



[2019] JMSC Civ 117

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV01422**

<b>BETWEEN</b>	<b>ERICA DOWNER HAMILTON</b>	<b>1<sup>ST</sup> APPLICANT</b>
	<b>DISCOVERY BAY COMMUNITY DEVELOPMENT COMMITTEE LIMITED</b>	<b>2<sup>ND</sup> APPLICANT</b>
	<b>ALLOA FISHERMEN CO-OPERATIVE SOCIETY LIMITED</b>	<b>3<sup>RD</sup> APPLICANT</b>
	<b>JOHN GREAVES</b>	<b>4<sup>TH</sup> APPLICANT</b>
	<b>JENNIFER GREAVES</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>AND</b>	<b>NATIONAL ENVIRONMENT AND PLANNING AGENCY</b>	<b>1<sup>st</sup> RESPONDENT</b>
	<b>NATURAL RESOURCES CONSERVATION AUTHORITY</b>	<b>2<sup>nd</sup> RESPONDENT</b>
	<b>THE TOWN AND COUNTRY PLANNING AUTHORITY</b>	<b>3<sup>rd</sup> RESPONDENT</b>
	<b>SAINT ANN MUNICIPAL CORPORATION</b>	<b>4<sup>th</sup> RESPONDENT</b>
	<b>DOLPHIN COVE LIMITED</b>	<b>5<sup>th</sup> RESPONDENT</b>

## **IN CHAMBERS**

Dr Derrick McKoy, Mr. Richard Collie, Miss Stacy Ann Walker instructed by Collie Law for the Applicants.

Mr Patrick Foster Q.C and Mrs Camille Wignall-Davis instructed by Nunes, Scholefield, DeLeon and Co for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Ms Maliaca Wong and Miss Amanda Montague instructed by Myers, Fletcher and Gordon for the 5<sup>th</sup> Respondent.

Mr Kevin Powell instructed by Hylton Powell watching proceedings for the interested party The Guardsman Group.

May 3, 2019, May 10, 2019 and June 7, 2019

## **Leave for Judicial Review – Delay – Is there a duty to conduct an environmental impact assessment**

### **L. PUSEY J**

- [1]** Judicial review allows every citizen or group of citizens to challenge the actions of the state, statutory bodies or inferior tribunals to see if they have acted in accordance with the powers granted by law and in a reasonable and fair manner. In performing its role in judicial review, the court examines the decision or action of the body being reviewed to see if that body acted outside of the powers granted to it by law, has acted unfairly or has acted irrationally or unreasonably.
- [2]** Judicial review does not grant the Applicant or the court the power to determine whether or not the body made the correct decision but rather whether the decision made was permissible in law. The process of judicial review is not to settle disagreements between individuals and statutory bodies.
- [3]** The Applicants are residents of Discovery Bay in Saint Ann. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents granted a beach licence and an environmental permit to the 5<sup>th</sup> Respondent which enabled the 5<sup>th</sup> Respondent to operate a dolphinarium at the Puerto Seco Beach in Discovery Bay. The 4<sup>th</sup> Respondent is the municipal corporation and did not appear in court.

[4] The Applicants sought the following orders:

- i. *Leave to be granted to apply for judicial review in anticipation of the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under the auspices of the 1<sup>st</sup> Respondent to renew Beach Licence numbered **2018-06017-BL00019**, which expires on March 31, 2019, upon the application of the 5<sup>th</sup> Respondent.*
- ii. *A declaration that an environmental impact assessment on the Discovery Bay area shall be conducted by the 5<sup>th</sup> Respondent, prior to any application by them to renew Beach Licence numbered **2018-06017-BL00019**, and/or prior to the grant of such renewal of the said Beach Licence by the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Respondents.*
- iii. *An injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from renewing Beach Licence Numbered **2018-06017-BL00019**, as there has been a complete failure to assess the environmental impacts that the dolphins will have on the Bay, which is in breach of several of the conditions indicated in the Licence.*
- iv. *Leave to be granted to apply for judicial review of the decisions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under the auspices of the 1<sup>st</sup> Respondent to approve Environmental Permit numbered **2018-06017-EP00082**; and Beach Licence numbered **2018-06017-BL00019**, both approved October 3, 2018.*
- v. *An order for extension of time to apply for leave for judicial review of the decisions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under the auspices of the 1<sup>st</sup> Respondent to approve Environmental Permit numbered **2018-06017-EP00082**; and Beach Licence numbered **2018-06017-BL00019**, both approved October 3, 2018.*

- vi. *An order of certiorari quashing the decisions made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under the auspices of the 1<sup>st</sup> Respondent relating to Environmental Permit Numbered **2018-06017-EP00082** and Beach Licence Numbered **2018-06017-BL00019** for the development of a dolphin attraction or dolphinarium located at the eastern end of the Puerto Seco Beach, Discovery Bay, in the parish of Saint Ann.*
- vii. *A declaration that an environmental impact assessment on the Discovery Bay area should have been conducted by the 5<sup>th</sup> Respondent, based on legitimate expectation since such assessments were done for previously constructed dolphinarium by the 5<sup>th</sup> Respondent and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should have mandated that an environmental impact assessment be done for this project as the area of Discovery Bay where the dolphinarium will be built is designated a Special Fisheries Conservation Area by the Government of Jamaica.*
- viii. *A declaration that a properly effected public consultation should be undertaken by the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Respondents through their employees, servants, and/or agents prior to the grant of any permit and/or licence. This public consultation should canvas all of the residents and interested parties in the vicinity of the site for the dolphinarium/dolphin attraction, and adequately treat with any inquiries, objections, or misgivings that the parties may have for this project.*
- ix. *An order for constitutional redress by way of damages and an injunction against the Respondents collectively and/or separately for breaching the Applicants' human rights under Chapter III of the Constitution of Jamaica, section 13(3)(l) namely the right to enjoy a healthy and productive environment free from the threat of*

*injury or damage from environmental abuse and degradation of the ecological heritage, by irrationally and/or unreasonably approving the development and operation of a dolphinarium which, as designed and if constructed will result in the complete and/or catastrophic loss of the marine resources at Discovery Bay, Saint Ann, based on the scientifically proved effects of holding dolphins in captivity within a lagoon area and Special Fisheries Conservation Area.*

### **Applicants' evidence**

- [5] The Applicants are property owners and community organisations with connections to the Discovery Bay beach and marine community. The beach area known as Puerto Seco Beach has been developed and there is now a dolphin facility operating there. In their affidavits the Applicants admit that a notice was posted at Puerto Seco Beach on or around April 2018 but it was placed behind a fence and the notice referred to Ocho Rios Bay.
- [6] Despite the misnomer and a complaint that the sign was not as visible as it should have been, the Applicants point out that the sign caused great concern to them because they were of the view that a dolphin facility would cause damage to the marine environment. The 2<sup>nd</sup> Applicant indicates that on May 19, 2018 it organised a demonstration in Discovery Bay against the facility and that this demonstration attracted the attention of national media.
- [7] The 3<sup>rd</sup> Applicant indicated their objection in June 2018 and had a meeting with the 5<sup>th</sup> Respondent and aired their objections. Nevertheless, the applications for the licences were approved on September 18, 2018 and issued on October 3, 2018. The 1<sup>st</sup> Applicant indicated that she received notification of the issued licences on November 8, 2018.

- [8] The Applicants deponed that in opposition to the licences they engaged with governmental agencies, including writing to the Prime Minister. The Applicants also instituted an online petition and presented that to the Prime Minister on October 31, 2018. The Applicants in their affidavit evidence said that they were of the genuine belief that the issues raised by them with government officials would be resolved without litigation.
- [9] The Applicants have also relied on scientific evidence that the marine environment and the properties in the immediate area will be adversely affected by the waste that dolphins produce. Concern was also expressed about the unpleasant effects for swimmers in the area because of dolphin waste. Additionally the fish sanctuary area which has been declared in the waters of Discovery Bay has led to the improvement of fish stocks and to the benefit of the fishermen who are represented by the 3<sup>rd</sup> Applicant.
- [10] The affidavits also mention the propriety of keeping dolphins in captivity. Dr. McKoy clarified during his oral submissions, that this is not part of the application.
- [11] Paragraphs 31 and 32 of their affidavit filed on April 2 2019 summarise the Applicants' position. The Applicants indicate that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted outside of their powers by unreasonably and irrationally granting environmental and planning permits to the 5<sup>th</sup> Respondent to develop the dolphin facility. Additionally they indicate that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted irrationally and unreasonably in approving the licence as that was in breach of the Government of Jamaica ("GOJ") beach policy.

### **Respondents' evidence**

- [12] The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ("the environmental agencies") relied largely on the affidavits of Gabrielle-Jae Watson and Peter Knight. Miss Watson is coordinator of the Ecosystems Management Branch of the 1<sup>st</sup> Respondent and Mr Knight is its Chief Executive Officer.

- [13]** Miss Watson detailed the review process after the application for the licensing and the decision not to seek an Environmental Impact Assessment (“EIA”). She indicated that she consulted with persons from the relevant government ministry with responsibility for fisheries in relation to the proposal of the 5<sup>th</sup> Respondent to establish the dolphin facility. The Ministry indicated that consultations should be held with the University of the West Indies which has a marine laboratory at Discovery Bay and with the 3<sup>rd</sup> Applicant. The Ministry indicated that it had no concerns with the project. Miss Watson also indicated that ecological concerns were taken into consideration and the information gleaned from the operation of the other dolphin facilities in Jamaica was considered in the assessment of the licence granted.
- [14]** The marine laboratory had been contacted by Miss Watson and dialogue had begun before the Ministry had responded. Professor Webber of the Discovery Bay Marine Laboratory had indicated the concerns with the possible introduction of nutrients in the Bay and referred to a previously done study into circulation in the Bay. These concerns were passed on to the 5<sup>th</sup> Respondent and the responses forwarded to Professor Webber.
- [15]** In response, the 5<sup>th</sup> Respondent in fact provided a scientific study dated May 2018 from a firm specialising in civil, environmental and coastal engineering. Miss Watson reviewed this report and sent it to the marine laboratory for their comments. Professor Webber provided her comments and Miss Watson wrote to the 5<sup>th</sup> Respondent and requested that they redo the study to take into consideration the factors raised by Professor Webber. A further study dated July 2018 was done, submitted to the National Environment and Planning Agency (“NEPA”) and forwarded to the marine laboratory for its comments.
- [16]** On June 29 2018, staff of the marine laboratory facilitated a meeting with the fishermen who form the 3<sup>rd</sup> and 5<sup>th</sup> Applicants.

- [17] Mr Knight indicated the process employed in reviewing applications generally and in relation to these two applications. He explained that there is a Technical Review Committee that consults other relevant government agencies and specialists in the government service, academia and elsewhere. He pointed out that there was a comprehensive process of review and consultation with relevant ministries, professionals and stakeholders. He also indicated that additional research was done, technical and scientific studies were considered and conditions were developed and attached to the licences to mitigate and respond to adverse circumstances.
- [18] He indicated that Professor Webber was a member of the Technical Review Committee in this instance and that she helped to frame the requirement for the assessment of currents and the dispersion of nutrients and bacteria.
- [19] Mr Knight also indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents considered the 5<sup>th</sup> Respondent's record of compliance, the management of other dolphin facilities, an animal welfare program inclusive of veterinary support and a robust water quality monitoring program. In fact, he also argued that special conditions were included in the licences as a result of the research, namely a restriction of the number of dolphins in a pen and the water quality sampling and monitoring. Finally, he pointed out that the monitoring process has shown none of the effects on water pollution that the Applicants feared would have occurred.
- [20] The 5<sup>th</sup> Respondent set out in detail the process that it went through to obtain the licences. It exhibited the proposal and the supporting documentation that was submitted. It indicated that it has made a substantial investment in establishing the facility and that they have willingly engaged stakeholders who have had issues about the facility.

### **Delay**

- [21] The court has a discretion whether or not to grant leave for judicial review in circumstances where there has been a delay in making the application for judicial



review. Rule 56.6 of the Civil Procedure Rules (CPR) indicates that applications for judicial review ought to be “made promptly and in any event within three months from the date when grounds for the application **first arose**.” (my emphasis) Rule 56.6 requires that in relation to applications for certiorari the date on which the judgment, order, conviction or other proceedings occurred shall be taken as the date that grounds for the proceedings first arose. The discretion to extend time ought to be exercised where there is a good reason for doing so. The CPR sets out that some of the factors to be considered in granting an extension are whether the grant of leave would be detrimental to good administration and cause substantial hardship or substantially prejudice the rights of any person.

- [22] The Applicants argue that the delay between the grant of the permit and the licence and the making of this application arose because they had been contacting government officials and working on an online petition. They were of the opinion that these measures were working and that litigation was not going to be necessary. The application for judicial review was filed on April 2, 2019, some six months after the permit and licences were granted, and nearly a year since the 2<sup>nd</sup> Applicant staged a demonstration against the dolphin facility.
- [23] The Respondents have relied on **Raymond (Randean) v The Principal Ruel Reid and anor** [2015] JMCA Civ 59 where the Applicant elected to try other non-litigation measures before seeking judicial review. The application was refused and this refusal was upheld by the Court of Appeal. In my view, the principle is that the parties will be given the opportunity to seek non-judicial remedies before invoking the court however, Applicants ought to act quickly, especially where persons may have acted in reliance upon the decision that the Applicant is now challenging. Confidence that non-judicial remedies will be effective is not a reasonable excuse for delay to apply for judicial review. This is especially so when the parties have been actively opposing the decision even before it was made.

[24] The Respondents point out that there has been substantial reliance upon the permit and licence granted. The 5<sup>th</sup> Respondent has incurred significant expenditure in setting up the dolphin facility in reliance upon the permit and licence. As a consequence, this court is of the view that there would be substantial hardship to the 5<sup>th</sup> Respondent, a non-natural person, if the discretion was exercised to allow leave to be granted despite the delay.

[25] The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have given evidence that they conducted an extensive review and consultation with stakeholders. These discussions include meetings with some of the Applicants and considering some of the scientific evidence mentioned by the Applicants. The Applicants chose to rely on moral suasion and governmental intervention before seeking a legal remedy. It is the view of this court that to exercise the discretion in these circumstances would not be prudent, because persons would then have the leisure to elect when to employ litigation after seeking alternate measures.

[26] The application for an extension of time is denied.

### **Remedies**

[27] It may be helpful to look at the substance of the application, briefly.

[28] The remedies sought by the Applicants are something of a “mixed bag”. Order vi seeks an order for certiorari and order iv seeks an unspecified order for judicial review. The basis on which those orders are sought are not as clear as they could be. The court expects to be presented with the legal basis on which the specific orders would be made against the government agencies.

[29] Orders ii, v and vii seek declarations from the court. Some of the declarations sought do not necessarily reside in the area of judicial review. For example, the second order sought is for a declaration that an environmental impact assessment “shall” be conducted by the 5<sup>th</sup> Respondent prior to any application to renew the beach licence. This order is problematic to fit under the rubric of

judicial review. It does not require the statutory authorities namely, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to do any act. The order presumes to enforce a power which the Natural Resources Conservation Authority (“NRCA”) has but does not seek to compel the NRCA to do something. It may have been intended as an order for mandamus requiring the NRCA to require an EIA.

[30] The application also seeks constitutional redress, which does not need an application for leave and there in relation to the declarations there are some authorities that suggests that a person does not need leave in actions for declaration against state entities.

[31] My understanding of the Applicants’ claim is that they believe that in the circumstances the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ought to have required an EIA and have consultation with stakeholders before they granted the licences. The Applicants are of the view that because these were not done the granting of the applications were irrational and unreasonable and should be quashed. I will therefore look at these two contentions to determine whether or not there is a reasonable chance of success by the Applicants.

### **Need for an Environmental Impact Assessment (EIA)**

[32] Section 10 of the Natural Resources Conservation Authority Act states that the NRCA “may by notice” require an Applicant for a permit to provide an EIA. It does not impose a duty on the NRCA. The Applicants acknowledged this in their first affidavit at paragraph 10 where they state:

*10. Whilst the Applicants are aware that an environmental impact assessment may not have been required in these circumstances, one ought to have been mandated based on the legitimate expectation created by the fact that the 5<sup>th</sup> Respondent had previously conducted environmental impact assessments prior to developing the other dolphin attractions in the island. The environmental impact assessment would have allowed a proper determination to be made of the impact of the introduction of dolphins in sea pens to the ecology of the bay.*

- [33] A legitimate expectation arises when a public authority promises or undertakes to follow a particular procedure. (see **Attorney General of Hong Kong v Ng Yuen Shiu** [1983] 2 All ER 346). Parties ought to be able to rely on these promises and the court will set aside a decision if that decision is made contrary to the promise or undertaking of the public authority. In this case there is no evidence that the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents undertook to hold an EIA.
- [34] As the evidence of Miss Watson and Mr. Burrowes (for the 5<sup>th</sup> Respondent) has shown there were two studies done by the 5<sup>th</sup> Respondent on the direction of NEPA. These studies were reviewed by the University of the West Indies Marine Laboratory and adjustments made by the 5<sup>th</sup> Respondent based on that review. Furthermore, NEPA has indicated that adjustments were made to the licences for water quality monitoring.
- [35] The evidence of Mr Knight is that only on one occasion was an EIA used where there was a dolphin facility developed. Therefore, a legitimate expectation could not arise based on the practice of NEPA.
- [36] I am of the view that no undertaking or promise was made or can reasonably be inferred from the actions of NEPA. The duty of NEPA under the NRCA Act is to ensure that a proper scientific and environmental review is done in relation to the development. Section 9 of the NRCA Act requires the agency to consult with “any agency or department of government exercising functions in connection” and it is clear that this was achieved even without a formal EIA.
- [37] It cannot be said based on the evidence before this court that the 1<sup>st</sup> Respondent failed its statutory duty in not ordering an EIA or that it acted unreasonably or irrationally in not doing so.

### **Need for Consultation**

- [38] The Applicants also suggest that an EIA would mandate consultations with the community. As pointed out the EIA is not mandatory and the consultations required are with other government agencies.
- [39] In any case, the evidence suggests dialogue with stakeholders including the 3<sup>rd</sup> Applicant were carried out. There is no statutory duty to consult other parties. Whereas general community meetings may be advisable, the Applicants have not claimed any statutory imperative to hold such meetings. I am of the view that the court could not set aside this decision based on lack of consultations.

### **Miscellaneous issues**

- [40] The Applicants have asserted that the renewed beach licence has been sent in the name of Mr Stafford Burrowes rather than in the name of the 5<sup>th</sup> Respondent. The 1<sup>st</sup> Respondent has indicated that this is a genuine error which will be corrected. This error does not improve the Applicants' prospect of success in relation to the application for judicial review since there was no application by Mr Burrowes or could there be any genuine permit in his name. It appears that this is a matter that could be corrected as it is a mere error.
- [41] It is also argued that the renewal of the licences and permits should require a new consideration and therefore should not be renewed automatically. The position taken by NEPA is that the Licence was renewed based on the monitoring of the water quality and the 5<sup>th</sup> Respondent's compliance with the requirements of the original licences. If every licence had to go through the complete process each year this would fetter commerce and increase bureaucracy. This position advanced by the Respondents is unsustainable.

## **Conclusion**

- [42]** The court refuses an extension of time to apply for judicial review because there is no good reason to extend the time and it would cause substantial hardship to the 5<sup>th</sup> Respondent and be detrimental to good administration.
- [43]** The court is of the view that there would be no reasonable prospect of success in the application for judicial review and in any case will not grant leave.