

The Belize Alliance of Conservation Non-Governmental Organisations

Appellant

v.

**(1) The Department of the Environment and
(2) Belize Electricity Company Limited**

Respondents

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT UPON A PETITION FOR A
CONSERVATORY ORDER OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 13th August 2003

Present at the hearing:-

Lord Walker of Gestingthorpe
Sir Martin Nourse
Sir Andrew Leggatt

[Delivered by Lord Walker of Gestingthorpe]

Competing Public Interests in Belize: The MRUSE project

1. Belize is bordered on the north by the Yucatan province of Mexico, on the east by the sea, and on the south and west by Guatemala. In the centre of the country are the Maya Mountains. Their north-western slopes give on to the Macal and Raspaculo river valleys, partly in the Chiquibul National Park. Much of this area is rainforest virtually unaffected by the impact of human activity since the age of the Mayas, about 500 years ago. The area is rich in rare fauna and flora; the mammals (variously classified as vulnerable, threatened or endangered) include jaguars, ocelots, pumas, and tapirs; there is also a rare form of crocodile; the birds include scarlet macaws. The area also contains a number of Mayan sites of great archaeological interest.

2. Belize is not a rich country. Tourism (and especially what is sometimes called eco-tourism) is important to its economy, so that Belize has an economic (as well as a cultural) interest in the preservation of these precious and fragile natural resources. 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.

3. There is already in existence a hydroelectric power station (built in 1994) at Mollejon, downstream from Chalillo. Mollejon is a run-of-river power station – that is, no water is impounded – and its efficient operation depends on a sufficient flow in the Macal River. The flow is however unreliable during the dry season (mid-February to mid-June). The new project would have a dual purpose: to generate some electricity in a new power station at the Chalillo dam, and (by impounding water behind the dam) to ensure a regular flow of water, at all times of the year, to the Mollejon power station.

4. The Chalillo dam is to be built of roller compact concrete, 49 metres high. When full it will impound an area of about 9.5 square kilometres but (because of the terrain) the impounded area will be a very irregular shape, extending about 20 kilometres up the Macal River and about 10 kilometres up the Raspaculo River. There will be a 7.3 MW powerhouse at the toe of the dam and a power transmission line (variously stated as 13 or 18 kilometres long) from the powerhouse to Mollejon. The original plan (decided on after feasibility studies first undertaken in 1992) was for work on access roads and other preliminary works to begin in March 2002; for the impounding of water to begin in June 2003; and for the powerhouse turbine-generators to be commissioned early in 2004. This programme has however been postponed by about a year, as explained below.

5. The MRUSF project has aroused controversy both inside and outside Belize. In Belize opposition to the project has been led by the Belize Alliance of Conservation Non-Governmental Organisations ("BACONGO"), the petitioner to the Board. It is an umbrella organisation of nine separate environmental and similar

bodies established in Belize. It was incorporated in 1994 under the laws of Belize. It did at one time have an office in Belize, but it now operates from the offices of one or more of its constituent bodies. It was suggested by the respondents that it is funded largely from sources outside Belize.

6. The first respondent is the Department of the Environment (“the DoE”), a department of the government of Belize. The second respondent is Belize Electricity Company Limited (“BECOL”), the company which wishes to carry out the MRUSF project through its main contractor, a Chinese company. BECOL is a 95% subsidiary of Fortis Inc. (“Fortis”), a Canadian company. Fortis also owns 68% of Belize Electricity Limited (“BEL”) which owns and operates the electricity distribution system in Belize.

Environmental Protection in Belize

7. Belize has environmental protection laws which, especially in relation to environmental impact assessment (“EIA”), are not wholly dissimilar from those in force in the United Kingdom (and indeed throughout the European Union). For present purposes the most important primary and secondary legislation is the Environmental Protection Act, passed in 1992 and since amended (“the Act”) and the Environmental Impact Assessment Regulations 1995 (“the Regulations”).

8. Part II of the Act establishes the DoE and sets out its functions. Part V (sections 20-23) deals with the requirement for EIA. Section 20 (apart from subsection (8) which is not material) is in the following terms:

“(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.

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

- (a) human beings;
- (b) flora and fauna;
- (c) soil;
- (d) water;
- (e) air and climatic factors;

- (f) material assets, including the cultural heritage and the landscape;
- (g) natural resources;
- (h) the ecological balance;
- (i) any other environmental factor which needs to be taken into account.

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

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

(5) When making an environmental impact assessment, a proposed developer shall consult with the public and other interested bodies or organizations.

(6) The Department may make its own environmental impact assessment and synthesise the views of the public and interested bodies.

(7) A decision by the Department to approve an environmental impact assessment may be subject to conditions which are reasonably required for environmental purposes.”

Section 21 provides for the making of regulations. Section 22 provides criminal sanctions for failure to carry out an EIA required by the Act.

9. Regulations 4 and 5 of the Regulations are in the following terms:

“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.

(2) Where appropriate, every effort shall be made to identify all environmental issues at an early stage in the environmental impact assessment process.

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.”

Regulation 7 and Schedule I make an EIA mandatory for certain categories of projects, including dams. 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.

10. Regulation 19 prescribes, in considerable detail, what is to be included in an EIA. Mr Clayton QC (for BACONGO) drew particular attention to the following requirements:

“(e) A description of the development proposed, comprising information about the site, the design and size and scale of the development, and its immediate surroundings;

(f) A description of the environment (local and regional);

(g) Significant Environmental Impacts. The data necessary to identify and assess the main effects which the proposed development is likely to have on the environment;

(h) A description of the likely significant 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.”

11. Regulation 20 provides for publicity to be given to any EIA submitted to the DoE, and for objections and representation to be

made to the DoE. Regulation 21 requires the DoE, on receiving an EIA to

“Examine [it] or cause it to be examined to determine whether

- (i) further environmental assessment is required; or
- (ii) any significant harmful impact is indicated.”

Regulations 22, 23 and 24 are as follows:

“22.(1) The Department shall advise the developer of its decision within sixty days after the completed environmental impact assessment has been received by the Department.

(2) Until the developer is advised under sub-regulation (1), the developer shall not commence or proceed with the undertaking.

(3) Where a developer is required to supply further or additional information in respect of environmental impact assessment then the environmental impact assessment shall not be deemed to have been completed until the developer has supplied such further or additional information to the satisfaction of the Department.

23. Where the environmental impact assessment is deficient in any respect, the Department may on the recommendation of the National Environmental Appraisal Committee require the developer:

- (a) to conduct further work or studies;
- (b) to supply further information;
- (c) to amend the environmental impact assessment accordingly; and
- (d) to resubmit the environmental impact assessment by a later mutually agreeable date.

24.(1) The Department, on the recommendation of the National Environmental Appraisal Committee, may require a public hearing, in respect of any undertaking, project or activity in respect of which an environmental impact assessment is required pursuant to these regulations.

- (2) In order to determine whether an undertaking, project or activity requires a public hearing, the Department shall 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.”

12. Regulation 25 provides for 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.”

NEAC consists of twelve members with a quorum of six. The chairman is the Chief Environmental Officer (at the present time Mr Ismael Fabro). Nine other members are public officers and two are non-governmental representatives. One of the non-governmental representatives is Ms Candy Gonzalez, an active supporter of BACONGO. Regulation 26 sets out the factors which NEAC is to take into account in its work.

The impugned decisions and the proceedings below.

13. In August 1999 an EIA prepared on behalf of BECOL was submitted to the DoE and passed to NEAC to be considered. It had been prepared for BECOL by AMEC E & C Services Ltd, a Canadian firm of consultants. The Board has not been shown the

EIA (even in the form of an executive summary) but it was before the courts below. It is said to be a massive document, consisting of one large main volume and four large supporting volumes extending to about 1500 pages in all. Nevertheless it has been criticised by BACONGO as being incomplete and deficient to such a degree as to be incapable of satisfying the requirements of the Act and the Regulations. That has been one of the two grounds relied on by BACONGO in these proceedings. The other ground relied on was the DoE's failure to direct a public hearing under Regulation 24.

14. On 9 November 2001 (after meetings on 4 October and 8 November as well as on that day) NEAC voted (by 11 votes to 1, Ms Gonzalez being in the minority) to recommend to the DoE that the EIA should be approved, and (unanimously) that a public hearing should be held. On 21 November 2001 BECOL, BEL and the Government of Belize entered into a written agreement which has been referred to as the Third Master Agreement. It contained in clauses 6 and 7 unusual provisions by which the government gave to BEL and BECOL some wide warranties and indemnities in respect of the MRUSF project (referred to as the new project). In January 2002 work began on access roads to the site of the proposed dam.

15. On 8 February 2002 BACONGO (and some individual applicants) applied for leave to apply for judicial review of the decision taken by NEAC on 9 November 2001. Leave was granted on 28 February 2002. The other applicants had been joined in case BACONGO's standing should be challenged, but it was not challenged, and the other applicants were given leave to withdraw. NEAC's decision was described as approval of the EIA (rather than a recommendation to the DoE for its approval). This error was given some encouragement by an affidavit dated 28 February 2002 made by the Chief Environmental Officer, Mr Fabro, which referred to the EIA as having been approved. In fact it was approved by the DoE on 5 April 2002 but (in spite of the pending judicial review proceedings) BACONGO was not informed of that fact. The respondents' reluctance to disclose information to BACONGO (even when it is highly material and not obviously confidential) has been a regrettable feature of this case. No doubt the respondents regard BACONGO as a most troublesome thorn in their flesh, but their unhelpful attitude can only have tended to increase BACONGO's suspicions, and perhaps also its determination to press on with the litigation.

16. The DoE's decision was announced in a letter dated 5 April 2002 from Mr Fabro to Mr Young, a director of BELCO who has been closely concerned with the MRUSF project. The letter was as follows:

“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.

Thank you for your kind consideration and cooperation in addressing these issues of mutual concern.”

17. The judicial review hearing began on 18 June 2002 before Conteh CJ. The DoE's counsel told the Chief Justice (most surprisingly) that environmental clearance had not yet been granted, but BECOL then produced Mr Fabro's letter of 5 April 2002. BACONGO was given leave to amend its application to challenge this decision also. The judicial review hearing ended on 31 July 2002. The Chief Justice gave judgment on 19 December 2002. He recognised BACONGO as having acted with commendable public spirit. However he rejected the attack on the EIA. He directed the DoE to hold a public hearing under Regulation 24, but did not quash either NEAC's decision of 9 November 2001 or the DoE's decision of 5 April 2002. He concluded his judgment with a quotation from an article by Professor Alder (JEL Vol 5 No. 2 (1993) 203, 211):

“Environmental impact assessment is not, as such, an environmental protection measure with positive goals. Environmental impact assessment is intended to enable

decision makers to make an informed choice between environmental and other objectives and for the public to be consulted.”

The Chief Justice added:

“The role of the Courts, of course, is not to make that critical informed choice, that is for policy-makers to do. But the Courts can insist and ensure that the applicable rules are observed, including consulting the public where the case clearly warrants this.”

The Chief Justice made no order as to costs.

18. BACONGO appealed to the Court of Appeal. While the appeal was pending a public hearing was held in accordance with the Chief Justice’s direction. The Board were told that the public hearing was attended by at least 50 people and that it was reported to and taken account of by the DoE (Mr Fitzgerald QC for the DoE initially mentioned an attendance of about 50 but later corrected this to about 500; Mr Clayton thought the original figure was correct, the Board cannot resolve this difference). BACONGO also applied for an injunction preventing work on the dam while the appeal was pending. This was after BACONGO had sought an undertaking from BECOL not to commence work, and BECOL had declined to give an undertaking. The application for an injunction was never heard by the Court of Appeal, being adjourned by a single judge of the Court of Appeal on 30 January 2003 to be heard by the full court. But BECOL did not in fact proceed with the work while the appeal was pending.

19. The Court of Appeal did not hear the application for an injunction, but instead proceeded at once to the substantive hearing, which took place between 24 and 28 March 2003. On 31 March 2003 the Court of Appeal dismissed the appeal, with reasons to follow. Again, there was no order as to costs. On 10 April 2003 the Court of Appeal gave BACONGO conditional leave to appeal, the order recording that the court found that the questions involved in the appeal were of public importance. Final leave to appeal was granted on 20 June 2003.

20. In the meantime a number of events had taken place. At some unspecified date after the dismissal of the appeal, BECOL entered into a contract with its main contractor. The total cost of the project is estimated at about US \$30 million. On 22 May 2003

BACONGO asked BECOL for information as to its proposed construction schedule, but never received a reply. On 28 May 2003 BECOL held a “ground breaking” ceremony attended by senior representatives of Fortis, the Canadian holding company. On 30 May 2003 BACONGO asked the DoE for information as to the construction schedule. The reply uninformatively referred BACONGO to the ECP, which contained no relevant information.

21. On 13 and 16 June 2003 the Macal River Hydroelectric Development Bill was passed, in each case in a single day, by the House of Representatives and the Senate respectively. This legislation (“the 2003 Act”) raises important constitutional questions as mentioned below. On 17 June the Court of Appeal gave its reasons for dismissing the appeal. The members of the Court (Rowe P, Mottley JA and Carey JA) were unanimous, although there was some variation in their reasons. Rowe P and Carey JA held that a public hearing was not mandatory (but that if it had been required it should have been held before any decision was taken). Motley JA held that a public hearing was required. They were also divided as to whether an EIA complying with the Regulations was a necessary condition for approval of the project. They all agreed that it was appropriate to look at affidavits made by members of NEAC. The 2003 Act came into force on 18 June 2002, which was the date set for the hearing by the Court of Appeal of BACONGO’s application for an injunction pending the appeal to the Board. On 20 June the Court of Appeal held (on grounds not connected with the 2003 Act) that it had no jurisdiction to grant an injunction. On 23 July BACONGO presented the petition for interim relief which is now before the Board. Its appeal to the Privy Council was registered on the same day.

The 2003 Act

22. The long title of the 2003 Act is:

“An Act to facilitate and ensure that hydroelectric projects on the Macal River are implemented in an environmentally responsible manner without undue delay in order to secure a reliable supply of electrical power, at a reasonable cost for the efficient and continuous development of the Belizean economy and the welfare of the people of Belize and to increase the production of electrical power in Belize.”

It contains a preamble to the same effect. Section 3(2) contains a number of declarations and affirmations which by section 3(1) are

to be “interpreted and construed generously, according to their spirit and intent in order to give true effect to this Act”.

23. Section 4 is in the following terms:

“Pursuant to section 3, and notwithstanding any other Laws to the contrary —

(a) BECOL and BEL are hereby directed and authorised to proceed with the design, financing, construction and operation of the Chalillo Project in accordance with the Act, the Third Master Agreement and the ECP;

(b) But subject to Section 6 hereof, compliance by BECOL and BEL with the ECP shall constitute compliance with all environmental Laws to which the Chalillo Project, or its design, financing, construction, or operation, may be subject, including without limitation compliance with the EPA, and no further or other review, hearing, assessment, approval or other proceeding under any other Law shall be required to authorise or permit the design, financing, construction and operation of the Chalillo Project in accordance with paragraph (a);

(c) But subject to Section 6 hereof, compliance by BECOL and BEL with the conditions set forth in the consent of the Public Utilities Commission referred to in Section 3(2)(g) shall constitute compliance with all Laws that relate to the generation or transmission of electric energy [or] the use or occupation of land to which the Chalillo Project, or its design, financing, construction or operation may be subject, including without limitation, the PUC Act and the Electricity Act and no further or other review, hearing, assessment, approval or other proceeding under any other Law shall be required to authorise or permit the design, financing, construction and operation of the Chalillo Project in accordance with paragraph (a);

(d) For the avoidance of doubt and for greater certainty, BECOL shall proceed with the design, financing, construction and operation for the Chalillo Project in accordance with paragraphs (a), (b) and (c) of this section notwithstanding any judgment, order or declaration of any court or tribunal whether heretofore or hereafter granted, issued or made.”

Section 5 refers to Section 68 of the Belize Constitution and Section 6 gives the Minister a wide power to make regulations.

24. The Attorney General of Belize (who with the Solicitor General attended the hearing before the Board, but did not address the Board) has made an affidavit in relation to the 2003 Act. Among other things he has stated his view that nothing in it breaches any provision of the Belize Constitution. Their Lordships did not hear argument on that issue as it did not appear necessary to do so in order to determine BACONGO's application for interim relief.

25. Mr Fitzgerald (who addressed the Board on behalf of the DoE) stated that he did not rely on the 2003 Act as a reason why the Board should not grant an injunction if it thought it right to do so. He also stated that the Government of Belize would obey any order of the Board. He also referred to the possibility of a constitutional issue being raised summarily in new proceedings in Belize. These issues may have to be ventilated more fully at the hearing of BACONGO's substantive appeal. Their Lordships think it better to say no more than that the Attorney General should be in no doubt as to the seriousness of the issues potentially raised by the 2003 Act.

The application to the Board

26. BACONGO's petition (which was prepared under some pressure of time) asks the Board to exercise its inherent jurisdiction to preserve the subject-matter of the appeal by ordering a halt in the construction works. It is supported by a considerable volume of affidavits. These include an affidavit of Mr Garel, the Chairman of BACONGO. Mr Garel's affidavit exhibits photographs showing that large swathes of forest have already been felled in the vicinity of the dam. Heavy vehicles and plant are working on site. According to press reports, about 300 workers are on site and have to be housed and maintained there.

27. The petitioner's evidence is met by a much smaller volume of evidence (prepared under even greater pressure of time) on behalf of the respondents. The Attorney General's affidavit has already been mentioned. The other important evidence from the respondents is an affirmation of their Privy Council agent, Mr Mireskandari, which sets out what he has been told by Mr Young of BECOL. The affidavit exhibits a diagrammatic description of the

original programme for the MRUSF project, and it explains how that programme has been deferred.

28. The programme is an informative document and it might have saved a lot of time and trouble if it had been disclosed much sooner. It shows that the original plan was for the project to be carried out during two dry seasons and two wet seasons, starting with the dry season of 2002, when a coffer dam was to be constructed to facilitate works on the abutments of the dam. A further coffer dam was planned for the dry season of 2003 for construction of the dam outlets and ancillary concrete structures. Construction of the dam itself was also to take place during the dry season of 2003, involving working 24 hours a day for 40 to 50 days.

29. Mr Mireskandari has explained (on Mr Young's instructions) that since work did not commence until after the Court of Appeal's decision was known, it was about 14 months behind schedule. By extending the construction of the first coffer dam and the abutments beyond the end of the dry season, the contractors have effectively caught up by about two months. BECOL and their contractors now intend to continue with the programme as before, but one year behind. BECOL's evidence is that between now and the time when the full appeal is likely to be heard by the Board, operations will be confined to the site of the dam, which is only about 1/75th of the total area of rain forest which will be affected. Nevertheless, the dam site itself extends for about 25 acres.

30. The main issues with which their Lordships are concerned on this interim application are as follows:

- (1) Does the Board have jurisdiction (either original, or by way of appeal from the Court of Appeal's refusal to grant interim relief) to grant an interlocutory injunction halting work on the dam?
- (2) If the Board has jurisdiction, what principles should it apply (especially as regards requiring or dispensing with a cross-undertaking in damages) in determining whether to grant relief?
- (3) Has BACONGO an arguable case and (if and so far as it is necessary to attempt any more precise evaluation) how strong does it appear to be?

- (4) What view should the Board take of the balance of convenience (or the relative risks of injustice to one side or the other)?

Their Lordships consider these points in turn. For reasons already mentioned they do not find it necessary to go further into the issues raised by the 2003 Act.

Jurisdiction

31. The Court of Appeal declined to assume jurisdiction on the basis that its powers (so far as relevant to an appeal to the Board) are exhaustively set out in Section 9 of the Privy Council Appeals Act and that Section 9 does not extend to the grant of an injunction against a successful respondent. Mr Clayton accepted that Section 9 is limited in its scope. He relied instead on the general powers of the Court of Appeal under Section 19(1)(a) of the Court of Appeal Act and in particular its final words authorising “such further or other order as the case may require”.

32. Their Lordships do not find it necessary to express a view on this point. As the Court of Appeal declined jurisdiction it did not consider that it had any discretion to exercise, and did not express any view as to how it might have exercised its discretion. In England the Court of Appeal has jurisdiction to grant an injunction, even to a wholly unsuccessful appellant, pending a possible appeal to the House of Lords (see *Polini v Gray* (1879) 12 Ch D 438 and the discussion of the authorities by Megarry J in *Erinford Properties Limited v Cheshire County Council* [1974] Ch 261, 266). But (quite apart from the 2003 Act) it would have been a strong thing for the Court of Appeal, which had unanimously and decisively rejected BACONGO’s case, to have granted an injunction pending an appeal to the Board; and there would be a high degree of unreality in the Board attempting to place itself in the position of the Court of Appeal in exercising the discretion which the Court of Appeal disclaimed.

33. It is unnecessary to pursue that point since their Lordships are satisfied that the Board itself has jurisdiction to grant interim relief, where appropriate, in order to ensure that any order which it makes on the eventual hearing of the appeal should not be rendered nugatory. The clearest and most obvious instance of this is in staying execution of a death sentence: see *Reckley v Minister of Public Safety and Immigration* [1995] 2 AC 491. Their Lordships are not aware of any reported decision in which the jurisdiction has

been discussed and exercised in a civil case, but they are satisfied that it exists, and has been exercised from time to time. The jurisdiction depends on the power of any superior court to supervise and protect its own procedures (see *Attorney General v Punch* [2003] 2 WLR 49, especially the observations of Lord Nicholls of Birkenhead at page 58). The power may be termed an inherent power, but that is not to say that its origins are devoid of statutory foundation. When Parliament established the Judicial Committee of the Privy Council and then extended its powers by the Judicial Committee Acts of 1833 and 1843 it must be taken to have intended to confer on the Board all the powers necessary for the proper exercise of its appellate jurisdiction.

34. Mr Rabinder Singh QC (for BECOL) relied on the decision of the Board in *Electrotec Services Limited v Issa Nicholas (Granada) Limited* [1998] 1 WLR 202 as indicating that the Board has no inherent jurisdiction to make ancillary orders. But that decision was concerned with a suggested power to impose restrictive conditions (as to security for costs) on an appellant who had a constitutional right of appeal in a case where security for costs was already covered by the statutory code. It is in no way inconsistent with the Board having inherent or implied powers to make ancillary orders for the purpose of ensuring that an appeal, if successful, is not frustrated.

Injunctions in public law cases

35. Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in *American Cyanamid Company v Ethicon Limited* [1975] AC 396, but with modifications appropriate to the public law element of the case. The public law element is one of the possible “special factors” referred to by Lord Diplock in that case (at page 409). Another special factor might be if the grant or refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category.

36. The Court’s approach to the grant of injunctive relief in public law cases was discussed (in particularly striking circumstances) by Lord Goff of Chieveley in *Queen v Secretary of State for Transport, ex parte Factortame Limited (No 2)* [1991] AC 603, 671-4. The whole passage calls for careful study. Lord Goff stated at page 672 that where the Crown is seeking to enforce the law, it

may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of injunctive relief. Lord Goff concluded (at page 674):

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

37. In some public law cases (such as *Queen v Servite Houses and Wandsworth LBC, ex parte Goldsmith* (2000) 3 CCLR 354) the issue is a straightforward dispute between a public or quasi-public body (in that case, a charity providing care services on behalf of a local authority) and citizens to whom the services are being provided. In such a case an injunction may be granted to the citizen, without any undertaking in damages, if justice requires that course. Swinton Thomas LJ took into consideration the public importance of the case, involving the closure of a residential care home; the very serious consequences for the elderly and infirm residents who would be moved from accommodation in which they were settled; their prospect of success at the full hearing; and the relatively short period for which the injunction would be in force pending the hearing of the appeal.

38. In *Queen v Inspectorate of Pollution, ex parte Greenpeace Limited* [1994] 1 WLR 570, on the other hand, a campaigning organisation was challenging an official decision which, if stayed, would have adverse financial implications for a commercial

company (British Nuclear Fuels PLC) which was not a party to the proceedings. Brooke J had refused a stay and the Court of Appeal upheld this decision. Glidewell LJ said at page 574:

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

Scott LJ said at page 577:

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

A similar approach has been taken by the Land and Environment Court of New South Wales in *Jarasius v Forestry Commission of New South Wales* (19 December 1989). Some observations of Lord Jauncey of Tullichettle in *Queen v Secretary of State for the Environment, ex parte The Royal Society for the Protection of Birds* [1997] Env LR 431, 440 are also consistent with the view that an undertaking in damages should normally be required, even in a public law case with environmental implications, if the commercial interests of a third party are engaged.

39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result). In the context Mr Clayton referred to the well-known decision of the Court of Appeal in *Allen v Jambo Holdings* [1980] 1 WLR 1252, which has had the result that in England a very large class of litigants (that is, legally assisted persons) are as a matter of course excepted from the need to give a cross-undertaking in damages.

However their Lordships (without casting any doubt on the practice initiated by that case) do not think that it can be taken too far. The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice. In *Allen v Jambo Holdings* Lord Denning MR said (at page 1257),

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

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

Arguable case

40. Although the Court of Appeal stated, in granting leave to appeal, that this case raises issues of public importance, their Lordships have to form some view of the strength or weakness of BACONGO's case. That is particularly important where, as here, the grant of an injunction would cause the respondents significant financial loss, and no undertaking in damages has been offered. Mr Clayton submitted that the respondents' assertions about loss should be treated with circumspection, and their Lordships are prepared to assume that they may have put their case too high. Nevertheless a delay of four months, with about 300 men and large quantities of vehicles and plant now on site, would be bound to cause severe disruption and significant loss. It may be that under the terms of the Third Master Agreement any loss would fall on the government of Belize rather than on BECOL.

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. It seems unlikely that this point still carries much weight. 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. Their Lordships do not think it appropriate to go far into the complex detail of these topics, not least because both sides disclaimed any wish to embark on a trial on affidavits. Nevertheless some brief comment is called for.

42. It is clear that there was an important difference of opinion between the geologists who advised BECOL and the representative on NEAC of the Geology Department as to the geology of the dam site. This difference, having arisen earlier, was discussed at the NEAC meetings in October and November 2001. The outcome was that a new independent expert, Dr Andrew Merritt, was instructed and further site investigations took place before the DoE gave environmental clearance. This aspect of the matter is covered in detail in paragraphs 27-33 of the judgment of Rowe P in the Court of Appeal. He concluded (paragraph 33)

“This was a case of making ‘good’ better and not one of shutting the eyes of the assessors to patent dangers to the environment.”

43. Rowe P also considered (in paragraphs 37-48 of his judgment) the three other particular areas of complaint as to the inadequacy of the EIA. He rejected the complaints. He cited (as had the Chief Justice) the judgment of Cripps J in the Australian case of *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402:

“Clearly enough the legislator wished to eliminate the possibility of a superficial, subjective or non-informative environmental impact statement and any statement meeting that description would not comply with the provisions of the Act, with the result that any final decision would be a nullity. But, in my opinion, 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 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. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute or the regulations. In matters of

scientific assessment, it must be doubtful whether an environmental impact statement as a matter of practical reality would ever address every aspect of the problem. There will always be some expert prepared to deny the adequacy of treatment to it and to point to its shortcomings or deficiencies.

An environmental impact statement is not a decision-making end in itself – it is a means to a decision-making end. Its purpose is to assist the decision-maker.”

44. Mr Clayton submitted that BACONGO has a strong case on appeal. He relied particularly on regulation 4(1) of the Regulations, emphasising that environmental issues are to be identified and examined before the start of a project. Mr Fitzgerald pointed to the largely concurrent conclusions of Conteh CJ and the Court of Appeal, and described BACONGO’s case as risible. Their Lordships certainly do not accept that BACONGO’s case is risible. This is a matter of great public concern, involving as it does competition between two very important public interests. But despite the skill with which Mr Clayton developed his case in the limited time available, it does not appear to their Lordships to be a strong case on which to seek, without an undertaking in damages, an injunction which would halt a major construction project for four months.

Balance of risk of injustice

45. The dam site is already a very busy construction site. Access roads have been built, large numbers of trees have been felled, and the abutments of the dam have been constructed. If no injunction is granted, the work (restricted by the wet season) will continue until the appeal hearing in December. It will then be further advanced, and the total expenditure incurred will be proportionately greater. But if BACONGO succeeds on appeal, it will be for the Board hearing the appeal to determine what significance (if any) to give to the fact that the work will have been in progress for about six months rather than about two months. That would depend on the view taken by the Board hearing the appeal as to what the justice of the case requires.

46. Their Lordships do not accept that BACONGO has been guilty of delay in applying for interim relief. Delays have occurred, but they occurred mainly because the Court of Appeal declined to hear the application for interim relief before the hearing of the

substantive appeal, and declined jurisdiction on the renewed application after the dismissal of the appeal. The application to the Board has been made promptly. The fact that work has now been proceeding on the site for two months cannot sensibly be attributed to any fault on the part of BACONGO. Nevertheless, it is a fact which has to be taken into account.

47. Their Lordships have concluded that the grant of an injunction at this stage would entail a greater risk of ultimate injustice than its refusal. This dispute cannot fairly be described as a clash between public and private interests. Although BECOL is in the private sector, it is very closely associated in this matter with the government of Belize (first through the warranties and indemnities in the Third Master Agreement and now also through the 2003 Act) and there are public interests of real importance on both sides of the argument. Both courts below have, although for rather different reasons, rejected BACONGO's challenge to the project. Their reasoning and conclusions have not been shown to have been ill-founded. In their Lordships' view this is not a case in which, in the absence of an undertaking in damages, it would be right to halt a major project which is of real importance to the economy of Belize.

Conclusion

48. Their Lordships have already directed that Phyllis Dart (the President of the Belize Eco-Tourism Association, who owns a jungle lodge on the Macal River) and Godsman Ellis (the Vice-President, who owns a hotel on the river) should be joined as parties to the proceedings. Their Lordships have also already directed that there should be an expedited hearing of the appeal, and it has been fixed for 3 and 4 December 2003. For the reasons set out above their Lordships consider that an injunction restraining further work on the MRUSF project until the hearing of the appeal should not be granted. The costs of this application will be determined on the basis of written submissions.

