COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2020/PUB/jrv/FP/00005

IN THE MATTER OF an application for for Judicial Review

BETWEEN

THE QUEEN

AND

(1) The Hon ROMAULD FERREIRA MP
Minister of the Environment and Housing

(2) ROCHELLE NEWBOLD
Director of Environmental Protection and Planning

(3) THE ATTORNEY GENERAL
(In a representative capacity for the Governor General)

Respondents

Ex Parte

(1) WATERKEEPERS BAHAMAS LTD
(2) COALITION TO PROTECT CLIFTON BAY

Applicants

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Frederick Smith, QC along with Mr. Garth Phillippe for the Applicants
Mr. Aiden Casey, QC along with Mr. Franklyn Williams, Mr. David Higgins and Mrs. Kayla Green-Smith for the Respondents
Ms. Clare Montgomery, QC along with Mr. Leif Farquharson and Mr. Adrian Hunt for the Intended Interveners on the issue of a Stay

RULING

1. The Applicants by Ex Parte Application filed on December 9, 2020, which is supported by the Affidavit of Mr. Joseph Darville filed December 9, 2020, seek leave to apply for Judicial Review pursuant to Order 53 Rule 3 of the Rules of the Supreme Court ("**RSC**") in relation to the following decisions by the 1st Respondent:
   (1) in February 2020 to grant Environmental Authorization ("**EA**") to the Intended Intervener The Bahamas Petroleum Company Plc ("**BPC**") to begin an exploratory offshore oil drilling program at the "Perseverance # 1 Well" ("**the Drill Site**") near the Cay Sal Bank in the southern waters of The Bahamas ("**the Project**") intended to have commenced on or around December 15, 2020;
   (2) in November 2020, to approve changes to the Project and/or
   (3) in November 2020, to issue a new EA.
2. The Decisions by the 2nd Respondent:
   (1) in February 2020 to approve the BPC EIA and EMP;
   (2) in November 2020 to approve the amended and resubmitted EIA; and /or
   (3) in November 2020 to approve the changes to the Project without an amended EIA and EMP
3. The Decisions of the Governor General of The Bahamas:
   (1) in April 2020, to renew or extend the validity of BPC and Bahamas Offshore Petroleum Limited's (a wholly owned Bahamian subsidiary of BPC hereinafter referred to as "**BOP**") licenses to December 2020;
   (2) in August 2020, to renew or extend the validity of BPC/BOP's licenses to April 2021; and
   (3) in November 2020, to renew or re-extend the validity of BPC/BOP's to June of 2021.
4. The Applicants seek the following Orders:
   (1) Leave to apply for Judicial Review;
   (2) An extension of the time period within which to commence Judicial Review in respect to 3 of the Decisions under review; and
   (3) An order under Order 53 Rule 3 (10) of the RSC to stay the effect of the Decisions under review pending determination of the Judicial Review proceedings.
5. The Applicants seek ultimately Relief in the form of:
   (1) A Declaration or declarations that the decisions and each of them is procedurally unfair, unlawful, and an abuse of power and/or irrational;
   (2) An order or orders of Certiorari setting aside each Decision;
   (3) Costs.

6. On December 29, 2020 the Applicants filed a Summons to add the Town Planning Committee as a party, the 4th Respondent, to this application and an application to amend the application for Judicial Review. This application is supported by the 2nd Affidavit of Mr. Joseph Darville filed December 29, 2020.
7. That Crown opposes the application for leave and filed a Notice of Objection on December 22, 2020 on the grounds of delay, that the grounds relied upon by the Applicants are devoid of substantive merit and that the stay should not be granted. The Respondents rely on the Affidavit of Rochelle Newbold, the 2nd Respondent filed on December 22, 2020. The Crown further opposes the application for joinder and amendment.
8. On December 29, 2020 Mr. Smith, QC withdrew his objection to BPC being heard on the issue of the grant of a stay of the drilling that is underway **ONLY**. He maintained his objection that BPC is not a party to the action otherwise.
9. The Applicants' Submissions are dated December 11, 2020, the Crown's Skeleton Arguments on behalf of the Respondents are dated December 22, 2020 and BPC Skeleton Arguments for hearing on leave and interim relief were filed December 22, 2020. BPC also relied on the First Affidavit of Simon Potter filed December 11, 2020 and the Third Affidavit of Simon Potter filed on December 21, 2020 in support of its Skeleton Arguments. On December 30th, 2020 Mr. Smith, QC via e-mail forwarded "talking points" to be considered by the Court and on December 31, 2020 the Crown and BPC indicated that they did not find it necessary to add to their Submissions.

Background

10. This application relates to environmental authorizations and approvals given to BPC/BOP by the 1st and 2nd Respondents to undertake exploratory oil drilling at the Drill Site located near the Cay Sal Bank in the southern waters of the Bahamas, based on licenses granted to BPC/BOP. That the drilling vessel The IceMaxx set sail for The Bahamas on November 26, 2020 with the intention that the Project would commence on or about December 15, 2020. By email correspondence from Mr. Smith, QC dated December 14, 2020 the Court was moved to set down this application for leave for hearing. BOP commenced drilling on December 20, 2020.
11. The Applicants, Save the Bays ("STB") and Waterkeeper Bahamas Limited ("WKB") are each limited liability companies incorporated in The Bahamas in 2013 and 2018 respectively, engaged in, inter alia, environmental protection, advocacy and environmental education.

Brief Statement of Facts

12. The evidence contained in the Affidavits of Mr. Joseph Darville and Ms. Rochelle Newbold speak primarily in my view to the substantive application for Judicial Review should leave be granted. The following however is a brief summary of their evidence relative to the application for leave.

13. Mr. Joseph Darville, in his Affidavit states in part states that he is the Secretary and Director of WKB and a Director and Executive Chairman of STB. Mr. Darville set out inter alia, the overall objectives of the Applicants, the nature of the offshore oil drilling programme undertaken by BPC, the decisions of the Respondents under challenge and the grounds thereof and the factual matrix in his Affidavits according to Mr. Darville from in or about 2007 to the filing of his Second Affidavit on December 29, 2020. He further outlined the attempts by the Applicants to find a non-litigation solution between July 2020 and November 2020 with the forwarding of letters before action and concluded with the relief being sought. Mr. Darville in his 1st Affidavit at paragraph 114 sets out the reasons for the Applicants delay that:-

    i. the Applicants were misled by the Minister for the Environment in May of 2018 into thinking that the project would not go ahead and so were unprepared when the February Decisions were announced.

    ii. the Covid-19 lockdown measures introduced in March 2020 intervened to make organization and fundraising difficult for the Applicants.

    iii. BPC indicated that it could not go ahead with the drill in April 2020 as planned due to insufficient resources to do so and no JV partner and so it was hoped that the Minister would honour the assurance made in May 2018 and that the GG would not extend /renew licenses. The Applicants wrote to the PM on July 2, 2020 seeking this outcome but the GG's August Decision dashed these hopes.

    iv. Significant modifications were then announced by BPC in May 2020 (namely a completely different drilling contractor and drill vessel and equipment which seemed to throw a significant portion of the February approved EIA and EMP out of the window) and in October 2020 it announced that a modified EIA was being submitted. A huge portion of the EMP was either about Seadrill and the Seadrill vessel West Saturn or was comprised of documents from Seadrill.

    v. The Applicants expected the EPPA and EIA Regulations that came into force in September 2020 to be respected and the EIA process reopened to deal with this significant change.

vi. Letters Before Action seeking assurances to this effect were sent on November 17, 2020 and it was announced on the same day that the November Decisions had been taken without the EPPA process now in force being respected.

vii. As soon as possible after the 14 day deadline in the Letters Before Action expired, this application was filed.

14. In response to Mr. Darville's Affidavit Ms. Newbold states in part that she is the Director of Environmental Protection and Planning ("DEPP") and previously held the position of Director of Bahamas Environment and Technology Commission ("BEST"). She also states that DEPP was launched in July 2020 and that during her tenure as the Director of the BEST Commission the review process for BPC was undertaken and there was no objection issued for the project works. The recent modification to the projects by BPC had no relation to the Impacts associated with the Environmental Impact Assessment ("EIA") and therefore no new approval was warranted. That a re-opening of the EIA was not required and therefore there was no need to undertake a consultation as the original approval was unchanged. That the EIA is in compliance with the Petroleum Offshore EPP Regulations. She asserts that the disposal of treated sewage and food waste would take place at a location in excess of 16 nautical miles of Bahamian archipelagic waters. That the change in drilling contractor did not compromise the identified and required undertakings in the Environmental Management Plan ("EMP"). That generally there had been no new information or changes, modifications to the EIA or the no objection approval previously given. That while the project date and rig contractor had changed the identified impacts and area of work remains the same and that consultation pursuant to the Petroleum Act, 2016 was undertaken by the Ministry of the Environment on February 11, 2020 and that BPC undertook a series of consultative efforts between 2014 to February 2020 with NGOs, business groups, churches, schools and fishermen. That the BEST Commission reached a point that resulted in the letter of non-objection being published on the DEPP's website and there was no feedback from this posting for more than 8 months by Bahamas National Trust ("BNT") or any other NGO.

Application for Joinder of Respondent and Amendment

15. Mr. Fred Smith, QC Counsel for the Applicants, has made an application for joinder and amendment pursuant to Order 15, Rule 6(2)(b) and Order 53, Rule 3(6) of the RSC and relies on his oral submissions made during the hearing. It is his submission that the Town Planning Committee is a necessary party to the proceedings (application) as the provisions

of the Planning and Subdivision Act (the "PSA"), in particular Section 48, place, inter alia, a statutory obligation on that party to stop any development, operation or activity being conducted without a site-plan approval. Mr. Smith, QC further submits that the amendments would not prejudice any of the other parties as they are already before the Court.

16. Mr. Aiden Casey, QC, Counsel for the Respondents oppose the application for joinder and amendment and also relies on his oral submissions made during the hearing. Mr. Casey, QC submits in part that the claims against the Town Planning Committee as indicated by the draft Amended Notice of Motion is doomed to fail and is wholly lacking in substantive merits. Moreover, he submits that the Court should not grant the amendments if it can be seen that the proposed arguments have no real prospect of success and granting such would be a waste of judicial time and a waste of costs. It is his submission that in the instant case the PSA and the Planning Subdivision Extension to Family Islands Order 2012 does not apply due to the fact, inter alia, that the proposed drilling site falls outside of the islands specified by Section 2 of the PSA.

17. Mr. Smith, QC argued that the PSA was not restricted to the islands mentioned in Section 2 of the PSA. He referred the Court to Section 4(1) of the PSA which defines land and development as follows; "...includes land covered with water, and land underlying the sea surrounding the coast within the limits of the territorial waters of the Bahamas." He submits that the Drill Site is "within the limits of the territorial waters of the Bahamas" and that the word "development" is defined as "the carrying out of any building operation, engineering, or other operations in, on, over, or under land;..." That the project is prohibited by Section 36 of the PSA, unless the developers have obtained site-plan approved by the Committee.

The Law

18. Order 15, Rule 6(2)(b) of the RSC states:-

"6.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter,

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

19. Order 53, Rule 3(6) of the RSC states:-

"(6)Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit."

20. The Respondents have not had an opportunity to file a responsive Affidavit but the definition of land as set out in Section 4(1) of the PSA seems to suggest that the Drill Site is located within the territorial waters of The Bahamas and would be subject to the PSA. At paragraphs 16 and 18 of the 2nd Affidavit of Joseph Darville filed December 29, 2020 he states that there has been no publication of a land use or a site plan approval. In my view the Applicants have an arguable case on the applicability of the PSA. Clearly the Court has the power and the discretion pursuant to Order 15 and Order 53 of the RSC to grant leave to join another party and to amend the Application.

21. Having read the 2nd Affidavit of Mr. Darville filed December 29, 2020 and heard the oral submissions of Counsel for the Applicants and the Respondents I find that the Town Planning Committee should be joined as a party to this action as its presence before the Court is necessary to ensure that all of the matters in dispute may be effectually and completely determined and there exists a question or issue connected to the relief or remedy sought by the Applicant and it would be just and convenient to determine such between Applicant and the intended 4th Respondent and the other parties.

22. Further, the Applicants are given liberty to amend its Notice of Motion in accordance with the amendments made in red as exhibited to the Second Affidavit of Joseph Darville.

Applicants Application for Leave

23. On an application for leave to apply for Judicial Review the Court must consider:-

i. whether the applicant has a sufficient interest in the matter to which the application relates;

ii. whether the applicant acted promptly and in any event 6 months from the date when the grounds for the application first arose; and

iii. whether there is an arguable case for granting the relief claimed by the applicant.

24. On an application for leave to apply for Judicial Review, the Applicants have an exceptionally low threshold to meet.

Sufficient Interest

25. Mr. Smith, QC submits that the Applicants in the instant case have a sufficient interest and standing to bring the application and refers the Court to the case of **The Queen v The Rt. Hon. Hubert Alexander Ingraham, Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Prime Minister and as the Minister Responsible for Crown Lands) et al ex parte Responsible Development for Abaco (RDA) Limited and another** 2009/PUB/jrv/FP/00013 in support. He further submits that the Applicants are respectable and respected environmental groups and as such demonstrates an interest in and standing to bring the application.

26. The Respondents take no issue with the standing of the Applicants to bring this application.

Promptness/Extension of Time

27. Mr. Smith, QC by his Written Submissions contends that the Applicants acted promptly as it relates to the August and November decisions and that while the application for the February and April decisions were not brought within the 6 months the Applicants still acted promptly and submits that there are good grounds for the Court to extend the time for filing such application. Mr. Smith, QC refers the Court to **R (on the application of the Law Society) v Legal Services Commission [2010]** EWHC 2550 (Admin) [2011] A.C.D. 16 in support of his submission for an extension of time. However, as the Court understood Mr. Smith's, QC oral submissions during the hearing, he now submits that the February, April, August and November decisions were a continuing process that led to BPC commencing the drilling and refers the Court to **Re EARTH Limited v The Queen et al** 2013/PUB/jrv/00034 and **The Queen v The Rt. Hon. Hubert Alexander Ingraham, Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Prime Minister and as the Minister Responsible for Crown Lands) et al ex parte Responsible Development for Abaco (RDA) Limited and**

another (supra) in support of his submission. It is also Mr. Smith's, QC submission that the Respondents will not suffer any prejudice if leave is granted in respect of the out of time decisions as they are "a part of a continuum" and "a part of a series". He refers the Court to the cases of **Stephen Hilditch v The Lord Mayor and the Citizens of Westminster** 1990 WL 754659 and **The Queen v The Rt. Hon. Hubert Alexander Ingraham, Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Prime Minister and as the Minister Responsible for Crown Lands) et al ex parte Responsible Development for Abaco (RDA) Limited and another (supra)** in support of his submission relating to delay and submits that this is a matter of public importance and needs a resolution.

28. Mr. Aiden Casey, QC submits in part that the decisions to which the Applicants seek to challenge, in particular the February and April decisions fall outside of the "longstop" period, i.e. outside of the 6 month period from the date when the grounds first arose and that the August and November decisions while fall within the "longstop" period the Applicants failed to make their application promptly as required by the RSC. He refers the Court to the cases of **Mauritius Shipping Corporation Ltd v Employment Relations Tribunal** [2019] UKPC 42; **Fishermen and Friends of the Sea v Environmental Management Authority** [2018] UKPC 24; **R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd** [1998] Env LR 415 in support of his submissions.

29. It is also his contention: -

    i. that the Applicants do not have a strong prima facie case and even if they had such it was incumbent on them to act on it promptly;

    ii. that the Intended Intervener BPC would suffer extreme prejudice and any alleged lack of prejudice to a person or entity is not a good reason for delay or an extension. **See Fishermen and Friends of the Sea (supra)**

    iii. the Applicants' assertions that they were taken by surprise by the grant of the February decision is not fully explained in the evidence and is contradictory when reviewing the evidence contained in the Affidavit of Joseph Darville.

    iv. that the Applicants' assertion that the COVID-19 pandemic made organizing and fundraising difficult is not a strong reason to qualify as a reason for delay.

    v. that the Applicants' further assertion in the Affidavit of Joseph Darville that the Applicants made a calculated decision to wait and see whether BPC could raise the funding necessary to proceed with the project is not a good reason for delay.

vi. that BPC would suffer immeasurable prejudice if the extension is granted as BPC faces losses in the millions of dollars especially following the commencement of the drilling. Further, as it is a case of public importance, the highest level of delay gives rise to substantial prejudice to the public interest.

30. It is Mr. Casey's, QC submission that the Applicants have not produced any evidence to justify the delay.

31. Mr. Smith, QC in response refers the Court to the case of **BACONGO v Department of the Environment of Belize [2003] 1 WLR 2839** in support of his application for leave and submits that important and serious issues have been raised in particular issues as to the compliance with the environmental protection regulations; the contention as to whether there was a decision or one which could be reviewed by the Court and the issue of possible prejudice to the interest of others.

The Law

32. Order 53, Rule 4(1) of the RSC states "(1) An application for judicial review shall be made promptly and in any event within six 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."

Discussion

33. I found the case of **Maharaj v National Energy Corporation of Trinidad and Tobago [2019] 1 WLR 983,** a case referred to the Court by BPC to be instructive on the approach that the Court should employ when considering the grant of an extension of time. Lloyd-Jones, LJ at paragraphs 36 to 39 outlines the approach:-

> " 36. More generally, and quite independently of the particular provisions and scheme of the legislation in Trinidad and Tobago, as a matter of principle, considerations of prejudice to others and detriment to good administration may, depending on the circumstances, be relevant to the determination of both whether there has been a lack of promptitude and, if so, whether there is good reason to extend time.
>
> 37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay. Thus, for example, in 1991 in R v Independent Television Commission, Ex p TV Northern Ireland Ltd reported [1996] JR 60 Lord Donaldson MR warned against

the misapprehension that a judicial review is brought promptly if it is commenced within three months.

> "In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged." (p 61)

Similarly, in R v Chief Constable of Devon and Cornwall, Ex p Hay [1996] 2 All ER 711, Sedley J observed (at p 732A):

> "While I do not lose sight of the requirement of RSC Order 53 rule 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the respondent or to third parties."

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.

38. **In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest.** (See for example, Greenpeace II at pp 262-264; Manning v Sharma [2009] UKPC 37, para 21.) Here the Board finds itself in agreement with the observations of Kangaloo JA in Abzal Mohammed (para

25) cited above para 17. In Trinidad and Tobago these are all matters to which the court is entitled to have regard by virtue of subsection 11(3). More fundamentally, where relevant, they are matters to which the court is required to have regard.

39.**If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way. It is not controversial in these proceedings that, even where there is considered to be a good reason to extend time, leave may nevertheless be refused on grounds of prejudice or detriment. By contrast, if, without taking account of the absence of prejudice or detriment, it is concluded that there is no good reason for extending time, leave will be refused and their absence can never operate to the benefit of a claimant.** (**emphasis mine**)"

34. In the above case, the Court considered the application of Section 11 Judicial Review Act of Trinidad and Tobago which reads:-

"(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."

inter alia, Section 11(1) of the Judicial Review Act above is similar to Order 53, Rule 4(1) of the RSC.

35. There is no doubt that the February and April decisions are out of time so the Court must consider next the broader test of whether there is a good reason for extending time.

36. Based on the reasons provided by Mr. Darville above, it is clear that the Applicants were actively engaged in the progress of this Project from as early as 2018 and the meeting with the Minister. From Mr. Darville's account the Applicants monitored the progress of the approvals, they monitored the representations made by the Respondents to the public, the representations made by BPC to the public and they came to an erroneous belief that an international corporation such as BOP would not in due course sort its resources and despite several delays proceed with the Project. Like BPC the Applicants were impacted by the COVID-19 pandemic in that their fundraising abilities were hindered, and I accept as stated by Mr. Darville that they made several non-litigation efforts to persuade the Respondents as late as July 2020 to stop the Project when they wrote to the Prime Minister of the Bahamas and finally in November 2020 with the initiation of the Letters Before Action. Therefore, I find that the Applicants wait and see strategy was a grave miscalculation, however I accept that the reasons given when taken together are sufficiently good reasons for the Court to consider extending the time.

37. The Court must then consider the presence or absence of prejudice or detriment to good administration to the Respondents in the event the Court grants the extension of time. I find based on the evidence and submissions before me that the Respondents have failed to demonstrate what prejudice, if any, they would suffer following the grant of an extension of time for leave to commence Judicial Review proceedings. Moreover, the Respondents have similarly failed to demonstrate detriment, if any, to good administration upon the grant of an extension of time for leave to commence Judicial Review proceedings.

38. Therefore, the Applicants have satisfied the nominal test for an extension of the time period within which to commence Judicial Review with respect to the Decision by the 1st Respondent in February 2020 to grant Environmental Authorisation for the Project; the Decision by the 2nd Respondent in February 2020 to approve the BPC EIA and EMP; and the Decision by the Governor General in April 2020 to renew or extend the validity of BPC/BOP's licenses to December 2020.

Arguable Case

39. Mr. Smith, QC submits that the Court is not at this stage concerned with determining the merits of the substantive judicial review challenge, save only that the judicial review

challenge must not be frivolous, vexatious or hopeless. **See R v Secretary of State for the Home Department, ex parte Rukshanda Begum** [1990] COD 107. He also submits that the Applicants have a strong prima facie case and outlines the reasons at paragraph 21 of his Written Submissions with the primary issues being the Respondents failure to consult and whether the Respondents are in compliance with environmental protection regulations as drilling has commenced. He submits that the Applicants application is far from frivolous, vexatious or hopeless and that Judicial Review is the only procedure available to challenge the decisions and achieve the remedies sought by the Applicants.

40. Mr. Casey, QC submits that the Applicants do not have a strong prima facie case and that the Applicants arguments do not have substantive merit.

41. In **R v Secretary of State for the Home Department, ex parte Rukshanda Begum (supra)**, Lord Donaldson states "**For my part, as it seems to me, a judge who is confronted with an application for leave to apply for judicial review should grant it if he is clear that there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.** If he is satisfied that there is no arguable case he should dismiss it. But there is an intermediate category of cases in which the judge, on looking at the papers which support the application, can very reasonably come to the conclusion that he really does not know whether there is or is not an arguable case, either because the facts are not clear or because he has not received sufficient assistance with the law to enable him to be satisfied as to precisely what the relevant law is. That is not necessarily a criticism of counsel supporting the application: it may well be inherent in the problem.

In those circumstances, where he is in doubt, the right course, in my view, is always to invite the putative respondent to attend and to make representation as to whether leave should or should not be granted. This is not to say that the subsequent inter partes hearing should become anything remotely like the hearing which would ensue if leave were granted. It is analogous to the approach which was considered by Lord Diplock in Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 at p 207 in a quite different context, that of arbitration: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should give leave. Adjournment for an inter partes hearing will at least enable the judge to have a bird's eye view of the contentions on both sides and any doubts or difficulties are likely to be resolved

one way or the other; that is to say either in favour of granting leave or in favour of refusing leave, or resolved in the sense that it is obviously very difficult and needs further thought, which of course amounts to a requirement for leave to be granted. I say no more about that." (**emphasis mine**)

42. The evidence raised in the Affidavits of the Applicants and the 2nd Respondent on behalf of the Respondents satisfies me that there are issues fit for further consideration.
43. In light of the above, the Applicants are granted leave to bring Judicial Review proceedings upon the grounds and for the relief set out in the Applicants' Amended Ex Parte Application for leave to commence Judicial Review.

Applicants Application for a Stay

44. Mr. Smith, QC has asked the Court to grant an Order for a Stay of the effect of the decisions, which are the decisions of February, April, August and November.
45. Mr. Casey, QC resists the Applicants application for a stay and submits in part that in following the authorities of **R v Secretary of State for Education Ex p. Avon CC** [1991] 1 QB 558 and **R v Ashworth Hospital Authority Ex p. H** [2003] 1 WLR 127 they correctly summarize the Respondents position that the granting of a stay against them would be futile as the decision-making process has been completed and nothing remains to be done by the Respondents to implement their decisions. He refers the Court to the case of **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd** [1991] 1 WLR 550 and submits that there is no purpose in granting a stay in the instant case as the decision has been implemented. Mr. Casey, QC also submits that the authorities establish that where a grant of stay against a public body will or may detrimentally affect a third party, the proper approach is to treat the application as being for an injunction with a consequence of such an undertaking in damages being required. **See R v HM Inspectorate of Pollution Ex p Greenpeace Ltd (No.1)** [1994] 1 WLR 570; **R v Secretary of State for the Environment Ex p. RSPB** (1995) 7 Admin LR 434.
46. Mr. Casey, QC further submits that the grant of a stay against the Respondents would produce unnecessary delay to the project which is of great public importance. He submits that the Applicants acting promptly in the commencing of their application could have avoided the delay. Mr. Casey, QC also submits that the granting of a stay poses a real risk of BPC losing its window for its vessel and teams of specialists to complete the exploration

drill and more so other commercial operators being unwilling to become involved or make investments with the Bahamas in regard to oil exploration. He also refers the Court to the Affidavit evidence of Mr. Simon Potter filed December 11 and 21, 2020 which exhibits a memorandum of Mr. David Bond (the Drilling Director), relevant specialists of BPC who depose that there will be potential environmental risks should the drilling stop at this point in the process. It is his submission that the Applicants delay in commencing their action at this juncture instead of promptly would have allowed the Court to consider the questions they are now before the Court for before any drilling had commenced.

47. Counsel for BPC, Ms. Clare Montgomery, QC for the Intended Interveners also resists the Applicants application for a stay and relies on her Written Submissions dated December 21, 2020. She submits that the Court must first consider whether the Applicants have a good arguable case before deciding whether to grant a stay. It is her submission that the Applicants case is hopeless as it is out of time, has not been brought promptly and by the Applicants own evidence they had been aware from the first decision in February and cannot now come and state that the decisions from February to the latest November decision was a continuous process. Further, Ms. Montgomery, QC highlights five points to which she submits in response to the Applicants application :-

    i. The drilling has commenced and it would be more hazardous to stop drilling than to complete the project and that whatever the merits of a stay might have been before the drilling commenced, this factor should now be decisive;

    ii. The Applicants inexcusable delay means that an interim stay of any significant duration would in effect constitute final relief and thus make it impossible for BPC to conclude the project within the lifetime of its licence; **See BACONGO (supra)**

    iii. A stay would cause more than US$25 million of damage to BPC and possible much more;

    iv. The Applicants have not offered any cross undertakings in damages, such that the prejudice to BPC would be irremediable; See **ex p Greenpeace, per Scott LJ**; **BACONGO (supra)**

    v. The Minister has determined that it is in the public interest for the oil exploration project to proceed.

48. Ms. Montgomery, QC referred the Court to the case of **BACONGO (supra)** in support of her submissions and submits that in line with **BACONGO (supra)**, it is necessary to look at an application for stay as if it was an interlocutory injunction and for that reason it is necessary to also hear from the persons who might be affected. She further submits that

the Court in **BACONGO (supra)** also stated that a cross undertaking in judgment was not only a permissible condition to be imposed in an environmental case but it should normally be required even in a public law case with environmental implications should the commercial interest of a third party be engaged. It is also her submission that there is clear and obvious prejudice in relation to BPC as the Applicants are unwilling to provide any assurance that the costs would be covered by them if they turn out to be wrong. She further submits that the test the Court is to apply in determining this application is in considering the balance of convenience to which she states is bourne entirely by BPC and the Bahamian government and prejudice to good administration and proper governance.

49. Mr. Smith, QC in response to the submissions made by BPC relies on his Speaking Notes dated December 30, 2020 and submits that the grant of a stay would not amount to final relief in the circumstances as they can apply to renew their licenses and as the drilling is expected to take 45 to 60 days if the judicial review hearing is expedited and determined there would still be time to allow the drilling to take place and end before June, 2021. He further submits that there is nothing to prevent BPC from making an application to have the stay lifted in the event the proceedings are still ongoing in May 2021. It is also his submission that there is no evidence to suggest how much expenditure was incurred by BPC after November 17 2020 and any such expenditure afterwards was at their own risk.
50. Mr. Smith, QC submits that there are cases whereby injunctions and stays were granted in the absence of an undertaking in damages (**R v Prime Minister ex parte Save Guana Cay in Privy Council (unreported 2005); R v Prime Minister and Others (Nygard et al) ex parte Coalition to Protect Clifton Bay (JRs 1 to 4**) and that the Court has a wide discretion on the question of whether a stay or injunction should be refused due to the lack of cross-undertaking in damages. It his submission that it will be relevant to look at the strength of each applicant's case to assess whether ordering a stay in the circumstances would produce a just result and to assess whether the refusal of relief is likely to be decisive of the whole case. See **BACONGO (supra).**
51. Mr. Smith, QC in response to the Respondents opposition submits that there is no damage suffered by the Government on this application and as BPC is not a party to this action, BPC cannot impose themselves at this stage and seek an undertaking in damages. He submits that no damages would flow by the giving of the stay to the decisions which would then have the effect of staying and putting those decisions into effect and the Government would have to stop BPC from continuing to drill.

Discussion

52. As leave has already been granted to the Applicants to apply for judicial review, the Court considers Order 53, Rule 3 (10)(a) RSC which states " Where leave to apply for judicial review is granted, then — (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;".
53. Counsel for all parties have indicated that the Court does have a discretion to order a stay pending the determination of the hearing of the judicial review. However, there are several considerations that must be taken into account before the Court can make such an order.
54. It is evident that the Applicants application for a stay on the face of it is tantamount to an application for an injunction. It is important to make such distinction because while the Court does have the jurisdiction where appropriate to do so, such an order is only to stay the decision-making process, the decision itself and its implementation. **See The Supreme Court Practice, 1999, Volume 1 at 53/14/51 on page 914**. The facts as highlighted by all of the parties is that the decision-making process has been completed, the decisions have been implemented and subsequently the drilling exercise to which those decisions that were made has commenced. Therefore, to my mind, in the circumstances, there is no decision-making process to be stayed. I therefore accept the submissions of Mr. Casey, QC in this regard.
55. Further, as all parties have agreed that this exercise is of great public importance albeit for different reasons, I do not accept Counsel for the Applicants submissions that the Respondents and BPC would suffer no prejudice if a stay was granted and therefore accept the submissions of the Respondents and BPC in this regard and the evidence of Mr. Simon Potter as found in his First and Third Affidavits filed herein which exhibits a memorandum of Mr. David Bond (the Drilling Director), (accepted as read).

Undertaking in Damages

56. In **BACONGO (supra)** the Court considered the requirement of a cross-undertaking for interim relief in public cases.

> "35. Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in *American Cyanamid Company v*

Ethicon Limited [1975] AC 396, but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case (at page 409). Another special factor might be if the grant or refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category.

36. The Court's approach to the grant of injunctive relief in public law cases was discussed (in particularly striking circumstances) by Lord Goff of Chieveley in *Queen v Secretary of State for Transport, ex parte Factortame Limited (No 2)* [1991] AC 603, 671-4. The whole passage calls for careful study. Lord Goff stated at page 672 that where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of injunctive relief. Lord Goff concluded (at page 674):

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong *prima facie* case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mindthe possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken."

37. In some public law cases (such as *Queen v Servite Houses and Wandsworth LBC, ex parte Goldsmith* (2000) 3 CCLR 354) the issue is a straightforward dispute between a public or quasi-public body (in that case, a charity providing care

services on behalf of a local authority) and citizens to whom the services are being provided. In such a case an injunction may be granted to the citizen, without any undertaking in damages, if justice requires that course. Swinton Thomas LJ took into consideration the public importance of the case, involving the closure of a residential care home; the very serious consequences for the elderly and infirm residents who would be moved from accommodation in which they were settled; their prospect of success at the full hearing; and the relatively short period for which the injunction would be in force pending the hearing of the appeal.

38. In *Queen v Inspectorate of Pollution, ex parte Greenpeace Limited* [1994] 1 WLR 570, on the other hand, a campaigning organisation was challenging an official decision which, if stayed, would have adverse financial implications for a commercial company (British Nuclear Fuels PLC) which was not a party to the proceedings. Brooke J had refused a stay and the Court of Appeal upheld this decision. Glidewell LJ said at page 574:

> "At the hearing before Brooke J no offer was made by Greenpeace to give an undertaking as to damages suffered by BNFL should they suffer any; the sort of undertaking that would normally be required if an interlocutory injunction were to be granted. I bear in mind that the judge said that he was influenced by the evidence about Greenpeace's likely inability to pay for that financial loss, but he had earlier remarked that he had not been offered an undertaking. If we were dealing with this matter purely on the material which was before the judge, I would find no difficulty at all. This was essentially a matter for the discretion of the judge."

Scott LJ said at page 577:

> **"But if the purpose of the interlocutory stay is, as here, to prevent executive action by a third party in pursuance of rights which have been granted by the decision under attack, then, in my judgment, to require a cross-undertaking in damages to be given is, as a matter of discretion, an entirely permissible condition for the grant of interlocutory relief and in general, I would think, unless some special feature be present, a condition that should be expected to be imposed."**

A similar approach has been taken by the Land and Environment Court of New South Wales in *Jarasius v Forestry Commission of New South Wales* (19 December

1989). Some observations of Lord Jauncey of Tullichettle in *Queen v Secretary of State for the Environment, ex parte The Royal Society for the Protection of Birds* [1997] Env LR 431, 440 are also consistent with the view that an undertaking in damages should normally be required, even in a public law case with environmental implications, if the commercial interests of a third party are engaged.

39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result). In the context Mr Clayton referred to the well-known decision of the Court of Appeal in *Allen v Jambo Holdings* [1980] 1 WLR 1252, which has had the result that in England a very large class of litigants (that is, legally assisted persons) are as a matter of course excepted from the need to give a cross-undertaking in damages. However their Lordships (without casting any doubt on the practice initiated by that case) do not think that it can be taken too far. The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice. In *Allen v Jambo Holdings* Lord Denning MR said (at page 1257),

> "I do not see why a poor plaintiff should be denied a *Mareva* injunction just because he is poor, whereas a rich plaintiff would get it".

On the facts of that case, that was an appropriate comment. But there may be cases where the risk of serious and uncompensated detriment to the defendant cannot be ignored. The rich plaintiff may find, if ultimately unsuccessful, that he has to pay out a very large sum as the price of having obtained an injunction which (with hindsight) ought not to have been granted to him. Counsel were right to agree (in line with all the authorities referred to above) that the court has a wide discretion." (**emphasis mine**).

57. I do not accept Counsel for the Applicants submissions that in the case of a stay they should not be required to give a cross-undertaking in damages, as such an undertaking is usually required in the grant of interim relief. I note the Applicants refusal to offer such a cross-undertaking.

58. Therefore, the Applicants application for a stay of the effect of the decisions pending the determination of the Judicial Review application is refused.

Dated this 5th day of January, A. D. 2021

Petra M. Hanna-Adderley
Judge