REPUBLIC OF TRINIDAD AND TOBAGO

In the Court of Appeal

Civ.App. No. 106 of 2002

Between

Fishermen and Friends of the Sea	Appellant
And	
The Environmental Management Authority	Respondent
And	
BP Trinidad and Tobago LLC	Respondent/ Interested Party

Coram:
Jones C.J. (Ag.)
Nelson J.A.
Lucky J.A.

Appearances:

Mr. R. Maharaj S.C., Dr. R. Ramlogan appeared on behalf of the Appellant/Applicant.
Mr. M. Daly S.C., Miss M. Williams appeared on behalf of the Respondent.
Mr. R. Martineau S.C., Ms. D. Peake, Miss A. Mc Gowan appeared on behalf of the Respondent/Interested Party.

Date Delivered: August 14, 2003

Jones C.J. (Ag.),

I have read in draft the judgment delivered by Nelson J.A. I agree with it and have nothing to add.

L. Jones,
Acting Chief Justice.

JUDGMENT

Nelson, J.A.

1. Trinidad and Tobago possesses significant reserves of natural gas within its territorial waters and its continental shelf. These reserves must be drilled offshore and transmitted onshore for processing as liquefied natural gas for export.

2. The appellant is a public interest group and a body corporate dedicated to the environmental well-being of the citizens of Trinidad and Tobago. The appellant is the objector to the development of the offshore Kapok Field ("the Kapok Project") and the continuation onshore of a 48-inch line from the Kapok Project from landfall at Rustville to the existing Beachfield receiving station ("the Bombax Pipeline Project").

3. BP Trinidad and Tobago LLC ("BP") the Respondent/Interested Party is the developer and the proposed operator of the Kapok and Bombax Pipeline Projects.

4. The Environmental Management Authority ("the EMA"), the Respondent, is a statutory corporation charged with the management, use and regulation of the environment. However, the EMA is not the only regulatory authority relevant to

the Kapok and Bombax Pipeline Projects, which I will refer to compendiously as "the Project", where convenient.

5. The Ministry of Energy and Energy Based Industries ("the Ministry") regulates the petroleum industry as a whole. That Ministry issues licences for petroleum operations as well as licences for pipelines. The Ministry also has certain regulatory, environmental and safety responsibilities under the Petroleum Act Chap. 62:01 and the Continental Shelf Act Chap. 1:52 as well as other statutes not here material.

The Project

6. The Kapok gas field is situated off the south-east coast of Trinidad and the gas produced is to be transmitted by pipeline to a gas liquefaction facility owned by Atlantic LNG at Point Fortin, a town on the south-east coast of Trinidad.

7. Two additional (liquefied natural gas) "trains" or plants have been constructed at Point Fortin. The object of the Bombax and Kapok projects is to enable BP to deliver its increased share of the gas demand occasioned by the construction of these two plants at Atlantic LNG's facilities at Point Fortin.

8. The Kapok project involves the development of the Kapok drilling platform and the installation of three pipelines including a 48-inch gas pipeline, which extends 66 km to landfall at Rustville. This pipeline runs parallel to an existing 40-inch gas pipeline.

9. The Bombax Pipeline Project involves running the 48-inch gas pipeline from landfall at Rustville for an additional 2.4 km to the Beachfield Receiving Facility and the installation of new equipment at Beachfield to accommodate the increased quantities of gas. From Rustville to Beachfield the 48-inch pipeline occupies part of an existing right of way.

10. The increased volumes of gas so delivered at Beachfield are then transmitted through an existing 38-inch pipeline westwards over land to the processing plants at Point Fortin.

Procedural History

11. On November 29, 2001 the EMA granted BP a Certificate of Environmental Clearance ("CEC") pursuant to section 35 of the Environmental Management Act ("the Act") thus enabling BP to proceed with the Project.

12. By an Amended Statement dated May 20, 2002 and filed pursuant to Order 53 rule 3 of the Rules of the Supreme Court 1975 the appellant sought leave to apply for judicial review of the EMA's decision to grant the CEC. The Amended Statement claimed relief by way of certiorari to quash that decision and a declaration that the CEC was unlawfully issued and was null and void.

13. Bereaux J. heard the application for leave in July, 2002 inter partes, the EMA and BP (as an interested party) opposing the application. On August 30, 2002 the learned Judge refused leave to apply for judicial review and dismissed the application.

14. By Notice of appeal dated September 13, 2002, and a draft Amended Notice of Appeal filed on March 12, 2003 which amendments we formally grant, the appellant appealed against the refusal of leave by Bereaux J.

The Grounds of Appeal

15. The grounds of appeal extend over some 13 pages, and although couched in terms of an appeal on errors of law attack the exercise of the learned Judge's

discretion on the basis that he misapprehended the facts, made wrong findings of fact or omitted to consider relevant facts and make findings thereon.

16. The appellant contends that the Judge was wrong to hold there was no good reason to extend the time for applying for leave to move for judicial review. The appellant accepts the judge's finding that it became aware of the grant of the CEC in mid-March, 2002. The application for leave was therefore five and a half (5 ½) months after the decision. The conduct of the EMA and of BP was such as to decline to disclose that the EMA had granted the CEC on November 29, 2001 although the appellant received correspondence from the EMA dated February 14, 2002 and from BP on February 25, 2002. The appellant had made known its concerns about the Project to both the EMA and BP. There was no national register recording the grant of the CEC. Delay was therefore due to the conduct of the EMA and BP.

17. The delay from mid-March, 2002 till the present application on May 20, 2002 was due to the sheer volume of the documentation and the need to gather information and obtain legal and technical advice. The judge wrongly held that the appellant had by then sufficient information.

18. BP was not prejudiced by the delay of two months since it had expended money on the Project prior to its application on August 29, 2002. BP "with full knowledge that the appellant/applicant intended to question in Court the approval of the projects" had incurred expenditure and there was no evidence of the quantum of expenditure incurred since the application. BP could not therefore complain of hardship, and the judge should have extended the period for the application.

19. The learned Judge was wrong to hold that it would have been detrimental to good administration and prejudicial to BP to extend the time for making the application. The Judge should have considered the prejudice and hardship to

112,000 persons living in the vicinity of the pipeline. BP had been spending money on the Project since May, 2000 and there was no evidence of the quantum of expenditure between mid-March, 2002. Detriment occurred when the EMA failed to follow the statutory procedures under the Act. In any event the Judge had a duty to grant leave and allow the issues to be considered at the same time as the substantive issues.

20. The learned Judge should have extended the time because the public interest in having issues determined affecting the lives of human beings, public safety and health and the environment and the need to resolve such issues weighed heavily in favour of the grant of leave to apply even when the delay was unreasonable.

21. The time for applying for leave should have been extended if the Judge had considered that the appellant merely had to show an arguable case. The case was complex enough for the Judge to leave the issues to be determined at the substantive hearing. The affidavit evidence of Mr. Gary Aboud and of Dr. Khan was not challenged. The Judge accepted that the EMA granted the CEC outside the provisions of the Act, which in itself showed that the appellant's case had sufficient merit.

22. Bereaux J. could not properly hold that there was little merit in the appellant's application although the EMA did not follow the statutory CEC procedure under the Act. The EMA failed to comply in the following respects:

(1) It did not prepare draft Terms of Reference ("TORs") – rule 3(1) of the Certificate of Environmental Clearance Rules ("the CEC Rules").

(2) It could not therefore hold the required public consultation on such TORs – rule 5(2) of the CEC Rules.

(3) It did not collect the prescribed charges to enable it to retain experts to assist in preparation of the TORs and the Environmental Impact Assessment ("the EIAs") for the Project: rule 5(1)(e).

(4) The EMA failed to prepare final TORs pursuant to rule 5(3) and instead adopted the TORs prepared by the Town and Country Planning Division ("TCPD") and the Ministry before the new CEC process.

(5) The EMA did not comply with section 35(5) of the Act and instead submitted for public comment the EIAs prepared by TCPD and the Ministry under the pre-Act procedure.

(6) The EMA gave the minimum period of 30 days for public comment on the EIAs used and did not extend that period pursuant to section 28 of the Act.

(7) The EIAs submitted by BP were inadequate.

(8) The terms and conditions of the CEC were inadequate.

(9) The EMA had no power to rely on TORs which were of no legal effect.

(10) The transmission of increased volumes of gas from the 40-inch and 48-inch pipelines required a separate CEC from the one issued: section 35(1) of the Act.

23. The appellant further contended that despite the finding that there was no good reason for the delay, the grant of leave to apply would cause significantly less prejudice to the EMA and BP and less detriment to good administration as the public interest required a determination of the application on the merits.

24. A further ground of appeal was that the judge failed to hold that the CEC was not granted by the EMA as defined in the Act.

25. The learned Judge erred in law and misdirected himself on the facts in holding that the EMA had made an informed decision in issuing the CEC. The

Judge had failed to consider the uncontradicted evidence of Dr. Khan of major deficiencies in the CEC process, in the EIA's, adverse effects on health, safety and environment and the possibility of death or injury to some 112,000 as a result of the increased volumes of gas in the 36-inch pipeline.

26. There was no evidence that the EMA had consultants and technocrats qualified to advise it. The EMA failed to collect the statutory charges from BP, which would have enabled it to retain such experts so as to make an informed decision to grant the CEC. The EIAs were to be prepared by qualified persons and Dr. Khan had found them deficient.

27. It was wrong to hold that the EMA was lawfully entitled to adopt the decisions of TCPD and the Ministry although the EMA admitted it did not follow the mandatory provisions of the Act.

28. The decision of the judge that the Act did not sufficiently provide for the transition between the old and the new legislation and that he could rely on the decision of TCPD and the Ministry in respect of the TORs and the EIAs was an erroneous interpretation of section 39 of the Act.

29. Finally the Judge misdirected himself on the facts when he held (a) that BP had no notice of an intended legal challenge to the grant of a CEC: see exhibits GA-12 and GA-16; (b) that the appellant had been following the process since May, 2001 although the CEC application was only made on August 29, 2001; (c) that the project was substantially completed when only the construction phase was partially completed and the project was expected to last 50 years.

The issues

30. I mean no disrespect if I say that the issues are by no means as wide-ranging as the grounds of appeal.

31. By section 6 of the Judicial Review Act 2000 ("the JRA") all applications for judicial review are subject to a preliminary process of triage. The wheat is separated from the chaff. The procedure is discretionary. If an application for leave is not prompt or is outside the three-months limit the Judge has a further discretion to extend the time for making the application for leave. Once time is extended and there is undue delay (as there normally would be after three months) there is an additional discretion to refuse leave to apply if the "grant of any relief" would cause substantial hardship or prejudice to the rights of any person or would be detrimental to good administration.

32. By section 11(3) of the JRA the court must consider the time when the applicant first became aware of the making of the decision and might subjectively consider such other matters as the court considers relevant.

33. In my judgment the sole issue is whether Bereaux J., properly exercised his discretion in refusing to extend the time to apply for permission and consequently dismissing the application.

34. The learned Judge despite refusing to extend time went on to consider certain other factors. I have concluded that the learned judge's postscript was directed towards discovering whether there were other relevant factors which overrode his decision and required him to proceed to a substantive hearing.

35. It is extremely important in this case to keep in mind the provisions of section 11 of the JRA, which in its present form is only a distant relative of the equivalent English provisions.

36. I shall return to this point, but for present purposes I note that section 11(2) of the JRA as to undue delay is not an issue in this case. I turn now to

consider the Court of Appeal's power to set aside a judge's exercise of his discretion.

Review of Discretion

37. I must bear in mind the policy of the JRA was to have a filtering mechanism for applications for judicial review, and, further, where such applications are not prompt or later than three months from the impugned decision a second filter, a discretionary extension of time, must be put in place. Thereafter, under our law, if the time for applying for leave is extended, by section 11(2), which deals only with the leave stage, the application for leave may be defeated if undue delay would cause substantial hardship or prejudice to third parties or detriment to good administration.

38. Against the background of these multi-tiered discretions I bear in mind the words of Lord Diplock in **Hadmor Productions v Hamilton** [1982] 2 WLR 322, at 325 "[An appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only."

39. "It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere." : per Lord Fraser of Tullybelton in **G. v G.** [1985] 1 WLR 647, at p. 651. See also **Jones v Solomon** (1989) 41 WIR 299, 336B-337H per Sharma J.A. (as he then was).

40. I turn now to consider whether the learned judge's refusal to extend time was a proper exercise of his discretion.

Section 11 of the Judicial Review Act, 2000

41. Section 11 deals with delay in applying for judicial review. In its Amended Statement the appellant sought "leave of the Court to extend the period of time within which to make this application as there is good reason for extending the period."

Section 11 of the Judicial Review Act, 2000 reads in part:

> "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."

42. Until the enactment of the JRA the law on delay in judicial review proceedings was based on the Rules of the Supreme Court 1975, particularly Orders 53 rule 4(1), which was copied from the English Order 53 Rule 4(1) as it existed in 1977. That rule gave the Court power to refuse preliminary leave and to refuse any relief sought on the application where there was undue delay in making the application.

43. In England rule 4(1) was revoked in 1980 and replaced by a new rule 4(1) based on lack of promptness unless there was good reason for extending the time for applying for leave to apply for judicial review. That 1980 rule has been enacted in Trinidad and Tobago as section 11(1) of the JRA.

44. Thus, in Trinidad and Tobago we have both the old Order 53 rule 4(1) and the 1980 replacement of it. However, since the 1980 UK rule 4(1) has been enacted as substantive law in section 11(1) it must prevail over our existing rule 4(1), which is subordinate legislation.

45. In 1981 the UK Parliament enacted section 31(6) of the Supreme Court Act, 1981, which reverted to the concept of undue delay but yet preserved the 1980 rule with its three-months time limit subject to extension for good reason.

46. In Trinidad and Tobago we have copied section 31(6) of the UK Supreme Court Act in our section 11(2), but with substantial changes. The effect of the changes is to disapply the concept of undue delay to applications for substantive judicial review. Section 11(2) deals only with leave applications and not substantive applications.

47. Section 11(3) has no parallel in the UK principal or subordinate legislation. Subsection (3) gives the court a wide discretion to take any relevant matters into consideration including the time when the applicant became aware of the making of the decision in forming the good reason opinion for overriding lack of promptness or in arriving at a decision to refuse leave on the grounds that because of undue delay the grant of any relief would cause substantial hardship or substantial prejudice to the rights of any person or would be detrimental to good administration.

48. In my judgment the phrase "an application for judicial review" in section 11(1) of the JRA should be read as referring to an application for leave to apply for judicial review: see **R. v Stratford –on- Avon D.C. exp. Jackson** [1985] 1 WLR 1319 (CA) and **R v Dairy Produce Quota Tribunal exp. Caswell** [1990] 2 WLR 1320 (H.L.)

49. The effect of section 11(1) was that an application for leave must be made promptly and in any event within three months of the making of the impugned decision : see **exp. Caswell** (supra). In such a case the court may refuse leave unless it considers that there is good reason for extending the period: see section 11(1) of the JRA.

50. When read with section 11(1), section 11(3) gives the court the power to consider a wide range of factors in arriving at its opinion on good reason. The chief relevant factor is the time when the applicant became aware of the making of the decision.

51. The appellant listed several reasons for its late awareness of the grant of the CEC. Among these the appellant contended that the conduct of the EMA and BP in failing to disclose the grant of the CEC on November 29, 2001 was a reason.

52. However, it is clear that the judge accepted that the appellant only became aware of the CEC sometime in mid-March 2002. In arriving at that conclusion the judge considered all the reasons advanced by the appellant. Those reasons included the alleged conduct of BP and the EMA. At the end of the day he did not accept that the appellant showed promptness in the two months prior to the filing of these proceedings on May 20, 2002. He considered but did not accept that the volume of documentation and the need to gather information in order to get legal and technical advice constituted a proper explanation.

53. A random survey of the evidence shows that the judge's finding was correct.

54. The appellant had by letter dated November 19, 2001, given notice to the EMA of a claimed violation of section 69(1)(a) of the Act (alleged failure to pay the EMA certain fees or charges for review of the EIAs). It referred to the need for an EIA and for collection of TORs on payment of the prescribed charges.

55. Again, Dr. Khan, who was hired by the applicant in April 2002, was an environmental expert, who had worked for the EMA.

56. The learned judge further accepted the principle that in planning permission applications, to which the present application was analogous, there was a special need for expedition. In **R v Cotswold D.C. ex parte Barrington Parish Council** (1998) 75 P & C. R. 515, at p. 524 Keene J. cited with approval dicta of Simon Brown J. (as he then was) that there was a "the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency....." Further, speed was also an important factor in public interest litigation. In **R v Secretary of State for Trade and Industry ex parte Greenpeace Limited** [1998] Env. L.R. 415, 425 Laws J. said" "Delay will be tolerated much less readily in public interest litigation".

57. The appellant before us contended that BP could not properly complain of prejudice since it had assumed the risk of wasted expenditure. With respect, the issue of prejudice to BP is not relevant to the principle of promptness and expedition on the part of the appellant.

58. In the light of his own findings and the evidence before the learned judge he was entitled to exercise his discretion by refusing to extend the time for applying for leave to bring judicial review proceedings.

59. However, the learned judge went on to consider certain other relevant factors. The appellant also sought to press upon us facts and matters, most of which were listed in its grounds of appeal, which indicated that the learned judge's discretion was wrongly exercised.

Illegality of the CEC process

60. The appellant urged upon us that the alleged illegality of the CEC process was a powerful factor requiring the judge to extend the time and even to order that the application for permission and the substantive hearing be taken together, much as happened in **R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd.** [2000] Env.L.R. 221.

Section 39 of the Act

61. Section 39 reads as follows:

> "Sections 35 to 38 inclusive shall not apply to –
>
> (a) any activity with respect to which, prior to the date on which review under this section first became applicable, all final approvals necessary to proceed already had been obtained from all other governmental entities requiring such approvals; and
>
> (b) any activity with respect to which, prior to the effective date on which review under this section first became applicable, outline planning permission or full planning permission under the Town and Country Planning Act had already been obtained."

62. Section 35 imposes on the relevant Minister the obligation of designating a list of activities, which would require a CEC. It prevents anyone from proceeding with a designated activity unless that person applies for and obtains a CEC.

63. The purpose of the application is to enable the EMA to assess the environmental impact of the designated activity and to obtain public comment thereon.

64. Section 36 gives the EMA power to refuse a CEC with reasons or to grant a CEC with conditions. Section 37 gives the EMA the power to monitor the performance of a designated activity to ensure compliance with any conditions imposed. Section 38 makes it clear that the issue of a CEC does not dispense with the need to obtain planning permission or other government approvals, if required, for a designated activity.

65. The need for a CEC does not apply to any activity in respect of which prior to the effective date on which review under those sections "first became applicable" outline or full planning permission had been obtained.

66 The effective date when review first became applicable under the Act was when the Certificate of Environmental Clearance (Designated Activities) Order 2001 ("the Order") and the Certificate of Environmental Clearance Rules 2001 ("the CEC Rules") being subject to negative resolutions, became effective on July 7, 2001.

67. Section 39 exempts only activities which have already obtained final governmental approvals necessary to proceed and those with outline or final planning permissions. The Act is not retrospective.

68. After the coming into force of the Act on March 8, 2000 and up to July 7, 2001, the regulatory bodies for the Project were the Ministry and TCPD. At the effective date some applications before these bodies had traversed the entire process of Terms of Reference, EIAs, public consultation and regulatory evaluation but had not obtained final approvals. The EMA correctly concluded as the new regulatory body that a formal CEC application and a CEC were required under the Act.

69. The Act, however, is silent as to whether such "old law" applications already in the system had to be started all over afresh or continued and taken over by the EMA with the benefit of the process already completed.

70. In my judgment this was a practical matter for the EMA. It could not have been the intention of Parliament that the huge outlays in time, effort and money involved in such applications should be thrown away, and be incurred all over again.

71. The EMA properly and lawfully put in place procedures for dealing with applications in progress. At least six projects were affected : the Project; the Point Lisas Port Expansion; the Methanol 5000 plant; Oil Mop Processing; NGC Pipeline – Westmoorings and the Atlas Methanol Plant.

72. The EMA in a document attached to a letter dated February 14, 2002, to the secretary of the appellant, Mr. Aboud, states as follows:

> "It should be noted that the Companies had previously applied to the TCPD for Outline Planning Permission prior to the effective date of the CEC Rules. TCPD had advised on the requirement for an EIA, issued TOR and had already received the EIA Reports. These Reports had already been reviewed by a TCPD Evaluation Committee which comprised of several key government agencies, including the EMA. The entire evaluation was complete and the TCPD was ready to issue their Outline Planning Permission (OPP) when the CEC Rules came into effect.
>
> For the BP Bombax project it should be recognized that there was an offshore component which was handled by the MEEI. The MEEI had issued TOR and the EIA report had already been submitted and was under evaluation. The EMA played a role in this evaluation when the CEC application for this project was made. Prior to this, BPTTL had submitted a copy of the EIA Report to the EMA for evaluation."

73. In my judgment, therefore, it was not necessary for the EMA to apply the new procedure under the CEC Rules or to start the clearance procedure afresh prior to issuing a CEC.

74. In July 2000 BP had commenced public consultations on the Bombax -Kapok project. By February 2002 it had held some 14 – 16 public consultations.

75. On October 11, 2000, BP applied to the Town and Country Planning Division for outline planning permission for the onshore portion of the Project. On October 24, 2000, the Planning Division issued Terms of Reference for the Assessment of Environmental Impacts for the onshore portion of the Project. On December 4, 2000, the Ministry of Energy issued to BP Terms of Reference for the offshore portion of the Project.

76. On May 22, 2001, the EIA for the onshore portion of the Project was submitted and on June 22, 2001, the EIA for the offshore portion of the Project was deposited with the Planning Division and with the Ministry of Energy respectively.

77. On August 30, 2001, BP applied to the EMA for the CEC which was granted on November 29, 2001. Consequent upon the CEC, BP obtained outline planning permission on December 7, 2001 and final planning permission on December 20, 2001.

78. I am firmly of the view that the EMA was justified on the facts and on a proper construction of section 39 of the Act in completing "old law" applications under its section 35 powers without cancelling such applications and requiring them to start all over again. Accordingly I do not find that there was any illegality in the manner in which BP obtained the CEC.

79. The learned judge in holding that the Act did not provide sufficiently for the transition between the old and new legislative regime could not have meant that the EMA had proceeded unlawfully and I so hold.

80. In my judgment **Berkeley v Secretary of State for the Environment [2000] 3 All ER 897 (H.L)** is distinguishable. That case concerned the home ground of Fulham Football Club ("Fulham"). The relevant Town and Country Planning Regulations required that certain applications such as redevelopment of Fulham's ground should be accompanied by an environmental statement. Fulham applied for planning permission to redevelop its ground but no environmental statement accompanied the application, contrary to the Regulations. The Secretary of State called in the application and held a public inquiry but did not require an environmental impact assessment ("EIA"). Planning permission was granted and Lady Berkeley moved to quash the purported grant of planning permission.

81. Lady Berkeley failed at first instance and in the Court of Appeal but succeeded in the House of Lords. In the House of Lords it was conceded as was held in the Court of Appeal, that an EIA was required. However, their Lordships held that the court could not retrospectively waive that statutory requirement and treat its absence as irrelevant on the facts.

82. In the present case I have held that there was no breach of the Act. Existing statutory procedures were complied with at the relevant stages. Contrary to what happened in **Berkeley** the public had an opportunity to express an opinion on the EIAs.

83. For the foregoing reasons I reject the contention that the EMA was in breach of the mandatory provisions of the Act in any of the eight relevant respects claimed in the grounds of appeal set out at paragraph 22 above. As to the adequacy of EIAs and of the CEC, these are matters that would require determination only if time were extended and leave granted.

Merits at the leave stage

84. Counsel for the appellant seized upon what appeared to him to be an indirect finding by the learned judge that there was merit in "the issue as to the power of the respondent to permit the Project to proceed outside of the provisions of the CEC process."

85. He contended therefore that the merits so established compelled the judge to extend the time and allow the application to proceed. Alternatively, he argued that the learned judge had not sufficiently considered the merits.

86. Counsel seemed to be saying that the "quick perusal" of the merits envisaged by Lord Diplock in **R v. Inland Revenue Comrs. ex parte National Federation of Self-Employed** [1982] AC 617, 643 and by the learned judge was not enough in the present case.

87. Counsel relied on dicta of Simon Brown L J in **R v Criminal Injuries Board ex parte** A. [1997] 3 WLR 776, 791 in which he said:

> "At the leave stage (putting section 31(6) (a) aside), the question is whether there is "good reason" for extending time and allowing the substantive application to be made. This involves consideration both of the reasons for the delay and the apparent merits of the challenge; the better the prospects of success, the readier will the court be to extend time even where the delay is unjustifiable i.e. the merits themselves can contribute to or even supply the "good reason."

88. Counsel further relied on dicta of Ackner L J (as he then was) in **R v Stratford –upon- Avon D.C, ex parte Jackson** [1985] 1 WLR 1319, 1325:

> "We think that on the facts of the present case such consideration may well necessitate (inter alia) some assessment of the substantial merits or otherwise of the applicant's complaints and that this assessment can be made far more appropriately and satisfactorily on the hearing of the substantive application."

89. It must not be forgotten that the English provisions are different from ours. In Trinidad and Tobago the structure of section 11 of the JRA requires an application more than three months late to pass the test of an extension of time and thereafter the test of substantial hardship or prejudice to third parties or detriment to good administration. On these tests while merits in the sense of an arguable case rather than the outcome of the case are relevant, at the undue delay stage even substantial merits can be defeated by third party considerations or detriment to good administration. A consideration of merits on an extension of time application may well be otiose.

90. Suffice it to say that neither case lays down a rule of law that merits would inexorably lead to an extension of time. The most that can be said is that merit is a factor to be considered in the judge's exercise of his discretion.

91. I am satisfied that Bereaux J. did consider the merits of the substantive application in a preliminary way in the context of other factors.

Public Interest

92. The learned judge considered whether "the public interest balance comes down in favour of extending time and permitting an application to be made," as happened in **Greenpeace II (supra),** which he compared with **Greenpeace I** (1998) Env. L.R 415. He further considered the appellant's "concern for the lives and well-being of those persons living in the immediate vicinity of the 36-inch pipeline."

93. On the authority of **R v Secretary of State for the Home Deparment, ex. P. Ruddock** [1987] 1 WLR 1482, 1485 counsel for the applicant pressed upon us the substantial public importance of the public health, safety and environmental issues raised by the evidence of Dr. Khan and the public interest in compliance with the Act. I have already dealt with the latter issue as to non-compliance with the Act on the present facts.

94. The evidence of Dr. Khan suggested that the increased volume of natural gas to be transported through the 36" pipeline posed a serious threat to human life, health and the environment in the event of the escape of gas owing to a rupture or puncture. Despite this evidence the applicant presented no expert evidence on the engineering of the Bombax pipeline, the corrosion protection and the pigging and other maintenance of the pipeline. Nor was there any evidence on the flow of natural gas in pipelines. No specific issue of the integrity of the

Bombax pipeline was raised so as set up the general issue of human life, health and safety.

95. It is clear, however, that despite the manifest deficiencies of Dr. Khan's evidence the learned judge did consider the applicant's concern for the lives and well being of persons residing near the 36" pipeline.

96. In the state of the evidence before the learned judge he was entitled, as he put it, "to come down against the grant of leave to the applicant" on this issue.

97. In **Greenpeace II** (supra) Maurice Kay J. held that certain UK regulations were not a complete and lawful implementation of the European Habitats Directive and the Secretary of State's approach was legally erroneous. He considered that to be "a matter of substantial public importance". The present case is far removed from that situation.

98. Maurice Kay J. therefore held that despite the lack of promptness which he identified "the public interest balance comes down in favour of extending time and permitting the application to be made". In arriving at that conclusion Maurice Kay J. was exercising his discretion on the facts before him. Bereaux J., clearly echoing the words of Maurice Kay J., and considering the facts before him, came to the opposite conclusion, as did Laws J. in **Greenpeace I** (supra). I can find nothing so plainly wrong or aberrant in the learned judge's exercise of his discretion on this point.

Detriment to good administration

99. The learned judge in considering other matters relevant to his decision under section 11(1) of the JRA assessed the detriment to good administration if he were to extend time and allow the action to proceed. The learned judge properly called to mind a passage from **ex parte Caswell** (supra at p. 1328):

> "In asking whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context, that interest lies essentially in a regular flow of consistent decisions ..... in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision".

100. He further relied on **0'Reilly v Mackman** [1983] 2 A.C. 237 at p. 280 per Lord Diplock.

101. The learned judge regarded the need for finality of decision. The circumstances of this case he took into account that BP had entered sub-contracts with some twenty-five sub-contractors. He took into account that BP, a third party, had consulted with the EMA and the Ministry (and I should add TCPD) at all material times during the Project. They were the competent authorities. Bereaux J. next considered that the Bombax pipeline was 70% complete and the Kapok Project was 52% complete. He weighed in the balance that US$213 million had already been spent, and any delay in completion of the Project would result in significant losses running into millions of dollars per month.

102. The appellant did not pursue orally or in his written submissions the arguments contained in his grounds of appeal on this topic. He contended that the issuance of the CEC outside the CEC Rules was a potentially invalid decision on the judge's finding. It would be contrary to good administration to allow potentially invalid decisions to be treated with decisiveness and finality. I reject this submission for the reasons I have already advanced earlier in this judgment.

103. Counsel for BP has indicated in answer to the court that as of July 2003 the Project is complete in the sense that the pipeline is being tested. On the evidence before the court when the Project is complete some US$420 million would have been spent.

104. Section 35(2) of the Act requires a valid CEC before proceeding upon designated activities, such as BP's. It is not suggested that the CEC was

fraudulently or improperly obtained. BP has acted upon it to completion of the Project.

105. At least five other companies in the oil and gas sector of the economy are affected. If the EMA's decision on the Project were re-opened it would lead to other applications to review EMA clearances in respect of those projects. I can take judicial notice of the importance of the oil and gas sector to the economy of Trinidad and Tobago. In the circumstances I would agree with the learned judge for these additional reasons that it would be detrimental to good administration not to treat the EMA's decision on November 29, 2001 as final in the face of the appellant's delay.

Observations

106. Before parting with this case I wish to stress that I am by no means persuaded that the appellant did not have an alternative remedy by way of a direct private party action before the Environmental Commission pursuant to section 69 of the Act. However, since the learned Judge did not deal with the point and there was no full argument in this court I express no concluded view on this point.

Conclusion

107. In the final analysis I have found no basis for interfering with the learned judge's exercise of his discretion pursuant to section 11(1) of the JRA. I would dismiss this appeal with costs fit for senior and junior counsel and affirm the order of Bereaux J. in the court below.

R. Nelson,
Justice of Appeal.