

IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 550 of 2010

**PENINSULA CITIZENS FOR CLAIMANT
SUSTAINABLE DEVELOPMENT LIMITED**

AND

DEPARTMENT OF THE ENVIRONMENT DEFENDANT

PLACENCIA MARINA LIMITED INTERESTED PARTY

Hearings

2011

3rd June

13th June

15th June

8th August

4th October

Mrs. Andrea McSweaney-McKoy for the claimant.

Mr. Andrew Bennett and Ms. Illiana Swift for the defendant.

Mr. Eamon Courtenay SC and Ms. Pricilla Banner for the interested party.

LEGALL J.

JUDGMENT

Brief Facts

1. The claimant is a company incorporated on 13th February, 2007 under the Companies Act Chapter 250 of the laws of Belize. Among the objectives of the company are the preservation of the environment,

especially the Placencia Peninsula; mangrove restoration, and ensuring water quality and quantity. The defendant is a statutory body established under the Environmental Protection Act, chapter 328 of the laws of Belize (the Act). The functions and duties of the defendant are contained in section 4 of the Act, including the approval of environmental impact assessments and to make representations to mitigate against harmful effects of any proposed action on the environment. The interested party is a company incorporated in Belize with registered offices in Belize City and carries on the business of the construction for sale of luxury homes, and also runs a hotel, restaurant and bar, called the Placencia Hotel, at the Placencia Peninsula catering mainly for tourists. The hotel, restaurant and bar are located close to the Placencia seashore, which provide to guest, not only an exquisite view of the Caribbean Sea, but also exposure to the strong refreshing breezes so regularly present in that area.

2. The Placencia Peninsula, located at the northern tip of Belize, juts majestically into the vast expanse of the Caribbean Sea which is home to a myriad of species of aquatic life. Among the varieties of fish are the dangerous Stingray, the Goliath Grouper, bonefish, the Common Snook, and turtles, all in their multitudes. Among the mammals are the endangered and rare Moselet Crocodiles and the American Saltwater crocodile. There are also a vast assortment of bird species in the area of the Peninsula. There is the shy, and highly sensitive, Jabiru birds; and the endangered and exquisite Yellow Headed Parrot. There are also the gorgeous Little Blue Heron, the magnificent Brown Pelican and the aggressive Turkey Vulture, all also in large numbers.

They depend on the living organisms of the Sea for their nutrition. A construction on the sea itself may be expected to affect the birds and the aquatic life; but to a negligible extent due to the comparatively small size of the project on the massive sea.

3. The interested party intended to construct on the Caribbean Sea, in front of the hotel, a semi circular wall, called a breakwater wall, made of stone and concrete, stretching from one side of the shoreline to the other, and including a part of the sea in front of the hotel. The enclosed area of the construction, called the Placencia Marina or Marina Project, would accommodate about 210 yachts, and would be about 1500 feet long, from the edge of the shoreline, and about 1800 feet wide, which would include a 300 feet long pier, with 210 boat slips, which are material markings on the sea within the wall showing the boundaries of parking for each yacht or boat. The slips range from 30 feet long to about five feet wide. Designs of the Marina Project are given in the Appendix.
4. There would be about five openings in the breakwater wall for entry into, and exit from, the enclosed area by yachts and boats belonging to guests and others using the facilities of the hotel, restaurant and bar. In simple terms, the Marina Project is intended to be a parking place on a small part of the sea for yachts and boats. The wall on the outer edge of the project is intended to break the waves of the sea for the protection of the yachts and boats parked therein. It is intended that on top of the wall there would be many lights, no doubt to beautify and identify the area, and for the prevention of accidents. This project

is to attract larger pools of tourists to the hotel who possess large yachts and boats, a market that has not been tapped into because of lack of adequate berthing facilities in Belize. The Marina Project is an attempt to exploit that market.

5. For the purpose of building the Marina Project, a proposal for the construction of the project was sent to the defendant by the interested party on 1st June, 2009 seeking approval for the project. Accompanying the proposal, were several relevant documents, including drawings of the project. The defendant, on 9th June, 2009, wrote to the director of the interested party and informed him that preliminary steps for approval of the project required an environmental impact assessment (EIA) in accordance with section 20 of the Act; as well as terms of reference (TOR) which would address the main environmental issues in relation to the project.

6. The terms of reference were prepared and they addressed certain issues, including (i) a description of the project and the physical environment; (ii) environmental issues; (iii) development matters; (iv) storage in the area of water borne vessels; (v) examination of wind and wave conditions; (vi) dredging requirements and (vii) conclusions and recommendations. The TOR is the first requirement for purposes of preparing the EIA report. The required contents of the EIA are stipulated by regulation 5 of the Environmental Impact Assessment Regulations 1995 (the Regulations), and include descriptions of the affected environment; proposed activities of the project, and measures to mitigate any environmental impacts of the

project. After the EIA is completed, an Environmental Compliance Plan (ECP) is prepared which includes topics such as water resources and quality, waste disposal and binding conditions, guidelines, policies and restrictions which the developer of the project agrees to as conditions for approval of the project. After the completion of the TOR and the EIA and the signing of the ECP, the project is given environmental approval by the defendant. Regulation 25 of the Regulations provides for the establishment of the Natural Environmental Appraisal Committee (NEAC) which is responsible for reviewing EIA's, and advising the defendant on the project.

7. The interested party in accordance with section 20 of the Act caused an EIA to be prepared dated June 2009 which was submitted by the interested party to the defendant, and on consideration of the EIA by NEAC, the NEAC declined on 10th August 2009 to make an informed recommendation to the defendant on the EIA “due to the overall inadequacy of the document.” The NEAC suggested that the EIA be revised and resubmitted at a later date. The NEAC requested that the revised EIA should include the following:

- “1. Details on the coastal dynamics of the project area, such as wave action, current movement erosion and accretion potential, flushing of the marina and preferred design of the facility, etc.). This information would need to be developed into a numeric modeling format that would greatly assist in finalizing the design and

specific location of the proposed marina, among other issues of concern.

2. Details on the Methodology proposed for the ‘grounding/anchoring’ of the geo-tubes to the seabed, especially taking into consideration hurricane events. This method should contemplate safeguarding the developer’s investment and environmental mitigation measures necessary.
3. Information on the potential negative impacts to species of conservation significance, particularly in regards to manatees and migrating routes.
6. Details on the social & economic benefits of this marina project to the nearby communities, and Belize as a whole.”

8. A revised EIA was therefore resubmitted in December, 2009. The NEAC on 21st January, 2010 reconsidered the revised EIA; and felt that the EIA was “too opinionated, and lacking scientific data to support the design of the marina and to address potential negative impacts and that the oceanographic data used in justification of the marina design was not adequate as it was not site specific.” The NEAC recommended, among other things “that at least one to two months site specific oceanographic data (wave height, wind direction, current flow, sediment transport) be collected and a bathymetric profile be prepared using other available software.” The NEAC stated that when the requested information was resubmitted, the NEAC would further consider the matter. A revised EIA, was resubmitted to the NEAC who after discussions and deliberations and satisfying

themselves of the adequacy of the document recommended on 24th February, 2010 environmental clearance be granted, subsequent to the signing of an ECP, for the Marina Project as follows:

“5.1.1 The project is granted approval in three (3) phases:

- (a) Phase 1 shall consist of Oceanographic Data Collection as stipulated in the Terms of reference for the development of the EIA, for minimum of 6 months.
- (b) Phase 2 shall consist of the approval of the Detailed Technical/Engineering Designs for the proposed marina. The technical designs will be developed using the findings gathered by the data collection exercise. The final designs shall be vetted and approved by the Ministry of Works, with input from the Belize Port Authority, Geology and Petroleum Department, and the Department of the Environment.
- (c) Phase 3 shall encompass all the construction activities above water, which shall commence only after Phase 1 & Phase 2 has been completed.

5.1.2 The NEAC recommended that a performance bond is prepared for this development.”

9. The defendant accepted the NEAC recommendation, and the ECP was prepared and signed by the interested party and the defendant on 6th April, 2010. The marina project was given approval and clearance by the defendant. The clearance states as follows:

**“1.0 SPECIFIC ACTIVITES FOR WHICH
CLEARANCE IS BEING GRANTED”**

Clearance is being granted for the following activities as per information submitted in the Environmental Impact

Assessment:

Marina Component:

- . Construction of a 34 acres marina semi-enclosed within break-waters (within a surface area of approximately 2000 feet long by 1300 feet wide) to accommodate a maximum of 300 vessels of up to 210 feet in length.
- . A 700 feet long, 16 feet wide pier with concrete piles;
- . Construction of service platforms, mooring berths and walkways to facilitate moorage, fuel service and other auxiliary services, including utilities; and
- . Installation of a fuel dispensing facility system.

Land-Based Component:

- . A 50 rooms Boutique Hotel;
- . A fitness centre;
- . A Commercial/Retail area;
- . A Casino of one storey;
- . A Parking area;
- . Amenity area for pools, bars etc; and

- . Public Utilities area on the lagoon side of the Placencia Road, to accommodate a state-of-the-art sewage treatment system among other utilities.

This marina project will be implemented in three (3) phases as outlined below:

(a) Phase 1 shall consist of “Data Collection” and the construction of the “Land Components.” This phase shall include the collection and submission of the requested oceanographic data on the microclimatic condition of the project site. This includes the following parameters:

- (1) Wind speed and Direction.
- (2) Sea Currents
- (3) Wave Height
- (4) Tide
- (5) Sediment Transport

On a pilot project/experimental basis, and at the risk of the developer, the construction of the 700 feet long marina access pier, and the first 700 feet long breakwater with boulders on the north side of this project.

(b) Phase 2 shall entail the “approval of the Detailed Technical/Engineering Designs” of the proposed marina. These technical designs will be developed using the findings accumulated during the data collection period. The final marina designs shall be approved by the Ministry of Works, with input from the Belize Port Authority, Geology and Petroleum Department, and the Department of the Environment.

(c) Phase 3 shall consist of the

construction of the
Marina (sea floor) component.”

10. The claimant by letter from its attorneys-at-law dated 17th May, 2010 wrote to the defendant and the NEAC, requesting among other things, the withdrawal the approval and clearance, and required the interested party to “conduct bathymetry and oceanographic studies” for further review by the NEAC. The claimant felt that the approval of the project was contrary to the Act and the Regulations because the approval was given without either bathymetry data or oceanographic data or any data regarding the land based components of the project, and without considering the availability of potable water, the appropriateness of the project site and the project designs. In general, the claimant’s case against approval of the project was that there was failure to provide the required bathymetry of the project site, oceanographic data; assessment of water needs and resources, project designs, public consultations, and data on land based components among other matters. As a result, the claimant on 29th July, 2010 filed a claim against the defendant and the interested party as follows:

“(1) A declaration that the defendant failed to approve the Placencia Marina Limited Environmental Impact Assessment (hereinafter referred to as “the EIA”) in accordance with its duties under section 4 of the Environmental Protection Act, Chapter 328 of the Laws of Belize, as amended by Act No. 5 of 2009; and the Environmental Impact Assessment

(Amendment) Regulations, No. 24 of 2007.

- (2) A declaration that the defendant failed to exercise its statutory duties under section 4 of the Environmental Protection Act, Chapter 328 of the Laws of Belize, as amended by Act No. 5 of 2009, and the environmental Impact Assessment (Amendment) Regulations, No. 24 of 2007 when it purported to approve and sign the Environmental Compliance Plan for Placencia Marina Limited, and therefore acted ultra vires.
- (3) A declaration that the defendant acted unlawfully by delegating, in the Environmental Compliance Plan for Placencia Marina Limited its jurisdiction to vet and approve the final detailed technical/engineering designs of the Placencia Marina Limited Project to the Ministry of Works.
- (4) An Order that the Environmental Compliance Plan dated 6th April, 2010 is illegal and therefore null and void.
- (5) Further or other relief.
- (6) Costs.”

Rule 32.6

11. Before examining the allegations of the claim, a preliminary issue must be addressed. On 3rd August, 2010 the claimant filed expert testimony in the form of an affidavit by Dr. Mark Chernaik dated 30th July, 2010 as required by Part 32.6(1) of the Supreme Court (Civil Procedure) Rules 2005 which states that “no party may call an expert witness or put in an expert’s report without the court’s permission.”

Recognizing the error of not obtaining the prior permission of the court to call the expert witness, learned counsel for the claimant, when the matter came up for hearing, withdrew, in open court, the expert affidavit testimony of Dr. Mark Chernaik. On 25th May, 2011 the claimant filed an application for permission to call Dr. Mark Chernaik, as an expert witness; and to file an expert's report. The grounds for the application stated that "Dr. Mark Chernaik, an environmental lawyer and scientist, is able to assist the court impartially on the issues in the claim which are within his area of expertise." The claimant also stated, as additional grounds, that the affidavit of Dr. Chernaik dated 30th July, 2010, was not properly before the court, and that the expert evidence sought by the new application was reasonably required to resolve the proceedings justly.

12. The defendant and the Interested Party objected to the application on several grounds; but the most important ground, in my view, was that the claimant did not comply with Part 32(6)(3) of the Rules, which states that when a party applies for permission to call an expert witness or to put in an expert report "that party must name the expert and identify the nature of the expert's expertise." Rule 32.6(2) states that "the general rule is that the court's permission is to be given at a case management conference." There is no doubt that the claimant failed to comply with Rules 32.6(2) and (3). The application was made long after the holding of case management, at a time when the case was set for trial, and nowhere in the application or the affidavit in support of the application, does it identify the nature of Dr. Mark Chernaik's expertise. It is stated, rather vaguely, that he is "an

environmental lawyer and scientist.” What kind of scientist is he and in which aspect or aspects of the environment is he an expert. These questions remain unanswered.

13. It seems to me that the intention of Rule 32.6(3) is that the application for permission to call an expert must show evidence to satisfy the court that the intended expert does not only possess the necessary training and experience of the subject matter, but is also suitable to assist the court on the subject on which he intends to testify. Neither the application nor the supporting affidavit satisfies, in my view, Rule 32.6 (3). But the claimant has submitted, among other things, and based on the overriding objective of the Rules, which is to enable the court to deal with cases justly, that the objective requires granting the application. Rule 1.12 states that dealing justly with a case includes “ensuring, so far as is practicable, that the parties are on an equal footing.” In this matter, the other parties – the defendant and interested party – have not made an application to call an expert. Moreover there is the breach of Rules 32.6(2) and (3). I think it would be unjust to grant the application which was made late and at the date of trial of the matter and contrary to the Rules.

Statutory Framework

14. Let us return now to the claimant’s claim against the project, which is generally that the defendant exceeded its jurisdiction and acted contrary to the Act and the Regulations. I do not think that this court is being asked whether the government made the right decision in approving and authorizing the building of the project. I think the

dispute between the parties is over the procedure by which that decision was made. It is therefore important to detail the statutory procedures to be followed in making that decision as contained in the Act and Regulations. The legislation provides that anyone undertaking a project which may significantly affect the environment must cause an (EIA) to be carried out and submitted to the Department of the Environment (DOE). The statutory provisions prescribe the required form and content of the EIA and establish, as we saw above, the (NEAC), an expert advising body, to advise the DOE on the adequacy or suitability of the EIA. The project cannot lawfully proceed, until the DOE, having considered the advice of the NEAC on the project, has approved the EIA.

15. Section 3 of the Act establishes the DOE and invests it with wide environmental powers and responsibilities. Section 20(1) requires any person who intends to undertake a project “which may significantly affect the environment” to cause an EIA to be carried out by a suitably qualified person and to submit it to the DOE. Section 20(2) specifies, in general terms, the contents of an EIA. The EIA must “identify and evaluate” the effects of the proposed development on a list of interests, including human beings, flora and fauna and the cultural heritage. Section 21 gives the Minister charged with responsibility for the environment power to satisfy these requirements by making detailed regulations.
16. The Regulations contain provisions to enable the DOE to decide whether a proposed development requires an EIA or not. In the

present case, there is no question that it did. Regulation 5 sets out the requirements for an EIA. The EIA must contain:

- (a) a description of the proposed activities;
- (b) a description of the potentially affected environment, including specific information necessary to identify and assess the environmental effect of the proposed activities;
- (c) a description of the practical alternatives, as appropriate;
- (d) an assessment of the likely or potential environmental impacts of the proposed activities and the alternatives, including the direct and indirect, cumulative, short-term and long-term effects;
- (e) an identification and description of measures available to mitigate the adverse environmental impacts of proposed activity or activities and assessment of those mitigative measures;
- (f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information.

17. Where an EIA is required, the developer is required to submit draft terms of reference to the DOE which decides whether they are adequate and may require them to be modified: see regulation 15. During the course of the assessment, the developer must provide the opportunity for meetings with interested members of the public in accordance with a procedure determined by the DOE: see regulation

18. Regulation 19 examined below sets out in detail several matters in relation to the EIA
18. The EIA is then submitted to the DOE, which examines it to determine whether it complies with the terms of reference and whether a further EIA is required. By regulation 22(1), the DOE must advise the developer of “its decision” within 60 days after the completed EIA has been received. If the developer is required to supply more information, the EIA is not “deemed to be completed”, i.e. the 60 day period does not start to run, until the information has been supplied: see regulation 22(3). The power to require the developer to supply additional information or conduct further work or studies and to amend and resubmit the EIA is contained in regulation 23.

Claims Against The Project

19. Having considered generally the statutory scheme, let us consider the claimant’s case that the defendant acted contrary to the Act and Regulations when it approved the project. Mary Toy, in support of the claims has identified in her affidavit several sections of the Act and regulations which she states ground her claim that the defendant acted contrary to the Act and Regulations when it granted approval of the project. The first section relied on by Ms. Toy is section 4, but it is unknown from the pleadings which of the 27 subsections of section 4 is being relied on by the claimant. This seems to me to be a grave omission on the part of the claimant to specifically identify, in the pleadings, the specific subsection or subsections of section 4 being

relied on. It is not, in my view, the duty of the court, to make that identification in support of the claim. It is the duty of the claimant.

20. Mary Toy, for the claimant, to prove that the EIA is not in accordance with the Act relies also on section 20(2)(3)(4) which states –

“ 20(2) An environmental impact Assessment shall identify and evaluate the effects of specified developments on -

- (a) human beings;
- (b) flora and fauna;
- (c) soil;
- (d) water;
- (e) air and climatic factors;
- (f) material assets, including the cultural
- (g) natural resources;
- (h) the ecological balance;
- (i) any other environmental factor which needs to be taken into account.

(3) An environmental impact assessment shall include measures which a proposed developer intends to take to mitigate any adverse environmental effects and a statement of reasonable alternative sites (if any), and reasons for their rejection.

(4) Every project, programme or activity shall be assessed with a view to the need to protect and improve human health and living conditions and the need to preserve the reproductive capacity of ecosystems as well as the diversity of species.”

21. According to Mary Toy the EIA is contrary to the above section. But as will be shown below the EIA does address the matters referred to in the section. She also claims in her affidavit that the defendant acted contrary to regulations 5, 15(2), 16, 19, 21 and 22 of the Regulations and therefore the approval is void. Regulation 5 deals with matters to be included in the EIA. The matters are:

- “5
- (a) a description of the proposed activities;
 - (b) a description of the potentially affected environment, including specific information necessary to identify and assess the environmental effect of the proposed activities;
 - (c) a description of the practical activities, as appropriate;
 - (d) an assessment of the likely or potential environmental impact of the proposed activities and the alternatives, including the direct and indirect, cumulative, short-term and long term effects;
 - (e) an identification and description of measures available to mitigate the adverse environmental impacts of proposed activity or activities and assessment of those mitigative measures;
 - (f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;

22. Regulation 15(2) states that the TOR shall contain such information as may be required by the DOE and Regulation 16(1) states that DOE is to examine the TOR to determine its adequacy, which was done. Miss Toy does not identify the sub regulation of regulation 19 that the EIA violates. It is advisable to quote the whole of Regulation 19 as follows:

“19. A report of an environmental impact assessment shall include the following:

- (a) Cover Page. A single page listing the title of the proposed project and its location; the name, address, and telephone number of a contact person, a designation of the report as draft or final and a one paragraph abstract of the EIA report;
- (b) Summary. A summary of the proposed project, preferably not exceeding 15 pages in length, accurately and adequately describing the contents of the EIA report. The summary should highlight the conclusions, areas of controversy and issues remaining to be resolved.
- (c) Table of Contents. A list and page number index of the chapters, sections and subsections in the EIA report, including a list of tables and a list of figures and appendices;
- (d) Policy, Legal and administrative Framework. Any policy, legal or administrative issues that may have an impact on the proposed development;
- (e) A description of the development proposed, comprising information about the site, the design and size and scale of the development, and its immediate

- surroundings;
- (f) A description of the environment (local and regional);
 - (g) Significant Environmental Impacts. The data necessary to identify and assess the main effects which the proposed development is likely to have on the environment;
 - (h) A description of the likely significant effect direct and indirect, on the environment of the development, explained by reference of its possible impact on:

- human beings;
- flora;
- fauna;
- soil;
- water;
- air;
- climate;
- material assets, including the cultural heritage and landscape;
- natural resources;
- the ecological balance; and
- any other environmental factors which need to be taken into account;

- (i) A presentation of all reasonable alternatives in comparative form, exploring, exploring each alternative, including the no-action alternative, and the reason why certain alternatives were recommended or eliminated. The object is to identify the least environmentally damaging alternative that satisfies the basic purpose and the need for the proposed action:
- (j) Environmental consequences of the project as proposed, and the alternatives, identifying any adverse effects that cannot be avoided if

the action is implemented, all mitigation measures to be employed to reduce adverse effects, the relationship between short-term uses of the environment and the enhancement of long-term productivity, and any irretrievable or irreversible commitments of resources that would occur if the action were implemented as proposed;

- (k) A mitigation plan;
- (l) A monitoring plan;
- (m) Inter-agency and public/non-governmental organizations involvement.
- (n) Report on public hearings or public consultations (if any);
- (o) A summary in non-technical terms of the language specified above;
- (p) A list, accompanied by a summary of the --- of all those persons that participated in the development of the EIA report.

23. I do not think that the claimant is contending that the EIA violates regulation 19(a) to (f). The other paragraphs of regulation 19 will be considered below. Regulation 21 (1) states that on receiving the EIA, the required actions the DOE is expected to perform, which actions were complied with by the DOE. Regulation 22(1) prescribes that the DOE shall within 60 days after receipt of the EIA shall inform a developer of its decision. This was also done.

24. Mary Toy further contends that the defendant not only acted in breach of the above legislation when it approved the project, but approved the EIA though the EIA failed to:

- “6, (1) (a) Identify and evaluate the effects of specified developments on the pertinent environmental factors, including water and natural resources, contrary to section 20(2) of the Act and Regulations 5, 15(2), 19, 21 and 22 of the Regulations;
- (b) Provide for mitigation of adverse environmental effects of the PML project contrary to regulation 20(3) of the Regulations;
- (c) Carry out the environmental impact assessment process with the need to protect and improve human health and living conditions contrary to section 20(4) of the Act;
- (d) Provide adequately for the protection of the environment, contrary to section 4 of the Act;
- (e) Provide the bathymetry and oceanographic data and detailed technical designs of the project as required under the Terms of Reference contrary to regulations 16 and 21 of the Regulations;
- (f) Comply with the requirements of the Terms of Reference, contrary to regulations 16 and 21 of the Regulations;”

25. Further says Mary Toy the defendant approved the ECP though it:

- “(2) (a) failed to specify the proposed developments, and identify and evaluate the effect of the development on the environment, contrary to 4 of

- the Act and regulation 19 of the Regulations;
- (b) without either having available to it or evaluating the bathymetric and oceanographic data, or any data regarding the land based components, the availability of potable water, or the appropriateness of the project site, as was required for properly assessing the effect of the PML project on the environment; and
 - (c) unlawfully delegates to the Ministry of Works its function to vet and approve final detailed technical/engineering designs of the PML. Project subsequent to the grant of approval of the Project.”

Oceanographic and Bathymetric Data

26. In relation to the oceanographic data, the defendant, by its present Chief Environment Officer, Mr. Martin Alegria, and its former Chief Environmental Officer Ismael Fabro, swore that oceanographic data for the project was submitted. The data was submitted by Eco Solutions and Services Ltd., who concluded according to the report, that “the Placencia Marina which is designed to minimize any impediment of the natural current flow and hence to the sediment movement along the local coastal zone both to the north and south of the Marina site, will cause little or no significant effects on the natural sediment accretion within that region of the coast.” In relation to bathymetric data with respect to the project, the interested party submitted the required bathymetric data for the marine basin area

which “consisted on some 200,000 sounding points, and also presented this data in the form of a bathymetric map

27. Mr. Fabro, the former Chief Environmental officer in relation to oceanographic data swore as follows:

“Ultimately the NEAC recommended, and the DOE approved the inclusion of the quantitative aspect of the oceanographic information as a condition of the ECP as Phase 1 of the Marina Project. Phase 1 of the Project is therefore phrased in the ECP as follows:

- (a) Phase 1 shall consist of “Data Collection” and the construction of the “Land Components”. This phase shall include the collection and submission of the requested oceanographic data on the microclimatic condition of the project site. This includes the following parameters:
 - (1) Wind speed and direction
 - (2) Sea currents
 - (3) Wave height
 - (4) Tide
 - (5) Sediment transport (See: Page 2 of the ECP)

....

3.03.1 Prior to commencing construction of the marina proper, save and except the pilot project on section 1(a), the Developer will first embark on a data collection exercise to gather oceanographic data on the microclimatic conditions of the

specific project site. The parameters to be gathered are: wind speed and direction, sea currents, wave height, tides and sediment transport.

3.01.2 All costs associated with the oceanographic data gathering exercise at the project site, inclusive of the initial equipment purchase, will be bore by the Developer. (See Page 5 of the ECP).”

28. The evidence of Alegria and Fabro is that the approval of the project was given based on the requirement of oceanographic and bathymetric data in the EIA. Mr. Fabro in his evidence also stated that the EIA had sufficient oceanographic data to equip the NEAC to make a decision to recommend approval of the project. The EIA deals among other things, with location and land use, bathymetry, climate, winds, wave climate, rainfall, tides and currents, underlying geology, river sediments, and shows that oceanographic and bathymetry data were considered see paragraphs 2:1 to 2:10 of the EIA. Moreover, there is evidence of Mr. Alegria that the interested party provided data of oceanographic conditions for the project to the DOE. The claimant’s position was given by the sole witness Mary Toy to the effect that at the very highest limited oceanographic and bathymetric data were considered with respect to the approval of the project. This is disputed by the evidence of the Chief Environmental Officers Alegria and Fabro. It is a question of fact whether sufficient data was considered and bearing in mind the evidence of the claimant, and Alegria and Fabro and also the contents of the EIA I think the claimant has failed, on a balance of probabilities,

to prove that not enough of such data was considered for approval of the project.

Design of the project

29. The interested party submitted to the defendant proposed engineering designs for the project, and these designs are showed as Exhibit IF15 of Mr. Fabro's 1st affidavit. These designs were also submitted to the Belize Port authority and the Ministry of Works. The defendant, on receipt of the designs, submitted copies of the designs to the Ministry of Works for its comments and recommendations from an engineering point of view. By letter dated 17th June, 2010 the Belize Port Authority wrote that it had "no objection to the final design of the project." The BPA, however, provided what should be included as a requirement of the project. The Ministry of Works, also made no objection to the project as far as engineering design and layout of the project were concerned, but made certain recommendations. The evidence of Marco Caruso, a director of the interested party, and the evidence of former Chief Environmental officer Fabro are that based on the recommendation of the BPA and the Ministry of Works, the interested party made changes to the designs and resubmitted them to the defendant for approval and the final approved designs are shown as Exhibit I.F. 18 of Mr. Fabro's first affidavit. In relation to the design of the project the Chief Executive officer, Ministry of Works wrote that the structural design and layout of the Marine Project were structurally sound and satisfactory, and said there was no objection to the engineering design and proposed layout of the project, and the design

and layout of the breakwater wall. Enough evidence was provided of the actual technical designs of the project.

Delegation

30. The claimant submits that the defendant acted unlawfully by delegating, in the ECP, to the Ministry of Works the defendant’s jurisdiction to vet and approve the designs for the project. The claimant does not cite in the claim form the specific statutory provision which the defendant allegedly contravened by the alleged delegation. The ECP, written by the defendant, states that the interested party shall pay careful attention and abide by certain conditions, including the following condition:

“3.01.03 The final design of the marina, and the type of construction materials to be used on the marina shall be submitted for approval to the Ministry of Works with input from Belize Port Authority prior to commencing any construction activities associated with the marina.”

The claimant’s submission is that the defendant acted unlawfully when it made the delegation to the Ministry of Works in the above clause.

31. Section 4 of the Act states the functions of the defendant; but that section does not specifically grant authority to approve designs. As a matter of fact, the section does not mention the word “designs” or any

synonym of that word. It is difficult to take the point that the defendant delegated a function under section 4, when the section does not specifically confer that function on the defendant. But there is the general or omnibus subsection (aa) of section 4 which states that the defendant shall, in addition to functions already given in the section “exercise any other functions relating to the protection of the environment.” This general function may include approval of designs for the project and may also include the power to ask another agency with the skill and capability of engineering matters, to look at a matter and make recommendations to the body responsible for the approval, which in this case, it is alleged, is the defendant.

32. It has to be noted that the NEAC is responsible for the review of all EIA’s and to advise the defendant. A member of the NEAC is the Chief Engineer who is a senior official of the Ministry of works. Under the wide ambit of subsection (aa) of section 4, I am of the view that the defendant is entitled to elicit recommendations from a member of NEAC as to designs submitted by the interested party while at the same time retaining to itself the power of approval of the designs.
33. The general principle is clear: the lawful exercise of power should be exercised by the authority upon whom it is conferred by the statute. This is exemplified by the well known maxim, **delegatus non protest delegare**. The question is whether the true construction of the statutory provision, it is intended that the power allegedly conferred on the defendant under subsection (aa) to approve designs also confers

a power to seek recommendations from the Ministry of Works. The law recognizes that a public authority is not a vessel of all knowledge and therefore it is expected that a public authority should work through committees, persons or authorities with special skills needed for the task at hand, provided that these committees or authorities, merely recommend action, leaving the legal act of approval and decision to the authority statutorily empowered to approve or make the decision: see *Hall v. Manchester Corporation 1915 79JP 385*.

Regulation 19

34. Miss Toy in her affidavit supporting the claimant submits that the EIA does not include and is contrary to the legislative requirements of Regulation 19. Decisions were made above on some provisions of Regulation 19, and now we may consider the other relevant provisions of the Regulation as follows.

(a) Human Beings

35. The EIA identifies the villages along the Placencia Peninsula which would be impacted by the project. The villages are Riverdale, Siene Bight, Placencia, Santa Cruz and Sagitun Farms with a combined population of 4,230 in 2008. The EIA also gives the occupational opportunities in the villages for men and women, including labour, fishing, handicraft, tourism and domestic work and work on banana farms. Education, health, medical facilities and other matters such as churches, availability of potable water, electricity cable TV are addressed in the EIA. The likely significant effects of the project on the above are given in the EIA: see paragraph 11.5. The EIA points

out positive and negative impacts of the project on the population of the villages. In relation to impacts on human beings the EIA states:

“During the mandatory public consultation conducted by the previous EIA preparers, the local residents expressed concerns in three areas:

- i. Marina design and marina basin water circulation.
- ii. Marina effects on the coast of the Placencia Peninsula.
- iii. General job creation for local residents.

The first and second concerns are being addressed in previous chapters, while the third is being addressed in this section.

Below is a summary of potential positive and negative impacts identified.

- i. Increased employment and job creation and the possibility for some villagers to enter or expand their business to meet the increase demand for food and services;
- ii That opportunity for employment be provided during the construction and post-construction phase of the development both direct and indirect;
- iii Attracts the higher-spending social groups.
- vi. Benefits to local businesses from resident and visiting yachts. On average, for every person directly employed by a marina, there are another twelve jobs in the community indirectly provided by the marina – engineering, catering, supplies, and so on. Crews of visiting yachts are the highest-spending tourists of all – the estimated spend is US\$650 per yacht per night.

- (vii) Produce needed by the marina and other needs will be sourced locally first.
- (viii) The project will provide its own internal security and will liaise with the local enforcement agency.
- (ix) Programs will be developed to provide opportunities for deserving student and other deserving Belizean citizens to experience and learn about marina management.
- (x) As the marina will be catering 60 percents of its berths to residence living at the Placencia Residences and hotel/resort guests and given the increase demand for berthing facilities, it is assumed that there is no displacement at the local level.
- (xi) The proposal will have an extremely beneficial impact on the local rural economy. In addition, the customers based at the Marina, will also make use of local facilities providing further trade and a much needed boost for local shops, public houses and businesses.”

36. Negative impacts identified in the EIA are migrant workers seeking employment would place increased housing demands and pressures on the social infrastructure of the small communities mentioned above. Moreover, increased tourism in the area is likely to increase the crime rate and sexually transmitted diseases, which seem to accompany the growth of the tourism industry. But the EIA states that since the project intends to target “an exclusive clientele” its impact on the increase of crime rate and prostitution within the communities is

assessed as minor or negligible. Included in the EIA are the additional benefits the project will generate. The EIA states:

“In conclusion, the marina development will have a number of beneficial and some negative environmental impacts. There will be some alteration to the landscape and temporary constraints to boat users. A net temporary increase in employment and revenue generation will also arise during the construction phase. In the long term, there will be an increase in marine habitat diversity as the area will now be less turbid due to a calmer area. Overall, there will be a gain from a significant improvement in the amenity and recreational value of the area and it is anticipated that the marina will generate major improvements in employment and inward expenditure.”

(b) Flora and Fauna

37. This topic is extensively addressed in the EIA. There is data that the vegetation around the project is characteristic of a typical coastal environment, dominated near the sea with vegetation named Coco Plum and Wild Grape while on the beach side and lagoon side are found other vegetation and plants such as the coconut tree, palms, hibiscus grasses, shrubs, mangrove. The EIA also includes data in relation to other flora such as the turtle grass, bristle ball brush and others.
38. In relation to fauna, the EIA contains data on aquatic life including fish species, such as silver sides, sardines and sprats that were

observed near the shore area of the project. But at the lagoon side of the project there are over 70 species of fish identified in the lagoon including bonefish, stingray and grouper and snook and species of jellyfish. Crocodiles have been reported but no sighting of these mammals were made during the survey of the project. The hawk skull and green sea turtles and manatees have been sighted in the lagoon. The EIA also contains data on the varieties of birds in the area of the project. Given below are specific paragraphs of the EIA which address flora and fauna.

39. Paragraph 4:8 of the EIA gives the impact to the flora and fauna of the project. Due to the comparatively small size of the project, considering the enormous wide expanse of the Caribbean Sea and its connected location on the seashore, the impacts on fish and mammals and birds seem to be negligible. The EIA concludes:

“In conclusion, it is worth mentioning that it is believed that the project is most likely to increase the biodiversity of the marina basin because of the specific features being incorporated in the design of the marina. In particular with the positioning of the breakwaters and their channel openings, the basin will be calmer with far less turbidity and with enough channel openings for a constant water flow in and out of the marina basin. Also, there will now be adequate fixed substrates for marine life to anchor to and colonize the basin. See chapter 9 for a more detailed impact assessment.”

(c) Soil, Water, Air and Climate

40. The EIA includes the following topics – soil, water, air and climate and their impacts on the project. I think a reference, rather than a repeating of the relevant parts of EIA, is enough. For general location and land use: 2.1; Climate, winds rainfall; 2.5; Water quality; 2.9 and 2.10; water resources; 5. For impacts to surface water; 1.7.2. For general and specific impacts: 57.11, 57.12. The numbers refer to paragraphs in the EIA where the respective topics are addressed.

(d) Material Assets, including cultural Heritage and Landscape

41. Material assets is a wide term, and I think it would include matters that would impact on the environment as a result of the project, which matters are included in the EIA, some of which are stated above. Paragraph 11 gives information of the lifestyle of the people in the communities near the project including employment, schooling, and so on and also describes the area and possible impacts of the project.

(e) Natural Resources and Ecological balance

42. The EIA contains data on natural resources such as vegetation. There is also reference to fish, birds and mammals and aquatic life as we saw above.

(f) Mitigation and Monitoring

43. The EIA extensively deals with mitigation in numerous paragraphs. For instance see paragraphs 1.71; 1.7.2; 1.7.3. In relation to monitoring, see 1.9 and paragraph 15.2 of the EIA.

(g) Inter agency Involvement

44. The Ministry of Works, Belize Port Authority and the NEAC and the Fisheries Department were involved in the project.

(h) Report on Public Hearing and Public Consultations

45. Included in the EIA is data on public consultations, in which local residents expressed certain concerns at these hearings on three matters: (i) marine design and marine basin circulation, (ii) Marina effects on the coast of the Placencia Peninsula and (iii) general job creation for local residents. In addition, Miss Toy admitted attending a public hearing but did not comment or ask questions at the hearing.
46. Considering all the evidence the EIA, in my view, satisfies the requirements of, and is in accordance with, Regulation 19.
47. It is not necessary that the EIA should pursue investigation to resolve every issue or topic. In *Belize Alliance of Conservation Non-Governmental Organizations, Department of the Environment v. Belize Electricity Company Limited 2004 64 WIR 68*, the Privy Council expressed views which are, in my view, relevant to this matter before me. I think I should give the facts briefly of the case to fully appreciate the decision. In this case The Belize Electricity Limited, a supplier of electricity in Belize, generated about half of the electricity used in Belize by diesel driven power stations using imported oil. The rest of electricity required was supplied by a Mexican company under agreement with Belize but the price was such that during peak periods, was five times higher than the ordinary

- rate. This resulted in Belizean residents paying about twice as much for electricity as their neighbours in Mexico.
48. As a result in 1992, BEL decided to construct a hydroelectric power station to increase its supply of electricity and so reduce its dependence on the supply of electricity by the Mexican company. A proposal was made for the construction of 49.5 metre dam up the Macal river at Chalillo, Belize to generate increased electricity throughout the year.
 49. This proposal aroused intense opposition from environmentalist on the main ground that the Chalillo Dam would result in the flooding of a vast area of land designated for preservation of various species of plants and rare species of crocodiles and other mammals such as the jaguar, puma and ocelot and tapirs and also birds such as scarlet macaws. These plants and wildlife could be lost due to the flooding. Despite these concerns of the environmentalists, and the potential environmental loss, the Government of Belize decided to approve the construction of the dam. The government felt that the losses were outweighed by the advantages to the community of a higher generation of electricity.
 50. The claimant challenged the decision to build the dam as unlawful on the ground that the procedure by which the decision was made was not in accordance with several provisions of the Environmental Protection Act and the Environmental Impact Assessment Regulations 1995 in that the steps required by the Legislation to be followed prior

to approval of the project were not complied with by the government before approval of the construction of the dam. Both the Supreme Court and the Court of Appeal in Belize; and the Privy Council rejected the case for the claimant.

51. The Privy Council held that it was not necessary that the EIA should pursue investigations to resolve every issue or topic. “The fact,” says Lord Hoffman, “that the environmental impact statement does not cover every topic and expose every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations: See also to the same effect Cripps J in *Prineas v. Forestry Commission of New South Wales 1983 49 LGRA 402 at p. 417*.

52. The court further held that, there must be included into the statutory obligations a concept of reasonableness, where an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out of the activity, it meets the standards imposed by the regulation: see Cripps J in *Prineas* at page 417 and Lord Hoffman in *Belize Alliance* at p. 19 above. Two Justices, Lords Walker and Steyn, dissented. They agreed with the general principle stated by Lord Hoffman above, but the basis for the dissenting opinion seems to be the finding that the EIA contained an error as to the geology of the bedrock of the river at the site of the

dam and the dissenting judges felt that this error concerning the bedrock was so fundamental that it went to the heart of the matter and for that reason they would have allowed the appeal.

53. In *Northern Jamaican Conservation Association v. National Resources Conservation Authority* 66 WIR 258 Sykes J. granted certiorari to quash a decision of a public authority on the main ground that a public consultation process in relation to an EIA was flawed. But His Lordship did say that there may be situations where an EIA has fundamental errors resulting in its invalidation. In my view, the claimant has failed to prove fundamental errors of the EIA in this case before me.

Aquifer Test

54. Paragraphs 2.01 to 2.05; and 6:01 to 6.012 of the TOR and many provisions of the EIA deal with water resources and water transportation, but do not specifically use the term aquifer test. But the NEAC in the minutes of a meeting on 24th February, 2010 at paragraph 4.1.5 stated that “the pump test for the aquifer is critical to determine the maximum sustainable yield on the aquifer for the project and others in the surrounding communities. This aquifer test can be requested in an ECP. The aquifer test was accordingly included in the ECP.” Further it came out in Mr. Alegria evidence that at the time his affidavit was signed the aquifer test was in process of completion. The NEAC’s stated position on the aquifer pump test was addressed in paragraph 3.03 – 3.03.1 of the ECP where it is stated that the developer is required to conduct a proper “pump test.” And

paragraph 3.03.2 states that if the pump test shows that the water supply source is unsustainable alternative water supply has to be identified and submitted to the DOE for approval.

55. The claimant states that the aquifer test was never done, “which test is of enormous importance since it would provide information to NEAC, DOE and the public whether the potable water resources in the area were adequate for the scale of the development. The failure to include this information in the EIA and to consider it prior to the clearance of the project is contrary to the Act and Regulations.” But the provisions of the legislation that allegedly require aquifer pump test was not identified in the submission nor was this aquifer test point pleaded. Moreover, the EIA deals extensively with water resources and quality as shown by paragraphs of the EIA below. For the above reasons I do not think there is merit in this submission.

Land Based Components

56. The claimant seems to submit that a failure to address in the EIA land based components of the project, such as hotel rooms and restaurant and other such amenities makes the EIA unlawful. But the claimant at the same time concedes that there is “no specific statutory requirement for their approval.” If there is no relevant legislation that requires approval for the land based components, I cannot find a ground for declaring the EIA unlawful even though the components would have some impact on water usage and availability in the area. Once again attention ought to be drawn to the elaborate treatment in the EIA of water resources, quantity and quality in the area of the project.

Contents of the EIA

57. There are numerous paragraphs of the EIA which deal with the concerns raised by Miss Toy in her affidavit and which satisfy the requirements of the Act and Regulation. Examples of some of the paragraphs of the EIA which deal with the concerns and requirements are paragraphs 1.71. Impacts to flora and fauna; 1.7.2. Impacts to surface waters; and mitigation measures; 1.73. solid waste impacts and mitigation measures; 2.3.1. Soil classification and land use; 2.4. General bathymetrics of project site; 2.5.1. Winds; 2.5.2. Wave climate; 2.5.3. Rainfall; 2.5.4. tropical storms and hurricanes. 2.5.5. storm surge; 2.5.6. tides and currents; 2.9. water quality of Placencia Lagoon; 2.10. water quality of the Caribbean sea project. 4.6. and 4.7. Flora and fauna; 4.8. impact to flora and fauna; 5.1 to 5.5. water quality and ground water; 5.7. to 5.7.22. infrastructure 8.0. negative environmental impacts and mitigation; 9.2.2. Bathymetrics of project sites; 9.2.3. winds; 9.2.4. wave climate; 9.2.6. tides and currents; 9.7.1. General environmental impacts; 10.3.2. potential impacts of hurricane; 10.4. earthquake preparedness Plan; 11.1. social factors of the project; 11.2. Impact on the community and villages along the Placencia Peninsula and population; 11.2. livelihood and the role of women in the communities; 11.2.1. a description of Santa Cruz Village its population and occupation of men and women; 11.2.2 and 11.2.3; and 11.2.4 give a description of the village of Sagitun Farms, Siene Bight and Placencia, their occupation and population; 11.3. Education, Health Services labour and employment, and alternatives for development 14.0.

58. I am not satisfied, on the evidence, that the claimant has proven that the defendant and the interested party acted contrary to the Act and Regulation or that the EIA and ECP do not satisfy the requirements of the legislation.

59. **Conclusion**

From the evidence the project would not negatively impact on the aquatic life and birds in the area because of the comparatively small size of the project in the vast Caribbean Sea. The evidence shows that overall there are positive benefits for the population residing in the villages connected to the project. The claimant has failed to prove that the EIA and ECP do not satisfy the provisions of the Act and Regulations and that the defendant and the interested party acted contrary to the said legislation.

60. I therefore make the following Orders:

- (1) The claim is dismissed.
- (2) The claimant shall pay costs to the defendant and interested party to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
4th October, 2011

P.T.O.

