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Privy Council Appeal No. 30 of 2004

Fishermen and Friends of the Sea *Appellant*

v.

(1) The Environment Management Authority and
(2) BP Trinidad and Tobago LLC *Respondents*

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 25th July 2005

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Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell
Sir Christopher Staughton

*[Delivered by **Lord Walker of Gestingthorpe**]*

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The Kapok and Bombax Projects

1. Trinidad has valuable offshore deposits of oil and natural gas, especially in the sea area south-east of the island. These have brought great economic benefits to Trinidad and Tobago but have also brought concerns about the environmental effects of the exploitation of these natural resources. This appeal relates to two linked projects undertaken by BP Trinidad and Tobago LLC ("BPTT"), the second respondent to the appeal. The projects involved additions to its offshore platforms, the construction of a new 48 inch submarine pipeline to landfall at Rustville on the south coast of Trinidad, and the construction of a further onshore underground pipeline, about 1.5 miles long, to a gas handling facility at Beachfield. The offshore part of the project was called the Kapok project. The onshore part was called the Bombax

project. Together they represented an investment of hundreds of millions of US dollars.

2. The projects are described in great detail in two environmental impact assessments ("EIAs") which were prepared (and, in circumstances described below, published twice in similar but not quite identical form). Most of the details are not material to this appeal. But it is relevant to mention that it has always been part of the overall plan that natural gas would be transmitted from the Beachfield facility through an existing 36 inch underground pipeline to liquid natural gas facilities at Point Fortin on the west coast of Trinidad, so substantially increasing the volume of gas passing through the 36 inch pipeline. This pipeline is about 43 miles long and it passes through or near some heavily populated areas in the southern part of Trinidad. It has been estimated that about 110,000 people live within 2.5 km on either side of the existing 36 inch pipeline.

The environmental legislation

3. It so happens that the Kapok and Bombax projects were being planned at a time of rapid development in environmental legislation in Trinidad and Tobago. The changing legislative scene has added to the difficulties which both the parties and the courts have encountered in this case. When the planning of the projects started there was an environmental measure on the statute book, the Environmental Management Act 1995 ("the EMA 1995"). But it had not been implemented by secondary legislation which would be needed to make it effective. Indeed their Lordships were told that there were doubts as to whether the 1995 Act was compatible with the Constitution of Trinidad and Tobago, since it had not been passed by special majorities. Since the EMA 1995 was for many practical purposes ineffective, environmental protection depended on powers of control contained in other earlier statutes. In particular, the Kapok project required approval by the Minister of Energy, and the Bombax project required approval by the Town and Country Planning Department ("the TCPD"), before work could begin. Both these authorities required documentary material tantamount to an EIA to be prepared and submitted in respect of major projects such as the Kapok and Bombax projects, although they did so under the general rubric of seeking further information.

4. The Environmental Management Act 2000 ("the EMA 2000") was enacted (having been passed by special majorities of the Senate and the House of Representatives) on 21 January 2000. It repealed the EMA 1995 and established an Environmental

Management Authority ("the Authority") with far-reaching powers for the protection of the environment. For present purposes the key provision of the EMA 2000 is section 35, which provides for certificates of environmental clearance ("CECs") and is in the following terms:

> "(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."

Section 28 contains detailed provisions for the publication of notices giving information as to the relevant proposal, identifying where the administrative record is being maintained, stating the length of the public comment period, and advising where comments are to be sent.

5. The EMA 2000, like its predecessor, needed some fairly complex secondary legislation in order to bring it into full effect. In particular, section 35 had no teeth until a list of activities had been designated under subsection (1) and procedural rules had been made under subsections (3) and (4). A ministerial order under subsection (1) was made on 4 April 2001 and came into force on 7 July 2001, two months after being laid before the House of Representatives. This was the Certificate of Environmental Clearance (Designated Activities) Order 2001 ("the Designated

Activities Order"). Procedural rules under subsection (3) and (4) were made by a Ministerial Order dated 30 April 2001, which came into force on 14 July 2001, two months after being laid before the House of Representatives. These were the Certificate of Environmental Clearance Rules 2001 ("the CEC Rules"). The Minister also made regulations (not subject to the negative resolution procedure) as to fees. These were the Certificate of Environmental Clearance (Fees and Charges) Regulations, 2001, made on 17 May 2001 ("the Fees Regulations").

6. Section 39 of the EMA 2000 contained some transitional provisions which were satisfactory so far as they went. But they can be seen, with hindsight, as having left some rather obscure gaps. Section 39 provided,

> "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 becomes 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."

The Judicial Review Act 2000

7. In Trinidad judicial review of official decision-making is regulated by the Judicial Review Act 2000 ("the JRA"). The first three subsections of section 11 of the JRA are in the following terms (subsection (4) not being relevant for present purposes):

> "(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."

8. Section 5 (6) of the JRA provides as follows:

"Where a person or group of persons aggrieved or injured by reason of any ground [for judicial review specified in the JRA] 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."

The Appellant Fishermen and Friends of the Sea ("FFS") is a company not formed for profit which campaigns for the protection of the environment. It has over 20,000 supporters in Trinidad and Tobago. It is not in dispute that it is acting, at least in part, in accordance with the terms of section 5 (6). Section 7 (8) of the JRA provides as follows:

"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."

The facts in outline

9. Because of the changes taking place in Trinidad's environmental legislation at the time, and also because this appeal turns ultimately on the judge's discretion under section 11 of the JRA, it is necessary to cover in some detail the sequence of events during the period of about a year leading up to the application for leave to apply for judicial review made by FFS on 20 May 2002.

10. The position at the beginning of that period was that the EMA 2000 had been enacted and the Authority had been established, but the new system had not yet been made effective by secondary legislation. BPTT had held some public consultation meetings of a preliminary nature, and had applied for approval of the Kapok and Bombax projects to the relevant authorities, the Minister of Energy and the TCPD respectively. Each had issued terms of reference for EIAs, and EIAs were in course of preparation. The EIA for the onshore project stated (para 2.4.2.2),

> "A consultation meeting was held with the [Authority] in January 2001, regarding the applicability of the CEC Rules to this project. The [Authority] indicated that due to the advanced state of the project these rules will not apply to this project. The EIA has been conducted in strict accordance with the TCPD's approved Terms of Reference."

The CEC Rules were then only at the drafting stage. This informal indication, formally recorded in the EIA, was to lead to some controversy.

11. On 3 May 2001 BPTT held a consultation meeting with a number of non-governmental environmental organisations, including FFS. BPTT was asked to make both the offshore and the onshore EIAs available to the public, and it agreed to do so subject to editing out "any proprietary information." That type of editing was approved by the Authority in a letter dated 8 May to Mr Zotter of BPTT. On 23 May the onshore EIA (dated 17 May) was submitted to the TCPD. It was prepared by Ecoengineering Consultants Ltd of St Augustine, Trinidad. It is a massive report extending (with its appendices) to over 400 pages. Section 8 (headed Risk Assessment) contained the following subparagraph 8.2, headed "Impact on Existing 36-inch Gas Pipeline":

> "Evaluations of the effect from the increased gas transport utilising the existing 36-inch gas pipeline from Beachfield to the LNG plant have also been carried out. Based on an evaluation of the effects from the increased amount of gas released in case of an accident compared to the present situation, it has been concluded that the increase in risk is expected to be insignificant; in other words, the additional gas flow through the pipeline does not create additional risk to people along the pipeline route."

12. By this stage the secondary legislation made under the EMA 2000 was beginning to come into force. The Designated Activities Order extended (items 25, 26 and 27 in the Schedule) to the establishment and expansion of gas facilities and pipelines. The CEC Rules contained detailed procedural requirements for applications for CECs, including (Reg 3) the form of any application; (Regs 4, 5 and 6) the processing of the application (including the decision whether an EIA is required, and if so preparing terms of reference for it); (Regs 8 and 9) the establishment by the Authority of a national register of CECs, with public access to it; and (Reg 10) standards for the contents of EIAs. The Fees Regulations prescribed (para 4 (1) (a)) a fee of not less

than $100,000 and not more than $600,000 for processing an EIA in respect of item 25, 26 or 27 in the Schedule to the Designated Activities Order.

13. BPTT had already submitted its offshore and onshore EIAs, but not to the Authority. At the end of July 2001 copies of the EIAs were at his request sent to Mr Gary Aboud, the Secretary of FFS. The public were notified that copies were available for inspection at six locations in Trinidad. It has not been suggested that section 8 of the onshore EIA was edited out either in Mr Aboud's copy or in the copies made available for public inspection. At about the same time the onshore EIA was reviewed by the Technical Review Committee (consisting of representatives of 17 different entities including the TCPD, the Ministry of Energy, the Authority and non-governmental environmental organisations) and a site visit took place.

14. FFS sought technical advice on the EIAs, and received it at the end of August 2001. According to Mr Aboud he was told by Mr Goddard (the Manager of the Authority's Pollution Prevention Unit) that the CEC process did not apply to BPTT's projects. Nevertheless on 30 August BPTT applied to the Authority for a CEC under section 35 of the 2000 Act. This apparent change of course is not fully explained in the evidence, although the memorandum mentioned in para 18 below goes some way to doing so. It can readily be supposed that there was, at this stage, a good deal of uncertainty as to exactly how the primary and secondary legislation affected projects for which approval had been sought, backed by EIAs meeting officially prescribed terms of reference, but had not yet been granted.

15. In October 2001 the Authority published in the official Gazette notice under section 28 of the EMA 2000 of BPTT's application for a CEC, under section 35 of the 2000 Act, in respect of the Kapok and Bombax projects. The administrative record was stated to be available to the public at five specified locations, and the period for public comment was from 17 October to 19 November 2001. The administrative record made available in this way included EIAs which were identical in every respect (including the date) with those already submitted and published, except that section 8 (Risk Assessment) was edited out and replaced by the following:

> "A Quantitive Risk Assessment (QRA) was conducted by Det Norske Veritas (DNV) for the BP Gas Transportation Project in Trinidad and a number of recommendations have

been identified for the construction and operational phases of the pipeline project. This Report is privileged and confidential and is provided to the Town and Country Planning Division (TCPD), the Ministry of Energy and Energy Industries (MEEI) and the National Emergency Management Agency (NEMA) under separate cover."

16. On 5 November 2001 Mr Aboud wrote a letter of protest to Professor Dyer Narinesingh, the Chairman of the Authority. This letter, which was copied to numerous other persons, was expressed in strong language. It made three complaints about the onshore EIA: first, that para 2.4.2.2 (already quoted) indicated that the CEC Rules would not apply to the project; second, that the Authority had failed to charge BPTT even the minimum fee required by the Fees Regulations; and third, that part of the EIA had been edited out on grounds of confidentiality. On 19 November Mr Aboud sent a further letter repeating the complaints, but concentrating on the fees point. On 20 November Professor Narinesingh sent a courteous acknowledgment of the letter of 5 November, undertaking to investigate the complaints.

17. On 29 November 2001 the Authority granted BPTT a CEC for the Kapok and Bombax projects, which were briefly described in the certificate, subject to numerous terms and conditions (concerned with mitigation measures, inspection of installations, monitoring of effluents, regular reports to the Authority and other official bodies, and similar matters). The granting of the CEC did not come to the knowledge of FFS for some time. Mr Aboud says that he was still waiting for a full reply from the Chairman of the Authority.

18. The Chairman eventually wrote to Mr Aboud on 14 February 2002, apologising for the delay but explaining that he had wished to make a detailed investigation. He enclosed with his letter a four-page report on the Authority's policy (in conjunction with the TCPD and the Ministry of Energy) in what he referred to as "phasing in the CEC Regulations." This report identified the relevant secondary legislation already mentioned, that is the Designated Activities Order, the CEC Rules and the Fees Regulations. It referred to section 39 of the EMA 2000 and to discussions between the Authority, the TCPD and the Ministry of Energy. It stated that it had been decided to manage CEC applications in respect of four pending projects (one of which was the Bombax project) as follows:

> "(a) The [Authority] would receive the CEC applications and the EIA reports;
>
> (b) The projects would require an EIA;
>
> (c) The [Authority], TCPD (and the applicant) would agree to and accept the [terms of reference] prepared by the TCPD (and the MEEI in respect of the [Kapok] project);
>
> (d) The [Authority] would follow the procedures of the CEC Rules in respect of public comments in light of the nature and sensitivity of these projects. At the same time it was felt that the public had a right to know the details and potential impacts associated with these projects. The [EMA 2000] and CEC Rules clearly provides a mechanism to facilitate a public awareness and ability to comment on projects that require an EIA;
>
> (e) The four EIA reports were submitted for public comment at five locations throughout Trinidad and Tobago. The public was informed via the Gazette and the daily newspapers on the availability of the EIA reports for their review and to submit comments to the [Authority]. The documents were available to the public for a minimum of 30 days.
>
> (f) The CECs were issued with conditions based on previous evaluations and consideration of any comments received. It should be noted that comments were received from one entity, [FFS]."

The report also explained that the Authority had not charged the minimum fee of $100,000 because it did not in fact incur expenditure in evaluating the EIAs, which had already been evaluated by the TCPD and the Ministry of Energy.

19. The last paragraph of the above-quoted passage disclosed, but by no means emphasised, the information that a CEC had already been granted for the Bombax project. Mr Aboud said merely that he was suspicious. During March 2002 he visited the Authority's office more than once, but found no register of CECs (as required by Regulations 8 and 9 of the CEC Rules). Eventually in mid-March he was informed of the CEC granted to BPTT on 29 November 2001. He deposed that he then had to obtain legal advice and to consult with experts. Dr Khan, who had been on the

board of the Authority but made an affidavit as an expert witness on behalf of FFS, stated that he was instructed in or about the first week of April 2002.

20. FFS applied for leave to apply for judicial review on 20 May 2002. BBTT was not informed of the proposed application until the day before. In the meantime BPTT's contractors had started work on both the offshore and the onshore projects in or about December 2001. A recent affidavit (which their Lordships admitted without objection from FFS) indicates that 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.

The proceedings below

21. The application by FFS for leave to apply for judicial review was heard by Bereaux J over six days at the end of July 2002. On 30 August 2002 he handed down a reserved judgment refusing leave. He set out a careful statement of the facts and the grounds of the application. The grounds were lengthy, but the judge's statement of them (in paragraphs designated (a) to (n) in the judgment) can be briefly summarised as follows: (i) that BPTT's application paid insufficient attention to increased risks resulting from the additional gas transmitted through the 36 inch pipeline; (ii) that section 39 of the EMA 2000 did not provide an exception in the circumstances of this case; (iii) that the Authority had not charged even the minimum fees; (iv) that there had been insufficient public consultation; (v) that the Authority had failed in its duty to keep a national register of CECs; and (vi) that the EIAs, and the terms of reference on which they were based, were defective.

22. The judge correctly directed himself that no problem arose as to FFS's standing to make the application. But FFS had to make out a case for an extension of time under section 11 (1) of the JRA. The judge correctly analysed the effect of the authorities on the analogous provisions applicable in England, including *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2 AC 738.

23. The judge asked himself whether there was a good reason for extending the time for the application. He listed some salient points in favour of FFS. The Authority had failed to disclose that it had granted a CEC to BPTT; FFS became aware of the CEC only in mid-March after Mr Aboud became suspicious and made three

visits to the Authority's offices. The Authority had failed to establish a register of CECs. After becoming aware of the decision FFS had to consult its membership, take legal advice and consult experts. The application related to a serious matter affecting the public interest. Against this, the judge pointed out that FFS had been following the CEC process since May 2001. It was in a position to take advice by the end of 2001 at latest (Mr Aboud's evidence was that he received advice on the first EIAs in August 2001). The Authority's letter of 14 February 2002 did refer, in general terms, to the grant of CECs. Nevertheless the judge in effect gave FFS the benefit of the doubt for delay down to mid-March 2002. But he considered that the lapse of about two months from mid-March to the filing of the application on 20 May 2002 was far more difficult to justify. He concluded that FFS had not shown good reason for an extension of time under section 11 (1).

24. The judge then went on to consider two topics specifically mentioned in section 11 (2), that is whether there would be substantial prejudice to the rights of BPTT, or detriment to good administration. He considered whether (in line with the observations of Lord Goff of Chieveley in *Caswell* at p747) he should grant leave and defer the issue of delay to the substantive hearing. He observed,

> "Where the judge entertains such doubt the issue should be deferred to the inter-partes hearing on the merits. In this case, however, the ex-parte application has been vigorously opposed, there has been full argument on the issue and evidence has [been] provided by BPTT of the prejudice it may suffer."

That evidence was contained in an affidavit made on 24 June 2002 by Mr John Gilmore, the engineering procurement and construction manager of the Bombax project. He deposed that the Bombax project was about 70% complete and the Kapok project was about 52% complete. Large numbers of sub-contractors were actively engaged in the work. Any delay would increase costs by millions of dollars a month. FFS had not warned BPTT of impending litigation until the last moment. The judge concluded that there would be significant prejudice to the rights of BPTT. He also referred, more briefly, to the interests of good administration.

25. Finally the judge referred to the public interest, and the decision of Maurice Kay J in *R v Secretary of State for Trade and Industry, Ex p Greenpeace* [2002] 2 CMLR 94. The judge said,

> "A decision in this case requires that I examine, however provisionally, the merits of the applicant's case. The authorities suggest that I must make a 'quick perusal' of the merits. I have done far more than that however if only because of the documentation presented to me by the applicant.
>
> In my judgment other than the issue as to the power of the respondent to permit the project to proceed outside the provisions of the CEC process, there is little merit in the application.
>
> The question therefore is whether the public interest requires that I permit that aspect of the respondent's decision to be reviewed. It is a question which has caused me some considerable anxiety. The applicant has made much of its concern for the lives and well-being of those persons living in the immediate vicinity of the 36 inch pipeline. It is for this reason that I have sought to acquaint myself with material put before me. Having done so it seems to me that the balance must come down against the grant of leave to the applicant. Its primary concern is that the 36 inch pipeline will carry an increased volume of gas when the Project is commissioned. It appears that the Act did not provide sufficiently for the transition between the old and new legislative regime. I am satisfied however that the respondent has taken an informed decision in the circumstances which presented themselves and that Project has proceeded after careful planning and consultation by technocrats qualified to do so."

26. The proceedings in the Court of Appeal can be summarised more shortly. On 14 August 2003 the Court of Appeal (Jones CJ (Ag) and Nelson JA, Lucky JA dissenting) dismissed the appeal. Nelson JA (with whom the Chief Justice agreed) correctly observed that although the grounds of appeal were wide-ranging, the sole issue was whether Bereaux J had properly exercised his discretion in refusing to extend the time for the application. Nelson JA saw no ground for interfering with his discretion. Lucky JA dissented on the ground that the judge had, by refusing an extension of time, in effect pre-empted the important issues in the case. Since their Lordships are in substance reviewing the exercise of discretion by Bereaux J it is unnecessary to go further into the judgments in the Court of Appeal.

The judge's exercise of discretion

27. Their Lordships do not accept that (as Lucky JA thought) the judge, by refusing an extension of time, pre-empted the determination of the most important issues in the case. He recognised that he could have carried forward the issue of delay to a substantive hearing. But he had in the course of a six-day hearing done far more than make a "quick perusal" of the merits. As their Lordships read his judgment he expressed a definite preliminary view against granting an extension of time, because of the unjustifiable delay on the part of FFS, but then went on to test that conclusion against other issues, including the public interest and the strengths and weaknesses of FSS's case. His consideration of those other matters did not alter his preliminary view. On the contrary, they confirmed his view that an extension should not be granted.

28. In their Lordships' view there is only one significant criticism to be made of the judge's careful and thorough judgment. In the penultimate paragraph of his judgment (set out in paragraph 26 above) the judge emphasised that the Authority had taken an informed decision, but the judge paid insufficient attention to the need for public consultation and involvement in the decision-making process (his reference to "consultation by technocrats" does not seem to refer to public consultation). Public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy. In *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615, 616, Lord Hoffmann said,

> "The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues.
>
> ...
>
> A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues."

29. These passages refer to the requirements of legislation of the European Union. But similar principles underlie the EMA 2000, as appears from the detailed requirements of section 28. The doctrine of "substantial compliance" must therefore be treated with considerable caution in environmental cases of this sort: see *Berkeley* at pp616-7.

30. Before their Lordships, Mr Herberg (for BPTT) accepted that there was an arguable case that the Authority had not fully complied with the requirements of the EMA 2000 and the secondary legislation made under it. Mr Daly SC (for the Authority), while rejecting the submission of Mr Maharaj SC as to "clear" or "naked" illegality, did not contend that there had been no procedural irregularity. Had the irregularity significantly affected the process of public consultation it is very doubtful whether it would be right, in a case of so much public interest, to treat the Authority as having substantially complied with its obligations.

31. In this case, however, the procedural irregularities arose primarily from shortcomings in the transitional provisions of the EMA 2000. The Authority's human and financial resources were no doubt limited and its officers were understandably reluctant to spend time and money in reconsidering EIAs which had already been carefully considered after their submission to the TCPD and the Ministry of Energy. But any shortcuts which were taken did not interfere with the processes of public consultation. A lengthy and detailed EIA on the Bombax project, including the risk assessment in section 8, was delivered to Mr Aboud of FFS on or about 26 July 2001, and at the same time it was made available for public inspection at various locations, and public comment was invited. The same EIA, shorn of section 8, was republished on or about 15 October 2001, and again public comment was invited. FFS responded on 5 November 2001, during the statutory consultation period. The omission (which dealt specifically with the safety of the 36 inch pipeline) was ill-advised. But Mr Aboud already had that information, and he used the full EIA to obtain advice at the end of August 2001. The concerns about the 36 inch pipeline were fully aired.

32. In these circumstances the judge's exercise of his discretion was not flawed. There is no reason to interfere with his decision not to grant an extension of time, and the appeal must be dismissed. The appellants must pay the respondents' costs before the Board and in the Court of Appeal. The Court of Appeal was not bound by section 7 (8) of the JRA, which applies only at first instance, and

there is no reason to interfere with the Court of Appeal's discretion in awarding costs against FFS. It was entitled to make its first-instance application without being at risk as to costs, but it acted at its own risk in taking the matter to appeal.