[2014] UKPC 23

Privy Council Appeal No 0060 of 2014

JUDGMENT

Bimini Blue Coalition Limited (Appellant) v The Prime Minister of The Bahamas and others (Respondents)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Neuberger

Lord Mance

Lord Clarke

Lord Toulson

Lord Hodge

JUDGMENT DELIVERED BY

LORD TOULSON

ON

24 July 2014

Heard on 16 June 2014

Appellant	First, Second & Third Respondents
Ruth Jordan	Peter Knox QC
(Instructed by Sheridans)	(Instructed by Charles Russell LLP)
	Fourth, Fifth, Sixth & Seventh Respondents
	Richard Gordon QC
	Malcolm Birdling
	(Instructed by Cleary Gottlieb Steen & Hamilton LLP)

LORD TOULSON:

1.
This appeal is brought by permission of the Court of Appeal against its dismissal, by a majority, of an appeal from a decision of Longley J on 30 May 2014 to set aside an injunction granted to the appellant by the Board on 23 May 2014.

2.
At the end of the appeal the Board informed the parties that it would humbly advise Her Majesty that the appeal should be dismissed. The circumstances which led to this matter coming before the Board twice in a short space of time are unusual and the underlying facts are complicated, but it is not necessary to go into them in any great detail in order to explain the reasons for the Board's decision.

3.
The action concerns the construction, which has already commenced, of a cruise ship terminal and 1,000 ft dock extending off the island of North Bimini and the creation of a 4.5 acre man-made island offshore, using material dredged from the sea. The claimant is a company formed mainly by residents on the island. It seeks to prevent the development which it believes will cause severe and irreversible environmental damage. There is a detailed framework of legislation for the protection of the environment including the Conservation and Protection of the Physical Landscape of The Bahamas Act ("the Conservation Act").

4.
On 20 November 2013 the claimant issued proceedings for judicial review of various decisions by the Prime Minister (first respondent), the Deputy Prime Minister in his capacity as Minister of Works and Urban Development and Minister Responsible for Building Regulation (second respondent) and the Town Planning Committee (third respondent). The claimant also joined the fourth to seventh respondents, who are collectively the developers.

5.
In its original form, the application for judicial review sought an order quashing the decision of the Prime Minister to allow the developers to carry out the proposed development on Crown land, a declaration that the Deputy Prime Minister was in breach of his duty to exercise his powers under the Buildings Regulation Act to require the developers to remove the structures which they had placed on the seabed, an order requiring the Town Planning Committee to take action under the Planning and Subdivision Act to stop the developers from carrying on with the development and ancillary forms of relief. It also sought declarations that the development contravened various statutory provisions.

6.
On 25 November 2013 the claimant was given leave to bring the judicial review proceedings.

7.
On 19 December 2013 Longley SJ dismissed an application by the claimant for an interim injunction to prevent the development from proceeding while the judicial review application was pending, and there has been no appeal against that decision. At the same time he ordered the claimant to provide security for the respondents' costs, in the sums of $250,000 for the Government respondents and $400,000 for the developers. He further ordered that the proceedings be dismissed if the claimant failed to provide such security within 21 days, and that in the meantime the proceedings be stayed. He gave permission to appeal against his judgment.

8.
On 17 January 2014 the developers filed a summons for an order that the proceedings be struck out because of the claimant's failure to provide security as ordered. The claimant responded by applying for permission to file a notice of appeal out of time against the order for security for costs only. On 27 February 2014 the Court of Appeal gave the claimant leave to appeal on the narrow issue of the quantum of the security for costs orders. There were a number of hearings in connection with the

security for costs appeal, but judgment had not been given by the time of the applications to the Board and the judicial review proceedings remained stayed.

9.
The appeal on quantum of security was due to have been heard on 9 May 2014. It did not proceed on that day, but the developers gave an undertaking to the Court of Appeal in the following terms:

“We undertake that when we have all the approvals or permits required to commence dredging we shall give notice of this fact and provide copies of such approvals and permits to BBC before commencing dredging”.

10.
On 13 May 2014 the developers provided documents to the claimant which on their contention satisfied the terms of the undertaking. The claimant objected, contending that the developers required a permit under section 7 of the Conservation Act. Section 6 of that Act prohibits any person from commencing or carrying on any “excavation”, as defined in section 2, except under and in accordance with the conditions of a permit under section 7.

11.
The issue of permits under the Act is the responsibility of the Director of Physical Planning (“DPP”). Section 7(1) provides for an application for the grant of a permit to be made to the DPP in writing. Section 8 provides that the DPP may, if he considers it necessary for the purposes of allowing any interested person to object in writing to the grant of a permit, give notice of the fact that he is about to consider whether any excavation should be carried out under the provisions of the Act through publication in local newspapers.

12.
On 15 May 2014 the claimant filed a notice of motion seeking an order from the Court of Appeal to enjoin the respondents from carrying out any dredging as part of their construction work until such time as they had supplied the claimant with a copy or copies of a current permit or permits granted to them by the DPP. The application was heard on the following day and on 19 May 2014 the Court informed the parties that it had decided by a majority to refuse the application. The claimant applied for leave to appeal against that decision to the Board.

13.
The Board heard the application as a matter of urgency on 22 May 2014. It then had the benefit of the written judgments of the Court of Appeal. One matter of central significance was whether the provisions of the Conservation Act applied to the developers’ activities. The majority of the Court of Appeal had concluded as a matter of interpretation that the Act did not apply; the dissenting judge considered that it did apply.

14.
At the hearing before the Board on 22 May the respondents were all represented by Mr Peter Knox, QC, who had come at extremely short notice. The Board considered that it would be unfair not to allow him further time and, after hearing argument on both sides, it adjourned the application to the following day.

15.

As a result of questions put by the Board during the first day's hearing, the respondents correctly anticipated that the Board might take a different, provisional, view from that of the majority of the Court of Appeal on the question whether the Conservation Act applied.

16.
When the application resumed on the morning of 23 May, the claimant's counsel, Ms Jordan, and the Board were presented with what purported to be a permit granted overnight to the developers by the DPP under the Conservation Act. There was no suggestion that the document was a fabrication, but there was no written statement from anyone to verify it or to explain how it came into existence.

17.
In those unusual circumstances the Board decided that an interim injunction should be granted for reasons explained in an oral judgment delivered by Lord Neuberger. In it he said that "given the very, very last minute nature of this permit, we consider that there must be a real question as to whether it is valid." He expressed the Board's conclusion as follows:

"As it is, because we differ from the majority of the Court of Appeal as to the strength of the applicants' case on the substantive legal point as to the applicability of the 1997 Act, because of our concerns over this very last minute permit, and because we think that refusing the injunction may undermine the JR proceedings, we think the right order to make is to grant the injunction. However, acknowledging the force of the respondents' arguments to the contrary, we are only prepared to do so on terms which enable the respondents to apply to discharge the injunction on very short notice and very quickly if and when they are able to establish that they are able to rely on the permit granted on the 22 May 2014. They may choose to wait and apply to the Court of Appeal on the 4 June or at any time thereafter as the Court of Appeal directs or thinks is appropriate, or they may be in a position to apply earlier, in which case, subject to what counsel have to say, we would have thought the right thing for them to do was to apply to the Supreme Court, but not to us.

We are anxious not to stand in the way of the Supreme Court's power to grant or refuse or discharge any injunction. We are equally anxious not to stand in the way of the Court of Appeal. We have had to consider this matter on short notice. They are the primary courts carrying out the functions of granting and refusing or discharging any injunctions. And therefore what we have had to say on the merits of the case should not be taken as written in stone, bearing in mind the very short time the parties have had to prepare for this appeal and the time that we have had to absorb the facts."

18.
On 23 May the developers issued an application to discharge the injunction. The application was heard by Longley SJ and lasted for four days from 26 to 29 May. He had written evidence from various witnesses including the acting DPP, Mr Charles Zonicle. There were no applications to examine Mr Zonicle or any other witness.

19.
By way of background, the developers had originally made an application for a permit under the Conservation Act before the development began, but the Government had taken the view at that stage that the Act did not apply. However, according to Mr Zonicle, before the Government permitted the developers to carry out the development on Crown territory, the DPP had numerous inter-agency meetings and consultations with other governmental agencies to review and consider the matter, including whether the developers should be allowed to dredge the seabed to facilitate the proposed ferry and terminal. The DPP was well acquainted with all the relevant documentation and issues raised in respect of the project, as originally envisaged and as amended by a substantial enlargement

of the volume of permitted dredging. Mr Zonicle said in his affidavit that he none the less reviewed the files and documentation previously considered by the DPP before issuing the permit under section 7. He said that he also addressed his mind to section 8 of the Act, but he considered that there had already been sufficient public notice and that interested persons wishing to object to the development had been given a full opportunity to do so. In those circumstances he issued the permit on 22 May “to remove any doubts about the approvals granted”.

20.
Longley SJ gave his judgment discharging the injunction on 30 May. The judge said that there had been a good deal of argument before him about what precisely the Board meant when it said that it was prepared to grant an injunction only on terms which enabled the respondents to apply to discharge the injunction on very short notice and very quickly “if and when they are able to establish that they are able to rely on the permit granted on 22 May 2014”. The judge rejected the claimant’s argument that the Board intended that the developers should have to prove to the civil standard that the permit was valid in order for its injunction to be discharged. The judge said:

“That may come at the trial. But this is not a trial and it is not necessary to make findings of fact which will be inappropriate on this application. All it seems to me that the respondents have to do is to adduce sufficient evidence to establish prima facie that there is an arguable case that the permit is one on which they can rely. A permit that they can rely upon is simply one that is regular on its face and which has been issued by the proper authorities with conditions that have been complied with in the opinion of the decision-maker.”

21.
After summarising the main points of the rival arguments, the judge observed that much of the evidence and arguments went to issues which appeared to him to be more appropriate for the substantive hearing of the judicial review application than the interlocutory hearing to discharge the injunction, contrary to that which was contemplated by the Board. He reminded himself of Lord Diplock’s words about the proper approach to interlocutory injunctions in American Cyanamid Co v Ethicon Ltd [1975] AC 396.

22.
Having considered the evidence and submissions, the judge concluded that on the face of the evidence before him the permit granted to the developers under the Conservation Act was one on which they could rely. He said that much had been made of the absence of consultation before the issue of the permit and that this might be a proper issue for the judicial review proceedings, but (to summarise his reasoning) unless and until the court held that the permit had been issued unlawfully, it remained prima facie valid and the developers were entitled to rely on it.

23.
The judge considered next the evidence and arguments about whether the developers were fully complying with the conditions of the licence. He said that this was the one area which had caused him concern. The conditions imposed were numerous and rightly so. The environmental impact could be devastating and catastrophic. However, the review and management of the project from an environmental point of view was an ongoing process and the DPP had authority under the Conservation Act to suspend or revoke a permit for non-compliance. He referred to affidavit evidence from the environmental agency BEST (short for The Bahamas Environmental Science and Technology Commission) to the effect that it was satisfied from site visits, meetings and discussions with the developers and their project engineers and consultants, that the concerns which BEST had first raised

about the dredging (and which featured prominently in the claimant's judicial review application) had been addressed or were receiving the necessary attention by the developers, and that BEST would continue to monitor the project to ensure the continued compliance with all environmental requirements. The judge concluded that on the evidence it was arguable that the conditions necessary to be complied with either had been or were being addressed to the satisfaction of the DPP.

24.
Having arrived at those conclusions, the judge then considered the balance of convenience. He noted that the claimant had not provided any undertaking in damages and the developers were losing up to $160,000 a day while the dredger sat idle under the contract for its hire. On the other side, he took into account that if the dredging were to continue the application for judicial review might be made moot. He decided on balance that he should discharge the injunction.

25.
The claimant appealed and the hearing before the Court of Appeal lasted two days. The majority held that the judge had made no error of law and that there was evidence on which he was properly entitled to exercise his discretion as he did. Conteh J, dissenting, held that the judge misdirected himself on the standard of proof necessary to determine the application for discharge of the injunction and erred in stating that the developers prima facie had a valid permit under the Conservation Act. A permit was either valid or invalid and the judge ought to have held that it was invalid, in particular because it had not been issued within the statutory framework. It had been issued at the last minute without any written application for it being made by the developers.

26.
Before the Board Ms Jordan reiterated the claimant's argument that the burden lay on the developers to establish as a fact that they had been granted a valid licence and were operating within its terms. They ought, she submitted, to have found that the developers had not proved these matters.

27.
Secondly, Ms Jordan submitted that the judge erred in law in considering that the questions as to the lawfulness of the conduct of the DPP in issuing the permit, in particular without a written application for a permit for the revised amount of dredging and without proper consultation, were more appropriate to the substantive hearing of the judicial review application and did not detract from the developers' ability to establish for the purposes of the interlocutory proceedings that they had a prima facie valid permit.

28.
Thirdly, Ms Jordan submitted that the judge acted perversely in deciding on the evidence that the developers were complying sufficiently with the conditions of the permit.

29.
In developing her submissions Ms Jordan argued that the issues relating to the developers' undertaking had to be approached in the wider context of the issues raised in the judicial review proceedings, and she made strong criticisms of the conduct of the government respondents.

30.
On behalf of the developers, Mr Richard Gordon QC submitted that the issues before the Board should be viewed in a narrower compass than the claimant sought to argue. The only jurisdictional foundation for the grant of the interim injunction was by way of enforcement of the undertaking which the developers had given to the Court of Appeal. In answer to the allegation of breach of that

undertaking, the developers were now able to rely on a permit issued under the Conservation Act by the appropriate authority. Even if the circumstances in which it was granted were to result in a finding of unlawfulness on the part of one or more of the government respondents in the judicial review proceedings, as matters stood the developers were not in breach of their undertaking to the court. Mr Gordon cited Lord Radcliffe's statement in Smith v East Elloe Rural District Council [1956] AC 736, 769-770:

"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

31.
As to the allegation that the developers were in breach of the conditions of the permit, Mr Gordon responded that this might (if correct) result in a revocation of the permit under section 10 of the Conservation Act, but unless and until the permit was revoked it remained valid.

32.
Mr Gordon submitted that there was no error of law on the part of the judge in his approach to the application and that there was evidence on which he was properly entitled to reach the conclusions which he did. Mr Gordon also emphasised the damage which the developers would suffer from a continuation of the injunction. Not only were they incurring heavy daily demurrage charges in relation to the dredger, but there was a real risk that further delay might encroach into the hurricane season. If that happened, the dredger would be unable to continue operations. This would result in the developers incurring a further mobilisation and demobilisation charge of $5.5m under their contract with the owners of the dredger. There was also a real risk that the developers' contract with the contractors employed to construct the development itself might be terminated by the contractors' exercise of a right of termination in the event of such delay. The claimant was not offering, nor apparently in a position to offer, any cross-undertaking in damages.

33.
On behalf of the government respondents, Mr Knox emphasised that his clients were not parties to the undertaking. He drew attention to the evidence that the developers had originally applied for a permit under the Conservation Act, and he submitted that the judge was entitled to accept as credible the affidavit evidence of Mr Zonicle regarding the DPP's role in the subsequent history and his decision to issue the permit. Mr Knox submitted that the judge was similarly entitled to attach the weight which he did to the evidence of BEST about monitoring of the developers' compliance with the relevant environmental requirements.

34.
A party appealing to the Board against a decision to grant, refuse or discharge an interlocutory injunction faces a high hurdle, and all the more so where there are concurrent findings by two lower courts. The Board would only grant leave to appeal in exceptional circumstances, but in this case leave to appeal was granted by the Court of Appeal, no doubt because the injunction in question had itself been granted by the Board in the unusual circumstances already described.

35.
The Board rejects Ms Jordan's argument that the judge erred in law in his approach to the developers' application to set aside the injunction. He was right not to interpret the Board's oral judgment on 23 May as intended to impose a legal burden on the developers to prove on the balance of probability

that the permit was valid as a condition of a successful application to set aside the injunction. The circumstances in which the Board granted its injunction were special in that there was no testimony before the Board regarding the issue of the permit. The purpose of granting a short injunction, with permission to apply to the Supreme Court to set it aside, was to preserve the position until such evidence was placed before the court which had the primary responsibility for granting or refusing interim injunctions. In approaching that matter the task of the Supreme Court was intended to be no different from that on any other application to grant or discharge an interim injunction.

36.
Moreover, since the basis for any injunction was that it was properly required so as to enforce the undertaking given by the developers to the Court of Appeal on 9 May, it was important not to confuse that issue with any question about whether an interim injunction should be granted pending the hearing of the judicial review proceedings on any wider basis. Such an application had been refused on 19 December 2013 and there was no appeal against that part of Longley SJ's judgment.

37.
The judge rightly considered whether the developers were entitled to rely on the permit issued by the DPP in order to carry on with their operation without breaching the undertaking which they had given to the Court of Appeal. As the judge properly recognised, that was a different question from questions about whether a permit, lawful on its face, might be invalidated by the court by reason of some public law illegality affecting its issue. If that were to happen, it would not make conduct by the developers under the authority of a permit, which was prima facie valid, become retrospectively unlawful.

38.
Whatever conclusions a court might reach in the judicial review proceedings, if the current stay is lifted and they proceed to a final determination, the judge fell into no legal error in concluding that on the evidence before him the developers were entitled to rely on the permit as prima facie valid, with the consequence that they would not be breaching their undertaking to the court by continuing with the dredging.

39.
The judge, however, recognised the possibility that a court might subsequently hold that the permit was invalid, in which case the discharge of the injunction might in the meantime result in irremediable damage, and he took that into account in the exercise of his discretion. He also took into account the daily loss being suffered by the developers and the absence of any cross-undertaking in damages. On the question which caused the judge the greatest difficulty, that is, whether the developers were fully complying with the conditions of the licence, the Board rejects the suggestion that his approach or conclusions were perverse. He was entitled to conclude that the developers were at least arguably complying with the necessary conditions, and he was properly entitled to take the evidence from BEST into account in reaching his ultimate decision whether to set aside the injunction.

40.
In summary, there was no error of law or perversity of fact in the judge's decision to set aside the injunction, and the Court of Appeal was right to uphold it.