



FISHERMEN AND FRIENDS OF THE SEA

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Fishermen and Friends of the Sea- FFOS (Appellant) v Environmental Management Authority- EMA and BP Trinidad and Tobago LLC (Respondents) PCA (Privy Council Appeal) No. 30 of 2004

Facts

This matter relates to a project undertaken by BP Trinidad and Tobago LLC (BPTT). The project involved two components – the Bombax Pipeline Project (the onshore component) and the Kapok Project (the offshore project). It included the installation of two infield submarine pipelines and the installation of a 48-inch main truck line from Beachfield in Guayaguayare (the 48-inch pipeline which ran alongside an existing 40-inch offshore pipeline). The natural gas from offshore in the 48” and 40” pipeline was pumped from Beachfield to Point Fortin into an existing 36” pipeline. This pipeline passed through the southern part of Trinidad where approximately 112,000 people lived.

The Kapok and Bombax projects were being planned at a time of rapid development in environmental legislation in Trinidad and Tobago. When the planning of the projects started, the Environmental Management Act (**EMAct**) 1995 was already passed but it had not been made effective by secondary legislation. Since the EMAct 1995 was ineffective for many practical purposes, environmental protection depended on earlier statutes. In particular, the offshore Kapok project required approval by the Minister of Energy, and the onshore Bombax project required approval by the Town and Country Planning Division (**TCPD**) before work could begin. Both these authorities required documentary material tantamount to an Environmental Impact Assessment (**EIA**) to be prepared and submitted.

Prior to the enactment of the EMAct 1995 none of the laws of Trinidad and Tobago expressly provided for an environmental clearance process. The EMAct 2000 and the EMAct 1995 provided a framework for the environmental clearance process but this could not have been implemented until subsidiary legislation were made. The EMAct 2000 obtained a special majority but had the same content as the EMAct 1995. It was the intention of Parliament to introduce a proper process for ensuring environmental clearance (CEC Rules) by making it mandatory with respect to certain designated activities (Designated Activities Order) and removing the discretionary power vested in other state agencies to require environmental clearance. On 11th October 2000, BPTT applied to TCPD for outline planning permission for the onshore portion of the Project. During this time period, the EMAct 2000 had been enacted and the EMA had been established, but the EMAct 2000 had not yet been made effective by secondary legislation

such as an Order (Designated Activities Order) which would designate activities requiring the CEC; the making of the Rules (CEC Rules) to explain how the CEC process would be implemented; and the Regulations which would provide for the payment of fees and charges. These secondary legislations were only implemented in May 2001.

BPTT had held some form of public consultation meetings of a preliminary nature, and had applied for approval for the Kapok and Bombax projects to the relevant authorities, the Minister of Energy and the TCPD respectively. Each had issued informal terms of reference (**TORs**) for EIAs, and EIAs were in course of preparation. On 22nd May 2001 and 22nd June 2001, the EIAs were submitted for the onshore and offshore project respectively. The CEC Rules were then only at the drafting stage. This informal public consultation, formally recorded in the EIA, lead to controversy. By the time, the CEC Rules had come into effect, the EIA was already submitted by BPTT.

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

On 5 November 2001 FFOS wrote a letter of protest to Professor Dyer Narinesingh, the then Chairman of the EMA. This letter, made several complaints about the onshore EIA, such as:

1. the CEC Rules was not being applied to the project;

Further to section 39 of the EMAAct 2000, which states that

“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”

FFOS argued that BPTT should have be subjected to the CEC Rules as they had obtained final planning permission and approval and as mandated by the EMAAct BPTT was supposed to undergo the entire process once the Rules were passed.

2. the EMA had failed to charge BPTT even the minimum fee required by the Fees Regulations; and
3. part of the EIA had been edited out on grounds of confidentiality
4. BPTT activities created significant risks to the human health and environment of the communities situated along and in the vicinity of the pipeline route.

On 20 November 2001 Professor Narinesingh sent a courteous acknowledgment of the letter of 5 November, undertaking to investigate the complaints and assuring us that the EMA would hold its hand until he had investigated the matter.

On 29 November 2001 the EMA granted BPTT a CEC for the Kapok and Bombax projects.

On 14 February 2002, the then Chairman eventually wrote to FFOS apologising for the delay but explained that he had wished to make a detailed investigation and stated that it had been decided to manage CEC applications in respect of four pending projects (one of which was the Bombax project). During March 2002 FFOS visited the EMA's office more than once, but found no register of CECs. Eventually in mid- March FFOS was informed of the CEC granted to BPTT on 29 November 2001.

FFOS applied for leave to apply for Judicial Review outside the 90-day window for Judicial Review.

The Kapok project was completed and fully tested by November 2003, having cost US\$267m. The Bombax project was completed and fully tested by October 2003, at a cost of US\$194m.

Court: High Court, Court of Appeal and Privy Council.

FFOS relied on the grounds of:

1. Substantial compliance with the TOR and the CEC Rules

Outcome:

High Court – Justice Bereaux refused FFOS leave on the basis of delay without hearing the substantive matters. The Judge concluded that there would be significant prejudice

to the rights of BPTT. He also referred, more briefly, to the interest of good public administration.

Court of Appeal –FFOS appealed the matter. On 14th August 2003, Jones CJ (Ag) and R Nelson, A Lucky dismissed the appeal in agreement with the High Court Decision, but allowed FFOS to appeal the matter at the Privy Council.

Privy Council – Even though BPTT accepted that there was an arguable case that the EMA had not fully complied with the requirements of the EMA 2000 and the secondary legislation made under it, the Privy Council accepted that the procedural irregularities arose primarily from shortcomings in the transitional provisions of the EMA 2000 and dismissed the appeal mainly on the basis of delay. On 25th July 2005, the matter was dismissed.

This case has been cited many times in the Commonwealth as it defines “time” and “delay” in Judicial Review.

Subsequent to this matter, the EMA sought to recover legal costs from FFOS by attempting to hold the Directors of the NGO personally liable by “lifting the corporate veil”. This attempt could have potentially destroyed the hopes of other public interest groups from challenging any decision of the EMA or the government of the day. FFOS was successful as it proved to be acting in the public interest with no personal benefit and the matter was dismissed by Justice Pemberton at the High Court.