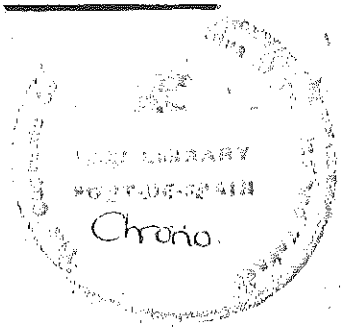

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv.A No. 106 of 2002

BETWEEN

FISHERMEN AND FRIENDS OF THE SEA (A COMPANY DULY INCORPORATED UNDER THE LAWS OF TRINIDAD AND TOBAGO)	**APPELLANT**

AND

THE ENVIRONMENTAL MANAGEMENT AUTHORITY	**RESPONDENT**

AND

BP TRINIDAD AND TOBAGO LLC	**RESPONDENT/ INTERESTED PARTY**

PANEL:

L. JONES, (Ag) C.J
R. NELSON, J.A.
A. LUCKY, J.A.

APPEARANCES:

MR R. L. MAHARAJ, S.C. AND MR M. RAMLOGAN
APPEARED ON BEHALF OF THE APPELLANT

MR M. DALY, S.C. AND MS M. WILLIAMS
APPEARED ON BEHALF OF THE 1ST RESPONDENT

MR R. MARTINEAU, S.C. APPEARED
ON BEHALF OF THE RESPONDENT/INTERESTED PARTY

DATED DELIVERED: 14th August, 2003

JUDGMENT

Delivered by Lucky JA

In this appeal the appellant seeks to challenge the decision of Bereaux J. who refused to grant the application filed by the appellant for leave to apply for judicial review of a decision of the Environmental Management Authority ("***the EMA***") in granting a certificate of Environmental Clearance ("***the CEC***") to the Respondent/Interested Party for the establishment, modification, expansion, decommissioning or abandonment of a facility for natural gas or condensate production. ("***the project***").

The project involved two components – the Bombax Pipeline Project (the onshore component with which the application was primarily concerned) and the Kapok Project (the offshore component). It included the installation of two infield submarine pipelines and the installation of a 48 inch main trunk line from Beachfield in Guayaguayare (the 48 inch pipeline will run alongside an existing 40 inch offshore pipeline). The natural gas from offshore in the 48" and 40" pipelines will be pumped from Beachfield to Point Fortin in an existing 36 inch pipeline. This pipeline passes through the Southern part of Trinidad where the appellants say approximately 112,000 people live.

The issues

Pursuant to an order of Kangaloo J.A. on 28th May 2003 the parties filed a statement of issues which are as follows:

1. Whether the learned judge was plainly, palpably or demonstrably wrong in exercising his discretion to refuse to grant leave to apply for the judicial review so as to justify the Court of Appeal interfering with the Trial Judge's exercise of his discretion.

2. Whether in all the circumstances the learned judge erred in the exercise of his discretion in considering that no good reason was adduced by the Appellant/Applicant for extending the period within which the application for leave to apply for judicial review should be made.

3. Whether in all the circumstances the learned judge erred in the exercise of his discretion in considering that the grant of any relief would cause significant prejudice to the rights of the Respondent/Interested party and would be detrimental to good administration.

The crucial question in all these issues is whether the learned judge correctly exercised his discretion and if not whether the Court of Appeal can interfere with the decision.

The Submissions

The appellant, the Respondent and Respondent/Interested Party provided the court with full and comprehensive skeleton arguments with copies of several cases to which they referred in support of their arguments, all of which are very helpful. I have considered these arguments and the submissions in court. I mean no disrespect in not setting out their comprehensive submissions and arguments.

The exercise of the Judge's discretion

The first issue is whether there was a good reason to extend time? And, what for this purpose is good reason in these circumstances.

Section 11 of the Judicial Review Act (the Act) provides:

> *" 11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*
>
> *(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.*
>
> *(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.*
>
> *(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."*

It seems quite obvious to me that an application such as the instant one ought to have been made expeditiously.

Mr Maharaj submits that there are good reasons for the delay in making the application. Mr Daly and Mr Martineau argue that the reasons advanced are not '***good reasons***' for an extension of the specified period and have couched their arguments on the strict interpretation and procedure set out in the above section. Mr Maharaj contends that in a ***'public interest'*** or "***class***" action there are matters which are relevant such as the merits of the application and whether the procedure followed by the EMA before the grant of the CEC was correct.

It seems to me that in arriving at his decision to refuse to grant an extension of time the learned judge did not give full and thorough consideration to all the reasons advanced by the appellant. He focussed his attention, primarily on the rights of BPTT who in his view acted "***in ignorance of the possibility of challenge***" and the fact that "***the project was proceeding apace***" rather than to the rights of thousands of persons supported by the cogent, compelling, unchallenged and uncontradicted evidence of Dr Ahmad Khan, an environmental expert; and, whether the EMA followed the provisions of the Environmental Management Act before granting the CEC to BPTT. Dr Khan deposed *inter alia* that:

> "(a) The Environmental Impact assessments the "EIAS" in no way dealt with the 36" pipeline to be used to transport the higher volume (88" diameter) of natural gas at a higher pressure than what the 36" pipeline currently accepts.
>
> (b) The volume of natural gas that will be transported (normally 16 billion standard cubic feet per day) is significant since the rupture or puncture of this pressurized pipeline in any section of the line will result in a vapour cloud that will spread over an area of some 2.5 kilometres within an hour and pose a serious threat to human life, human health and the environment.
>
> (c) The threat from a rupture in the exposed area of the pipeline will result in the release of a vapour cloud of greater magnitude than if the rupture occurs in the buried sections of the pipeline.
>
> (d) If the vapour is ignited it can be transported in a flammable gas cloud over such a wide area and this is significant and it may include one or more of the following results:-
>
> (i) explosion;
> (ii) fire; and
> (iii) asphyxiation of human beings and animals;
>
> (e) The common use of exposed fires (for cooking or burning garbage) increases the risk of the formation of a flammable gas cloud along the entire pipeline route whether buried or exposed.

(f) The rural character of the pipeline route where a large percentage of the population lives below the poverty line and is more likely to use open flames and naked fires to burn garbage increases the risks to human life, human health and the environment".

With reference to the six reasons advanced by the appellant as good reason to extend time in his judgment the learned judge said:

> ***"Not all of the reasons adduced on behalf of the applicant are well founded. Indeed, the applicant had been following the CEC process since May 2001. I do not at all accept that the processes set out at item 5 above would have been as time consuming as suggested. The applicant must know that in matters of this nature, time is of the essence and certainly towards the end of 2001 would have had in its possession sufficient information to make available to its legal advisers, technical advisers and its members. I accept however that up until February 2001 Mr Aboud had no definite information that the CEC had been granted to BPTT".***

The judge confined his comments to Mr Aboud's evidence on affidavit seemingly oblivious to the fact that this was a "***public interest/class action***" involving a large group. It was complex and though time was of the essence, gathering information and advice would have taken considerable time, especially to have accessed information on the issuance of the CEC and the reasons and conditions of its issue.

The provisions of a Statute must be strictly construed and applied and, in doing so, consideration should be given to the relevant authorities which define the words used. Section 11(3) of the Act includes "***other matters as it (the Court) considers relevant***" this must include matters raised by the appellant such as the evidence of Dr Khan and in general the merits of the application. The judge seems to have treated Dr Khan's evidence with disdain.

It appears to me that the trial judge should have considered section 11 (1) of the Act, then 11 (3) in forming his opinion whether to extend time before proceeding to consider the provisions of section 11 (2).

Whether leave for Judicial Review should have been granted?

As I alluded to earlier an extension of time should have been granted. Therefore the learned judge should have made a more than "***quick perusal***" of the merits. In his judgment at p.21 the Judge said:

> ***"During the five and a half month hiatus BPTT has proceeded substantially to implement the project. This weighs heavily against the grant of leave more so when taken together with the conduct of the applicant.***
>
> ***In my judgment, there will be significant prejudice to the rights of BPTT. It is important to good administration that the decision of the respondent, particularly one upon which third parties will act, be treated with decisiveness and finality. BPTT and indeed other subcontractors are entitled to rely upon the finality of the decision of the respondent with respect to the grant of the CEC.***
>
> ***3. Does the public interest require that the application should be permitted to proceed?***
>
> ***There is still the question whether the public interest requires that the application should be permitted to proceed. I have been referred by Mr. Maharaj to the very interesting decision of Maurice Kay J in R v Secretary of State of Trade and Industry ex parte Greenpeace [2002] Env. L.R. 221 in which notwithstanding the lack of promptness the judge found that was "a case in which the public interest balance comes down in favour of extending time and permitting the application to be made."***

Mr Maharaj submitted and I agree that the judge ought to have done more. He ought to have said why he did not accept the evidence produced by the appellant and why the "***lack of promptness***" weighed more in favour of "***the public interest***". The long-term effects any project will have on the

communities and ecosystems of this country require prime consideration and attention, moreso where there may be risks to health.

The judge said he acquainted himself with the material put before him. In other words he familiarised himself then he gave his decision. I do not think the foregoing is sufficient or adequate in these circumstances. I do not think the evidence was sufficiently accessed. This is a complex matter, a "***class action***", filed by a public spirited organisation comprising many persons of different walks of life. Certainly it required more than acquaintance with the material, it necessitated a proper assessment of material and evidence and findings in respect of them and to ascertain whether the public interest balance comes down in favour of extending the time and therefore in my opinion there was sufficient cause to hear the substantive action. His reasons at page 21 clearly indicate a greater concern with two activities of BPTT and the presumption of correctness of the grant of the CEC rather than to the public interest balance to which I have alluded by reference to **Greenpeace** (vide paragraph 3 page 7 *supra*).

BP Trinidad and Tobago Limited (BPTT)

The question here is whether the grant of any relief would cause substantial hardship to or could substantially prejudice the rights of BPTT. It is not disputed that the learned judge had cogent and undisputed evidence of hardship (economic) and prejudice to BPTT if relief was granted – (see section 11 (2) of the Act).

The evidence shows that BPTT had acted in good faith and apparently without advance notice of any intended challenge to the grant of the CEC began construction of the project and expended over $220,000,000 U.S. Counsel informed the Court that the project is almost complete and testing is being carried out with gas flowing through the pipeline. So, based on this evidence the judge concluded that the grant of any relief would cause substantial hardship to the rights of BPTT. A strict interpretation of section 11 (2) shows that the learned judge initially adopted the correct approach. But, it seems to me that had he exercised his discretion and weighed all the factors he could have considered other relevant matters authority for which is prescribed in section 11 (3) of the Act. The question raised by the court and by Mr Daly is: "***Where do we go from here***" or what relief if any could the judge have granted had his discretion been favourable to the appellant; or, for that matter the Appeal Court if it finds the judge did not exercise his discretion as he ought to have done.

As I said earlier, I think the trial judge ought to have extended time. This is a complex matter of "***public interest***" and environmental concern and should have been fully addressed.

It seems to me that citizens should prevent destruction of the environment for industrial development which involves the extraction of the non-renewable resources of the country or if for sustained economic development necessary safeguards and guarantees should be put in place with the necessary check and balances to protect the environment. Necessary Legislation has been passed to ensure the foregoing. Hence the establishment of the EMA.

The Environmental Management Authority (the EMA)

The words "***an application for judicial review***" refer to an ***ex parte*** application for leave to apply, not to the substantive application. However, it seems to me that this application was not simply an ***ex parte*** application but more one that was ***inter partes***. All the parties made submissions and furnished affidavits and documentation. However, none of the deponents were cross-examined.

The crucial words in section 11(2) of the Act with respect to the EMA are "***if granting the relief sought would be likely to ....be detrimental to good administration***." In carrying out a delicate *balancing act* the judge should weigh the rights of the citizens against that of the Interested Party (BPTT) and the EMA. In other words was the EMA procedurally correct in granting a CEC to BPTT?

It is not disputed that there was delay which made the application late and outside the prescribed time. But as I alluded to above there appears to be good reason for the delay and hence an extension ought to have been granted.

Both counsel for the respondents contend that the rights of BPTT would have been prejudiced by the delay of five and a half months and would cause considerable financial loss. The EMA granted a CEC approval therefore the reliefs sought would be detrimental to good administration. Mr Daly argues that the EMA followed the prescribed procedure before it granted the CEC. Mr Maharaj was of the opposite view. He felt that full consideration of the

merits was necessary before the judge exercised his discretion not to extend time.

The public interest in situations such as this is very important. There is evidence of letters from Mr Aboud and news releases which were used to demonstrate that he knew there was an application for a CEC and that one had been granted months before the application was filed. But if the EMA was aware of this, the question must be posed: Why the haste? In carrying out the '***balancing act***' to exercise his discretion I think the learned judge should have given further consideration to the application and examine carefully whether the procedure adopted by the EMA before the grant of the CEC was correct.

Mr Daly argues that section 11 (1) of the Act reveals no fetters on the discretion given to a judge in determining whether there is good reason for extending the period within which an application shall be made. In support of his contention Mr Daly referred the court to the following cases: ***Gardner v Jay*** (1885) 29 Ch D. p.50 at p.58; In the ***Southhard and Co*** (1979) 1 WLR. 1198; ***Chevallier v . Attorney General and Another*** (1985) 38 WIR. 240 at p 248 A – G and ***Attorney General of Trinidad and Tobago v Curtis Thomas*** CA. 73 of 2000, among others, all of which are helpful but in none of them the facts were similar to this application. Mr Martineau is of a similar view to that of Mr Daly. Mr Maharaj contends that this is not the usual application, it is complex, there is considerable development in the Law and application by public interest groups are relatively "***new***", therefore I think the judge is not fettered by the subsection.

It is my view that section 11 should be construed as a whole. The provisions of subsections (1) (2) and (3) are all inclusive in its construction and application. Subsection 3 begins with the words "***In forming an opinion for purpose of this section the Court shall have regard to ... such other matters as it considers relevant***" (emphasis mine). So in exercising his discretion the learned judge ought to have given full consideration to the merits and indicate why he preferred one to the other or others which could only be achieved by the hearing of the substantive action.

Having refused the extension of time; for reasons not expressed in the judgment, the learned judge went on to consider "***whether detrimental to good administration or prejudiced to BPTT***". In doing so he referred to the dicta of ***Lord Goff of Chievely in Reg v Davy Tribunal ex parte Caswell*** 1990 2 AC. 738 and ***Lord Nolan*** in **Rv. Criminal Injuries Board** ***ex parte*** A, 1999 2 AC. 330. The gist of the decisions is that where the trial judge entertains doubt as to the promptness of the application the issue should be deferred to the ***inter partes*** hearing on the merits. In **Caswell** at p. 747 Lord Goff said:

> ***"It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6) or would be detrimental to good administration. I imagine that, on an ex parte application for leave to apply before a single judge, the question most likely to be considered by him, if there has been such delay, is whether there is good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment, under section 31(6) are, I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply, as indeed they did in Reg. V Stratford-***

on-Avon District Council, Ex parte Jackson; but even then, as in that case, it may be thought better to grant leave where there is considered to be good reason to extend the period under rule 4(1), leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application.

In this way, I believe, sensible effect can be given to these two provisions, without doing violence to the language of either."

The judge said at p. 18 of his judgment:

"the ex parte application has been vigorously opposed, there has been full argument on the issue and the evidence has been provided by BPTT of the prejudice it may suffer".

As I alluded to earlier the application before the judge could not have been an inter partes hearing on the merits. The rights of BPTT were considered in some detail but not those of the appellant and by extension the public interest of the "***class***" in turn to which he was compelled to find the appropriate balance. As I said, in my view, acquainting oneself with material is not sufficient. The crucial question is whether the EMA followed the proceedings set out in Law for the grant of a CEC.

The Environmental Management Act (the EMA Act)

The EMA Act No. 3 of 2000 was assented to on 8th March 2000 and came into fore on 1st July 2001. (L.N. 113/2001). The EMA Act repealed and re-enacted the Environmental Management Act 1995 and Validated all acts and things done thereafter. The application was filed on 20th May 2002 to review the decision of the EMA made on 29th November 2001, to issue a CEC to BPTT.

In accordance with section 26(e) and 41 of the EMA Act the Environmentally Sensitive Areas Rules, 2001 were made (LN 64/2001) the Certificate of

Environmental Clearance (Designated Activities) Order 2001 (LN 103/2001) and the Certificate of Environmental Clearance (Fees and Charges) Regulations 2001 were made.

Section 35, 36 and 37 provides as follows:

35. (1) For the purpose of determining the environmental impact which might arise out of any new or significantly modified construction, process, works or other activity, the Minister may by order subject to negative resolution of Parliament, designate a list of activities requiring a certificate of environmental clearance (hereinafter called "Certificate").

(2) No person shall proceed with any activity which the Minister has designated as requiring a Certificate unless such person applies for and receives a Certificate from the Authority.

(3) an application made under this section shall be made in accordance with the manner prescribed.

(4) *The Authority in considering the application may ask for further information including, if required, an environmental impact assessment, in accordance with the procedure prescribed.*

(5) *Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority.*

36. (1) After considering all relevant matters, including the comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures.

(2) Where the Authority refuses to issue a Certificate, it shall provide to the applicant in writing its reasons for such action.

37. The Authority shall monitor the performance of the activity to ensure compliance with any conditions in the Certificate, and to confirm that the performance of the activity is consistent with-

(a) the description provided in the application for a Certificate; and

(b) the information provided in any environment impact assessment.

The crucial question is whether the EMA followed the procedure set out in the above sections before granting the certificate. It seems to me that the judge did not address this issue because he had pre-empted the determination of those issues by refusing to grant an extension of time. I think that if he had he may not have exercised his discretion as he did without hearing the substantive matter because the following questions inter alia would have arisen: what specifically are the list of activities? What is the environmental impact assessment (the EIA). Was the EIA submitted for public comment? (section 28 of the EMA Act). What was the public response? Were their comments or representations made during the public comment period? If these statutory requirements were not followed and those could only be ascertained during the determination of the substantive matter, then the issuance of the CEC as exist at present was invalid and the decision ought to be reviewed.

For the above reasons I would allow the appeal with costs fit for senior and junior counsel against the EMA here and in the court below. I would dismiss the appeal against BPTT with no order as to costs and order that the substantive matter on the merits be heard as soon as possible.

A. Lucky
Justice of Appeal