IN THE MATTER of an application for leave to apply for Judicial Review

AND

IN THE MATTER of a Decision of the National Environmental Appraisal Committee made on Friday, November 9th, 2001 to approve an Environmental Impact Assessment by Belize Electric Company Limited

AND

IN THE MATTER of a Decision of the Department of Environment or of the National Environmental Appraisal Committee made on Friday, November 9th 2001 to grant environmental clearance to the Macal River Upstream Storage Facility Project

AND

IN THE MATTER of the Environmental Protection Act, Chapter 328 of the Laws of Belize, Revised Edition 2000, and the Regulations made thereunder

THE QUEEN

And

THE DEPARTMENT OF THE ENVIRONMENT
BELIZE ELECTRIC COMPANY LIMITED RESPONDENTS

EX PARTE
BELIZE ALLIANCE OF CONSERVATION NON GOVERNMENTAL ORGANIZATIONS (BACANGO) APPLICANT

Supreme Court
Action No. 61 of 2002
22nd April, 2002
Conteh, CJ.

Mr. Dean Barrow, S. C. with Ms. Lois Young Barrow, S. C. together with Mrs. Marilyn Williams for the Applicant.

Mr. Denys Barrow, S. C. for the First Respondent.
Mr. Michael Young, S. C. with Mrs. Tanya Herwanger for the Second Respondent.

Application for leave to amend Statement in Support of Grounds for Judicial Review - Applicable principles to be considered by the courts in determining such applications.

R U L I N G

1. **Action No. 61 of 2002**, the instant action out of which the present application I now have to rule on, is beginning to acquire what may be called a checkered career. It began its life innocuously enough as an application for leave to seek judicial review by Summons dated 8th February 2002. Then the putative Respondents were the Attorney General, Department of Environment; Ministry of Natural Resources, Environment, Commerce and Industry; and the applicants for leave were Belize Alliance of Conservation NGOs (BACANGO for short, and so referred to hereafter); Belize Ecotourism Association; Sharon Matola and Eligorio Sho.

2. When the original Summons for leave to seek judicial review however, came up before me on 26th February, the applicants were then represented by Mrs. Marilyn Williams together with Mrs. Antoinette Moore. However, on that date, the application itself for leave ran into what it is safe to simply call, some headwind, because of its format and contents. For example, in the Statement in Support, there was no description of the applicants, as such applications would normally contain. More fundamentally however, the grounds upon which relief was being sought were lacking in particularity. This caused me some disquiet. The applicants were then seeking leave for judicial review in the form of several orders, viz: ***certiorari*** to quash a decision dated November 9th 2001, of the National Environmental Appraisal Committee and/or the Department of the Environment and/or the Ministry of Natural Resources, Environment, Commerce and Industry jointly and/or severally, by which environmental clearance to the proposed Macal River Upstream Storage Facility (MRUSF) project was granted; ***certiorari*** to quash a decision of the Government of Belize to commence road building as part of the construction of the Macal River Upstream Storage Facility; ***prohibition*** preventing the Government of Belize whether by themselves, their agents, workmen, servants or otherwise from any further road construction at or near the site of the proposed Macal River Upstream Storage Facility; ***mandamus*** directed to National Environmental Appraisal Committee and/or Department of the Environment and/or the Ministry of Natural Resources, Environment, Commerce and Industry, requiring them to withdraw the approval given on 9th November 2001; ***mandamus*** directed to National Environmental Appraisal Committee and/or Department of the Environment and/or the Ministry of Natural Resources, Environment, Commerce and Industry requiring them to conduct public hearings prior to examination of the completed Environmental Impact Assessment (EIA) for the proposed Macal River Upstream Storage Facility; and ***mandamus*** directed to the National Environmental Appraisal Committee and/or Department of the Environment and/or the Ministry of Natural Resources, Environment, Commerce and Industry requiring them to examine the Environmental Impact Assessment only after the completed Environmental Impact Assessment has been submitted and further to conduct such examination in the manner specified in the Environmental Impact Assessment Regulations. The applicants also sought on interim stay of all proceedings on the said decision.

3. The hearing was however adjourned to Thursday, February 28, 2002, in order to enable the applicants to come with necessary particulars and properly formulated grounds.

4. On 28th February 2002, the applicants were then represented by Mr. Dean Barrow S.C. together with Mrs. Marilyn Williams, but with Mr. Barrow S.C. as lead attorney. The applicants had however on that day a different application dated 27th February and filed on 28th February. It was entitled "Amended". It was however stated to be between the Department of the Environment and Belize Electric Company Ltd. as putative Respondents (the latter had by an application on 26th February applied to be joined as a Respondent) and BACANGO as the sole applicant. Mr. Barrow S.C. also dropped the Attorney General as a putative Respondent.

5. The Amended application for leave dated 27th February 2002 sought only a ***certiorari*** to quash the decision of the National Environmental Appraisal Committee to approve an Environmental Impact Assessment submitted to it by Belize Electric Company Ltd. and a decision of the National Environmental Appraisal Committee or Department of the Environment to grant environmental clearance to the implementation/construction of the Macal River Upstream Storage Facility and a ***Declaration*** that the said decisions were ***ultra vires*** the Environmental Protection Act and the Regulations made thereunder and were therefore contrary to law and void.

6. The decision against which the amended application for leave sought to impugn were stated in the Statement in support as: a) Decision of National Environmental Appraisal Committee, made on 9th day of November 2001. The said decision was to approve an Environmental Impact Assessment submitted by Belize Electric Company Ltd. (BECOL); b) Decision of the Department of the Environment or National Environmental Appraisal Committee made on 9th November 2001 to grant environmental clearance for the implementation/construction of the Macal River Upstream Storage Facility.

7. Thus matters stood when the application for leave was exhaustively argued by both sides before

me. The argument occupied the best part of the Court's time on Thursday 28th February 2002.

8. At the end of the day, I ruled that the applicant, BACANGO, had on the materials before me established an arguable case which should be tested at a full ***inter partes*** hearing. Accordingly, I granted it leave to seek judicial review for Orders of ***certiorari*** and ***declaration*** relating to the decision of the National Environmental Appraisal Committee of 9th November 2001.

9. The matter was then adjourned. Ordinarily, after the grant of leave for judicial review, the successful applicant would then proceed to set the matter down for the substantive hearing. This he may do in civil causes for judicial review, by originating motion to a judge sitting in open court or unless the court directs it be done by Originating Summons, to a judge in chambers. In England, the Court may also direct the matter be heard by originating motion to a Divisional Court of the Queen's Bench Division. The latter of course is hardly applicable here in Belize. (See generally ***Order 53 Rule 5 of the English Supreme Court Rules - Vol. 1, White Book 1999 Ed. para. 53/5*** at ***p. 895***.

The notice of motion for the substantive hearing must be served on all persons directly affected. To be served together with the notice of motion or summons are copies of the Statement in Support of the applicant's application for leave. Also, each party to the substantive hearing of the application for judicial review must supply to every other party on demand and payment of the proper charges copies of every affidavit which he proposes to use at the hearing. The Applicant must also supply the respondents with the affidavit he used in support of his application for leave - See ***Order 53 Rule 6***. A respondent who intends to use an affidavit at the hearing must in turn file an affidavit as soon as practicable. In England, by a ***Practice Note*** of 7th March, 1989, the timeline allowed a respondent to file his own affidavit was increased from 21 days to 56 days after service on him of the applicant's motion or summons and supporting papers - ***(1989) 1 All E.R. 1024***.

10. The above, I believe, roughly represents the schema for the procedure on judicial review up to the substantive hearing: See generally ***Judicial Remedies in Public Law*** by C. Lewis (Sweet & Maxwell 1992) at ***pp. 249 to 252***. This was substantially followed in this case, apart from the filing of affidavits, if any, by the respondents.

11. However, when the scheduled substantive hearing came up before me last Friday, 19th April, Mr. Dean Barrow S.C., informed the Court that the applicant had given notice for leave to amend the filed Statement in support of its application for leave of 28th February, 2002 by substituting amended grounds on which relief is sought (a copy of the amended ground was attached to the notice). He also sought leave to use a second affidavit of Ambrose Tillett sworn to and filed on 11th April 2002, and to use the affidavit of Brian Holland sworn to and filed on the same 11th April 2002.

12. Both respondents had, however, intimated that they would oppose the applicant's application to amend its Statement in Support and its request to use further affidavits as indicated in the notice of 11th April 2002. Indeed, they made good on this. For on the hearing on Friday last, they put up what, it is fair to describe, as spirited if helpful opposition. This has necessitated this ruling.

13. It is perhaps germane to give some background which I believe set in train the respondents' opposition at least, to the amendments sought by the applicant to substitute amended grounds on which it is seeking relief. Evidently, sometime after my ruling on 28th February granting leave to the applicant to seek judicial review, there ensued some differences between the parties as to ***what*** precisely I had given leave to be the subject of judicial review. These differences resulted in some forensic skirmishes between the parties' attorneys, as they could not agree on a formal settled text reflecting the upshot of my ruling on 28th February, 2002, granting leave to the applicant.

14. I might point out here, in parenthesis, that in England, ***all*** orders in judicial review proceedings, whether relating to leave or a substantive application, are drawn up and issued by the Crown Office, and ***not*** by the parties. See ***Vol. 1 White Book 1999 Ed. at para. 53/14/14 at p. 900.*** We of course in Belize, do not have the Crown Office or Crown Side, the section of the judicature

that deals with judicial review proceedings in England. As a result, the attorneys in any matter settle between them a draft Order, as in every case, including judicial review proceedings, which is then forwarded to the judge for approval.

15. The parties' attorneys could not agree on a common text embodying the Order on my ruling of 28th February, 2002. As a result, a conference was arranged between them in my chambers on Monday 15th April to settle one, some 48 days after my ruling on 28th February! This, I must confess, I find somewhat disconcerting, as I would have thought that the dispositive part of my ruling was clear enough, I repeat it here for the sake of emphasis and, I hope, clarity:

*"Accordingly, leave is granted to the applicants to seek judicial review for **certiorari** and declaration of the decision of National Environmental Appraisal Committee of 9th November, 2001".*

16. Admittedly, this may be a terse or laconic rendition of what has agitated the recourse to judicial review proceedings by the applicant. But that was the pith and substance of my ruling on the 28th February. I am sure however at the substantive hearing, the whole picture would emerge.

17. Mr. Denys Barrow S. C. for the first respondent and Mr. Michael Young S. C. for the second respondent, both resisted the applicant's application for amendment and leave to use further affidavits. I wish to acknowledge their assistance with the form of the skeleton arguments and submissions they furnished the Court with; in particular I would like to thank Mr. Denys Barrow S.C. for providing me with a copy of the case of ***R v Bow Street Stipendiary Magistrate ex parte Roberts and others (1990) 3 All E.R. 487***. This case I found especially instructive, in addition to the relevant provisions of our own ***Supreme Court Rules*** and those of ***Order 53*** of the English Rules governing judicial review proceedings.

18. In so far as amendments generally are concerned, it is settled law, I think, that the overriding principle is that all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the court thinks just. In practice however, an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury to the other side which cannot be properly compensated for by costs. Thus, ***Order 31 Rule 12*** of our Supreme Court Rules provides:

"The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendment shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings".

19. It has therefore, I believe, rightly been stated that a guiding principle of cardinal importance on the question of amendment is that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" per Jenkins L.J. in ***G.L. Baker Ltd. v Medway Buildings Supplies Ltd. (1958) 3 All E.R. 540 at p. 546.*** This is a principle that has long been recognized and articulated by the Courts down the ages as it were. Thus, Bowen L.J. stated in ***Cropper v Smith (1883) 26 Ch.D 700 at pp. 710 - 711***:

"It is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their case by deciding otherwise than in accordance with their rights . . . I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right".

With this dictum A.L. Smith L.J. in ***Shoe Machinery Co. v Cultam (1896) 1 Ch. 108*** at ***p. 112***, expressed "emphatic agreement".

20. This ameliorative power in the Court, to allow amendments in order to be able to get to the heart of the matter in contention between the parties for the purpose of determining the real question or issue raised by or depending on the proceedings, was confirmed even with the formal provision in 1977 of judicial review as a new and comprehensive public law remedy. In consequence, the new ***Order 53*** which came to govern proceedings for judicial review provides in ***Rule 6(2)***:

"(2) The Court may on hearing of the motion or summons allow the applicant to amend his statement, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit, and may allow further affidavits to be used by him".

21. This power is however qualified by the provisions of ***Rule 6(3)*** which states:

"(3) Where the applicant intends to ask to be allowed to amend his Statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party".

22. It is worth noting that even with the promulgation of the new ***Civil Procedure Rules 1998 (CPR)***, which came into effect in England on 26th April, 1999, the provisions of ***Order 53*** remain substantially the same, and now form part of ***Schedule 1 of the Civil Procedure Rules***.

23. Thus ordinarily, although an applicant for judicial review is precluded at the substantive hearing from relying upon any grounds or seek any relief other than the relief or grounds set out in his Statement in Support of his application at the leave stage - ***paragraph (1) of Rule 6 of Order 53***, this prohibition is however, often attenuated, and there is provision in ***Rule 6(2)***, as I have pointed out earlier, to overcome this by seeking leave to amend, whether by specifying ***different*** or ***additional grounds*** or ***relief*** or otherwise - see also ***Lewis op. cit.*** at ***p. 253***.

24. I therefore also found great comfort in the case of ***R v Bow Street Magistrate ex parte Roberts and others supra***, in the face of this application to amend the Statement in Support to substitute different or additional grounds for relief by the applicant. I have already acknowledged the assistance of Mr. Denys Barrow S. C. for the first respondent, in providing me with a ready copy of this case. For this I am grateful. The facts of this case briefly were that the applicants who applied for leave for judicial review on a number of grounds were only granted leave in respect of some and not others. They thereafter sought to renew their applications for those other grounds. The object of the renewal of the applications for leave, the Divisional Court of the Queen's Bench Division (consisting of Watkins L.J. and Potts J.) found was to have that Court give additional leave in respect of grounds that were disallowed earlier by the judge (Rose J.) who heard the original applications.

25. It is, I think, instructive in this connection to quote from the judgment of Watkins L.J. vis-à-vis the reliance on grounds at the substantive hearing other than those which had formed the basis for the leave application:

"The practice as to reliance on grounds other than those which have formed the basis for leave to move given by . . . the . . . judge to an applicant for judicial review needs to be explained . . . It is this. Where an applicant has made an application for leave to apply on a number of grounds and is given leave to move expressly on one of them for example, it is unnecessary for him to renew his application . . . for the purpose of relying on the other grounds on which he has not specifically been given leave to move provided, and this of the utmost importance, that he gives notice to the respondent whoever he may be, and if there is more than one then each of them, that he intends at the substantive hearing to rely on one or more of the other grounds on which he has not expressly been given by the . . . judge leave to move. That is so that the respondent shall have ample opportunity to consider his position in respect of the other grounds on which the applicant seeks to rely".

26. In concluding on this point, I would like, with the utmost respect, to adopt the words of the learned Lord Justice:

"If (this) is not generally known and so as to remove all doubt about it for the future, I emphasize that any applicant who seeks to rely on grounds specified in his notice and in respect of which the . . . judge has not expressly given leave and who intends to rely on one or more of those other grounds should within 21 days of the service of his notice of motion serve on the respondent a notice which specifies that or those other grounds".

27. Applying the ***ratio*** of this case, in addition to the permissive provision of ***Order 56 Rule 6(2)***, I must ineluctably, grant the leave sought by the applicant to amend its Statement in Support of its application of 28th February, 2002, whether this involves specifying different or additional grounds of relief. This would mean of course, that even if, ***arguendo***, the applicant was refused leave at the hearing on 28th February, 2002 in respect of one or other of its grounds of relief on its application for leave, it may, with leave of this Court still, at this stage, the substantive hearing of its motion, apply for leave to specify that or other ground for relief. I now do so, that is, grant the applicant leave to amend its grounds on which it is seeking relief after a careful perusal of the papers filed and having listened carefully to the helpful arguments and submissions by the attorneys for both sides. Also, in exercising my discretion to allow the amendments sought, I cannot be unmindful of the need to allow both sides to put before the Court the real issues in contention between them for determination. Also Mr. Denys Barrow S. C. with some candour, almost conceded the application for amendment. In this he was, though not as full-heartedly, joined by Mr. Michael Young S. C.

I note with satisfaction also, that the applicant had served the necessary notice and the amended grounds for relief sought on both respondents as required by ***Order 53 Rule 6(3)***.

28. I will therefore, accordingly, allow the amendments sought as they do not, in any event, occasion any prejudice to the respondents who have yet to file any affidavits in answer to the applicant.

29. The applicant is also by the same notice of 11th April 2002 seeking leave of the Court to use further affidavits, viz, one by Brian Holland, the other, a second affidavit by Ambrose Tillett. Both were sworn to on the 11th April 2002 and have been served on both respondents.

30. Both respondents are resisting the grant of leave to use these affidavits. The basis of their objection, I believe, is that these affidavits will introduce new elements or fresh evidence and in any event they relate to issues that arose after the decisions the applicant is seeking to impugn were taken.

31. Again, I believe the short answer to the respondents on this score is contained in the combined operation of ***paragraphs (2) and (3) of Rule 6 of Order 53***. These provide:

"(2) The Court may on hearing of the motion or summons allow the applicant to amend his Statement whether by specifying different or additional grounds of relief or otherwise, on such terms if any, as it thinks fit and ***may allow further affidavits to be used by him"****.*

"(3) Where the applicant intends to ask to be allowed to amend his Statement ***or to use further affidavits*** *he shall give notice of his intention and of any proposed amendments to every other party". (emphasis added)*

32. Clearly, I think the rules permit the applicant to apply to the Court to be allowed to use ***further*** affidavits provided it gives notice of its intention to every other party. In the instant application, as I have mentioned, the applicant has given notice of its intention and served copies of the further affidavits on the respondents.

33. Although ***Lewis op. cit.*** at ***p. 252*** to ***253*** expresses the view that the provision in ***Order 53 Rule 6(2)*** is directed primarily at the applicant who may wish to respond to matters raised in a respondent's affidavit in reply, I do not think however, that this is an impediment in the way of the Court exercising its discretion to allow an applicant to use further affidavits even if, as here, there

is, as yet, no affidavits from the respondents on the substantive hearing of the applicant's motion.

34. I believe therefore, in all the circumstances of this application, the applicant should, especially in the light of its amended grounds for the relief sought (which I have granted), be allowed to use the further affidavits it is seeking leave to use. I am also guided by the consideration that the respondents have yet to file their own affidavits and therefore have ample time to controvert or rebut anything contained in the affidavits sought to be used.

35. Finally, at the substantive hearing I think at the very least, I could consider the evidence contained in these further affidavits ***de bene esse***, and determine whether the materials or things averred therein are fresh evidence as the respondents contend, and if so, whether they fall outside the parameters within which fresh evidence is admissible in judicial review proceedings. These principles are helpfully set out in ***R v West Sussex Quarter Session (1973) 3 All E.R. 289 at pp. 298 and 301***. For now I will grant the applicant leave to use these further affidavits.

36. Before I conclude, let me say a few words, if I may, even if obiter, on the remedy of judicial review as it obtains at present in Belize and developments in England to whose provisions we are statutorily enjoined to have recourse in this area of the law and its administration in the evident absence of local provisions.

37. Although the new Civil Procedure Rules in England are intended for and applicable to a whole new landscape of litigation in that country, providing a "new procedural code" for the conduct of civil litigation, the old Rules of the Supreme Court 1965 have been retained. They continue in force by virtue of Part 50 of the Civil Procedure Rules and set out in Schedule 1 thereto.

Therefore, it is possible that the provisions of ***Schedule 1*** of the English Civil Procedure Rules are, by virtue of the provisions of ***section 60(a) of the Supreme Court of Judicature Act*** under Part VII - Practice and Procedure - ***Chapter 91 of the Laws of Belize - Revised Edition 2000*** and ***Rule 1*** of ***Order 78*** of our Supreme Court Rules, applicable to proceedings in Belize, absent applicable local law or rules regulating some aspects of litigation. ***Section 60*** provides:

> *"60. The Practice and procedure of the Court -*
>
> *(a) in its general civil jurisdiction, shall be regulated by this or any other Act or by rules of Court and* ***where no provision is made, by the practice and procedure in the High Court of Justice in England".*** *(emphasis added)*

Order 78 Rule 1 *of the Supreme Court Rules provides:*

> *"1. Where no other provision is made by any law or by these Rules the procedure and practice then in force in the Supreme Court of Judicature (England) shall, as near as may be, apply".*

38. Undoubtedly, the combined operation of these provisions made possible the planting of the seeds and the watering and nurturing of the remedy of judicial review on Belizean soil, even in the face of the omission or lack of express local provisions. Today, in England however, where once administrative law was pooh-poohed at, the remedy of judicial review has, from a tender sapling, grown to a sturdy oak, manifested in the existence of the Administrative Court in that country. However the main provision and features of ***Order 53***, whether under the old ***Rules of the Supreme Court*** or as part of ***Schedule 1 of the Civil Procedure Rules*** would, I believe, be still cognizable, I hope, to Belizean practitioners and Courts. And to these, in this branch of practice and procedure, we in Belize must perforce, have recourse as the occasion demands.

39. However, in the interest of the integrity of the system of the administration of justice, clarity and ease of access, I would strongly urge that there be enacted in Belize and for Belize, an autochthonous Administrative Justice Act, which will bring home in all its plenitude and vigour the practice and procedure of the salutary and increasingly popular remedy of judicial review. This

way, practitioners and judges do not have, by exegesis, as it were, to have recourse to English provisions; a situation compounded by the rapid pace of change in both the landscape and rhythm and indeed, the very machinery of litigation in that country. For example, on the 4th March this year, there was issued in respect of all judicial review claims a new Pre-actional Protocol, which requires that all claims for judicial review must state whether this Protocol has been complied with or contain reasons for non-compliance. This Protocol sets out a code of practice and contains steps which parties should generally follow before making a claim for judicial review. The main feature of this Protocol is the requirement of a letter before claim to be sent prior to commencing judicial review proceedings. How far the requirements of this Protocol are applicable in Belize may be a matter open to debate. But a practical consideration for judicial review proceedings here is that it would, for example, in the circumstances of Belize, be quite anomalous to insist on 56 days after the receipt of the copies of the applicant's Statement in Support of its application at the hearing before the respondent in a judicial review proceedings, could put in his own affidavit, if any, as he is entitled to unless the Court directs otherwise. This would, in the circumstances in Belize, I think, have a chilling effect on the progress of the action.

This said, I will now hear the parties, in particular the respondents, on how much time they would need to file their own affidavits, if they intend to.

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