COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
PUBLIC LAW DIVISION
2010/PUB/JRV/00020

IN THE MATTER of certain provisions of the Roads Act, Chapter 201 ("the Act)

AND IN THE MATTER of certain planning developments affecting the area forming part of communities served by portions of Blue Hill Road and Market Street by the construction and reconstruction and extensions to those public roads being carried out by the minister responsible for roads in implementing the permanent changes in the directions of vehicular and pedestrian traffic flows:

AND IN THE MATTER of an application by Arnold Heasite, Leana Ingraham and Rupert Roberts Jr., for an Order authorizing them to bring and defend judicial review proceedings as a representative action pursuant to the provisions of R.S.C., (1978), Ord. 15, r. 13;
AND IN THE MATTER of an application upon such grant of Authority for leave to apply for judicial review

Between

ARNOLD HEASTIE,
LEANA INGRAHAM and RUPERT ROBERTS, JR.
(Suing on behalf of themselves and all the other businesses and property owners organized under the name of 'The Coconut Grove Business League')

Applicants

and

THE MINISTER OF PUBLIC WORKS AND TRANSPORT
(Sued in the capacity of Minister Responsible for Roads)
Respondent

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Maurice Glinton; Messrs Raynard Rigby and Paul Moss with him, for the Applicants

Mr David Higgins; Mrs Melissa Wright and Sophia Thompson-Williams with him, for the Respondents

17, 18 August 2010

D E C I S I O N

Adderley J

1. This is an application for an interlocutory injunction pending the hearing of a Judicial Review. The review arises out of the $120 million dollar New Providence Road Improvement Project. **("NPRIP")**.

2. The application is distinct from but ancillary to the application for Judicial Review ('judicial review application ") pursuant to RSC Order 53 filed 24 June 2010.

3. As correctly stated by Mr Higgins the principles relative to the grant of injunctions in public law cases were set out with clarity by their Lordships in the Privy Council of ***Belize Alliance of Conservation Non-Governmental Organizations V Department of the Environment*** **et al** [2003] 1 WLR 2839 ("***BACONGO***") The Board per Lord Walker of Gestinghope at page 2849 paragraph 35 gave the following opinion:

> "...when the Court is asked to grant an interim injunction in a public law case, it should approach the matter on the line indicated by the House of Lords in ***American Cyanamid Co. V Ethicon Ltd.*** [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 the case at p.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,"

THE BALANCE OF CONVENIENCE

4. It is conceded that the issue to be tried is not frivilous or vexatious and is a serious one. In addition each side submits that damages would not be an appropriate remedy: not for the respondent, not for the applicants. The court is prepared to accept this.

5. The court must therefore consider the balance of convenience. The affidavits of Alikhan Khader, project coordinator, filed 11 August 2010 and Charlene Collie-Harris, civil engineer filed 13 August 2010 set out that the **NPRIP** is a public interest project:

> "...to reduce transport costs for road users by providing a more rational and efficient transportation system for New Providence Island." (para 5 of the Collie-Harris affidavit),
>
> "...to upgrade the existing traffic system in New Providence by providing a more rational and efficient transportation system for New Providence Island. (para 4 of Khader affidavit)."

6. Against this overall public interest is the interest of the members of the Coconut Grove Business League. Their issue is not one of compensation for loss of enjoyment of "property" or "interest in or over property" but that the works on the **NPRIP** in its corridors 11A and 11B, the Blue Hill Road and Market Street road respectively is destroying their way of life and means of livelihood which the State has no right to destroy. They say that the public authority must justify the manner of this interference with the enjoyment of private property caused by what they call a public nuisance. They also argue that it amounts to a compulsory taking of property under Article 27 of the Constitution and the authority must justify that the necessity is such as to afford reasonable justification for causing any hardship. [Act 27(1)(b)].

7. The applicants further state that the authority must have regard to "the human factor" referred to by Lord Scarman in ***Westminister Council V Gt. Portland Estates Plc***. p 670 at letter E where he said:

> " personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It will be inhumane pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use."

Westminster dealt with development plans and planning control and the dictum was in relation to the process that must take place in the determination of land use, and in the context of certain United Kingdom statutory provisions. I am not convinced that it has application to this case. This is not concerned with land use. The use of the roadway as such was determined many decades ago.

8. The respondent states that it has indeed justified its manner of interference. According to the affidavits of Khader, Collie-Harris and that of Joy John filed 16 August 2010 a period of public announcements, consultations, press releases, town hall meetings, public displays at the General Post Office was taking place since 2000, then in 2007 and 2010. A schedule of public relations releases and consultations was planned and implemented. In the Collie-Harris affidavit she outlined in detail a public consultative process and door-to-door consultations that took place between 18 March 2010 and 18 April 2010 relating to the **NPRIP**. She noted that at the meeting of 23 March 2010 at A.F. Adderley gym at which the one way couplet on Baillou Hill Road and Market Street, inter alia, was discussed many business owners along Baillou Hill Road and Market Street including persons listed in this action such as Ethrick Bowe, Rupert Roberts, Ms. Hutchinson, Arnold Heastie and CB Moss were present. There were various questions but no adverse comments.

9. In addition according to the affidavit of Joy John, Project Execution Unit, Ministry of Works and Transport, prior to the contract to commence the **NPRIP** the Government had professional reports done by Mott McDonald at the cost of approximately 2.0 million dollars, and a further economic appraisal in May 2008 at a cost of 1.3 million dollars.

10. In perusing these various reports, it is clear to the court that none of them dealt with the impact on businesses located along corridors 11A and 11B.

11. The applicants are not claiming that the Minister of Works and Transport ("the Minister") has acted illegally in not publishing regulations under section 17 (1) of the Act, they are claiming that he acted unreasonably. Section 17 reads as follows:

> "17 (1) The Minister may make regulations for the better carrying out of the provisions of this Act and generally for the control, construction, maintenance and use of public roads.
>
> (2) Without derogation from the generality of the foregoing power, such regulations may prescribe the conditions subject to which the Minister may permit any temporary obstruction, encroachment or work to be made or carried out on any public road or part thereof and may prescribe the fees to be paid therefor by any person who requires such permission."

Regulations were made under the Road Traffic Act in March 2010 to authorize the reversal of traffic flow on Market Street and Baillou Hill Road but no regulations were made under section 17 of the Roads Act. The applicants say the latter omission was unreasonable.

12. The parties seemed to agree that since ***Save Guana Cay Reef Association Ltd. and others V R and others*** [2009] UKPC 44 the applicants have a legitimate expectation for consultation in a matter such as this that will affect their property interest since such affect was not the inevitable consequence of the statutory authority acting lawfully. Mr. Higgins contends that

the required level of consultation has taken place. The applicants point to two letters exhibited to the affidavit of Arnold Heastie filed 24 June 2010, dated 7 April and 21 May 2010 respectively addressed to the Honourable Prime Minister wherein they seek audience with him regarding the adverse effects of the traffic reversal on the roads.

13. The letters ought properly to have been directed to the Minister, not the Prime Minister, as the former is the Minister responsible for roads. The letters were not copied to the Minister either. The representatives received no reply from the Prime Minister. Although improperly addressed they are evidence that in the applicants' mind there has been no sufficient consultation.

14. A case almost on point was cited by Mr. Glinton. In ***Smith V Council of the Shire of Warringah*** (1969) 79 NSW WN 436 ("***Smith***"). That was a case where a local council without notice erected a permanent fence across one of its public roads to prevent through traffic from using a certain section of the road and to force it to by-pass that section. A few days later the Main Roads Board carried out additional work on the by-passing highway. The council knew that this would be done. The diversion of traffic caused loss of custom to a number of businesses conducted on premises situated along the by-passed section of the road. The plaintiff, a garage proprietor whose business was conducted on premises situated on this section, sued the local authority for an injunction to prevent the council from continuing to block the road. It was held by Hardie J that the plaintiff had *locus standi* to sue, as he had suffered special damage, such special damage not being confined to damage suffered by him in his capacity as a user of the highway nor measured solely by reference to his own right to use the highway. In ***Smith*** it was assumed that the council's actions were not authorized by law. In this case the applicants do not claim that the action of the Minister is unlawful, only unreasonable. That case was therefore against the authority for the tort of a private action in public nuisance. Absent the unlawful claim the avenue left for the applicants is a judicial review. Should the

facts turn out to be contentious the rules of the Supreme Court make adequate provisions.

15. Although I am not bound by ***Smith***, I nevertheless consider it a correct and fair decision.

16. An application of this nature is not to become a mini trial on affidavits; that is for the substantive hearing. The applicants have only to show that there is a serious issue to be tried. Based on the facts of this case I believe the balance of convenience is in favour the applicants. It seems to me, too, that based on the segregation of the road works the interest of the applicants does not necessarily conflict with that of the public at large. I am therefore minded to grant the interlocutory injunction.

17. Each side agrees that if an injunction was granted to take effect immediately thereby stopping the work on corridor 11, it would not be roadworthy because of the current stage of repairs.

18. The affidavit of Mariano Aranibar filed 13 August 2010 states that as of August 2010, $1,402,183.70 of the total works of $8,033,941.94 has been done of corridor 11 A (Baillou Hill Road), and $440,901.54 of $9,235,734.49 on corridor 11B (Market Street). All of the plant and equipment for the **NPRIP** has been mobilized, the materials and equipment required for the work at corridors 11A and 11B are in stock at the contractor's compound. Suspension of the works could result in such loses that may cause the contraction to consider terminating the contract. Corridor 11 is a part of the total contractual work for 17 corridors under the **NPRIP** representing an amount of $119,900,713.20. Mr Khader refers to the plan in respect of Baillou Road/Market Street corridor to be "minor improvements."

UNDERTAKING AS TO DAMAGES

19. The general rule is that even in a public law case unless some special feature be present the recipient of an injunction ought to be required to give an undertaking as to damages especially where the rights of a third party is engaged. ***BACONGO*** makes reference to cases where an injunction may be granted to a citizen without any undertaking. One example was a straight forward dispute between a public or quasi-public body to whom services are rendered (*Rv Service Houses, Ex p. Goldsmith* (2000) 3cclr 354). However the court has a wide discretion to take the course that will minimize the risk of an unjust result.

RULING

20. For the above reasons I consider it just and convenient to grant an interlocutory injunction to the applicants pending the hearing of the judicial review application. I was minded to grant the injunction and to impose a stay to take account of the view of both parties that an injunction if granted should not take effect immediately due to the stage of the works. I have therefore decided to set the matter down for an early hearing 21 and 22 September 2010. If between now and the hearing representatives of the applicants communicate with the Minister and this communication results in reasonable consultation by the Minister with the applicants, it is possible that this could be taken into account at the hearing.

21. Costs will be decided at a later date after submissions.

Adderley J.