THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-02403

IN THE MATTER OF AN APPLICATION BY FISHERMEN AND FRIENDS OF THE SEA LIMITED FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998

And

IN THE MATTER OF AN APPLICATION BY FISHERMEN AND FRIENDS OF THE SEA LIMITED UNDER THE JUDICIAL REVIEW ACT CHAP 7:08

Between

FISHERMEN AND FRIENDS OF THE SEA

Claimant

And

ENVIRONMENTAL MANAGEMENT AUTHORITY

Defendant

Appearances:

Claimant: Mr. Anand Beharrylal QC and Mr. Alvin Shiva Pariagsingh.

Defendant: Mr. Anthony Vieira, Mr. Anil V. Maraj and Ms. Nicole de Verteuil-Milne.

Before the Honourable Mr. Justice Devindra Rampersad

Date of delivery: April 6, 2020.

Ruling on Application for Security for Costs

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Introduction

1. On 8 November 2018, the claimant's Research Officer, Damian Clarke, visited the respondent's National Register and requested a copy of the EIA report in relation to the Certificate of Environmental Clearance No. 0563/2003 in relation to an integrated resort development Golden Grove and Buccoo Estates, Tobago.

2. He was informed that *"only 10% of the EIA report could be copied per member of the public or per organization regardless of how many visits were made."* This was a modification of the procedure that the claimant said had been adopted approximately 2 years prior that the claimant's delegates could acquire 10% of the EIA document per visit. This was, itself, a further modification of the previous procedure whereby full copies of the same were granted in the past.

3. As a result, the claimant alleged in its letter to the defendant's chairman dated 11 December 2018 that it meant that 10 visits by 10 separate entities were now required to secure a complete document for scientific examination. The claimant's corporate secretary, Gary Aboud, in the said letter, requested reasons for this new process and went on to say:

> *" …. an EIA report can be thousands of pages and to assess the contents it must be viewed in its entirety. The review and commenting. For the EIA is a mere thirty (30) days making it logistically cumbersome and it seems to be another deliberate frustration and blockade being imposed on CSOs and members of the public who are being locked out of the process. These documents require various disciplinary expertise from different professionals and your prohibitory approach cripples our ability to constructively contribute to the process in a timely manner. …*
>
> *In the spirit of transparency, accountability and public participation please provide us with a complete copy of the EIA report (CEC 0563/2003) which is imperative to our monitoring and evaluation of the current CEC Application for the said location."*

4. In response, the defendant, through its chairman Ms Nadra Nathai-Gyan, responded approximately 3 months later by letter dated 13 March 2019 to say, amongst other things:

> *"The EMA is seeking to recalibrate its library policies and practices so as to be better aligned with the law, in particular:*
>
> - *Section 17 (3) (a) of the Environmental Management (EM) Act, Chap. 35:05 which mandates that the EMA shall not disclose or provide information which is subject to a trade secret or confidentiality claim by a person supplying the information without the prior consent of that person.*
> - *Section 17 (3) (b) of the EM Act, which mandates that the EMA shall not disclose or provide any information with the EMA determines that disclosure of the information would compromise its enforcement program or be contrary to national interest.*
> - *Section 18 (4) (c) of the Freedom of Information (FOI) Act which mandates that if the form of access requested by the applicant would involve an infringement of copyright subsisting in a person other than the State, access in that form shall be refused but access may be given in another form.*
>
> *…..*
>
> *On the matter of copyright and in particular, FFOS's stated practice of making multiple visits in order to secure a "complete document for scientific examination", you will or should be aware that copyright is a property right and the owner of copyright has the exclusive right to allow or prohibit photocopies of his/her work. See Sections 5 and 8 of the Copyright Act, Chapter. 82:80.*
>
> *As a general rule, where a person requesting access to information wants to copy entire documents, as opposed to just being able to view them without the copyright owner's permission, this would constitute a breach of copyright.*
>
> *The challenge is staking out and managing the applicable boundaries in a responsible fair and proportionate manner. Accordingly, where trade secrets and confidentiality claims pertaining to parts of Environmental Impact Assessment (EIA) Reports are involved, such information cannot be provided or disclosed. Further, where an individual wants to copy short extracts of an EIA Report, our Library*

and must be satisfied that the copy would be used solely for the purpose of study, scholarship or private research and not for any other purpose."

5. Not being satisfied with this response, a pre-action protocol letter was submitted to the defendant dated 24 May 2019 and by letter dated 6 June 2019, the defendant responded giving the rationale for its continued refusal to supply the entirety of the EIA report by photocopy. It maintained the objections mentioned above and went on to say the following:

> *"In the circumstances, the Information Centre will continue to provide a photocopy of ten percent (10%) of an EIA that is requested. Exceptions to the ten percent (10%) photocopying of EIAs will be to trade secrets, confidential information, copyright information and information protected by the Data Protection Act, Chapter 22:04. The authority will seek to include the owner of the copyright in this process by requesting its consent to disclosure of the EIA through photocopying. The Information Centre will also take a collaborative approach with the party requesting a copy of the EIA by confirming that it is to be used for a non-commercial purpose. This will be facilitated through the signing of a declaration."*

6. As a result, this claim was brought for judicial review for the following reliefs, amongst others:

   6.1. A declaration that the EMA's decision, reasons and policies that EIAs are subject to copyright are wrong in law, and that EIAs are not subject to copyright by virtue of the Environmental Management Act Chap 35:05, Freedom of Information Act Chap 22:02 and/or the Copyright Act Chap 82:80.

   6.2. An order of Mandamus that the EMA provide FFOS copies by email and/or permit FFOS to make a hard copy of any whole EIA requested by FFOS, subject to reasonable copying charges if given in hard copy.

7. There is no doubting the authorities put forward by the defendant in respect of the test which is applicable for a security for costs application under Part 24 of the CPR. Both local authorities referred to were in respect of commercial matters, however, rather than administration actions. Notwithstanding that, there is also no doubt that the court has the jurisdiction to make an order for security for costs in an administrative law matter.

8. In the latter regard, the court has considered the following further statements.

9. At paragraph 19.94 of Supperstone & Ors[1], the authors opined in relation to applications for security for costs in public law matters:

> *"The public nature of the jurisdiction should point against a requirement for giving security where the effect would be to rule out a claim that should be ventilated in the public interest. As a consequence, the use of security for costs applications in public law cases have fallen into abeyance in recent years. Outside of the context of commercially motivated cases, applications for security for costs orders are unlikely to succeed and will be closely scrutinised. This is particularly the case where a claimant is challenging a decision which affects his human rights or some basic welfare entitlement. It is also likely to be the case in environmental cases, where the application of the Aarhus Convention may weigh heavily against such orders."*[2]

[1] ***Supperstone, Goudie and Walker on Judicial Review***/Chapter 19 Procedure: the Early Stages/Costs in the Early Stages of Judicial Review/Security for costs - This text was cited by attorneys-at-law for the defendant in their submissions.

[2] The **Aarhus Convention** is a convention out of the United Nations Economic Commission for Europe and is known as ***The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*** – Trinidad and Tobago is not a signatory to that Convention - see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en

10. Notwithstanding this statement, however, Supperstone & Ors went on to say[3]:

> *"Security for costs in judicial review has now been brought into line with the rules governing security for costs in ordinary civil actions[4]. In R (We Love Hackney Ltd) v Hackney LBC[5], Farbey J, having set out the main authorities, granted security for costs in favour of the defendant local authority, noting that one of the conditions for the grant thereof, that there is reason to believe the claimant company would not be able to satisfy a costs order if unsuccessful, was made out. Farbey J also accepted the defendant's argument that the burden rested on the claimant to show that there did not exist third parties who could reasonably be ex-pected to put up security for the defendant's costs, finding on the facts that granting security for costs would not stifle the claim in circumstances where the claim had 'successful and resourceful backers who have the funds to provide security and to enable the claim to continue'.*

11. The claimant has not shied away from the suggestion that it may not be able to pay any order for costs made against it since it says it is a non-profit company. Mr. Aboud quoted Pemberton J, as she then was, and the Privy Council in his affidavit deposed to and filed on 17 December 2019 to support the judicial recognition, up to the highest court in the land, of the claimant's non-profit status and public interest concerns.

12. However, the claimant has not come straight out and said that the claim would be stifled if the order requested was made. Instead, it is left to the

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[3] At paragraph 19.95.

[4] Examples in case law of the operation of the new rule are ***Olatawura v Abiloye*** [2002] 4 All ER 903; and ***R v Leicester City Council, ex p Blackfordby and Boothorpe Action Group Ltd*** [2001] Env LR 35 at 37. In ***R (Residents Against Waste Site Ltd) v Lancashire County Council*** [2008] Env LR 27, Irwin J held that, in the context of a challenge by a local interest group to the grant of planning permission for a major waste recycling and processing plant, 'it is perfectly open to a defendant in this situation to make energetic attempts for adequate security before costs'. In ***R (Plantagenet Alliance Ltd) v Secretary of State for Justice*** [2013] EWHC 3164 (Admin), Haddon-Cave J refused an application for security for costs made by the Secretary of State for Justice. He held that such an order would be inappropriate: it could not be concluded from the formation of a limited liability company that there was any improper motive given that reasons had been given for the incorporation; an order for security for costs would stifle the claim; and the maintenance of a Protective Costs Order meant that the application for security for costs fell away.

[5] [2019] EWHC 1007 (Admin).

court to so infer. The basis of that inference comes from the following statements in Mr. Aboud's said affidavit:

12.1. It has limited financial resources[6];

12.2. It's Attorneys-at-Law appear on a pro bono and/or no win – no fees basis[7];

12.3. It's furniture and resources were donated by various members over the years[8];

12.4. It has many sources of income including small voluntary donations made by members and supporters[9];

12.5. It operates out of the residential premises of several of its members and has one desk inside Mr. Aboud's personal office.

13. Further, there was no denial of any of the facts set out in Jenell Partap's affidavit filed on 31 October 2019 in support of the security for costs application by the defendant. In particular, there was no denial of the matters set out in paragraphs 14 and 15 thereof where there were unchallenged allegations of the claimant having:

13.1. No publicly available register of members.

13.2. No evidence of the existence of a fund capital to finance its operations, and

13.3. No substantial assets in Trinidad and Tobago including no real estate, vehicles or furniture of its own.

14. Of these matters, the lack of a register of members gives the court the greatest concern. It seems obvious that the claimant company is not being

[6] Paragraph 4 of the affidavit.
[7] Ibid.
[8] Paragraph 8 of the affidavit.
[9] Paragraph 9 of the affidavit.

forthright in relation to its composition and contributors or subscribers and their respective abilities to contribute to the cause in respect of legal costs. Further, the court is of the respectful view that the claimant has been deliberately vague in its response with respect to its income by saying that it had "*many sources of income*" without identifying those sources or giving any further particulars – condescending to particulars is the usual language that is used.

15. Make no mistake, this court does not for one moment doubt the public interest concern that the claimant has, and seeks to protect and, in fact, the content of these proceedings is an especially troubling one.

16. Ms. Partap has glibly said in her said affidavit that:

> *"20. I am advised by Counsel and verily believe the same to be true that the issues in the instant case are primarily matters of law involving statutory interpretation in consequence whereof there is no question of the environment being in peril if a stay is granted."*

17. This is, of course a rather simplistic statement, with all respect to Ms. Partap, since a thorough analysis of an EIA report may be vital to successfully contribute to any discussion or consultation prior to the grant of a CEC, which in turn may ultimately place the environment in peril. To expect that an EIA report, which Mr. Aboud has uncontrovertibly suggested may comprise thousands of pages, may be digested comprehensively during the defendant's opening hours with all of the interruptions and factors that Mr. Aboud mentioned and which may interfere with the expeditious and efficient analysis of the same, along with the fact that the experts who may be required to analyze the same may be out of the country, is a troubling concern. On the other hand, the court appreciates the conundrum that the defendant is in if what it contends is true in relation to the application of the Copyright Act[10]. Surely, a speedy resolution of this issue in these proceedings would heavily impact not only the outcome of this matter, but more

[10] The court is not sure why the defendant may have placed itself in such a position without sorting out any perceived copyright issues at the CEC application stage

importantly, the future process implemented by the defendant in relation to the provision of copies[11]. The court can also see its far-reaching impact upon other areas of public law. No doubt, the defendant must not be left in doubt as to its remit in relation to the provision of information in a modern world where climate issues are so much on the front burner and the protection of the environment in the face of industrial and commercial progress is so crucial.

18. The claimant has sought to rely upon sections 5 (6) and 7 (8) of the Judicial Review Act. Those sections provide as follows:

> *"5 (6) Where a person or group of persons aggrieved or injured by reason of any ground referred to in paragraphs (a) to (o) of subsection (3), is unable to file an application for judicial review under this Act on account of poverty, disability, or socially or economically disadvantaged position, any other person or group of persons acting bona fide can move the Court under this section for relief under this Act."*

> *"7 (8) Where an application is filed under section 5(6), the Court may not make an award of costs against an unsuccessful applicant, except where the application is held to be frivolous or vexatious."*

19. Respectfully, the court does not see the application of section 5 (6) on the facts before the court since these proceedings have not been filed on behalf of any person or group of persons aggrieved or injured was unable to file on account of poverty, disability or socially or economically disadvantaged position. These proceedings have been filed by the claimant for its own benefit i.e. in order to participate and contribute to consultations in relation to CECs. There is no evidence that it is acting other than in the public interest and the facts do not support the application of this section, to my mind.

[11] Again, in this digital world and environmentally protective focus, and with all of these >1000 page reports, no doubt, being done digitally, the court is not sure why physical copies are still an accepted approach for disbursing information.

20. The claimant's attorney-at-law also referred to the dichotomy between section 522 of the Companies Act Chapter 81:01 and its section 307. The court does not accept that dichotomy to be of relevance to the function that it must carry out having regard to the discretion with which the court has been imbued under Part 24.3 of the CPR. The application of section 522 is not a guarantee of the grant of an order for security for costs. Such an order is dependent upon the exercise of the court's discretion and only then if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. One of those circumstances must, obviously, be the matters discussed in section 307 of the Companies Act and the financial standing of a non-profit company. The modification, therefore, of section 522 under section 307 is therefore manifested by the exercise of the court's discretion under Part 24.3 of the CPR.

21. It is the defendant that has implemented a procedure in respect of a statutory duty under section 17 of the Environmental Management Act which is different from that which it had previously employed. That procedure is now being challenged and for the defendant to have suggested that the claimant had a possible alternative remedy by means of an interpretation summons in relation to the provisions of the statutes mentioned above i.e. the EMA, the FOIA and the CA, is an attempt to foist that statutory responsibility on to the claimant. That duty to compile and provide information is not the claimant's statutory duty, it is the defendant's. Therefore, if the defendant was not sure of the propriety of its adopted stands, then it was free to commence the interpretation "summons" of its own accord especially because of the statutory burden that it carries.

22. In those circumstances, if such an approach were to be considered now, it may very well save costs and time and this court might consider staying these proceedings to allow that interpretation "summons" to be determined as a guide to the propriety of the said stance. Obviously, if the defendant's stance is sanctioned by law, then it must have an impact upon these proceedings.

These proceedings are about a decision made. The defendant would need to consider the propriety of that decision.

23. Since the claimant is admittedly a public interest non-profit company, and since the defendant is a State authority imposed with statutory duties funded by the public purse, the court is of the respectful view that the claimant ought not to be imposed with the burden, at this stage, of having to meet a security for costs order. Although the court has considered the defendant's reliance upon the central government for subventions in relation to legal costs incurred, matters such as these which are of public interest and which may tend to affect the community at large and, specifically, the environment, ought to be prioritized in terms of funding. If it is not, then that is a matter of governance.

24. This is not a commercial activity or a commercial transaction. This is a matter of national interest and therefore, weighing the arguments on both sides, and having considered all of the arguments, submissions, authorities and facts before the court, the court is of the respectful view that, in all of the circumstances of the case, it would not be just to make an order for security for costs against the claimant.

Order

25. In the circumstances, the defendant's notice of application for an order for security for costs is dismissed and the court will hear the parties with respect to the issue of costs on that application at a future hearing.

/s/ D. Rampersad J.