allow time for full judicial review of the project.[7] Justice Longley employed the balance of convenience test and refused the injunction, ordering security for costs in the amount of $650,000 Bahamian dollars.[8] The lack of public consultation barely figured in the judgment.

At the time of the Supreme Court decision the developers had all the necessary permits, except those for dredging, and so on 9th May 2014 the respondent companies gave an undertaking not to commence dredging on the site until all the necessary approvals and permits had been provided to the Bimini Blue Coalition. On 13th May 2014 the developer sent permits to the Coalition, and started dredging the next day on 14th May 2014, using a dredger curiously named the Nicolo Machiavelli.

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[6] 'Questionable demand for Bimini ferry' The Nassau Guardian 25 October 2013 available at: http://www.thenassauguardian.com/index.php?option=com_content&view=article&id=42748&Itemid=2 , 'Islands in the Steam: the battle for the soul of Bimini' The Telegraph 6 July 2014 available at: http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/bahamas/10947445/Islands-In-The-Stream-The-battle-for-the-soul-of-Bimini.html.

[7] Bimini Blue Coalition v Minister Responsible for Crown Lands et al, PUB/JRV/FP-3 2013, rough transcript dated 24th January 2014.

[8] This was subsequently reduced to $315,000 in Court of Appeal on 18th July 2014.

On 19th May 2014 the Coalition brought an action for breach of the undertaking of 9th May 2014 by the developers,[9] claiming that a permit under *the CPPL Act* had not been obtained. Justices Allen, Adderley and Conteh, in a majority decision, stated that no breach of the undertaking had taken place. Justices Allen and Adderley decided that a permit under *the CPPL Act* was not required for dredging, and therefore no breach of an undertaking had taken place. Both justices relied on the BACONGO decision, with Justice Adderley also relying on the good administration and deference to the affairs of the state argument employed by High Court Justice Bereaux in the Fishermen & Friends of the Sea judgment.[10] Justice Adderley acknowledged the irony of this argument, as it encourages developers to carry out unpermitted work quickly, so that the courts are reluctant to order the removal of an almost completed development. Justice Adderley suggested that to cure this defect, timely judicial review proceedings should be undertaken before a project begins.[11] However, without strict and enforced statutory requirements for access to environmental information, consultation, or a freedom of information act,[12] it is difficult for the public to obtain information about projects before they begin, and therefore extremely difficult to bring judicial review proceedings. Conteh provided a powerful dissenting opinion,[13] stating that a permit under *the CPPL Act* was indeed required, and the developers had acted in a Machiavellian way by dredging the very day after sending the permits to Bimini Blue, without affording any time for the Coalition to determine if the permits were in fact the appropriate ones. He stated that the developers have, 'presented not only the applicant, but this court and the proper administration of justice with an unacceptable *fait accompli*.'[14] He went on to state that by carrying out the dredging activities had used expediency to their advanctage, and therefore 'rendered nugatory'[15] the ongoing judicial review proceedings. As a result he would have granted the injunction. In a prescient statement at the end of his judgment, Conteh noted:

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[9] Bimini Blue Coalition Limited v Minister Responsible for Crown Lands et al, SCCiv App Side No. 35 2014.

[10] Re: Fishermen and Friends of the Sea (2002) TT HC, upheld by Fishermen and Friends of the Sea v The Environmental Management Authority et al (2003) TT CA, but subsequently critiqued by Lord Walker in the Privy Council, Fishermen and Friends of the Sea v Environmental Management Authority and BP (205) TT PC 15.

[11] Bimini Blue Coalition, (n8), Justice Adderley, paragraph 44.

[12] See 'Country Report: The Bahamas, Access to environmental information, EIAs and Public Participation in Development Decisions' by Lisa Benjamin, IUCN eJournal 2014(5).

[13] Conteh was a judge in the High Court Belize BACONGO decision in [2005].

[14] Bimini Blue Coalition (n8) Justice Conteh, paragraph 80

[15] Ibid paragraph 81.

> *'…it is not the role or function of the courts to decide or approve what projects are in the interest of the country. That is the function of elected officials. The court's proper role and duty, however, is to ensure that when there is a challenge to any project, however laudable and beneficial that project might be, that those projects are approved and executed in accordance with the laws of the country.'*[16]

The issue of breach of the undertaking was appealed to the Privy Council. In an emergency sitting on 22nd May 2014, the Privy Council heard arguments as to whether all of the required permits had been provided. It became clear to all parties on the 22nd May that the Privy Council was strongly favouring Conteh's minority opinion in the Court of Appeal: that a permit under the CPPL was in fact required for the dredging. A second day of hearing was allowed on 23rd May 2014, and on that day Bahamian government officials produced a permit under the CPPL from the Director of Physical Planning, dated 22nd May 2014, with no supporting evidence as to why it was produced. The Privy Council was rightly suspicious as to the reasons why a permit had been produced so quickly, and granted the injunction subject to any further decisions on the issue by national Supreme or Appellate courts. The Privy Council was concerned that the production of a permit overnight indicated an arbitrary use of government power, without the requisite considerations being given to the environmental effects of the development. The Privy Council was also aware that refusing the injunction could negatively impact the ongoing judicial review proceedings.

The issue was returned to the Supreme Court, and in an oral judgment on 30th May 2014, Justice Longley determined that the permit under the CPPL dated 22nd May 2014 was in fact a permit that the developers could rely on, and was prima facie a valid one. He relied heavily on an affidavit provided by the Director of Physical Planning.

Bimini Blue appealed Justice Longley's decision, claiming he had erred in law. On 5th June the Court of Appeal provided a preliminary judgment upholding, in another majority decision, Justice Longley's judgment. Conteh again provided a dissenting judgment. Fuller judgments from the Court of Appeal were provided on 11th June 2014.[17] Both Justices Allen and Adderley decided that the permit was produced overnight because it was clear that the Privy Council was leaning towards Justice Conteh's minority judgment on 19th May (that a permit under the CPPL was in fact required). However, Justice Adderley's decision stated that it

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[16] Ibid paragraph 94.

[17] Bimini Bay Coalition v Minister Responsible for Crown Lands et al, SCCiv App No. 35 of 2014, 11th June 2014

was not the developer's fault that they had not obtained the correct permit. In fact the developers had approached the Director of Physical Planning for a permit, and had been directed to the Department of Lands and Surveys instead. As a result, he decided that the CPPL was not in the contemplation of the developers when they provided their undertaking on 9th May 2014.[18] According to this logic, an error by the government in failing to provide a permit enables a developer to provide an undertaking and carry on development without the requisite approvals. This is what, in fact, occurred. The government had failed to provide the developers with the required permit under the CPPL, and the developers had therefor given an undertaking not to dredge unless the required permits were furnished. The required permits were not furnished, and the development was allowed to proceed, unimpeded by the courts, because a permit produced overnight was allowed to retroactively validate an unpermitted development.

Justice Conteh again provided a powerful dissenting judgment. He likened the permit to a rabbit produced out of a hat.[19] Justice Conteh decided that Longley had in fact erred in law as he had failed to consider the fundamental issue of whether the permit of 22nd May was in fact valid. He decided that it could not in fact be valid, as no application for the permit was ever produced, and the permit clearly contemplated 'proposed dredging', when it was issued after the dredging had already taken place.

The issue was again appealed to the Privy Council which provided their opinion on 24th June 2014. Lord Toulson decided that Justice Longley had not in fact erred in law, and, by relying on the affidavit of the Director of Physical Planning, was right to decide that the developers could in fact rely on the permit. Lord Toulson did not decide the issue of lack of public consultation, as he stated that this was an issue for judicial review proceedings. Judicial review proceedings never took place as the claimants were stymied by a security for costs order in the amount of $315,000.

Impact and Relevance of the Judgments

Both cases illustrate that developments have proceeded without the requisite permits, and that government approvals are often provided without any form of oversight by an overarching environmental agency whose mandate is to ensure that all permits are in order. While the development on Blackbeard's Cay was shut down as a result, the Bimini Bay

[18] Ibid Justice Adderley paragraph 10

[19] Ibid Justice Conteh, paragraph 13

project was allowed to proceed with little public consultation, and dredging proceeded in the absence of the required permit. A full judicial review of the Bimini Bay development decision never took place.

There are a number of issues that the Bimini Bay case raises about environmental justice concerns in The Bahamas. Firstly, security for costs of such a high amount effectively stymied a full judicial review claim, and prevented access to environmental justice. Secondly, a thorough hearing on lack of public consultation on a development with such high environmental impacts never took place, in part due to the security for costs judgment. Lack of enforced and thorough statutory provisions on EIAs, access to environmental information and public consultation, combined with the unsatisfactory Guana Cay decision on this issue, left the public very few protections in law to have their views taken into account. Thirdly, lack of a freedom of information act meant that the Coalition's time and resources were spent trying to determine, through the courts, whether a permit under the CPPL was ever provided for the development. A simple freedom of information request could have resolved the issue, and enabled a full judicial review of the decision making process to have taken place.[20] Fourthly, the judiciary continue to rely excessively on the good administration and deference to affairs of the state defence, encouraging developers to pursue unpermitted developments before the issue ever made it to trial. This defence is part of the legacy in the region of the Belize BACONGO decision. Unpermitted development is therefore rubber stamped by the courts.

Finally, in his dissenting judgment in June 2014, Justice Conteh summarized the entire debacle as being characterized by a fundamental misunderstanding of the CPPL. Neither government officials, nor the majority in the Court of Appeal, appreciated that the CPPL was in fact applicable to the development. It was only at the Privy Council level that the applicability of the Act was determined. This constitutes a serious failure to understand the applicability of environmental legislation at the national level, due to either neglect, or, perhaps, more likely, the negative impacts of excessive fragmentation of environmental legislation and government institutions involved in the permitting process. The jurisdiction clearly needs a comprehensive and well-funded environmental protection agency, properly established by statute with officials who are thoroughly familiar with existing environmental legislation. These officials should have the legal mandate and obligation to carry out public

[20] The government is in the process of reviewing the 2012 FoIA which was never enacted, and it is hoped that significant deficiencies in the Act are rectified and it is passed shortly.

consultation, issue the required permits, oversee the permitting process, monitor developments, and fine developers who violate of the laws of the country.