Privy Council Appeal No. 47 of 2003

IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

B E T W E E N:

1. THE BELIZE ALLIANCE OF CONSERVATION NON-GOVERNMENTAL ORGANISATIONS
2. PHYLLIS DART
3. GODSMAN ELLIS

Appellants

and

1. THE DEPARTMENT OF THE ENVIRONMENT
2. BELIZE ELECTRICITY COMPANY LIMITED

Respondents

CASE FOR THE FIRST RESPONDENT

INTRODUCTION

1. This appeal concerns the decision of the First Respondent, the Department of the Environment (DOE), on 5 April 2002 to grant clearance to the Second Respondent, the Belize Electricity Company Limited (BECOL), for the construction of the Chalillo Dam on the Macal River in Belize. This project is known as the Macal River Upstream Storage Facility (MRUSF) and is designed to produce electricity and upstream storage capacity for Mollejon Power Plant, and thereby to increase Belize's electricity generating capacity. The Appellant's challenge was dismissed by the Supreme Court of Belize and its

appeal against that decision was unanimously dismissed by the Court of Appeal of Belize. On 10 April 2003 the Appellant obtained leave to appeal to the Privy Council against the decision of the Court of Appeal.

2. The Appellant sought an interim injunction to restrain work on the project pending the appeal to your Lordship's Board. Following a hearing on 30th July 2003, their Lordships refused the injunction in a judgment given on 14th August 2003. In its skeleton argument of 25th July 2003 in support of its application for an injunction the Appellant advanced only two contentions (at paragraph 80):

   1.1.1. "The EIA [Environmental Impact Assessment] was unlawful in failing to meet the requirements of the EIA regulations and that the DOE acted unlawfully in approving it in reliance on future assessments; and

   1.1.2. "The DOE [Department of the Environment] acted unlawfully in failing to hold before approving, and thus take into account in deciding whether to approve the EIA, representations made at, a public hearing".

1.2. In relation to these their Lordships observed (at paragraph 41):

> "*As already noted, the Court of Appeal differed on the need for a public hearing under Regulation 24. But (in addition to other public consultation which took place in August 2001) a public hearing has now been held and (as the Board was told without contradiction) the DoE has taken account of the objections and representations made at the hearing. The appeal will turn on BACONGO's claim that the EIA was incomplete and defective, in particular because of the need for further investigations in four important areas: geology (as affecting the design and construction of the dam); hydrology (including the impact on downstream settlements); flora and fauna; and archaeological sites*. "*…*"

1.3. At the time of the hearing for an interim injunction there was also an issue about the effect of the Macal River Hydroelectric Development Act 2003. The First Respondent does not rely on this Act. It is anticipated that by the time this appeal is heard, the Act will have been repealed in all material respects and so no issue arises on it.

2. The First Respondent's case on the remaining issues is, in summary:

I. The EIA was lawful.

2.1. Whether an EIA is adequate or sufficient is a matter for the judgment of the DOE. The Court can only interfere if that decision is irrational.

2.2. The Courts below were right to hold that the EIA was sufficient. The standard they applied, derived from *Prineas v Forestry Commission of New South Wales* 49 LGRA 402, was, if anything, more exacting than necessary under the Belizean statutory regime. The Belize regime is materially different from that in England and Wales (hereafter referred to for convenience as the system in England). It does allow for some matters to be dealt with by the imposition and monitoring of conditions. But in any event, this EIA sufficiently alerts the decision maker to the relevant significant environmental effects to comply with the English Regulations.

2.3. As to the specific matters in respect of which the EIA was said to be deficient:

2.3.1. There was no material deficiency in the geological analysis of the site. While some of the geology may have been misdescribed it did not affect the competency of the site to hold this dam. In any event, by the time of the DOE's decision of 5th April 2002 granting approval there was no room for any doubt about this. Further measures were in any event included in the ECP.

2.3.2. The information as to the impact on wildlife was sufficient and provided an adequate basis for an assessment whether the project should go ahead. Mitigation measures were either described in the EIA itself or appropriately dealt with by the imposition of conditions in the Environmental Compliance Plan [ECP].

2.3.3. The information available did not reveal that significant archaeological remains were at risk because of the project. The measures identified in the ECP gave ample scope for proper mitigation measures in respect of archaeological remains. It was clear that this would be the case at the time the EIA was submitted.

2.4. In any event, in Belize, a decision whether or not to give clearance to a project is not dependent on whether a fully compliant report of an EIA, has been submitted. To the extent that this is the case in England, then the law in Belize is different.

2.5. By the time it came to reach its decision, the DOE had sufficient material on which to found a lawful decision to grant clearance. And the Courts below were right to hold that it had not acted irrationally.

II. The decision was valid despite the lack of a public hearing.

2.6. The majority of the Court of Appeal were right to hold that no hearing was necessary. This is a matter for the judgment of the DOE and can be challenged only if it is irrational.

2.7. The DOE was entitled not to hold a hearing having regard to the extent of public consultation that had already taken place and information available. Conteh CJ was wrong to hold (at first instance) that a hearing was necessary.

2.8. In any event, even if there was an error in failing to hold a hearing, the decision of the DOE should not be quashed on this ground.

2.8.1. After the hearing before Conteh CJ a hearing was held. Representations were made, both for and against the project, including a presentation from the Appellant. These representations have been taken fully into account by the DOE.

2.8.2. There would be substantial prejudice if relief were granted. Construction work has already started on the dam and this would be wasted if relief were granted. Any order quashing approval would in any event delay a major project judged by the Government be a substantial benefit to the people of Belize.

3. The submissions below deal with the following:

3.1. The factual background, including the parties and the main events leading to the decisions challenged.

3.2. The proceedings below.

3.3. A description of the legislative scheme for an environmental impact assessment in Belize.

3.4. The decision-making process regarding EIAs in Belize.

3.5. Differences between the regime in Belize and the regime in England and Wales.

3.6. The proper approach to determining whether an EIA is adequate for the purposes of a decision to grant environmental clearance for a project.

3.7. The First Respondent's response to the Appellant's complaints about the EIA in this case.

3.8. The Respondent's submissions on the public hearing point.

3.9. There are also 2 appendices dealing with:

3.9.1. A note dealing with the scheme for environmental impact assessments applicable in England and Wales.

3.9.2. The material before the Courts below as to the environmental impact of the project so far as relevant to the criticisms made by the Appellant, and which supports the findings made by the Courts below.

4. The First Respondent's submissions deal only with the material before the Supreme Court of Belize and the Court of Appeal and points that were taken in those Courts. After judgment was given in the Court of Appeal the Appellant filed further evidence in support of its claim for an injunction pending an appeal to your Lordships' Board. Some of this material has been reproduced in the extracts from the Record. The First Respondent submits that this material is irrelevant to the issues on the appeal and the First Respondent does not address it.

BACKGROUND

5. **The parties**

5.1. The Appellant, Belize Alliance of Conservation Non-Governmental Organizations (BACONGO) is an environmental non-profit organization in

Belize, made up of nine other organizations. The other main environmental non governmental organisation in Belize is the Association of National Development Agencies (ANDA).

5.2. Phyllis Dart is President of the Belize Eco-Tourism Association and she owns a jungle lodge on the Macal River. Godsman Ellis is the Vice President of that Association and he owns a hotel on the river. Both were directed to be joined as Appellants on 30th July 2003.

5.3. The First Respondent is the Department of the Environment (DOE). It is established under Section 3 of the Environmental Protection Act, Chapter 328. Its functions are described in detail in Section 4 of that Act. They involve the general oversight of environmental matters in Belize, including the examination and evaluation of any proposed action on the environment (section 4(m)). The breadth of its functions in relation to the Environment were described by Conteh CJ as "remarkable" [para 9 p. 562]. The Department is headed by the Chief Environmental Officer "CEO", a position established by s. 3(2) of the Act. The CEO is and has throughout these proceedings been Ismael Fabro.

5.4. The Second Respondent is the Belize Electric Company Limited (BECOL). This company proposes to build the Macal River Upstream Storage Facility (MSRUF described below). BECOL is a subsidiary of a Canadian owned company, Fortis Inc.

5.5. The National Environmental Assessment Committee (NEAC) is not formally a party but made the decision under challenge of 9th November 2001. The NEAC is established under the Environmental Impact Assessment Regulations and its functions include to review all EIAs and advise the DOE of their adequacy or otherwise. It also advises the DOE

whether a public hearing is necessary. It is not an agent of the DOE. It has 12 members, 10 of whom are drawn from specialist sectors in the public administration. The remaining 2 are representatives of non governmental organisations. At the time of the decisions under challenge (and since then) the NGO represetatives have been BACONGO and ANDA. Each of them is an organisation representing other environmental bodies. The BACONGO representative was Candy Gonzalez, who swore the main affidavit in support of the Appellant's application for judicial review below. The chairman of NEAC is the Chief Environmental Officer.

6. The Macal River Project

6.1. The Macal River has been used for the generation of hydro electric power since 1995, when the Mollejon hydro-electric dam became operational. This is sited downriver from the proposed Chalillo dam. This is a "run of river" plant. Water flows in the Macal river are highly seasonal and this plant will operate more effectively if water is stored in a storage facility upstream. Such a storage facility was contemplated at the time the Mollejon plant was built and formed part of the plans developed for that project in 1988.

6.2. The current proposal is for a 49.5m high dam on the Macal River (the Chalillo dam). It will impound water having a total surface area of 9.53 km^2, extending about 20 km up the Macal River and 10 km up the Raspaculo River. The reservoir will be up to 35m deep. There will be a 7.3 MW powerhouse at the toe of the dam and an 18 km long power transmission line from the proposed powerhouse to the existing Mollejon Plant. The Chalillo Dam, the Powerhouse and the Transmission Line collectively make up the Macal River Upstream Storage Facility ("the MRUSF").

6.3. At present Belize is heavily reliant on Mexico for its supply of electricity. In 2000 it obtained 48% of its requirements from that source and in 2001 experienced power disruption for many weeks when this supply failed. The contract with Mexico is due to expire in 2008. The MRUSF will assist Belize to become self sufficient in electricity generation. At present Belize is exposed to high on peak rates of electricity in its contract with Mexico. The current Mollejon plant cannot produce sufficient off peak electricity in the dry season. The First Respondent takes the view that the MSRUF would considerably improve the situation [see the project justification at pp 6-7 of the EIA main report] and will provide an affordable source of energy. In the course of the injunction proceedings evidence was given that the most serious environmental problem facing Belize is not a single project like the dam, but poverty[1]. The project will help address this.

6.4. Terms of reference (TOR) for an EIA were initially agreed between BECOL and the DOE in March 1999. An EIA was produced later that year but was rejected by the DOE as being insufficient. However, there was substantial discussion about the project at this stage. For example, a national symposium on the state of the environment was held on 14th January 2000. A session was devoted to the MRUSF with some 300 attendees [Fabro 3rd affidavit p. 231]. When the NEAC came to consider the report submitted in 2001 they were well aware of this background [as was accepted by Rowe P at paragraph 24 – p. 681].

6.5. A further EIA, working to the same TOR was submitted to the DOE on 24th August 2001. In the course of preparing this document there had

[1] Diane Marie Wade-Moore Director of Education, Belize Audubon Society affidavit of 12th June 2003 para 7. See also Wathern (ed) Environmental Impact Assessment:Theory and Practice 1988 at p. 28 "Nor must it be assumed that development and protection of environmental quality are necessarily conflicting. Indeed the converse may be true as experience from some LDCs [less developed countries] clearly points to the serious environmental impact of poverty".

been further consultation and discussion with members of the public. Details of this consultation occupies half of an entire volume (no IV) of the appendices to the EIA[2]. The evidence was that this document was "the most comprehensive EIA ever submitted to the DOE" [Ismael Fabro 3rd affidavit para 22]. Conteh CJ drew attention [para 59 – p. 586] to statements of other members of the NEAC to the effect that the EIA was "very comprehensive and adequate" and that it was "well done". It was described by Rowe P as "an EIA considered by the governmental agencies with authority to grant clearance as the best that they had ever seen" [Paragraph 75 p. 705].

6.6. The covering letter presented with the EIA stated that: "the impacts stated are the worst possible outcomes that can be envisaged from the project. Most will not materialise. However, in order to develop the Environmental Management Plan it is important to know the worst possible outcomes…". [pp. 40-3].

6.7. On 28th August 2001 the DOE directed that the EIA be placed in libraries in 9 towns for examination by the public together with ledgers for public comments [letter at p. 44]. The availability of the document for inspection was advertised in the local press and on radio. This "level of distribution to the public was unprecedented" [Rowe P at paragraph 24 p. 681] and this was the only occasion on which copies of an EIA had been required to be placed in libraries nationwide [Fabro 3rd affidavit p. 226].

6.8. Copies of the EIA were distributed to members of the NEAC on 29th August 2001.

[2] Details are also given in the affidavit of Dawn Sampson pp 321-88.

6.9. The NEAC first met to consider the EIA on 24th October 2001. By that time the members had had the document for 8 weeks. The usual period is about 3 weeks to examine a report. [Andrade 1st affidavit paragraph 6 p. 272]. Some substantial comments from interested parties [see a summary at p. 60] had been received including [at pp 101-2] a letter from Lt Col Rogers, who helped conduct one of the studies in the report (from the Natural History Museum) and [at pp 75-100] a 26 page objection from the NRDC (Natural Resources Defence Council). This report was delivered to each member of the NEAC [Vasquez 1st affidavit para 36 p. 70]. The other comments were made available to members of the NEAC [p. 231].

6.10. The NEAC meeting on 24th October 2001 lasted from 9.29am to 3.35pm [minutes pp 252-5]. The evidence before Conteh CJ was that the chief environmental officer, Ismael Fabro, summarised the concerns and views of the public [3rd affidavit p. 262] It was agreed that further information be sought from BECOL. This was requested by letter on 25th October 2002 [51-2], and provided on 7th November 2002 [53-9].

6.11. Some members of the NEAC, including the geology representative, visited the project site on 31st October 2001.

6.12. The NEAC met again on 8th November 2001 [minutes pp 256-62]. Representatives of BECOL and the Consultants who prepared the EIA were there. The minutes record that "the overwhelming majority of the NEAC members considered that the EIA with the additional information provided was complete to enable an informed decision to be made by the NEAC". The representative from the geology department did not agree with the assessment of the rock type on site. He believed it was sandstone and not granite and arrangements were made for him to see

the core samples the next day. He believed that this would still be competent for dam design but would require some changes to the engineering design.

6.13. The core samples were examined by Mr Fabro, the geology representative and Candy Gonzalez on 9th November 2001. Eventually it was agreed they would be subjected to independent analysis.

6.14. The NEAC met again on 9th November 2001 [minutes pp 263 – 267]. The meeting lasted for 2 ½ hours. The meeting voted by a majority of 11:1 in favour of giving conditional approval to the project. The dissenting member was the BACONGO representative. The majority included the ANDA representative and the representative from the geology department.

6.15. At the same meeting all members voted for a working group to develop the Environmental Clearance Plan (ECP). The minutes of the meeting record that the Chairman said "clearance for the project would not be given until the NEAC has negotiated the ECP".

6.16. The NEAC also voted 10:2 in favour of holding "public consultations after the decision". The express terms of the vote describe the process as one of public consultation rather than a public hearing [p. 265].

6.17. Deliberation by the NEAC was not confined to the meetings. By the time the NEAC voted on 9th November, there had also been extensive informal discussions between members of the NEAC and the DOE [Fabro paragraph 39 p. 234].

6.18. BECOL was notified of the decision to recommend clearance on 10th December 2001. The letter is at p. 302. It notified BECOL that the NEAC had voted 11 to 1 in favour of granting Environmental Clearance for the Project on the signing of an Environmental Compliance Plan. It continued:

"*The ECP is currently under preparation and will include mitigation measures recommended in the EIA, other measures proposed by the NEAC and also items discussed with you. Upon completion, the ECP will be forwarded for your review and if in agreement, for signing. After signing the ECP, the Environmental Clearance letter will be issued by the Department of the Environment to Belize Electric Company Limited (BECOL)*."

6.19. Terms for an Environmental Compliance Plan (ECP) were agreed between BECOL and the DOE on 5th April 2002 [427-460]. The ECP is 34 pages long. It is an agreement between the DOE and BECOL. The terms of the ECP are examined where relevant below. They include detailed provision for further geological and archaeological investigation and for monitoring of the impact on wildlife. Failure to comply with the conditions in the plan will be a breach of the agreement and would render BECOL liable to enforcement action under the Environmental Protection Act (below). The ECP expressly provides [p. 427] that "disregard of the terms and conditions specified herein shall result in revocation of the approval of the Project and any permits granted under the Act and/or penalties imposed in accordance with the Act". The plan is described as a dynamic one that will be reviewed and revised as the project develops and if more information becomes available. For that reason the DOE reserves the right to make reasonable modifications.

6.20. Following agreement to and the signing of the Environmental Compliance Plan the First Respondent gave clearance to the project. The letter is at p. 303 and reads:

"Please be informed that Environmental Clearance is hereby granted to Belize Electric Company Limited for a hydroelectric project (Macal River Upstream Storage Facility). This Environmental Clearance is granted subsequent to the signing of the Environmental Compliance Plan (ECP) prepared by the Department of the Environment (DOE) on April 5, 2002.

Kindly be informed that Belize Electric Company Limited is required to comply with all the terms and conditions incorporated in the Environmental Compliance Plan. Disregard of any of the terms and conditions stipulated in the compliance plan will result in the revocation of Environmental Clearance and/or legal actions being taken against Belize Electric Company Limited.

No changes or alterations to what has been agreed to in the ECP will be permitted without the written permission of the Department of the Environment…"

7. The Proceedings

7.1. These proceedings were started by an application for judicial review dated 8th February 2002. The claim was amended on 29th July 2002, to include a complaint against the decision of the DOE to grant clearance for the project. The reasoning in the Courts below has differed in matters of detail, particularly as to the need for a public hearing. However, none of the judges below has felt it necessary to quash the decision to grant clearance. Each of them has considered that there was at least sufficient information to enable to DOE to reach the decision it did. The material findings of the Courts below are dealt with in the course of the First Respondent's submissions below. In summary:

7.2. Conteh CJ heard the application for judicial review over 6 days in July 2002. In a reserved judgment given on 19th December 2002, he dismissed the application. So far as relevant he held that:

7.2.1. There was no explicit requirement that the decision of the DOE to grant clearance was to be determined by the adequacy of the EIA [paragraphs 24 and 30].

7.2.2. In any event he held, at paragraph 60-1:

> *"The EIA may or may not be the perfect EIA, this is not a matter for this Court to decide. The body charged with that responsibility has come to its own deliberate conclusion on this issue. However, a perusal of the five volumes of the EIA in question here would show that it address[ed] the requirements of Regulation 19 as well as the pertinent provisions of section 20 of the Act on EIA.*
>
> *"Accordingly, therefore, I do not think that the charge by the applicant that NEAC's decision and therefore, that of the DOE on the EIA, was unreasonable or irrational, is made out. Certainly it falls a long way short of* ***Wednesbury's*** *sense of unreasonable. [paragraph 60-1].*

7.2.3. The Chief Justice found support for this approach in the test enunciated in *Prineas v Forestry Commission of New South Wales* 49 LGRA 402 [paragraph 62 and cited where relevant below].

7.2.4. As to a public hearing, Conteh CJ held [at paragraphs 67 to 80] that the DOE ought to have held a public hearing as there was a distinction between consultation by the developer in the course of the EIA and a hearing about the project. Since the project met the requirements of section 24(2) a hearing should be held. However, the decision to grant clearance should not be quashed. Conteh CJ recognised that the outcome of the hearing may or may not affect the decision of the DOE and accepted that the result may well be the same. However, he held that the developer "could be assisted in complying with its obligation regarding the proposed Chalillo dam project...". On 16th January 2003, a hearing was held, in compliance with the Order of Conteh CJ.

7.3. The Appellant appealed by grounds of appeal dated 9th January 2003 [1-11]. So far as relevant to the issues currently before your Lordships the grounds of appeal (taken from the amended grounds at pp 785-98) were:

7.3.1. <u>Ground 3</u>

"A complete EIA is an indispensable condition for a project to proceed: *The learned judge erred in faiing to find that, on a true construction of the Act and the regulations, a project or activity could nt, as a matter of law, proceed, if the EIA required in connection therewith was not complete, inadequate or failed to comply with the Act and the Regulations"*

7.3.2. <u>Ground 4:</u>

"All necessary information was not before the NEAC: *The learned trial judge misdirected himself in law as to what was required for complaince with the Act and the regulations in that he upheld as lawful an EIA which left material matters for future assessment".*

7.3.3. <u>Ground 8:</u>

"A public hearing is an element in the democratic process of evaluating an EIA and must be held prior to any decision on the EIA".

7.4. The appeal was heard before the Court of Appeal of Belize between 24th March 2003 and 31st March 2003. In a unanimous decision given on 11th April 2003 they dismissed the appeal [Order at 737, Judgments at 672-730].

7.5. <u>As to ground 3</u>, all members of the Court of Appeal proceeded on the basis that there needed to be a sufficiently complete EIA in order to support the decision of the DOE. However, Rowe P held (at paragraph 24) that an EIA would be complete in this sense so long as it was "developed according to approved Terms of Reference and addresse[d]

all the minimum requirements of Regulation 5 and section 20 subsections (2) and (3) of the Act" In that case the EIA would be facially complete. He was "entirely satisfied that the EIA was complete at the time when it was submitted by BECOL to the DOE". The judgment of Carey JA was to similar effect at paragraph 21. All were satisfied that the EIA in this case met that test.

7.6. As to ground 4, all members of the Court of Appeal accepted that it was for the decision maker to determine whether an EIA was adequate. They relied, as had Conteh CJ on the passage from *Prineas v Forestry Commission of New South Wales*, 49 LGRA 402 as to the appropriate test (cited at paragraph 35 of the judgment of Rowe P at pp 686-7).

7.7. Rowe P examined in detail each of the challenges made by the Appellant and found each of them unfounded. His findings in respect of the matters in issue are dealt with more fully below. He dealt with:

7.7.1. Geology at paragraphs 27 to 37, at paragraph 37 rejecting the submission that there was an absence of complete and accurate geological data.

7.7.2. Hydrology at paragraphs 39-41. He found at paragraph 41 that the relevant NEAC member considered that the information gathered on the hydrology of the project was adequate and that the data submitted was acceptable.

7.7.3. Impact on wildlife and mitigation at paragraphs 42 to 6. He found the information submitted to be "a fully considered and conscious effort to meet the requirements of the Act and regulations, The NEAC and the DOE were in a position to weigh and take a decision on this issue and I find nothing irrational in their decision".

7.7.4. Archaeology at paragraphs 47 to 8. At paragraph 48 he found that at all levels there "was a seriousness of approach and a desire to

preserve the cultural heritage of Belize". The decisions of the DOE and NEAC were not irrational.

7.8. Carey JA also held that, applying the approach in *Prineas* that the EIA covered all relevant matters [paragraph 28] and that all necessary information was before the NEAC [paragraph 31]. To the extent that there were inadequacies they could not convert an EIA "otherwise unexceptionable, into being unlawful".

7.9. As to Ground 8, concerning the public hearing, the Court of Appeal held, by a majority, that there was no requirement for a public hearing. Mottley JA (in the minority on this point) and Carey JA held that there should be no order for certiorari on this ground in any event. This was both because a hearing had been held, and because of the prejudice to good administration if certiorari was granted.

8. <u>THE EIA LEGISLATIVE SCHEME</u>

8.1. Belize does not have any formal system of planning control of the kind found in England and Wales. There is no general requirement for planning permission for development except where a scheme has been established under the Housing and Town Planning Act (which is not the case here). The Environmental Protection Act ("the EPA") and the Environmental Impact Assessment Regulations ("the Regulations") together require an environmental impact assessment ("EIA") in relation to some major developments or activities. Although these provisions use similar terminology to that found in England , the framework in which they appear is significantly different. This is addressed below.

8.2. The Environmental Protection Act was passed in 1992 and has since been amended. Part II of the Act establishes the DOE and sets out its

functions. Part V (sections 20-23) deals with the requirement for EIA. By Section 20(1) "Any person intending to undertake any project, programme or activity which may significantly affect the environment shall cause an environmental impact assessment to be carried out by a suitably qualified person, and shall submit the same to the Department for evaluation and recommendations". Section 20(2) requires that the EIA "shall identify and evaluate" the effects of the development on certain matters including flora and fauna, and cultural heritage. An environmental impact assessment shall include measures which a proposed developer intends to take to mitigate any adverse environmental effects (section. 20(3)).

8.3. By section 20(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". The DOE may make its own environmental impact assessment and "synthesise the views of the public and interested bodies" (section 20(6). And by section 20(7) "A decision by the Department to approve an environmental impact assessment may be subject to conditions which are reasonably required for environmental purposes."

8.4. Section 22 provides criminal sanctions for failure to carry out an EIA required by the Act. Section 52 provides for enforcement notices to be served where the there is a contravention of the Act or Regulations or any condition imposed. By section 58, the DOE may also serve a cessation notice if an activity is carried out without an EIA where one is required.

8.5. The Environmental Impact Assessment Regulations (EIAR are made under section 21 of the EPA. They make the following further provision with regard to EIAs.

8.5.1. By Regulation 4.(1) "In identifying the environmental impact assessment process under these Regulations, the relevant significant environmental issues shall be identified and examined before commencing and embarking on any such project or activity…

8.5.2. By Regulation 5: "An environmental impact assessment shall include at least the following minimum requirements —

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." (emphasis added**)**

8.6. Regulation 7 and Schedule I make an EIA mandatory for certain categories of projects, including dams. By Regulation 12: "The Department shall not consider or decide upon a scheme of the types detailed in Schedule I unless an environmental impact assessment has been prepared in respect of such undertaking".

8.7. Under Regulations 11 and 14–17 the DOE is to be given notice when an EIA is or may be required. Draft terms of reference must be submitted to and approved by the DOE. Regulation 18 provides for public consultation during the preparation of an EIA. The developer is to arrange meetings with interested members of the public, especially within or immediately adjacent to the geographical area of the proposed undertaking". The DOE may also invite comments from interested persons and pass them on to the developer. By Regulation 18(4) "the procedure for public contact and involvement shall be determined by the department".

8.8. By <u>Regulation 19</u> "a report of an EIA shall include" a number of matters listed at (a) to (o). Some are formal requirements such as a cover page (a), or table of contents (c). Others deal with the content of the EIA. They include:

"(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;

…

(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 effects, direct and indirect, on the environment of the development, explained by reference to 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;

(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;

…

(n) Report on public hearings (if any).

(o) A summary in non-technical terms of the language specified above."

8.9. Regulation 20 provides for the developer to advertise that they have submitted an EIA and to make a copy available for inspection. The DOE may direct (Regulation 21(1)(a)) that copies be made available for

inspection by interested persons. On receiving an EIA the DOE shall (Regulation 21(1)(c))

"examine [it] or cause it to be examined to determine whether:

a) further environmental assessment is required; or

b) any significant harmful impact is indicated."

8.10. Regulation 22(1) requires the Developer to “advise the developer of its decision”. Until the developer is advised, then they cannot start the undertaking (Regulation 22(2)), and they would commit an offence if they did so.

8.11. Regulation 23 provides that where an EIA is deficient in any respect then the DOE may on the recommendation of the NEAC, require the developer to carry out further studies, or to supply further information or amend and re-submit the EIA. If the DOE exercises this power, then the EIA is not “deemed to have been completed” until the developer has complied. Where further information is supplied, then the Regulations do not provide for it to be re-advertised in the same way as the initial EIA.

8.12. By Regulation 24 the DOE may, on the recommendation of the NEAC require a public hearing, in

respect of the undertaking Regulation 24(2) requires the Department to take into account the following factors:

a) “the magnitude and type of the environmental impact, the amount of investment, the nature of the geographical area, and the commitment of the natural resources involved in the proposed undertaking, project or activity;

b) “the degree of interest in the proposed undertaking, project or activity by the public, the Department and other government agencies, as evidenced by the public participation in the proposed undertaking, project or activity;

c) “the complexity of the problem and the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity."

8.13. Regulation 25 requires the appointment of a National Environmental Appraisal Committee ("NEAC"). Its functions are to:

"(a) review all environmental impact assessments;

(b) advise the Department of the adequacy or otherwise of environmental impact assessment;

(c) advise the Department of circumstances where a public hearing is desirable or necessary."

8.14. The membership of the NEAC is set out in Regulation 25(2). It includes the chief officers of the relevant public agencies or departments and two members of non governmental organisations appointed by the Minister.

8.15. Regulation 26 sets out factors that must be taken into account in any assessment of an EIA by NEAC. They include (Regulation 26(d)) the need for and the requirements of any follow up programme in respect of the project".

8.16. Regulation 27(1) provides for a right of appeal to the minister where the Department "has decided that an undertaking, project or activity shall not proceed". The Minister may "allow the appeal and permit the project to proceed or may dismiss the appeal".

9. THE DECISION MAKING PROCESS IN BELIZE AND THE CONTENTS OF AN EIA REPORT

9.1. The term EIA or EIA process as used in the regulations covers several different matters.

9.1.1. Firstly there is the assessment carried out by the developer. This is the process of gathering and collating information. It ends with the submission of the report of the assessment.

9.1.2. Secondly the term EIA is used to describe the report of the assessment submitted under Regulation 19.

9.1.3. Thirdly the Regulations refer to the EIA process. This is the overall process by which the environmental impact of the proposed undertaking is evaluated by the NEAC and a decision made by the DOE, including the development and monitoring of any implementation plan. The EIA process is described in this sense in Regulations 4, 6 and 26(2).

9.2. The function of the NEAC is advisory only. This is explicitly stated to be the case in Regulations 23 and 25. However, in giving advice the NEAC is not bound simply to assess whether or not the EIA is formally adequate. It considers whether the information set out in the EIA is accurate and it is entitled to come to a conclusion as to whether the project should proceed[3]. The NEAC thus reaches a decision whether it considers that the project should be given clearance and advises the Department accordingly. However, an attack on the decision of the NEAC must take account of the fact that it is advisory only. It is entitled to act on the basis that the DOE will act properly and will exercise its powers (including any power to require additional information or to impose conditions). The next stage in the EIA process is when the DOE makes a decision in respect of the project together with any conditions that

[3] For example, by Regulation 26(2)(a) any assessment by NEAC must include a consideration of the purpose of the project. This implies that NEAC will (provisionally) balance the purpose and benefits of the project against the adverse impacts.

it sees fit to impose. The DOE is not bound by the position as it appeared when the EIA was submitted to the NEAC or as matters appeared to the NEAC. If the NEAC falls into error, then the DOE is not affected by that error unless it adopts it.

9.3. It is accepted that the advice of the NEAC is a decision that is capable of being judicially reviewed. However, where the process has continued to the grant of approval for the project as a whole, then any challenge to the NEAC becomes academic. The real question is as to the lawfulness of the decision of the DOE.

9.4. The decision of the DOE is to grant approval for the project to go ahead. Although s. 20(7) of the EPA refers to approval of the EIA, the decision in fact relates to the project or undertaking rather than the EIA as such. The description by the DOE of the decision as an "environmental clearance", is apt. Thus section 20(4) of the EPA refers to the assessment of the "project programme or activity", and under Regulation 22(2) "until the developer is advised under sub-regulation (1), the developer shall not commence or proceed with the undertaking". If the developer ignores this and proceeds then they commit an offence [Regulation 28(2)] and would also be liable to an enforcement notice under the EPA. The nature of the DOE's decision also appears from Regulation 12, which refers to the DOE deciding on a "scheme" of the type requiring an EIA and Regulation 27(1), which provides for a right of appeal where "the Department has decided that an undertaking, project or activity shall not proceed".

9.5. Neither the Act nor Regulations expressly state that a development shall not proceed where the DOE does not grant approval, and no sanction is expressly provided if they do not do so. However, the provisions are obviously intended to give the DOE power to control developments requiring an EIA, including a power to refuse to allow the project to go ahead. This must be intended to apply where a fully compliant EIA reveals an unacceptable level of harm. It must therefore be implied into the Regulations that a developer shall comply with any decision of the DOE that a project shall not proceed (i.e. the type of decision referred to in Regulation 27(1)). If they do not so then that will trigger proceedings for an offence under Regulation 28, and enforcement action. The same result can be achieved by reading Regulation 4 EIAR as applying to the whole assessment process and not just to the report of the EIA. On that reading, the examination of the relevant significant environmental issues does not occur unless and until the DOE gives approval to the project. Since this must happen before embarking on the project, a developer who started work on the project would commit an offence and be liable to enforcement action.

9.6. The Respondent's primary case, as developed below, is that the EIA prepared here was sufficient and did comply with the Regulations. The real question is whether the DOE acted rationally in giving approval to this project. The Appellant has never pursued an independent challenge in this respect. Its case has always been that the decision of the DOE was unlawful because it relied on the decision of NEAC to approve the EIA. The argument was summarised by Rowe P [paragraph 14 p. 676] in the Court of Appeal as follows: "to quash the decision of the NEAC that was taken on November 9 2001 on the basis that it was unlawful and to quash the decision of the DOE that was taken on April 5 2002 on the

ground that it was unlawful because it was itself based on unlawful proceedings".

10. DIFFERENCES BETWEEN THE REGIME IN BELIZE AND THAT IN ENGLAND AND WALES.

10.1. The Appellant's case is developed by analogy with cases decided under the English regime. Thus, it has rested on two principal claims:

10.1.1. Firstly, that permission (i.e. clearance) cannot be granted until there has been a complete EIA meeting all the requirements of the Regulations.

10.1.2. Secondly, in granting permission, the DOE cannot hold over matters for later consideration.

10.2. For reasons developed below the Respondent says that these are not absolute requirements, even in English law and the present decision would meet the tests developed there. But the Appellant's approach is misconceived at a more fundamental level. The Belize regime is substantially different from that in England, and produces different results. This difference reflects the policy choice of the legislature, reflecting local conditions and should be respected. Belize is a country with a population of under 300,000 [estimated at 240,000 in 2000 – EIA 4.6.1.1 p. 134]. It is wrong to try to apply a highly developed scheme such as that found in the EC to Belize. Regimes like that in the EC are based on an implicit assumption that the appropriate balance between economic welfare and development has broadly been struck[4]. Thus, the

[4] See United Nations Environment Programme (UNEP), Environmental Economics Series Paper No 6,: Environmental Impact Assessment Where to From Here? – "underlying the EIA process is an unstated assumption, or supposition, that the socioecological status quo may be taken as being acceptable – a threshold which is seen as a yardstick against which negative change must be resisted. This assumption does not apply to developing countries, because in areas where there has been little or no development, even a modest development project can bring, *and is expected to bring*, a dramatic improvement in the welfare of affected people" (original emphasis).

environmental impact process in such a regime is explicitly directed towards assessing the negative impacts. The position is different in developing countries, where the EIA process has to be seen in the context of the need to develop[5]. The Rio Declaration on Environment and Development[6] expressly recognised that a different approach to environmental protection might be appropriate in developing countries. In particular:

10.2.1. Principle 2: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

10.2.2. Principle 11 "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".

10.3. Principle 17 states that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority". However, it does not purport to establish any particular method or standard of

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[5] Confirmed as an "a universal and inalienable right and an integral part of fundamental human rights" in paragraph 10 of the Vienna Declaration and Programme of Action adopted by the World Conference On Human Rights Vienna, 14-25 June 1993.

[6] Adopted by the UN Conference on Environment and Development (UNCED) in 1992.

environmental impact assessment. Other guidance given by relevant international bodies provides more detail as to the scope of an EIA but is equally non-prescriptive as to the precise form that the process should take[7].

10.4. These observations must be kept in mind in comparing the English and Belizean systems.

10.5. In Belize there is no general system of planning control and consequently no comparable system of different decision makers such as one finds in England i.e. the various planning authorities, inspectors and Secretary of State. The entire system of clearance for environmental projects is overseen by the DOE, subject to advice from the NEAC where appropriate. It is much less formal than in England. It is misleading to think of the grant of clearance as analogous the grant of planning permission. The system in Belize operates against a background where the general rule is that permission is not required for development.

10.6. A summary of the English Regulations is set out in Appendix I to this case. The First Respondent notes the following main differences between that regime and that in Belize:

10.6.1. In Belize it is not a condition precedent to the grant of clearance that there must be a complete EIA report, at least not in the sense understood in the English authorities.

10.6.2. In Belize the EIA process contemplates monitoring and the working through of conditions after clearance is granted and this permits matters to be left unresolved at the clearance stage to a much greater extent than in England.

[7] See e.g. Goals and Principles of Environmental Impact Assessment Preliminary Note – issued 16th January 1987 by UNEP – United Nations Environmental Programme.

10.6.3. In Belize, the consultation process is different. In some respects consultation in Belize is less extensive than in England. However, Belize provides for consultation in the course of the EIA and has its own system of expert scrutiny through the NEAC. The decision in *Berkeley v Secretary of State* [2001] 2 AC 603 is not applicable.

10.7. These differences are developed below

11. NO CONDITION PRECEDENT

11.1. It is not the case, as claimed by the Appellant in the Court of Appeal, that in Belize a fully complaint report of an EIA is a condition precedent to the grant of clearance. This point was put in the Appellant's skeleton of 31st July 2003 as follows:

"The Belizean regime…requires an environmental impact assessment compliant with (very similar in the two jurisdictions) requirements to be submitted and considered by the decision-maker in deciding whether to permit major development projects to proceed".

11.2. In the Courts below:

11.2.1. Conteh CJ held, at paragraph 24, that there was no explicit provision in either the Act or the Regulations to the effect that "the decision whether a project or activity can or cannot proceed, is to be determined by the **adequacy or otherwise of the EIA**" [original emphasis], and at paragraph 30: "There is no **explicit** provision that the EIA is a *sine qua non* for the grant of permission for the project to proceed".

11.2.2. In the Court of Appeal:

11.2.2.1. Rowe P, with whom Mottley JA agreed held [at paragraph 23] that "neither the NEAC nor the DOE is entitled to grant environmental clearance for this project without having first received a complete EIA and evaluating it for adequacy and compliance with the Act and Regulations". However, this required only that the EIA be "facially complete" in the sense that it "addresse[d] all the minimum requirements of Regulation 5 and section 20 subsections (2) and (3) of the Act". He considered that the EIA in this case did comply.

11.2.2.2. Carey JA also considered (at paragraph 21) an EIA would be complete as long as it complied with Sections 20(2) and (3) of the EPA and Regulation 5 of the EIAR. However, he considered that the passage from the judgment of Conteh CJ paragraph 30 considered above was not necessary to his decision.

11.2.3. The First Respondent's position is that a complete EIA is not a necessary condition precedent to the grant of approval by the DOE. But in any event:

11.2.3.1. To the extent that it may be said to be a condition of valid approval, all that is required is that the EIA is "facially complete" in the sense described by Rowe P, that is, it addresses the minimum requirements of regulation 5 and section 20. The EIA did comply in this sense.

11.2.3.2. The Court of Appeal was right to hold that the EIA was complete when judged by the criteria applied in *Prineas* and relied on below. It sufficiently alerted the decision-maker to the significant environmental effects.

11.3. The English regime imposes a specific limit on the power of the decision maker to grant planning permission if they do not take account

of the environmental information (Reg 3). That information includes the environmental statement (ES) and if the ES fails to comply then planning permission cannot be granted[8]. Regulation 12 of the EIAR does not produce this result. It only requires that an EIA be prepared before the DOE makes its decision. The DOE takes account of that information as relevant information but the submission of a complete EIA is not a condition precedent to the grant of valid clearance.

11.4. This is consistent with:

11.4.1. The fact that the procedures overall are much less formal or elaborate than in England. There is no detailed provision for formal screening or scoping opinions. This is dealt with in the EIAR but subject to the general overview of the DOE. The English Regulations provide for the developer to have access to information held by other bodies in preparing the statement. The English scheme devotes considerable administrative resources to this stage of the process. This reflects the Directive that the assessment of environmental effects must be "conducted **on the basis of the appropriate information supplied by the developer".** Information provided by other sources is supplementary only. In Belize, the lack of formality is inconsistent with defects in the EIA being fatal to the process.

11.4.2. The EIA cannot be looked at in isolation. The DOE has a plenitude of powers. It may obtain information from other sources. It receives advice and further information the NEAC (which does not exist in England). It also receives observations from members of the public and any other interested bodies. It may conduct its own

[8] See Newman J in *Burkett* above at para 8(iii).

environmental assessment and may "synthesise the views of the public and interested bodies" [EPA section 20(6)].

11.4.3. The English Regulations make clear that a defective Environmental Statement (ES) will not qualify as an ES at all. Thus they refer at various stages to the document that the developer states is an ES and Regulation 19 of the English Regulations refers to information required by the authority to be included in order for the document to "be an ES"[9]. Thus, when the authority makes a judgment about whether or not the ES complies with the minimum requirements, it makes a decision about whether it actually is an ES. If it does not so qualify then there cannot be the appropriate environmental information and the authority cannot grant permission. The position in Belize is different. A deficient report of an EIA is still an EIA for the purposes of the DOE's powers under Regulation 12 (to make a decision on the project). Regulation 23 makes this clear. If the DOE considers the EIA to be defective then it may (not must as in the case of the English Regulations) require the developer to submit further information or take other action. If it does request this then the EIA is not complete until that information is provided but there is no indication that if the DOE decides not to do so then the EIA loses its status as such.

11.4.4. The Belizean Regulations in Regulation 19 include certain formal requirements about the report, for example it must contain a cover page and table of contents. It cannot be intended that all of these elements are conditions of a valid EIA and hence a valid clearance.

[9] See also Newman J in *R ota Burkett v LB Hammersmith and Fulham* [2003] EWHC 1031 (Admin). At paragraph 8(iii) "Where the developer fails to address matters which must be included in the statement,

11.4.5. The points made below, about an EIA in Belize involving a continuing process, in particular the requirement that the EIA identify gaps in knowledge, are also inconsistent with a complete EIA being a condition precedent.

12. THE EIA PROCESS IN BELIZE PERMITS CERTAIN MATTERS TO BE LEFT FOR FUTURE CONSIDERATION

12.1. Regulation 5 (f) expressly requires that an EIA should include as one of its minimal requirements:-

"(f) An indication of gaps in knowledge and uncertainty which may be encountered in computing the required information."

12.2. Similarly, regulation 19 (h) expressly recognizes that a lawful and satisfactory EIA will nonetheless leave certain matters for further resolution. Thus the regulation requires:-

"19. A report of the environmental impact assessment shall include the following:-

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."** (added emphasis)

12.3. There is no counterpart to Regulation 19(h) in the English Regulations. Regulation 5(f) is superficially similar to paragraph 7 of Part I of schedule IV to the English Regulations. That requires "an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information". This does not have to be in every environmental statement but is required only to the extent "that is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile" (English Regulation 2). EIAR Regulation 5(f) refers to gaps in knowledge, however they arise[10]. The effect is that this Regulation and Regulation 19(h) expressly contemplate that at the stage that the EIA is completed it may well not contain enough to allow a decision to be made on the basis of "full information" about the proposed development as that term might be understood in English cases[11]. Equally, the Belize regime accepts that this information will not be available, through the report of the EIA, to members of the public. It is for the DOE to decide how to deal with the gaps in information, whether to call for further information, and ultimately whether they are so substantial that the project ought not to proceed.

12.4. This is supported by the remaining provisions of the EPA and EIAR. The Belize regime deals with uncertainty at the EIA stage by a series of measures. Again, the regime is significantly different from its counterpart in England. As well as the DOE having other information available, and expert scrutiny by the NEAC (above) the Belize regime places an EIA in a continuing process that looks beyond the grant of clearance for the

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[10] This wording does not appear to have been inspired by the EC Directive or the English Regulations. It follows more closely the wording of the UNEP Guidelines Principle 4(f).

[11] See Lord Hoffmann in *R v North Yorkshire County Council, Ex p* Brown l2000] 1 AC 397,404 that the purpose was "to ensure that planning decisions which may affect the environment are made on the basis of full information ".

project and expressly refers to measures that will only take effect after clearance is given. Thus, the DOE may grant approval subject to conditions (s. 20(7)). An EIA should include a monitoring plan (Reg 19(l)) and assessment of an EIA by the NEAC requires the NEAC to address "the need for and the requirements of any follow up programme in respect of the project". It is misleading to say that this is analogous to the imposition of conditions in English planning control. Approval by the DOE for a project is not the grant of planning permission and the considerations in the English cases do not apply.

13. DIFFERENT PROCEDURE FOR PUBLIC PARTICIPATION

13.1. In its skeleton of 25th July 2003 the Appellant again drew an analogy with the English regime and argued that in Belize as well as in England [para 82(b)]:

"A key purpose for such an assessment is to allow the public to be informed about, and thus comment on, the project and its environmental implications; and to have those comments taken into account".

13.2. In Belize this is also a general objective of the EIA regime. But again the procedures are different and it is wrong to assume that the same consequences flow in Belize as in England. In Belize, consultation must take place as part of the preparation of the EIA and the results must be included in the report (Regulations 18(1) and 19(m)). There is no similar requirement in England. Participation after submission of the EIA is secured in Belize by Regulation 20, requiring public notice to be given and such further notice as may be directed by the DOE. This allows

for inspection of the EIA and for any person to make objections and representations. There is also a power to hold a public hearing (Regulation 24). There is no provision (unlike the English Regulation 13(2)(c)) for submitting the EIA to nominated consultation bodies. Belize achieves widespread specialist input into the decision making process through the NEAC.

13.3. The English cases stress the need for completeness of the EIA for two reasons. Firstly, it is part of the environmental information (see above). Secondly, it is the document to which the public has access for the purpose of the participation in the process. In *Smith v Secretary of State for the Environment* [2003] EWCA Civ 262 Waller LJ explained that one of the reasons why an authority will fail to comply with (what is now Regulation 3(2) – the duty to take account of environmental information) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation:

"because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given".

Similarly, in *Berkeley v Secretary of State for the Environment and another* [2001] 2 AC 603, a case where there had been no environmental statement at all, Lord Hoffmann stressed that:

"The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA".

For that reason permission was quashed even though the same information might been available in other documents.

13.4. The same considerations do not apply directly in Belize. A valid EIA may have substantial gaps in knowledge (see above). Where further information arises in the course of the EIA process then there is no requirement that that should be re-presented to the public through an amended EIA (again in contrast to the English Regulations where additional information is obtained from the developer[12]). This is not to downplay the importance of public involvement in Belize. But the Regulations there do not require public consultation on every aspect of the proposal or mitigation.

14. THE CONTENTS OF AN EIA REPORT

14.1. In this section the First Respondent sets out its submissions as to the content of an EIA and the minimum information the DOE has to have before giving clearance. The First Respondent's key submissions are:

14.1.1. An EIA is an aid to decision-making and not an end in itself[13]. Its object is to alert the decision maker to significant effects. Criticisms of the EIA are relevant only to the extent that they impact on the decisions under challenge, namely the decision of NEAC to recommend clearance and the decision of the DOE to grant clearance.

14.1.2. It is for the DOE to determine, on advice from the NEAC whether the information contained in the EIA is adequate, whether to ask for additional information, and whether to grant clearance. Each of these decisions can be challenged only if it is irrational.

[12] English Regulation 19 then requires that that the fact that that information has been submitted should be advertised again. No decision is to be taken before there has been an opportunity to comment.

[13] "It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race" - *R ota Jones v Mansfield DC* [2003] EWCA Civ 1408 para 58 per Carnwath LJ

14.1.3. The English authorities relied on by the Defendant are not applicable because they relate to a different regime, but in any event they do not decide anything inconsistent with the above.

15. THE OBJECT OF AN EIA REPORT

15.1. The decision in question is that of the DOE to grant clearance. It has to examine the "relevant significant environmental issues" and to consider the factors identified in Regulation 26 (although directed to the NEAC these are clearly relevant matters for the DOE to consider as well). As noted above, the DOE may grant clearance even if significant effects are identified and even if there is uncertainty or a gap in knowledge about the relevant effects. In fact, for reasons developed below, there was no substantial gap in knowledge in any of the respects complained of by the Appellant.

15.2. Consistently with the above, an EIA is not required to be perfect or to identify completely every effect. It has to identify and assess only the significant or main effects. The key issue is whether, taken together with any other material, it alerts the decision-maker to the significant effects. The passage from *Prineas* applied both at first instance and in the Court of Appeal[14] is applicable (subject to the proviso that the Belize regime allows for gaps in information in the EIA and that an EIA is not a condition precedent see above):

"Clearly enough the legislator wished to eliminate the possibility of a superficial, subjective and non-informative environmental impact statement and any statement meeting that description would not comply

[14] However, for reasons stated above, in Belize, the final decision to grant approval would not be a nullity even if the EIA was defective in this sense (i.e. superficial or uninformative). If there was no other material then the decision might be challenged on rationality grounds or on the basis that the DOE had failed to take account of relevant matters – but it would not be a nullity because of defects in the EIA.

with the provisions of the Act, with the result that any final decision would be a nullity…provided 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 and the Department of the Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations."

16. To similar effect are statements in the English cases. For example:

16.1. Sullivan J in *R v Rochdale MBC ex parte Milne* (200) 81 P & CR 365 stated as follows:

"the environmental statement does not have to describe every environmental effect, however minor, but only the "main effects" or "likely significant effects". It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required that there would be a real danger of the public during consultation, and the local planning authority in determining the application, 'losing the wood for the trees.'"

16.2. Similarly in *R v Rochdale MBC ex parte Tew* [2000] Env LR 1 Sullivan J. stated:

"That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed".

16.3. The Court of Appeal was correct to adopt this approach as appears from Carey JA para 28 of his judgment:-

"I accept as valid statement of the law that the EIA need not cover every topic and explain every avenue and that failure in that regard does not

inevitably invalidate the report. What is important is that it covers all relevant matters in the light of the project and the impact on the community from an environmental perspective."

16.4. And at para 32:-

"The EIA, it is clear, is not intended to be perfect in every way. Essentially it is designed to inform the decision-maker so that the "environmental consequences can be properly understood. [Prineas v The Forestry Commission of New South Wales (supra)]. There can be no such thing as a complete EIA in the sense being contended for on behalf of the Appellant. The EIA, a copy of which was submitted, was certainly comprehensive and exhaustive and could not be fairly described as superficial or objective. It comprises some five substantial volumes and covers the range of environmental concerns raised by the Appellant's representative."

16.5. The Respondent also adopts the reasoning of Rowe P at paras 24-57 of his judgment. It is not possible to argue that simply because the NEAC came later to require further information on certain issues, therefore the EIA is incomplete. The DOE has power to formulate conditions on which clearance for an EIA can be granted. Thus, the significance of the NEAC later calling for further information has to be judged in context and by reference to its distinctive role. At paragraph 33 the President states:-

"Where therefore the NEAC was evaluating the EIA it had in mind the plenitude of its powers and could fully take into consideration all the concerns of the geology expert in the NEAC, the views of BECOL and the additional and continuing studies that BECOL would make. This was a case of making "good" better and not of shutting the eyes of the assessors to patent dangers to the environment."

16.6. An EIA will only be inadequate for these purposes if the decision-maker is bound to conclude that it so completely fails to address the

required components that it does not qualify as an EIA at all[15]. This is in no way demonstrated simply by showing gaps or dissatisfaction with the measures proposed. As Ouseley J put it in *R(ota Bedford & Clare) v LB Islington and Arsenal Football Club PLC* [2002] EWHC 2044 (Admin) (para 203):

"I confess to approaching Mr McCracken's submissions with a degree of doubt as to whether the deficiencies to which he drew attention could be such as to mean that Islington could not reasonably regard the material as constituting an Environmental Statement. It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the local planning authority's part in treating the document as an Environmental Statement or that there was a breach of duty in Regulation 3(2) on the local authority's part in granting planning permission on the basis of that Environmental Statement".

17. JUDGMENT GIVEN TO THE DOE

17.1. It was accepted in each of the Courts below that it is for the DOE to decide, on advice from the NEAC, whether the EIA is adequate and whether to grant clearance for the project. The Supreme Court and the Court of Appeal both held that they could interfere only if that decision was *Wednesbury* unreasonable [Conteh CJ at para 60-1 at p. 586 and Rowe P at para 34 p. 685]. The Courts below were right to take this approach.

[15] Although the Respondent's case – see below, is that a deficient EIA is still an EIA for the purpose of empowering the DOE to grant clearance.

17.2. This follows from the wording of the EPA and the EIAR. These emphasise that a decision on an EIA is a matter of evaluation and judgment. For example:

17.2.1. By section 4(m) the DOE is to "examine and evaluate" EIAs.

17.2.2. Sections 20(1) and (4) of the EPA refer to the "evaluation" of the EIA and its approval under s. 20(7).

17.2.3. Where further information is required under the power in Regulation 23 EIAR then the EIA is not complete until it is provided "to the satisfaction of the Department" (Regulation 22(3)).

17.3. This is consistent with the English cases. Decisions both as to whether an EIA is required at all and as to the adequacy of an EIA that has been submitted are decided by the authority in the first instance. Examples are: *R v Cornwall CC ex p Jill Hardy* [2001] Env LR 473 at paragraph 37; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 at pp 610G-H and 614G – 615A, *R ota Jones v Mansfield DC* [2003] EWCA Civ 1408 at paras 14-17 and 60. The Courts will defer to the planning authority's judgment in all but the most extreme cases (*R v Rochdale MBC ex p Milne* (2000) 81 P & CR 365 at para 108 per Sullivan J). There is no reason to apply a more intensive standard of review in Belize.

18. RELEVANCE OF ENGLISH AUTHORITIES

18.1. The Appellant relies on a number of English authorities and in particular *R v Rochdale MBC ex p Tew* [2000] Env LR 1; *R v Cornwall CC ex p Jill Hardy* [2001] Env LR 473; *Smith v Secretary of State for Environment, Transport and the Regions* [2003] EWCA 262. These

authorities are relied on as authority for the proposition that it was unlawful for the authors of the EIA, and also the decision-makers, to postpone consideration of environmental effects and mitigation measures. The Respondent submits:

18.1.1. These authorities are decided in the context of English planning control. They do not provide a guide to the correct approach in Belize where the regime is different. Conteh CJ [at paragraphs 27-30and 58] and the Court of Appeal of Belize [Rowe P at para 23 and 57 and Carey JA at para 23] were both right to hold that these authorities did not assist here.

18.1.2. For present purposes they are examples of cases where, on the facts, the decision maker either did or did not have sufficient information rationally to make the decision they made.

18.2. *R v Rochdale MBC ex p Tew and others* [2000] Env LR 1 involved the adequacy of the statement submitted by the developer. The Applicants challenged a decision of the Respondent to grant outline planning permission for a business park development. All matters were reserved and the application was described by the judge as a "bare outline". The application stated the approximate number of dwellings and the hectarage of built land and amount of total floor space. Permission was granted subject to conditions, for example that no works should commence until "a scheme for the conservation and enhancement of [a brook in the site] has been approved". Sullivan J quashed the permission. The statement did not contain information capable of satisfying the requirement that it included a "description of the development concerned". Since there was no description of the development it was not possible to describe mitigation measures. There had to be, he held, a

description of the development, "sufficient to enable the main effects which that development is likely to have on the environment to be identified and assessed, to enable the likely significant effects on such matters as flora, fauna, water air and the landscape to be described, and to enable mitigation measures to be described where significant adverse effects are identified". The reason that these matters had to be addressed at this stage was that after that there was no going back. Outline planning permission could not be withdrawn without at least payment of compensation.

18.3. The development in Tew was considered again in *R v Rochdale BC ex p Milne* (2000) 81 P & CR 365, again by Sullivan J. The application had been re-submitted with further details but still reserved design of the development. Sullivan J held that even though some matters were still reserved that were capable of having an effect on the environment, that did not preclude the grant of permission. In respect of the resubmitted application the authority were entitled to say "We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect." [para 114]

18.4. As *Milne* shows, *Tew* does not decide as a matter of principle that no mitigation or other matters may be postponed to a later stage. The permission was quashed in that case because the information provided could not comply with the minimum required in an environmental statement and did not allow the planning authority to identify the impact of the proposed development. Under the English system that issue had to be addressed when planning permission (even if only in outline) was

granted and could not be cured by dealing with those points at the reserved matters stage. But this does not follow in every case.

18.5. These two cases were explained in *R v Bromley LBC ex p Barker* [2001] EWCA Civ 1766 (at para 33 per Latham LJ):

"The premise upon which he bases his judgments [i.e. Sullivan J in Tew and Milne] is that the 1988 Regulations require the full environmental impact of a proposed development to be capable of being identified at the time the planning authority considers the grant of permission. It may or may not be possible in any given case to define that impact in a purely outline application. If it is not, then clearly permission cannot be granted and the matter must proceed by way of an application for full permission. However, in many cases, sufficient information can be provided within an outline application to enable the planning authority to determine the impact that such a development is capable of producing and to make an EA accordingly. The planning authority has ample powers to require further information by way of detail to enable it to carry out this task; and always has the sanction of refusing permission if the material is not made available".

18.6. In *R v Cornwall County Council ex p Hardy* [2001] Env LR 473 an environmental statement was provided under the TCP regulations 1999. It said that bats (a protected species) might be found in mine shafts that were the subject of the application but that more detailed surveys were required. The report to committee accepted this but suggested that this could be dealt with by the imposition of appropriate conditions. The permission was quashed. Having accepted that additional surveys had to be carried out the authority could not rationally conclude that there were no "significant effects" requiring mitigation. They could not decide that until they had the results of the surveys. They therefore did not have full environmental information before granting planning permission. If bats had been found in these mine shafts then that would have highly material as to whether the development could proceed in the first place, given

their protected status. Therefore the authority could not properly grant permission without knowing that information.

18.7. This is not a true case of an environmental statement or consequent planning decision being defective for leaving matters over. The decision was quashed because the authority adopted inconsistent positions and considered that there would not be a significant impact when that conclusion was not open to them.

18.8. The position here is quite different. It is known that there will be serious effects on identified species and that many mitigation measures proposed are untested. The DOE is in a position to form a judgment that there will be a significant impact on these species in this area. They have confronted that and made their decision accordingly. It is not inconsistent with that position to require further surveys and mitigation work so far as that is possible.

18.9. In *Maureen Smith v Secretary of State* [2003] EWCA Civ 262 the challenge was not to the adequacy of an EIA but to the grant of planning permission by an inspector on terms that appeared to leave a substantial discretion to the local authority to agree future conditions (see paras 4 and 34 of Waller LJ's judgment.) That complaint was rejected on the facts of the case. It was recognized that it was an important principle that where consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interest of the environment as one of their objectives (See para 33 of Waller LJ's judgment). All that was decided was that there were limits to the extent to which a decision-

maker is entitled to leave the assessment of likely impact to a future occasion when deciding whether to grant planning permission.

18.10. It is submitted that the cases noted above do not establish, even in English Law, a general rule that a decision maker cannot leave any matters for determination at a later stage. The point is that the decision maker cannot act in ignorance of a matter that is so fundamental that they cannot reach a proper decision without it.

18.11. However, if the decision-maker legitimately reaches the position that they have enough information to make a decision, either that there will not be significant effects, or that clearance should be given despite the effects identified, then they do not then act unlawfully if they make provision for further investigations or mitigation measures to take effect in the future.

19. BACONGO's ARGUMENTS

19.1. In what follows the Respondent addresses the arguments raised by the Appellant. It concentrates on the point raised in the Appellant's skeleton of 25th July 2003 that:

"It is unlawful: for an EIA (and thus a project) to be approved where there are significant acknowledged gaps in the required information and in reliance on future, post-approval, assessments".

19.2. The specific areas where gaps are alleged are:

19.2.1. Geology of the dam project.

19.2.2. Rare plants.

19.2.3. Archaeology.

19.3. These points will be dealt with in turn below. However, certain preliminary points can be made:-

19.3.1. The EIA was a comprehensive document which was recognized by members of the NEAC to be a superior document of its kind. It conscientiously satisfied the statutory requirements laid down in the regulations, and served the essential purpose identified in the case law of informing the decision-maker so that "the environmental consequences could be properly understood".

19.3.2. The NEAC rigorously considered the EIA at a series of meetings, took account of public concerns communicated to it, sought further information on important issues, and reached a decision to approve the EIA by an overwhelming majority. Thus by the time that the NEAC reached its decision on the 9th November 2001, any inadequacies in information in the EIA had been addressed by the NEAC itself which had approved the EIA with the benefit of all the information that was by then available to the NEAC (including information about the geological issues and further information provided by BECOL).

19.3.3. There was extensive public consultation both during the compilation of the EIA and after. Indeed after the EIA was published and deposited in public libraries, public concerns were communicated to the NEAC and taken into account.

19.3.4. The DOE approved the project on 5th April 2002 subject to conditions elaborated in the ECP which had been formulated after consultation with the statutorily approved experts of the NEAC, including the BACONGO representative on NEAC. Further investigations had also been carried out in relation to geology. By the time the DOE reached its decision on April 5th 2002 it had available to

it further information which addressed the alleged gaps of knowledge identified by the EIA and it had formulated a more elaborate series of mitigation measures.

19.3.5. After the ruling of the Chief Justice, a public hearing was held and attended by some 300 participants, including representatives of BACONGO. The concerns of interested parties were fully expressed. Many of the concerns expressed had already been taken into account by the DOE in developing the ECP. The majority of participants were in favour of the project. The DOE considered the comments made and decided that the project should go ahead, subject to the conditions contained in the ECP.

19.3.6. In the Court of Appeal, Rowe P emphasised the care with which the NEAC evaluated the EIA. He developed this mainly by reference to the Geology issues (see below), but expressly said (at paragraph 34[16]) that this applied to the other grounds raised under this head.

19.4. In general the Respondent's response to the matters of detail complained about is that:

19.4.1. The Respondent had sufficient information about significant adverse effects but decided that the project should proceed nonetheless. It is not inconsistent with this to propose mitigation measures to mitigate this acknowledged adverse effect.

19.4.2. The Respondent did not in fact leave over for further consideration any substantial matters. There was nothing going to the heart of its decision on the project which was left over.

19.4.3. The Appellant's complaints are complaints of detail about the merits of the mitigation measures proposed by the Respondent. They do not come close to showing that the EIA so failed to comply with

[16] The reference to hydrology in that paragraph is a typographical error.

the requirements of the regulations that it cannot be said to be an EIA at all. Still less do they show that the DOE could not conclude that this was a valid EIA or that the DOE did not have proper information to make the decision it did. The courts below were right to conclude that the decision that the EIA was sufficient was not irrational, nor was the decision to grant clearance.

20. THE GEOLOGICAL FOUNDATION OF THE DAM

20.1. The First Respondent's case is that there was nothing materially deficient about the EIA's description of the geology of the site. In any event, the NEAC and the DOE caused proper investigations to be made and the decision to grant clearance was based on adequate information. The site is safe. The Court of Appeal was right so to hold.

20.2. The initial complaint in respect of this matter [amended claim for judicial review pp 12-23] was:

20.2.1. The decisions of the NEAC and the DOE were ultra vires because the EIA on which the decision was premised included "faulty and misleading geology reports and in the light of this failed to include a description of the possible impact of the project on human beings" [4.1.2.1].

20.2.2. The NEAC acted "without the kind of information that would enable it to come to a proper decision", in particular lack of correct or unchallenged geological studies and a lack of a monitoring plan or "mitigation measures against which any compliance plan could be formulated" [4.2.3]

20.3. Conteh CJ held that the decision to approve the EIA was not irrational.

20.4. The grounds of appeal to the Court of Appeal of Belize alleged that:

20.4.1. Conteh CJ misdirected himself in upholding an EIA "which left material matters for future assessment" [Ground 4.1]. In particular it failed to include definitive information about the geological foundation of the dam as was recommended in EIA as necessary to "reduce the uncertainty by conducting further investigations including precise mapping of geological contacts and land forms…mitigation measures could include sealing cavities" [Ground 4.1.h, 7.1.b]

20.5. Rowe P dealt with this at paras 27-31 and paras 36-37 of his judgment. In essence, he found that the EIA sufficiently discharged its function in identifying the geological issues, and thereby dealt with the Appellant's complaint that the EIA was inherently deficient in this respect. The President recognized that an issue for further investigation was identified relating to the geology of the dam and that the NEAC caused this to be investigated this further. But the difference of opinion as to the rock type of the dam area between the NEAC geology expert and the EIA report (namely whether it was sedimentary rock or granite as stated in the EIA) did not affect the competency of the rocks for the construction of the dam. (See para 28, 30 and 36). Therefore there was no "absence of complete and accurate geological data when the NEAC met and voted for environmental clearance". [para 37]. Thus, the EIA was not in itself defective. Nor was the decision of the DOE defective or based on inadequate data when it came to give environmental clearance.

20.6. The EIA did indeed recommend further mapping of the area "including further investigations to include precise mapping of geological contacts and landforms to address karsatic landforms below the full

supply level of the reservoir". This was recognised by Rowe P [at paragraph 32 citing section 6.6.1] and it was intended that the DOE would "issue an ECP that would set out the conditions on which clearance would be granted" [Rowe paragraph 33]. However,

20.6.1. The object of that mapping was to ensure that the reservoir area was not affected by limestone features such as sinkholes through which water might drain away. These did not affect the viability of the project but if present they would need to be filled in (as was made clear in the EIA report – at page 235-6). This is exactly the kind of investigation that can properly be left to a later stage. It does not affect whether it can or should go ahead but obviously needs to be addressed before the reservoir is filled.

20.6.2. In any event, this information was available by the time the DOE made its decision, as contained in the ECP. By then Zulfiquar Aziz had carried out further surveys of the reservoir area and had confirmed that the reservoir was not so affected [see p. 390]. The Appellants may not agree with these surveys but the decision-maker did. That is not a ground for judicial review.

20.7. At several points in his judgment Rowe P refers to the care with which the NEAC approached its task. Thus he refers:

20.7.1. At paragraph 29 to the "protracted discussion on the geology issue by NEAC members".

20.7.2. At paragraph 32 to the "close attention" paid by NEAC (in this passage and at 37 the President refers to hydrology and not geology. This is apparently a typographical error. He was obviously aware of the difference between the two issues because he refers correctly to hydrology at paragraphs 39-41).

20.7.3. At paragraph 36 he says: "NEAC members did not take their task lightly and the vote was only taken after that expert was satisfied with the information provided by BECOL".

20.7.4. At paragraph 37 he says the NEAC approached their task in "with the utmost care"

20.7.5. This conclusion was amply supported by the evidence as is shown in Appendix II to this Case.

20.8. The Appellant appears to suggest that the rock type may affect the design of the dam and so its final cost. There is no requirement that an EIA shall include detailed design specifications and these are normally identified at a much later stage in the project. This is clear from the evidence of Jeremy Gilbert Green at p. 395: "At the EIA stage a final design for the dam is not yet settled upon. Only a high level or preliminary design is completed. A more detailed design is done upon approval of the EIA, taking into consideration any additional information learned or constraints imposed by the process prior to tendering the project". Equally, the costs of the project are not required to be identified in the EIA.

20.9. In its skeleton argument of 25th July 2003 the Appellant says [paragraph 105] "if the dam breaks because the foundation had fractures or fault lines nearby, that is a main effect". The competence of the foundations has been dealt with above. A claim based on fault lines did not form part of the Appellant's Grounds in the Court of Appeal. In fact the material before the NEAC and DOE did fully address the fact that the proposed dam was in an area of moderate to high seismic activity and the dam was designed to international standards to withstand this (EIA Main report pages 79-80 and 237 and NEAC meeting of 8th November 2001 at p 260 para 3.01). The references are addressed in Annexe II.

21. FLORA AND FAUNA

21.1. The First Respondent's case is that the EIA adequately alerted the DOE to the significant risks to flora and fauna. The DOE's decision was not flawed by the lack of any material information. The merits of the decision were a matter for the DOE. The Court of Appeal were right to conclude that the EIA was sufficient and that the decision of the DOE was not irrational.

21.2. The grounds of appeal to the Court of Appeal alleged (so far as relevant to the current basis of the appeal as it is understood by the First Respondent) that the EIA was defective (and so Conteh CJ was wrong to uphold it) because it:

21.2.1. Failed to conduct and present the studies that the report of the Natural History Museum of London stated were necessary "in order to detail more clearly the magnitude of the identified impacts and to assess other effects wildlife [Ground of Appeal 4.1.b].

21.2.2. Failed to conduct and present multi-year studies "including investigation of seasonal movements between different geographical areas over the total range of the Selva Maya population of Scarlet Macaw", that according to 'the report of the Natural History Museum of London are "necessary to understand the Long-term Population fluctuation of the Scarlet Macaw throughout its range [Ground of Appeal 4.1.d].

21.3. The Court of Appeal was right to conclude that the Appellant's emphasis on the NHM report was taken out of context [Rowe P paragraph 44 at p. 690] and that:

"What appears clear from the multitude of wildlife issues dealt with in detail in the EIA is that this was not a cursory presentation by the developer to the DOE but a fully considered and conscious effort to meet the requirements of the Act and Regulations. The NEAC and DOE were in a position to weigh and take a decision on this issue and I find nothing irrational in their decision" [para 45 pp 690-1].

21.4. Specifically in relation to plant species, Rowe P noted that the EIA report sufficiently identifies species that might be at risk and proposes mitigation although it "concedes that, unless the transplantation programme is successful prior to construction, the environmental impact will be serious" [46].

21.5. This is not a case like *Hardy* where the decision maker had itself accepted the need for further studies necessary to make any kind of assessment of a key significant effect (whether there was a population of bats in the affected area). The NHM recommended further investigations but the compilers of the report did not agree and submitted the report on that basis. This is an example of the kind of case referred to by Cripps J in *Prineas* "there will be always some expert prepared to deny adequacy of treatment to it and to point to its shortcomings or deficiencies". The EIA presented the decision maker with its own conclusions and this primary material. This gave the NEAC and the DOE the opportunity to evaluate that material and draw their own conclusions. The information available made clear that there were substantial environmental risks and what those risks were. The gist of the recommendation by NEAC and the decision by DOE was to give clearance despite those risks but to recommend whatever could be done by mitigation in the ECP. Nothing fundamentally affecting the nature of the decision was left over to be determined at a later stage.

21.6. In the Court of Appeal Ground 4.2 alleged that the EIA did not comply with the statutory obligation under section 20 (3) of the Act, and Regulation 5 (e) and 19 (k) of the EIA Regulations to specify the mitigation measures that would be taken. It is not clear how far this is now pursued as an independent point. The Respondent's case is that this has to be considered together with the information contained elsewhere in the EIA about the impact on wildlife and that overall the information was sufficient.

21.7. For the reasons above, the appropriate point to look at mitigation measures is the ECP and not the EIA.

21.8. In any event, it is important to identify what the EIA requires by way of identification of mitigation measures. The obligation is to state the "measures which a proposed developer intends to take to mitigate any adverse environmental effects" (s. 20(3) – EPA). The Regulations require the EIA to state a mitigation plan (Regulation 19(k)) and Regulation 5 requires an identification and description of "measures available to mitigate the adverse environmental impacts of proposed activity or activities and assessment of those mitigative measures". An EIA that fails to address these matters at all, may be formally deficient[17]. However, an EIA is not defective in this sense if the mitigation measures proposed are not as far reaching as they might be or they may be ineffective. The developer is not obliged to identify and provide for every last feasible means of mitigation. The DOE may decide to impose conditions requiring them to do more than they have agreed to do, but that is a matter for their judgment.

[17] That does not invalidate the subsequent grant of clearance for reasons noted above.

21.9. The minutes of the NEAC meetings (see annexe) do refer at times to the mitigation measures being inadequate. (see e.g. the chairman's comment at 2.21 on 8th November 2001). However, it is clear in context that this is a criticism of the extent of mitigation measure proposed rather than a claim that the EIA is non compliant. There is no inconsistency in noting this kind of deficiency but then approving the project, subject to appropriate measures in the ECP. Once again, it demonstrates how seriously the DOE took their responsibilities and the fact that they critically examined the EIA.

21.10. This is consistent with the decision of the Court of Appeal. Rowe P stated at para 56:-

"I will only repeat at this stage …(to) it was then for the decision-makers to detemine whether these measures were sufficient to satisfy them that environmental clearance could be provided for the project."

21.11. He then continued at para 57 to rule that "in the context of the Act and the Regulations the need for further studies identified in the mitigation measures did not in my opinion, render the environmental information incomplete nor did it cause the decisions of the NEAC and the DOE to be irrational".

21.12. This conclusion was again amply supported by the evidence, as shown in annexe II.

22. ARCHAEOLOGY

22.1. The First Respondent's case is that the EIA sufficiently identified the nature and limited significance of the archaeological remains at risk.

The ECP contained adequate mitigation measures. The decision of the DOE was not irrational. The Court of Appeal was correct so to hold.

22.2. The Grounds of Appeal alleged, so far as relevant, that the EIA was defective because it:

22.2.1. Failed to conduct and include surveys that the EIA stated were needed to understand the impacts of the dam or archaeological and cultural heritage resources as recommended by the EIA [Ground 4(i)(e)].

22.2.2. "Failed to conduct and include the more extensive survey of archaeological resources (8 prehistoric Mayan structures in the dam's path) that the archaeology representative on the NEAC …recommended" [Ground 4.1.f]

22.3. Archaeological remains were found in the area of the transmission lines and in the area to be flooded. None were found in the area of the footprint of the proposed dam itself. Mr Thompson, the Archaeology member on the NEAC did not consider that the remains were of the magnitude of the major sites in Belize. He considered that the issue could be adequately addressed by investigations funded by BECOL and provided for in the ECP. The Court of Appeal was entitled to conclude on this issue that:

"The extent to which the matter of archaeological and cultural heritage sites was treated in the EIA and considered by the member of NEAC who voted on the project indicates that at all levels there was a seriousness of approach and a desire to preserve the cultural heritage of Belize. There was no submission from the appellant that money could not be provided by BECOL for the archaeological sampling recommended by NEAC. I therefore do not find anything irrational in the decisions of NEAC and DOE in this matter".

[paragraph 48 – p. 692]. The material supporting this conclusion is summarised in Annexe I.

23. COMPLAINT THAT PUBLIC HEARING MUST BE HELD PRIOR TO ANY DECISION ON THE EIA

23.1. The complaint is: "the DOE acted unlawfully in failing to hold before approving, and thus take into account in deciding whether to approve the EIA, representations made at, a public hearing" [skeleton argument of 31st July 2003 para 80].

23.2. Conteh CJ drew a distinction between public consultation in the course of preparing the EIA and a public hearing about the project itself. He held that since the project met all the requirements of Regulation 24(2) a public hearing should be held. However, this could still be done after clearance had been given.

23.3. The Grounds of Appeal [Ground 8] alleged that any hearing must be held prior to the decision to grant approval. Since Conteh CJ had held that there ought to be a hearing under Regulation 24 then the decision to grant clearance should be quashed.

23.4. The Court of Appeal disagreed with Conteh CJ but gave differing reasons.

23.4.1. Rowe P held that the DOE had a discretion whether or not to hold a hearing even when all or any of the conditions in regulation 24(2) are present [paragraph 71]. The Court could interfere only if the decision was *Wednesbury* unreasonable. The decision was not irrational in that sense, particularly as this was a case where the

public had had prior involvement in the development of the project [para 71]. If a public hearing were required, then it ought to be held before the grant of clearance.

23.4.2. Mottley JA held that the DOE had not considered the factors set out in Regulation 24(2) in deciding not to hold a hearing as recommended by NEAC. However, he did not think it was right to grant certiorari because of the impact on good administration of doing so [paragraph 12]. He relied on:

23.4.2.1. The affidavit of Ismael Fabro, to the effect that the Government of Belize had spent $700,000 since approval of the project [paragraph 13 and 16].

23.4.2.2. The fact that a public hearing as directed by the Chief Justice had already taken place [paragraph 16].

23.4.3. Carey JA held that:

23.4.3.1. A hearing was not mandatory and no further hearing was warranted.

23.4.3.2. The complaint had been overtaken by events given that a hearing had already taken place and no further purpose would be served by pursuing the point further.

23.5. The First Respondent’s case is that the Court of Appeal were:

23.5.1. Correct (per Rowe P and Carey JA) to hold that in the circumstances no hearing was necessary. They were entitled to depart from the decision of Conteh CJ because he drew an incorrect distinction between consultation in the course of the EIA process and as to the undertaking.

23.5.2. Correct (per Mottley JA and Carey JA) to refuse to grant relief as a matter of discretion because a corrective hearing had already been held.

23.5.3. Correct (per Mottley JA) refuse to grant relief because to do so would prejudice good administration.

23.6. The First Respondent submits that the correct approach to Regulation 24 is as follows:

23.6.1. The Regulation confers a discretion whether or not to hold a public hearing. That discretion exists even where there is a "high score" on each of the factors identified in Regulation 24(2). Those factors are not exhaustive. Moreover, a high score in respect of the factors does not necessarily point in favour of a public hearing. For example, the fact that there has already been a high level of expenditure on a project may suggest that speedy completion is the priority. Equally, a high level of prior participation may lead to the conclusion that all relevant matters have already been canvassed, or

a project may be so complex that it is not amenable to further elucidation at a hearing.

23.6.2. The discretion under Regulation 24 only arises where NEAC have recommended a hearing. NEAC did not in fact recommend a hearing in this case. The resolution recorded in the minutes of 9th November 2001 is in favour of public consultation and not a hearing [265].

23.7. There is also a discretion as to when to hold a hearing, if any. One of the objects of a hearing is (in Regulation 24(2)(c)) to "assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity". This suggests that a hearing need not take place before the **project** is approved. The hearing may be solely concerned with mitigation or monitoring measures, or the contents of an ECP. The First Respondent submits that there is no fixed time at which the public hearing is to be held but it may be held at any time at which it is still practicable to get information that may assist the developer to comply with its responsibilities under the project.

23.8. There was no basis for interfering with the exercise of the DOE's discretion not to hold a public hearing and the majority of the Court of Appeal were correct so to hold. There had already been an

unprecedented level of public involvement. The First Respondent refers to the background material summarised above.

23.9. If, contrary to the above submissions, the DOE ought to have held a hearing then the lack of one initially had been cured by the fact that there was a hearing before Mr Eric Fairweather on 16th January 2003. Given that a hearing need not take place before approval is granted it was sufficient for this hearing to be held after the decision in principle had been taken. But in any event, it would at that stage have been a disproportionate and empty exercise to quash the clearance itself. The DOE had taken into account the material presented at the public hearing. Nothing new had been presented that tended to undermine the basis on which the decision had been made and the Appellant did not claim that this was the case before the Court of Appeal.

23.10. In any event, Your Lordships Board should not now quash the decision to grant clearance based on a failure to hold a public hearing. There are several reasons for this:

23.10.1. The objectives of a public hearing have already been substantially met by numerous public consultations countrywide that

provided the opportunity for the airing of concerns and the provision of information;

23.10.2. A public hearing was held following Conteh CJ's Order. At that hearing objections and representations were heard and taken into account by the DOE;

23.10.3. This is not a case where the Appellant can claim that it was prejudiced by the failure to hold a public hearing initially. BACONGO, and all the objectors, have had an opportunity to say everything they wanted to say before the decision was made. They have also had an opportunity to make their points at a public hearing. Their only real complaint is that they did not have an opportunity to express their views at a public hearing before the decision was made. BACONGO was involved (through its role on NEAC) from August 2001. It cannot assert that it was prevented from making any point that would have been made, had there been a public hearing before the decision. Indeed, no point was made at the hearing on 16th January 2003 that had not already been made.

23.10.4. It would be contrary to good administration to quash the decision now and refer the matter back so as to start all over again. In *R v Monopolies and Mergers Commission, Ex parte Argyll Group*

PLC, [1986] 1 WLR 763, the Court of Appeal per Sir John Donaldson, M.R. said:-

> *"We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. We have to approach our duties with proper awareness of the needs of public administration. I cannot catalogue them all, but, in the present context, would draw attention to a few which are relevant. Good public administration is concerned with substance rather than form…with speed of decision, particularly in the financial field…a proper consideration of the pubic interest…Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary".*

23.11. Mottley JA was correct to refuse to quash the decision for this reason in the Court of Appeal and the same considerations apply with greater force now.

23.11.1. The decision of NEAC taken on 9th November 2001 and was communicated to the Second Respondent on 10th December 2001. Final clearance was given on 5th April 2002 and work on the project has been proceeding. Evidence from Lyn Young will deal with the progress of the project to date. Very substantial costs have been incurred by BECOL and by the government in undertaking works to complete the infrastructure.

23.11.2. The Project has not been lightly approved by the Respondent but only after careful consideration and balancing of the

public interest. Your Lordships' Board at the hearing of the interim injunction stated:-

> *"However Belize has an energy problem. Part of its electricity supply is imported from Mexico. Domestic consumers pay exceptionally high rates for electricity. Demand for electricity is growing. Power-cuts occur from time to time. There is therefore a public interest in increasing the country's hydroelectric generating capacity, and the Macal River Upstream Storage Facility ("MRUSF") project aims to do that by the construction of a dam and associated works at Chalillo, upstream from the village of Cristo Rey and the town of San Ignacio."*

23.11.3. While Belize does have an economic as well as cultural interest in the preservation of its precious and fragile natural resources, the DOE has determined that in this case the greater public interest lies in the stable provision of increased electricity at the best possible rates to the people of Belize.

23.11.4. For its part, the Government has affirmed the importance it attaches to the project in that it was a manifesto commitment during the national elections of March 5th 2003. The Government was elected by a 22-7 seat majority in the House of Representatives (see affidavit of the Attorney General);

23.11.5. It is expected that by the time of the Appeal before your Lordships' Board the National Legislature of Belize will have declared that the project is in the public interest (See Macal River Hydroelectric Repeal Act 2003);

23.11.6. Mitigation measures will reduce the impact of the project on the environment (See ECP); and

23.11.7. No persons will be displaced by the project.

23.11.8. Even at this point, there is nothing that prevents the Appellant from submitting new information. Suggestions for further mitigation measures or other concerns can be incorporated into the ECP by the DOE where reasonable.

24. The First Respondent therefore invites your lordships' board to dismiss the appeal for the following among other reasons

BECAUSE the Court of Appeal rightly held that the EIA was not defective but adequate;

BECAUSE in any event a complete EIA is not a condition precedent to the grant of approval by the DOE;

BECAUSE the Court of Appeal rightly held that the DOE was entitled to approve the MRUSF;

BECAUSE there was no legal requirement to hold a public hearing;

BECAUSE in any event, any failure to hold a public hearing is not a ground for quashing the decision to grant approval, as all 4 judges in the Courts below found;

BECAUSE it would be contrary to good administration to quash the decision of the DOE to grant approval at this stage;

GODFREY SMITH (ATTORNEY GENERAL)

ELSON KASEKE (SOLICITOR GENERAL)

EDWARD FITZGERALD Q.C.

MARTIN WESTGATE