

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

PCA #30 of 2004

CA #106 of 2002

HCA #1715 of 2002

IN THE MATTER OF AN APPLICATION BY FISHERMEN AND FRIENDS OF THE SEA (A COMPANY DULY INCORPORATED UNDER THE LAWS OF TRINIDAD AND TOBAGO) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT AUTHORITY A STATUTORY AUTHORITY DULY CONSTITUTED TO THE PROVISIONS OF THE ENVIRONMENT MANAGEMENT ACT, NO. 3 OF 2000 (HEREINAFTER REFERRED TO AS "THE ACT") MADE ON THE 29TH DAY OF NOVEMBER, 2001 EXERCISING POWER GIVEN TO IT TO GRANT A CERTIFICATE OF ENVIRONMENTAL CLEARANCE UNDER SECTION 36(1) OF THE ACT TO BP TRINIDAD AND TOBAGO LLC

BETWEEN

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

PLAINTIFF

AND

THE ENVIRONMENTAL MANAGEMENT AUTHORITY

FIRST NAMED DEFENDANT

AND

BP TRINIDAD AND TOBAGO LLC

SECOND NAMED DEFENDANT



advanced three cases, two from the Privy Council and one from the House of Lords. In the **DYMOCKS FRANCHISE SYSTEMS (NSW) PTY. LTD** case, it is clear that this Order would be supplemental to that made by the Privy Council and not at variance with it.

[7] The second consideration is whether the FFOS would have pursued its appeals without the involvement of its directors. This "causation" factor emanates from Lord Brown's dicta that a non-party would not be ordinarily be made liable for costs if those costs would in any event have been incurred even without the non-party's involvement in the proceedings.

[8] Mr Benjamin contended that there is little material before the court to suggest otherwise than that this litigation would not have been pursued but for the directors.

[9] Mr Benjamin further elucidated for the court three (3) principles which he culled from the cases:

- (1) Costs Orders against non-parties are exceptional;
- (2) Costs Orders will not be made against pure funders, that is, those without a personal interest or hope to derive a personal benefit from the litigation; or who do not fund it as a matter of business or do not seek to control the costs – public interest in access to justice being favoured against the successful party's ability to recover costs.
- (3) **Wherethenon-partyisthereallitigantthecourtislikelytomaketheorder sought.**

[10] Mr Benjamin however did not elucidate on the evidence before the court in the form of affidavits from Dr Mc Intosh for the EMA and the two (2) directors of FFOS, Mr Beddoe and Mr Aboud but left the court to its own devices.

[11] **FISHERMEN AND FRIENDS OF THE SEA**

Mr Hosein agreed that this Court had jurisdiction to make the Order sought, but limited the powers to costs awarded by the Supreme Court of Trinidad and Tobago. Mr Hosein opined that since the Supreme Court comprised the High Court and the Court of Appeal, and costs were awarded against FFOS in the Court of Appeal only, those are costs which fall within my jurisdiction for consideration. Costs awarded to be paid in the Privy Council should not and cannot trouble me into deliberation'.

[12] - Another point of consideration is that the Order as contemplated by the EMA ought to be made in exceptional circumstances. Briefly Mr Hosein's main plank was that the EMA had to provide the court with evidence that these were exceptional circumstances for the granting of the Order prayed. In his view, they provided none. In addition, there was no evidence that the directors of FFOS were funders of litigation to the extent that they hoped to derive personal benefit from it. Additionally there was little or no evidence proffered that any of the directors of FFOS was "the real litigant". In fact, Mr Hosein referred me to the fact that the "public" nature and interest of FFOS was accepted by the Environmental Management Authority and acknowledged by all including the Court of Appeal and the Privy Council.

¹ See **SUPREME COURT OF JUDICATURE ACT Chap 4:01 Section 9** -

Section 9 (1) There shall be vested in the High Court all such original jurisdiction as is vested in or exercisable by the High Court of Justice in England under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925 of the United Kingdom.

Section 50 (1) subject to the provisions of this Act and to the rules of Court and not to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs are paid

RULES OF THE SUPREME COURT ORDER 62 RULE 1 and RULE 2 (4)

(4) The powers and discretion of the Court as to costs under the provisions of any Act or Ordinance which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs are to be paid shall be exercised subject to and in accordance with this Order

[[13] With respect to EMA, not applying for Security for Costs, at earlier stages of the litigation, this ought to weigh against them in the exercise of my discretion to grant the order prayed.

[[14] EVIDENCE

EMA

Dr Dave Mc Intosh, the Chief Executive Officer of the EMA gave a detailed history of the proceedings. After the award of costs and receipt of the Registrar's Allocatur the EMA proceeded to register the awards as final judgments. Letters passed from the EMA to the FFOS demanding satisfaction of the judgment debt but to no avail. The EMA conducted investigations on the FFOS. The investigations revealed:

- (1) FFOS listed its registered address but based on information and belief it does not operate from this location.
- (2) Another popular business operated by the Secretary/Director of FFOS from the said address but any information about FFOS was singular to the Secretary/Director.
- (3) The telephone number for the Secretary/Director is the same as for the business place.
- (4) Checks at other addresses stated to be those of the other Directors did not give any satisfaction.
- (5) That FFOS holds no assets.

Dr Mc Intosh concluded

It is my good faith, based on the foregoing that FFOS was a façade simply set up for the legal convenience of Gary Aboud and other members in addressing the environmental concerns or to otherwise mask the carrying out of their personal business. Therefore Gary Aboud and/or other Directors of FFOS should be personally liable to the Cost judgments awarded in favour of the EMA².

² Para 12 of affidavit of Dave Mc Intosh states:

[15] **FFOS**

MR TERRENCE BEDDOE

In response, Mr Beddoe the President of FFOS enlightened the court on his qualifications as an environmentalist and his interest in the area. He outlined his volunteer work since 1996 and the genesis of the organization. Mr Beddoe stated that FFOS has always operated on a very limited budget and the business was funded by membership fees. "Our greatest resource has always been volunteerism³. In 2000 the membership took a decision to incorporate FFOS as a non-profit organisation under the Companies Act 1995, since then the focus of the organisation strengthened with representation at various stakeholder workshops: so much so that in "2003 FFOS was identified by the NGC as a 'valued stakeholder' and asked to participate in a Corporate Identity Programme"⁴. In addition Mr Beddoe stated that "FFOS has also worked tirelessly to encourage public debate and awareness on a number of environmental issues"⁵.

[16] **MK GARY ABOUD**

Mr Gary Aboud deposed that he is the Corporate Secretary of FFOS. He has had a life long interest in environmental affairs which drove him to join with others in the formation of FFOS. As Corporate Secretary he was responsible for record

It is my good faith belief, based upon the foregoing, that FFOS was a façade simply set up for the legal convenience of Gary Aboud and other members in the addressing of environmental concerns or to otherwise mask the carrying out of their personal business. Therefore, Gary Aboud and/or other directors of Fishermen and Friends of the Sea should be personally liable to the Cost Judgments awarded in favour of the EMA.

Para 24 of Terrence Beddoe Affidavit states:

In 2003 FFOS was identified by the National Gas Company as a "valued stakeholder" and asked to participate in a Corporate Identity Programme. A true copy of that invitation dated February 14th 2003 is hereto attached and marked "T.B.9".

⁴ Para 25 of Terrence Beddoe Affidavit states:

I and other members of FFOS have also dedicated much time and effort towards the education of young people on environmental issues. We have lectured at a number of primary and secondary schools, and at tertiary level, including St Mary's College, Holy Name Convent, Bishop Anstey High School, St Benedicts College San Fernando, Barataria Junior Secondary School, Las Cuevas Government School, Blanchisseuse Government School, and the University of the West Indies.

⁵ See Section 4(1) SUPREME COURT OF JUDICATURE ACT Chap. 4:01

There shall be a Supreme Court of Judicature of Trinidad and Tobago **consisting** of a High Court of Justice and a Court of Appeal with such jurisdiction and powers as are conferred respectively on these courts by the act and the court.

keeping that is minutes and all other official documentation. Initially these documents were housed at a business house in Port of Spain of which he is the Managing Director. When the space there became cramped he relocated to another building further east. Sadly that building was destroyed by fire and FFOS documents and records were lost. The FFOS did not maintain a permanently staffed office and meetings were held on a pre-determined basis. Mr Aboud confirmed the "Community" nature of FFOS and their activities on the environmental front in Trinidad and Tobago.

Both Mr Beddoe and Mr Aboud have asked that based on the evidence of the public spiritedness of FFOS and the fact that their activities have been recognised as such that I should dismiss EMA's application.

[17] ANALYSIS AND CONCLUSION

It is accepted by both sides and I agree that the court has jurisdiction to grant the Order prayed in the correct circumstances. The questions are these circumstances such that I have the jurisdiction to grant the Order prayed in its entirety or at all?

[18] In these proceedings, the Privy Council made an Order for Costs in the Civil Appeal and therefore in favour of the Defendants. In DYMCKS FRANCHISE SYSTEMS (NSW) PTY. Ltd case an order was made in similar terms that the unsuccessful party pay costs incurred in the Court of Appeal and the Privy Council. Mr Hosein was correct in stating that my jurisdiction under ORDER 62 RULE 2(4) was limited to matters pronounced upon in the Supreme Court, comprising the High Court and the Court of Appeal⁶. Since this Order is an Order of the Privy Council and NOT of the Supreme Court of Trinidad and Tobago as defined in Section 4 (1) of the SUPREME COURT OF JUDICATURE ACT, I do not think that I can accede to the First Defendant's request. In my view, the EMA should have followed the course taken by the petitioners in the DYMCKS

⁶ See para 7 et seq. Judgment of Lord Brown of Eaton Under Heywood.

FRANCHISE SYSTEMS (NSW) PTY. Ltd case which both parties referred me and raised this issue before the Judicial Committee of the Privy council⁷.

[19] Be that as it may, and if I am pronounced against by higher fora, I shall proceed to reproduce my thoughts on the stated issue.

[20] The **DYMOCKS FRANCHISE SYSTEMS** decision is to me as the *locus classicus* in this area. Mr Benjamin culled three (3) principles which I shall repeat here and at the same time look to the evidence to assist in my determination.

(1) Cost Orders against non-parties are to be regarded as exceptional. "Exceptional" in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.

Where is the evidence of this exception? As I said, Mr Benjamin did not point me to the evidence but left it to my divination. I must confer that Dr Mc Intosh's affidavit left me unmoved.

[21] (2) The discretion will not be exercised against "pure funders". These are "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.

[22] It is with respect to this that Dr Mc Intosh gave some indication of the factual and evidential basis for the application. His bases were that FFOS trading address was the same as one of its directors' Mr Gary Aboud, business place and that he alone could have provided information about FFOS. He concluded therefore that FFOS does NOT operate from this location. This by itself does not carry the flag anywhere. The sources of the information, are not disclosed and in a matter of

⁷ See [2004] 1 WLR p. 2807 **DYMOCKS FRANCHISE SYSTEMS (NSW) PTY. Ltd v TODD & Ors.** (Associated Industrial Finance Pty Ltd, Third Party)

this kind this must be done or else the fact or information will carry little or no sway with the court.

[23] Secondly, Mr Mc Intosh asserts that FFOS has no assets. A point which Mr Hosein asserts is not in contention, which I will allude to again. Again, by itself or in association with the former issue does not advance EMA's position.

[24] Thirdly, that FFOS was a "façade simply set up for the convenience of Gary Aboud and other members ..." There is no evidence to back up what clearly amounts to statements of opinion and not evidence to which any weight can be attached by the court.

Even if the court were to grant the Order, who among the other directors should be named? There is no assistance or guidance on this issue and it seems that too much of this application has been left to the Court's fancies. I decline to accept this invitation to proceed on a frolic of my own with no directions.

[25] This is in stark contrast to evidence of Mr Beddoe, a director of FFOS. "FFOS has always operated on a very limited budget. We have never asked our membership to pay fees. Our greatest resource has always been volunteerism. Over the years we have managed to attract a wide range of persons who were able to provide us with scientific advice, technical assistance, administrative and management assistance, fishery expertise as well as legal advice^{m8}.

[26] In addition, I accept that Fishermen and Friends of the Sea was a body satisfying the "public interest" component of the **JUDICIAL REVIEW ACT**. This is acknowledged and I daresay accepted by all concerned including the Defendants at every juncture of these proceeding. It would be foolhardy of this Court at this late stage to accept a proposition stating otherwise.

^m See para 24 of Terrence Beddoe affidavit op cit fn 3

[27] (3) There is need to identify the real party to the litigation. If the "real party" is a company director it must be shown where he cannot be regarded as acting in the interest of the company or its shareholders and creditors but in his own interest. Suffice it to say, that EMA provided me with no evidence that the litigation was brought to service and/or promote the personal interests of any of its directors.

[28] **SECURITY FOR COSTS**

The Rules of Supreme Court (1975) at Order 23 Rule 1 (1) (b) provide that a party may apply to the court for a security for-costs order when a plaintiff not suing in a representative capacity "is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so. Further Section 522 of the **COMPANIES ACT** provides similar relief in relation to companies who are plaintiffs and it is believed are unable to pay the costs of a successful defendant⁹. Such an order may be applied for at any stage of the case.

As such, it is clear that EMA ought to have applied for an Order for Security for Costs and it has not supplied any explanation for this omission which has worked to its detriment.

[29] In the face of the above, will it be just to accede to EMA's request? Again this has not been adequately answered at all on the evidence. There is no evidence to suggest that it would be just for the EMA to receive an Order of this nature. I agree with Mr Hosein that to grant such an order would go against the sentiments of the court at all levels both in this jurisdiction and at the Privy Council. There is no change in circumstances brought to my attention to justify any departure for the sentiments expressed by previous fora.

⁹ See Section 522 of the **COMPANIES ACT** para. 57 Hosein submission.

[30] **CONCLUSION**

The request by the EMA for an Order that the corporate veil of Fishermen and Friends of the Sea be lifted so that the directors be held personally liable for costs, fails for the following reasons:

- (1) The application should have been made to the Privy Council since it is an order of that august body;
- (2) There were no exceptional circumstances warranting the making of such an order;
- (3) There is no proof that a Third Party was the "real party" to the litigation;
- (4) There was no explanation given by the EMA as to why a Security for Costs Order was not sought during the substantive proceedings;
- (5) In all the circumstances of this case, it would not be just to accede to EMA's request.

ORDER:

Summons dated and filed on 8th April 2008 be and is hereby dismissed;
Costs to be paid by Environmental Management Authority to Fishermen and Friends of the Sea certified fit for Senior Counsel to be taxed in default of agreement.

Dated this 5th day of November 2009.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE