COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2021/pub/JRV/00039

IN THE MATTER OF Order 53 Rule 3 of the Rules of the Supreme Court
AND IN THE MATTER OF an application for leave to apply for Judicial Review by Paul Fuchs, Don Rolle, Loyal Rolle, Robert Kelly Blake Jr., Daniel Clay Smith Jr.

AND IN THE MATTER OF an Application for an Interim Injunction

B E T W E E N:

THE QUEEN
AND
(1) THE DIRECTOR OF ENVIRONMENTAL PLANNING AND PROTECTION
(2) DEEPBLUE PROPERTIES LLC

Intended Respondents

-EX PARTE-

(1) PAUL FUCHS
(2) DON ROLLE
(3) LOYAL ROLLE
(4) ROBERT KELLY BLAKE JR
(5) DANIEL CLAY SMITH JR

Intended Applicants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Gail Lockhart-Charles QC, Candice Knowles for the Intended Applicants (*ex parte*)
Hearing Date:	13 April 2022

RULING

KLEIN, J.

INTRODUCTION

[1] Late in the afternoon of 13 April 2022, I heard an urgent application as the emergency civil Judge by counsel on behalf of the first, third and fourth intended applicants for an interim injunction to restrain the intended second respondent from resuming excavation and construction activities on a development site at Staniel Cay, Exuma, which were apparently due to resume the following morning. The application was made by *ex parte* summons filed 12 April 2022 and supported by several affidavits. I granted an interim injunction until the 19 April 2022 pending the *inter partes* hearing of the application.

[2] As the application was made during the pendency of an application for leave to apply for judicial review under Order 53 of the Rules of the Supreme Court (R.S.C.) 1978, which is currently before Brathwaite J., and having regard to the history of the matter (it appears that an interim injunction had earlier been granted and discharged), it is appropriate to record short reasons for my decision.

Background

[3] Only a brief background is necessary for the purposes of this application. The intended applicants are residents and second homeowners in Staniel Cay, one of the cays in the Exuma Island chain, and they own property near to the site owned by the second intended respondent, Deepblue Properties LLC ("Deepblue"). It appears that Deepblue had intended to build a development in the nature of a small hotel on the cay but, apparently due to opposition from residents and locals, decided to scale back the development to a "villa".

[4] The company was granted a Certificate of Environmental Clearance ("CEC") dated 9 August 2021 to construct a "single family home/residential" by the Director of Environmental Planning and Protection ("DEPP") under the *Environmental Planning and Protection Act 2019* ("EPPA"), pursuant to which the construction and "excavation" works are being carried out. Section 11(1) of the EPPA provides that no work shall be commenced on any project unless that person has been issued a CEC in accordance with the Act. The CEC itself provided that "There is to be NO excavation or mining activity on the property" (capitals in the original).

[5] Concerned that the construction works and any excavation works associated with it could potentially cause serious damage to the ironshore and coastline, which were in close proximity to the development, and in the absence of an Environmental Impact Assessment ("EIA") and Environmental Management Plan ("EMP"), the applicants applied for leave to commence judicial review by summons filed 30 December 2021 challenging the grant of the CEC.

Ex parte application

[6] I should record at the outset that I immediately enquired of Mrs. Lockhart-Charles QC as to whether there had been any attempt to inform the other side of the pending application, having in mind the warning of the Privy Council in *National Commercial Bank of Jamaica v Olint Corp. Ltd.* [2009] UKPC 16, that a judge should not entertain an application for an interlocutory injunction of which notice had not been given unless it was impossible to give notice or it would frustrate the application. Mrs. Lockhart-Charles QC assured me that emails had been sent to the parties the evening before indicating her intention to apply to Brathwaite J. for a fresh interim injunction and, if he was unavailable, to the duty judge. These emails were later forwarded to me.

[7] She also indicated that she had attempted to contact the other side by telephone that afternoon to inform them that she was seeking an audience before the duty judge, but apparently these attempts did not prove fruitful. In the circumstances, I indicated to Mrs. Lockhart-Charles QC that I would be prepared to hear her, and if a case were made out for the grant of interim relief, would be prepared to grant such relief to hold

the ring until the parties could get back before Brathwaite J., which I understood would be the first working day after the long holiday (19 April 2022).

DISCUSSION AND ANALYSIS

Interlocutory injunction principles

[8] There is no doubt that the court will grant an interim or interlocutory injunction in a public law case on the familiar principles set out in *American Cyanamid Co. v Ethicon* [1975] AC 396 but "*with modifications appropriate to the public law element of the case*", as one of the "special factors" referred to by Lord Diplock in that case (see *Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment (Interim Injunction)* [2003] UKPC 63.

[9] The *American Cyanamid* principles are often explicated by way of a four-part sequential test as follows:

(i) whether there is a serious issue to be tried;
(ii) whether damages would be an adequate remedy for any loss sustained by either party pending the outcome of the trial;
(i) whether the 'balance of convenience' favours the plaintiff or the defendant if there is any doubt to as to the adequacy of respective remedies available in damages;
(ii) whether there are any special factors that might affect the court's consideration of the matter.

Serious issue to be tried

[10] Essentially, the intended applicants are concerned about what they consider to be an illegality in the grant of the CEC. Consequently, they seek a variety of declarations and orders against the intended respondents. These include: (i) a declaration that the CEC is unlawful in the absence of an EIA and EMP being done prior to its issuance; (ii) *certiorari* quashing the CEC and mandamus directing the DEPP to exercise her discretion under s. 5 of the *Environmental Impact Assessment Regulations 2020* ("the Regulations") to require the submission of an EIA and EMP prior to the issuance of a CEC; and (iii) an order of prohibition to prevent the DEPP issuing a CEC to Deepblue with respect to "excavation" of the coastline or construction activities without an EIA and EMP.

[11] I use "excavation" in quotation marks because it appears that one of the main issues in contention between the parties is whether *excavation* as a term of art (i.e., as defined in environmental legislation such as *Conservation and Protection of the Physical Landscape of the Bahamas Act* 1997) is being carried out on the development site, so as to require a separate permitting process, or whether the excavation is only ancillary to the construction. It appears from the evidence and summary provided in the applicants' written submissions that when the works first commenced in late December of 2021, an interim injunction was granted *ex parte* by Brathwaite J. on 30 December

2021 to prevent excavation, but this was discharged on 14 March 2022 following an *inter partes* hearing.

[12] Apparently the discharge was made on the basis of affidavits filed by Dr. Rhianna Neeley-Murphy (the DEPP) on 24 January 2022 and 4 March 2022, which basically deposed that the project only required "*minor excavation*" for the purposes of constructing the main pool and foundation preparation. The applicants subsequently filed a number of affidavits which indicate that the extent of the excavation has been far more extensive than may have been represented to the court, one of which exhibits photos showing excavations close to the shoreline as deep as the height of a man. I do not need to refer to all of them, but I will refer to the fourth affidavit of Kara Neeley, filed 12 April 2022, which includes a report by an environmental scientist (Mr. Romauld Ferreira) that states in part:

> "The site is heavily impacted by extensive excavation and mining works. The impact to the environment has been dramatic, extensive, and irreversible. The entire crest of the Ironshore has been completed mined and excavated down to the main high tide mark. These excavations are so extensive, that the volume of fill mined from the site cannot be stored on the site. Nor is it conceivable that all of the mined material will be used on site to construct "the single family residence".

[13] I am conscious that leave has not yet been granted for judicial review, and I therefore express no opinion on whether or not the test for leave for judicial review is satisfied. But I would be prepared to hold that there are serious issues to be tried within the meaning of the *American Cyanamid* test as to the lawfulness of the CEC, in absence of an EIA and EMP, particularly in light of the recent affidavits filed by the intended applicants which throw new light on the extent of the excavations.

Adequacy of damages

[14] As to damages, monetary compensation would clearly not be an adequate remedy where it is alleged that there would be irreversible damage to the environment, and hardly any authority needs to be cited for this. Damages are also not an appropriate remedy in public law proceedings where what is being sought is the prevention of an apprehended breach of a planning or environmental statute.

[15] In *Tegra (NSW) Pty Limited v. Gundagai Shire Council and Anor* [2007] NSWLEC 806, Preston CJ, in the NSW Land and Environment Court, considered the question of whether damages were an adequate remedy in environmental law cases, in which an application for an injunction was being sought by the applicant to prevent quarrying under a development consent which they alleged was flawed. Although the Judge refused the injunction as he found on the facts that the balance of convenience did not lie with the applicant, this is what he said:

> "17. In environmental law cases, where public rights under environmental statutes are being enforced, no question arises as to whether an adequate remedy in damages would be available in lieu of the grant of injunction: *Williams v Homestake Australia* [2002] NSWLWC 5; (2002) 119 LGERA 55 at 66 [53].
> 18. In environmental cases, irreparable harm does not need to be suffered by the applicant personally; harm to the environment and to the enforcement of the law will also suffice."

[16] On the other hand, the intended applicants (or at least the first intended applicant) has given an undertaking in damages in respect of any damages sustained by the intended second respondent by the grant of the interim injunction, which has been memorialized in the Order.

Balance of convenience

[17] As damages are not an adequate remedy, I move on to consider the balance of convenience. I have no doubt, especially given the short period for which the injunction is to last, that the balance of convenience is in favour of the intended applicants. As the court has pointed out, there was copious affidavit evidence (which was not before Brathwaite J. when the injunction was discharged) that extensive excavation is being carried out. The balance of convenience—or to use the Privy Council's terminology from the *National Commercial Bank of Jamaica Case*— the course likely to "*cause the least irremediable prejudice to one party or the other*," was to grant the interim injunction.

The jurisdiction issue

[18] As leave has not yet been granted, the applicants also addressed arguments to the question of whether the court had jurisdiction to grant an interim injunction in the context of an intended application for judicial review, or whether such an injunction would be a "freestanding" injunction. Apparently, these were to meet objections from the intended respondents, and arguments that may have already been deployed in the application to discharge the injunction. The objecting arguments proceed on the basis that as no leave has been granted there is no extant cause of action on which an injunction can fasten.

[19] This contention is bolstered by reference to s. 19(2) of the Supreme Court Act, and several provisions of the R.S.C., Ord. 53(3)(1) and 53(3)(10).

s.19(2)(2):	"A declaration may be made or an injunction granted under this subjection in any case where an application for judicial review seeking that relief, has been made and the Court considers that, having regard to—[…] (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction granted."
Ord. 53, r.3(1):	"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."
Ord. 53, r.3(10)	"Where leave to apply for judicial review has been granted, then—[…] (b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in action begun by writ."

[20] The jurisdiction of the Supreme Court to grant injunctions is codified at s. 21 of the Supreme Court Act, which provides for the court to grant an interlocutory or final injunction "*in all cases in which it appears just and convenient to do so*." Order 29 of the Rules of the Supreme Court (R.S.C.) 1978 sets out the procedural provisions governing the grant of such relief. As is made clear by the phrase "*just and convenient*", the grant of an injunction is a matter of discretion and the court has a wide

discretion to grant relief. But as is the case with all forms of judicial discretion, it is to be exercised on the basis of judicial principles.

[21] I am not of the view that any of the provisions cited above can be read so restrictively as to prevent the court, in appropriate circumstances, from granting interim injunctive relief to preserve and protect the interest of the parties or the subject matter of an application pending a hearing for leave to commence judicial review. In my view, s.19 of the *Supreme Court Act* is clearly speaking to the ability of the Court to grant an injunction or declaration as final relief, and I do not read Ord. 53, r. 3(10) so narrowly as to preclude the grant of interim relief in support of an intended application for judicial review.

[22] In fact, Ord. 29 r. 1 recognizes that an application for an injunction may precede the filing of the originating process:

> "(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* on affidavit, but except as aforesaid, such application must be by motion or summons.
> (3)The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

[23] The argument against interim relief also proceeds on a fundamental misunderstanding as to the nature of public interest litigation, which unlike private law, does not require the presence of a personal interest or, strictly speaking, a cause of action. All that is required is "*sufficient interest*" in the matter to which the application relates. As Lord Diplock famously observed in the *IRC v National Federation of Self Employed and Small Business Ltd.* (1981) 2 All ER 93:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited tax-payer were prevented by outdated technical rules of Locus Standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."

[24] It should also be noted, in this regard, that the EPPA is a fairly modern piece of environmental legislation, and specifically grants standing to a private person, with the leave of the court, to enforce its provisions. For example, s. 51(1) provides as follows:

> "(1) Any person who is aggrieved by a violation of this Act or any regulations made thereunder may, with the leave of the court, institute proceedings in a court of competent jurisdiction against any other person whom he reasonably suspects is responsible for that violation."

[25] But if any authority is needed for the jurisdiction to grant such relief, it is to be found in the House of Lords' decision in *M v Home Office* [1994] 1 A.C. 377, and the many cases in the United Kingdom and elsewhere throughout the common law world that have followed (see, for example, *R v. The Commissioners of Inland Revenue, ex p. Kingston Smith* (1996) WL 1090299). Although the case is remembered for the principle that a minister or other office of the Crown is subject to injunctive relief when acting in his official capacity, it is often overlooked that the mandatory order to stop

the applicant's deportation was made during the pendency of a renewed application for leave to apply for judicial review. The House of Lords later upheld the decision of the judge that there was jurisdiction is s. 31(2) of the UK *Senior Courts Act 1981* (the equivalent of s. 21 of the *Supreme Court Act*) to grant such an injunction. Further, lest it be thought that jurisdiction in the UK to grant interim relief is different because it has been specified under Part 25 of the UK Civil Procedure Rules (CPR), it should be appreciated that both *M v Home Office* and the other case referred to predates the CPR, which came into force in 1998.

[26] I note, also, that there is a reference to *Bimini Blue Coalition v. The Prime Minister of the Bahamas and others* [2014] UKPC 23, a case on appeal from this jurisdiction, to support the principle that a freestanding injunction in the context of judicial review should not be granted and if granted should not be allowed to stand. But I find no statement of principle in the Privy Council's decision to support that. In fact, their Lordships granted an interim injunction, prior to the grant of leave, because as said by Lord Neuberger in the oral judgment granting the injunction (see para. 17):

> "because of our concerns over this very last-minute permit, and <u>because we think that refusing the injunction may undermine the JR proceedings, we think the right order to make is to grant the injunction.</u> However, acknowledging the force of the respondent's 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 entitled to rely on the permit granted on the 22 May 2014." [Emphasis supplied.]

[27] On the appeal to their Lordships from the Court of Appeal's decision affirming the decision of Adderly J. to set aside the injunction, the Privy Council said [para. 35]:

> "The purpose of granting a short injunction, with permission to apply to the Supreme Court to set it aside, <u>was to preserve the position until such evidence was placed before the Court which had the primary responsibility for granting or refusing interim injunctions</u>. 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."

[28] Thus, far from indicating a position that an interim injunction ought not to antedate leave, the speeches of their Lordships in both the oral ruling and the judgment on appeal confirm that such an interim injunction was justified to preserve the position so that the intended judicial review proceedings were not undermined.

[29] Indeed, it would be a remarkable thing if a court were powerless to grant an interim order to prevent possible irreversible damage to the environment in urgent cases simply because no leave had been granted, when the very feature or subject matter which the application was seeking to protect could be completely destroyed in the meantime. For example, suppose leave were refused but granted on a renewed application or on appeal, and nothing was in place to preserve the position? It would render the application futile. It is also instructive to note that the EPPA adopts the "precautionary principle" as one of the environmental principles which should guide its operation, and which requires that decisions should be made to "… *avoid serious or irreversible environmental damage*" even in the absence of full scientific certainty.

CONCLUSION AND DISPOSITION

[30] In all of the circumstances of this case and for the reasons given, I found that the balance of convenience favoured the grant of the interim injunction to preserve the status quo and prevent further damage to the environment until the application can be fully ventilated on a hearing involving all the parties, particularly in light of the new evidence which has been adduced. For my part, I also do not entertain any doubt that the court has jurisdiction to grant such an order.

19 April 2022

Klein, J.