



[2022] JMSC Civ 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018 HCV 03058

BETWEEN **ARLENE ELMARIE PETERKIN** (On behalf of herself **APPLICANT**
and 32 other residents in the community of Industry **/CLAIMANT**
Cove, in the parish of Hanover)

AND **NATURAL RESOURCES** **1ST RESPONDENT**
CONSERVATION AUTHORITY **/1ST DEFENDANT**

AND **TOWN AND COUNTRY** **2ND RESPONDENT**
PLANNING AUTHORITY **/2ND DEFENDANT**

AND **NATIONAL HOUSING TRUST** **3RD RESPONDENT**
/3RD DEFENDANT

IN CHAMBERS

Mr Kent Gammon instructed by CollieLaw for the Applicant/Claimant

**Ms Faith Hall instructed by the Director of State Proceedings for the 1st and 2nd
Respondents/1st and 2nd Defendants**

**Lord Anthony Gifford Q.C. instructed by Pollard Lee Clarke and Associates for
the 3rd Respondent/3rd Defendant**

Heard: April 13, 20 and 26, 2022

Civil Procedure – Application to appoint expert witness – Application made after case management conference – Application made in the context of a claim for judicial review – The role of the court in a claim for judicial review – Whether the proposed expert evidence is relevant to the issues to be determined in the claim for judicial review – Whether the proposed expert evidence is reasonably required to resolve the proceedings justly – Civil Procedure Rules, 2002, rules 32.2, 32.3, 32.6(1), 32.6(2), 32.6(3) and 32.6(4)

A. NEMBHARD J

INTRODUCTION

[1] This matter concerns an application to appoint an expert witness. The application is made in the context of a Fixed Date Claim Form, which was filed on 27 September 2019, by virtue of which the Applicant/Claimant, Ms Arlene Peterkin, on her own behalf as well as on behalf of thirty-two other residents of Industry Cove, in the parish of Hanover, seeks the following relief against the 1st Respondent/1st Defendant, Natural Resources Conservation Authority and the 2nd Respondent/2nd Defendant, Town and Country Planning Authority:

-

- (i) A Declaration that the 1st Respondent acted illegally or in the alternative irrationally in not requiring the National Housing Trust to submit with their application for a permit for the construction and operation of a sewage treatment plant, an Environmental Impact Assessment (EIA), in accordance with regulation 5(3)(c) of the Natural Resources Conservation (Wastewater and Sludge) Regulations, 2013;
- (ii) A Declaration that the 1st Respondent acted illegally or in the alternative irrationally in granting a permit to the National Housing Trust for relaxing the standards for the Discharge of Sewage Effluent without requesting that the application for the permit be accompanied by: (1) a model of the plume behaviour of the effluent in the coastal and marine environment; (2) the data, studies and calculations that show that the

proposed outfall will allow for effluent quality which is still acceptable and will not affect the marine environment beyond the levels already established for the ambient water quality; (3) the data and studies to show the effect of the effluent on the flora and fauna of the marine environment, within the sphere of influence of the abovementioned plume; (4) a drawing of the route of the marine outfall pipe and the construction material and bio-physical survey of the route of the pipe, including the method of laying the pipeline and the floor of sea stabilisation method; and (5) Bathymetry of the seafloor along the alignment of the pipeline, in accordance with regulation 23 of the Natural Resources Conservation (Wastewater and Sludge) Regulations, 2013;

- (iii) An Order of Certiorari quashing the decisions made by 1st and 2nd Respondents relating to Environmental Licences numbered 2017-09017-EL00021A and 2017-09017-EL00021B for the construction and operation of a sewage treatment system and Environmental Licence numbered 2017-09017-EL00021C for the discharge of sewage effluent into the Caribbean Sea from the said sewage treatment system;
- (iv) An Order of Prohibition preventing the 1st and 2nd Respondents from granting environmental permission for the sub-division of the lands located at Industry Cove, Hanover, in the alternative, if the 1st and 2nd Respondents have granted environmental permission, an Order of Certiorari quashing any such decision;
- (v) An Order for constitutional redress by way of Damages and an Injunction against the Respondents collectively and/or separately for breaching the Claimant's 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 construction and operation of a sewage treatment plant which, as designed and if constructed will result in the complete and/or catastrophic loss of the

beach, wetland and marine resources at Industry Cove, Hanover and for the damage already caused to the marine life and resources of the wetland located at the Claimant's property;

(vi) Costs of this Claim to be awarded to the Claimant;

[2] The application to appoint an expert witness raises the central issue of whether the proposed evidence is reasonably required to resolve the issues raised by the Fixed Date Claim Form, which was filed on 27 September 2019, justly.

[3] By way of a Further Notice of Application to Appoint Expert Witness, which was filed on 23 March 2022, the Applicant/Claimant, Arlene Peterkin, seeks the following Orders:-

(i) That the Applicant is permitted to call Mr Peter Wilson-Kelly, Coastal Zone Management and Remote Sensing (Aerial Photogrammetry), who holds a Masters of Science in Philosophy (MPhil) Degree in Marine Science from the University of the West Indies (Mona), as an expert witness at the hearing of the claim;

(ii) That the Applicant is granted permission to put in evidence the written expert witness report of Mr Peter Wilson-Kelly, without calling the maker of the report;

(iii) That the costs of the application are to be costs in the claim;

(iv) Any such further or other relief as this Honourable Court deems fit.

ISSUES

[4] The primary issue that arises for the Court's determination may be distilled in the following way: -

- i. Whether the Court ought properly to appoint Mr Peter Wilson-Kelly as an expert witness for the purposes of the hearing of the Claim for judicial review.

- [5] In an effort to determine the primary issue raised, the following sub-issue must also be resolved: -
- a. Whether the proposed evidence of Mr Peter Wilson-Kelly is reasonably required to resolve the issues raised in the judicial review Claim justly.

BACKGROUND

- [6] The application to appoint an expert witness is made against the background of a decision of the Natural Resources Conservation Authority (“the NRCA”) to grant environmental licences to the National Housing Trust (“the NHT”). These licences permit the NHT to construct and operate a wastewater treatment plant; to discharge the treated effluent therefrom onto the Industry Cove Beach, in the parish of Hanover; as well as for the relaxing of standards for the discharge of sewage effluent. This is in order to serve a housing development to be constructed by the NHT in that area. Ms Peterkin asserts that she is the owner of property situate at Industry Cove, in the parish of Hanover and contends that these decisions will have a direct impact on her property.
- [7] Ms Peterkin maintains that the NRCA granted these licences without requiring the NHT to submit an Environmental Impact Assessment (“EIA”) along with its application for these licences and in contravention of the Natural Resources Conservation Authority Regulations (“the Regulations”).
- [8] By way of a Notice of Application for Leave to Apply for Judicial Review, which was filed on 14 August 2018, Ms Peterkin sought leave to apply for judicial review of these decisions of the NRCA.
- [9] On 16 September 2019, Ms Peterkin was granted leave to apply for judicial review in the following terms: -
- (i) Time enlarged for the Application for Leave for Judicial Review. In all the circumstances, the Applicant is granted leave to apply for Judicial Review to apply for an Order of Certiorari and Prohibition questioning

the decision of the Natural Resources and Conservation Authority (NRCA);

- (ii) The Leave granted shall operate as a stay until Judicial Review is heard;
- (iii) Matter to be treated as urgent and given expeditious treatment pursuant to rule 26.1(2)(c);
- (iv) Notice is to be given to the parties affected; and
- (v) Leave is conditional upon the filing of the Fixed Date Claim Form within fourteen (14) days of this Order.

[10] On 27 September 2019, a Fixed Date Claim Form was filed and is fixed for hearing during the period 9 May 2022 to 12 May 2022, inclusive.

THE LAW

Expert evidence

[11] Part 32 of the Civil Procedure Rules, 2002 (“the CPR”) is entitled ‘Experts and Assessors’ and deals with the provision of expert evidence to assist the court. In this Part, an ‘expert witness’ is a reference to an expert who has been instructed to prepare or give evidence for the purpose of the court proceedings.

[12] Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.¹ It is the duty of an expert witness to assist the court impartially on the matters relevant to his or her expertise. This is a duty which overrides any obligation(s) to the person by whom the expert witness is instructed or paid.²

[13] No party may call an expert witness or put in an expert witness’ report without the court’s permission. The general rule is that the court’s permission is to be given at a case management conference.³ When a party applies for permission to call an expert witness, that party must name the expert witness

¹ See – Rule 32.2 of the CPR

² See – Rule 32.3 of the CPR

³ See – Rules 32.6(1) and 32.6(2) of the CPR

and identify the nature and expertise of the expert witness.⁴ No oral or written expert witness' evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.⁵

The role of the court in judicial review proceedings

[14] The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.

[15] The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**.⁶

[16] Roskill LJ stated as follows: -

"...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

[17] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public

⁴ See – Rule 32.6(3) of the CPR

⁵ See – Rule 32.6(4) of the CPR

⁶ [1984] 3 All ER 935

authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.

The approach of the court in matters of judicial review

- [18] Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. It is important to remember that, in every case, the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority, constituted by law, to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

Expert evidence in judicial review proceedings

- [19] The case of **R (The Law Society) v The Lord Chancellor**⁷ provides some guidance on the courts' approach to the issue of the admissibility of expert evidence in judicial review proceedings. At paragraph 36, Lord Justice Leggatt had the following to say: -

“36. It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and

⁷ [2018] EWHC 2094 (Admin)

evidence of the process by which the decision was taken - let alone any expert evidence.”

- [20] The dicta of Dunn LJ in the oft-cited case of **R v Secretary of State for the Environment, ex parte Powis**⁸ is equally instructive. There have emerged three identified categories of evidence which may be adduced in judicial review proceedings, as set out by the learned judge at page 595: -

“... (1) that the Court can receive evidence to show what material was before the minister or inferior tribunal... (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact or where the question is whether essential procedural requirements were observed, the Court may receive and consider additional evidence to determine the jurisdictional fact or procedural error... and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct or bias by the decision-making body, or fraud or perjury by a party...”

- [21] Collins LJ, in **Lynch v The General Dental Council**,⁹ expanded on the pronouncements of Dunn LJ and posited that, where an understanding of technical matters is required to enable the court to understand the reasoning employed in the decision-making process, in the context of a challenge to the rationality of a decision made, expert evidence may be required to explain such technical matters. If the alleged technical error is not incontrovertible but is a matter on which there is room for reasonable differences of expert opinion, an irrationality argument will not succeed.¹⁰

SUBMISSIONS

Submissions advanced on behalf of Ms Peterkin

- [22] Learned Counsel Mr Kent Gammon, in his submissions advanced on behalf of Ms Peterkin, asserts that Mr Wilson-Kelly is a Coastal Zone Management and Remote Sensing Specialist, with over twenty (20) years of work experience in both fields. He is a former employee of the National Environment and

⁸ [1981] 1 WLR 584, at page 595

⁹ [2003] EWHC 2987

¹⁰ See – **R (The Law Society) v The Lord Chancellor** (supra), at paragraph 41, per Leggatt LJ

Planning Agency (“NEPA”) as well as of the NRCA. He is currently the owner of a registered consultancy business which is involved in the generation of natural resources, spatial, temporal and status information as well as in the analysis and monitoring of environmental change, directly associated with human intervention. Mr Gammon asserts further that Mr Wilson-Kelly is uniquely qualified, both from the perspective of his vast knowledge and experience, to be appointed as an expert witness.¹¹

- [23]** Mr Gammon submits that the impact on the immediate environment of Industry Cove, Green Island, in the parish of Hanover, from the marine outfall and wastewater treatment plant, as currently licensed by the NRCA, necessitates the calling of expert evidence from an expert witness such as Mr Wilson-Kelly, within the Claim for judicial review. Mr Gammon contends that that evidence will assist the court to appreciate the evidence with respect to the Town and Country Planning (Negril and Green Island Area) Provisional Development Order, 2013.

Submissions advanced on behalf of the NRCA and the TCPA

- [24]** For her part, Learned Counsel Ms Faith Hall submits that Ms Peterkin has failed to satisfy the requirement of the CPR to demonstrate that the proposed expert evidence is reasonably required to resolve the proceedings justly. More especially, she submits, Ms Peterkin has failed to demonstrate that the proposed expert evidence of Mr Wilson-Kelly is pertinent to the resolution of the issues raised by the Fixed Date Claim Form, which was filed on 27 September 2019.
- [25]** Ms Hall maintains that the inclusion of an expert witness and of expert evidence at this stage of the proceedings, where the hearing of the substantive claim is scheduled to commence on 9 May 2022, will only serve to delay that hearing and will inevitably result in excessive cost to the parties.

¹¹ See – Paragraphs 5 and 6 of the Affidavit of Moveta McNaught-Williams in support of the Notice of Application to Appoint Expert Witness, which was filed on 15 March 2022

Submissions advanced on behalf of the NHT

- [26] Learned Queen’s Counsel, Lord Anthony Gifford, began his submissions with the observation that no report of Mr Wilson-Kelly has been exhibited to any affidavit that has been filed in respect of the substantive claim. Further to that, the affidavit of Mr Wilson-Kelly which was filed in support of the Application for Leave to Apply for Judicial Review, would presently be inadmissible, having already been utilized at the leave stage.¹²
- [27] Lord Gifford maintains that the affidavit of Mr Wilson-Kelly would be inadmissible on the basis that it is in the form of comments on other affidavits that are not currently before the Court for present purposes.
- [28] Lord Gifford maintains further that Ms Peterkin, by virtue of her application to appoint an expert witness, seeks to place before the court Mr Wilson-Kelly’s comments on material that is not before the court; the opinion of two purported experts whom Ms Peterkin does not seek to call at the judicial review hearing;¹³ and very little of Mr Wilson-Kelly’s own analysis and/or opinion. This, he contends, is not conducive to the expeditious and just trial of the claim for judicial review.
- [29] Lord Gifford reminded the Court that Ms Peterkin has, in an earlier affidavit sworn to on 14 August 2018, exhibited, as exhibit “**AP-18**”, a detailed report from Mr Wilson-Kelly. He submits that, if that is the report that Ms Peterkin wishes to have admitted as an expert report in the judicial review hearing, the NHT is unable to accept it as a true and accurate analysis of the treatment plant and its impact. Should Mr Wilson-Kelly be appointed as an expert witness, for the purpose of the judicial review claim, the NHT would need to cross-examine Mr Wilson-Kelly and to call its own expert witness in response. This, Lord Gifford asserts, is not necessary, as, the issues raised by the Claim for judicial review are concerned with the lawfulness of the decision of the NEPA as well as of the process which led to it.

¹² See – Affidavit of Peter Wilson-Kelly in Support of the Application for leave to Apply for Judicial Review and Injunction, which was filed on 19 October 2018

¹³ They are Professors Irwin Suffet and Michael Stenstrom of the University of California Los Angeles (UCLA), who are said to be specialists in environmental health and environmental engineering, respectively.

[30] Finally, it is submitted, should the Court be minded to grant the application to appoint Mr Wilson-Kelly an expert witness for the purpose of the judicial review Claim, the NHT would ask for an order that he attends for cross-examination; that the NHT be permitted to call Mr Anthony Cuthbert as an expert witness; and that Mr Cuthbert provides a written report which should be filed by 29 April 2022.

ANALYSIS

Whether the Court ought properly to appoint Mr Peter Wilson-Kelly as an expert witness for the purposes of the hearing of the Claim for judicial review

(i) *Whether the proposed evidence of Mr Wilson-Kelly is reasonably required to resolve the issues raised in the judicial review Claim justly*

[31] Rule 32.2 of the CPR provides an instructive starting point for the Court's consideration of the issue of whether Mr Wilson-Kelly ought properly to be appointed as an expert witness, for the purposes of the hearing of the Claim for judicial review. The rule establishes the threshold that an applicant is required to meet on an application to appoint someone as an expert witness. That is, a clear demonstration, on a preponderance of the evidence, that the expert evidence is reasonably required to resolve the proceedings justly. The language of the rule is mandatory in its nature. It requires the court to restrict expert evidence to that which is reasonably required to resolve the proceedings justly.

[32] This allows for a more streamlined approach to the reception of expert evidence and only in circumstances where its reception is reasonably required to resolve the issues raised in the proceedings justly. Where the court determines that the proposed expert evidence is not reasonably required to resolve the issues raised in a claim, then, it is not necessary to include it.

[33] By virtue of the Fixed Date Claim Form, which was filed on 27 September 2019, Ms Peterkin seeks a Declaration that the NRCA acted illegally or irrationally in the granting of its licences to the NHT; an Order of Certiorari to quash the decision of the NRCA to grant the licences; an Order of Prohibition

to prevent the NRCA and the TCPA from granting environmental permission for the sub-division of the lands located at Industry Cove, in the parish of Hanover; and Constitutional redress.

[34] It is in this context that this Court must determine whether the proposed evidence of Mr Wilson-Kelly is reasonably required to resolve the judicial review proceedings justly. The Court is also mindful of the role and approach of the court in matters of judicial review. It is well established that the role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public. The approach of the court is by way of review and not of an appeal. The purpose of the public law remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority, constituted by law, to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. Judicial review then is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

[35] The main contention of the proposed evidence of Mr Peter Wilson-Kelly relates to the possibility of impact of sewage discharge on ground water quality, coastal water quality, coastal recreational quality and marine environmental quality, if the sewage treatment system has either not been appropriately designed, or, may not be implemented in accordance with approved specifications and/or, once constructed and in operation, will sustain a malfunction.¹⁴

[36] While Mr Wilson-Kelly does not purport to make any classification of wetland type, he cites the presence of waterlogged conditions and wetland vegetation

¹⁴ See – Paragraph 7 of the Affidavit of Peter Wilson-Kelly in Support of Notice of Application for Leave to Apply for Judicial Review and Injunction, which was filed on 19 October 2018

that led him to the conclusion that the area is a wetland.¹⁵ Mr Wilson-Kelly goes on to provide the definition of a 'wetland', in accordance with The Convention on Wetlands of International Importance especially as Waterfowl Habitat, also known as the RAMSAR Convention, to which Jamaica became a signatory on 7 February 1998. He maintains that a 'wetland' is defined as types of "areas of marsh, fern, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres." Mr Wilson-Kelly maintains that a section of the area where the NRCA proposes to build its development is a wetland.

- [37]** In his report, Mr Wilson-Kelly raises questions in relation to the event that there are challenges with the performance of the sewage treatment system. He contends that, in reality, there is no system that will operate and perform one hundred percent (100%) as designed. This, he contends, is due to human, mechanical and/or electrical error. Mr Wilson-Kelly 'hypothesizes' that, if the treatment system does not perform in accordance with expected specifications, for whatever reason(s), or, if the climatic conditions create issues with either the treatment or discharge of effluent, then, improperly treated effluent could make its way to neighbouring land areas or to the marine environment.
- [38]** Additionally, the proposed evidence of Mr Wilson-Kelly treats with how the effluent quality in the reed bed may be influenced by the impact of rainfall; and how the water levels in the reed bed may be influenced by outfall level, inflow rates and external inputs.
- [39]** Finally, the proposed evidence of Mr Wilson-Kelly asserts that more information is required to assess the sensitivity of the area in Industry Cove, in which the development is to be constructed and for which this tertiary sewage treatment plant is proposed. Mr Wilson-Kelly maintains that it is likely that detrimental harm will come to the environment and the flora and fauna living

¹⁵ See – The Report of Mr Peter Wilson-Kelly, entitled "Site Descriptions and Technical Document Review National Housing Trust Industry Cove Sewage Treatment System", which is exhibited to the Affidavit of Arlene Elmarie Peterkin in Support of Notice of Application for Leave to Apply for Judicial Review, which was filed on 14 August 2018, as exhibit "AP-18", at page 8, paragraph 3.1

therein, should this development and sewage treatment plant be constructed and operated without further investigation.

- [40] Regrettably, the Court is unable to accept the submission that this proposed evidence of Mr Wilson-Kelly is reasonably required to dispose of the issues raised by the Claim for judicial review justly.
- [41] It is submitted that this proposed evidence of Mr Wilson-Kelly will assist the court in appreciating the evidence with respect to the Town and Country Planning (Negril and Green Island Area) Provisional Development Order, 2013 (“the Order”). The Court is also unable to accept this submission. This Court is of the view that the court is best suited to determine the proper interpretation to be applied to the provisions of the Order.
- [42] Nor has Ms Peterkin demonstrated that the proposed evidence of Mr Wilson-Kelly falls within any of the identified categories of other admissible evidence in judicial review proceedings, that is, evidence other than evidence of the decision that is being challenged.
- [43] In the result, the Court is constrained to find that Ms Peterkin has failed to meet the threshold requirement of rule 32.2 of the CPR, in that, she has failed to demonstrate that the proposed evidence of Mr Wilson-Kelly is reasonably required to resolve the judicial review proceedings justly.

DISPOSITION

- [44] It is hereby ordered as follows: -
- (1) The Further Notice of Application to Appoint Expert Witness, which was filed on 23 March 2022, is refused;
 - (2) The costs of this application are awarded to the 1st, 2nd and 3rd Respondents/1st, 2nd and 3rd Defendants against the Applicant/Claimant and are to be taxed if not sooner agreed;
 - (3) Messrs. Pollard Lee Clarke & Associates are to prepare, file and serve these Orders.