[2009] UKPC 44
Privy Council Appeal No 0013 of 2009

JUDGMENT

Save Guana Cay Reef Association Ltd and others *v* The Queen and others

From the Court of Appeal, Bahamas

before

Lord Hope
Lord Scott
Lord Rodger
Lord Walker
Lord Collins

JUDGMENT DELIVERED ON

17 November 2009

Heard on 7, 8, and 9 July 2009

Appellant	*Respondent*
Ruth Jordan (Instructed by Simons Muirhead & Burton)	James Dingemans QC Tom Poole (Instructed by Charles Russell LLP) Hugh Small QC Robert Adam (Instructed by Latham & Watkins)

LORD WALKER

Introduction

1. This appeal is concerned with an attempt to halt a large-scale development of the north-west part of Great Guana Cay ("the Cay"), an island north of Great Abaco on the northern edge of the Bahamas archipelago. In the course of the litigation some additional issues, including an issue as to apparent judicial bias, have arisen.

2. The Bahamas are known throughout the world for their natural beauty. It is also well known that their rich natural resources, and especially their coral reefs, are at risk from indiscriminate development. There is an admirable explanation of the background to this appeal in the judgment of the Rt Honourable Dame Joan Sawyer, the President of the Court of Appeal, which I gratefully adopt (paras 11 to 13):

> "The Bahamas is a country of 701 islands, cays and reefs which stretches in an arc from approximately 58 miles southeast of the east coast of Florida in the United States of America to just north of Hispaniola. It is separated from Florida by the Gulf Stream and from the Greater Antilles by the Old Bahama Channel. None of the islands is mountainous, the highest point being just over 200 ft above sea level, it has no rivers and its natural fresh water reserves consist of 'lenses' of fresh water which sit in the all pervasive salt water that surrounds and sometimes permeates the islands. Geologically, the islands are mainly composed of soft, porous limestone, the centuries-old accumulated result of minute coral. Overall, The Bahamas is approximately the size of the State of California in the United States with the difference that the greater part of this country consists of shallow waters and banks—the Great Bahama Bank and the Little Bahama Bank.
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> Within the larger archipelago that is The Bahamas, are other smaller archipelagos like Andros, Abaco, Exuma and Ragged Island to name just four. Abaco consists of approximately 265 islands and cays, among which is [the Cay] where the Developers decided to carry out some real estate developments in order to create a special kind of resort.
>
> In most, if not all, of the islands in The Bahamas, there are barrier coral reefs ringing them; parts of those coral reefs, if undisturbed and unpolluted, eventually become islands with their own 'barrier' reefs."

3. Then after commenting that the Commonwealth of The Bahamas has no comprehensive legislation for environmental protection, or public consultation on the disposition of public land, the President continued (paras 15 and 16):

> "The ecology of The Bahamas is said to be 'fragile' and with the concerns regularly mentioned in the national and international press about the 'bleaching' and possible deaths of those reefs due to 'global warming' coupled with environmental degradation which may result from indiscriminate development of the islands, it is quite understandable that thinking persons would be concerned to protect, as far as humanly possible, their environment, not only for themselves, but also for their descendants who may have to inhabit these islands in the future.
>
> Further, it is not unknown for damage to be done to coral reefs by the use of substances like chlorine bleach and other chemicals inimical to the plant life in the waters surrounding such islands which in turn may lead to the eventual destruction of the islands themselves—compare the south sea island that is sinking because the surrounding reef is 'dead'."

4. The Cay is a long, narrow strip of low-lying land separated from Great Abaco by about ten miles of sea. It is about 1,100 acres in extent, and over half of this area (about 650 acres) is included in the development (which is now about two-thirds complete). 451 acres of this was in private ownership and in May 2003 the developers contracted to purchase it. At the beginning of 2004 (when the planning and negotiation of the development was already under way) the population of the Cay consisted of only 153 full-time residents, 123 of whom were Bahamian. They were mostly engaged in fishing and crabbing. In summer the population was increased by seasonal residents, many of them citizens of the United States.

5. Most of the full-time population are in the settlement of Guana Cay, situated about half-way along the south side of the Cay. According to the Environmental Impact Assessment ("the EIA", which plays an important part in this case) it had in 2004 about seventeen businesses including two commercial marinas. There was rapid growth of tourism centred at the settlement, and about 450 house lots were for sale both north and south of the settlement. There were some paved roads. There were already pollution problems associated with waste disposal.

6. Most of the rest of the Cay was still in its natural state, with native vegetation including mangroves in a wetland area. There was however one significant blot on the natural landscape. Disney Corporation had been granted a lease in order to develop a 'Treasure Island' tourist facility on a relatively small part of the site of the new development. Disney Corporation then abandoned this venture without remedying the pollution which it had caused, leaving behind derelict buildings, storage tanks, transformers and contaminated soil. Its development also involved the introduction of some alien and invasive plant species such as Australian pines.

7. The development site includes a small island (Gumelemi Cay) off the north-west tip of the Cay. Apart from that the development site is very roughly in the shape of an hourglass, with a narrow waist. The wide area to the north is being developed as an 18-hole golf course, surrounded at the seaward edges by home sites and a clubhouse. The wide area to the south has already been developed, to a large extent, by the construction of a marina (excavated where the wetland had been) with moorings, shops, a club and inn, and numerous further home sites. Furthest to the south is an area (including a picturesque creek called Joe's Creek) which is to be preserved in its natural state, and a small beach area to which the general public will have access. The rest of the development is to be private and gated.

8. For the purpose of local government the Cay has since 1999 formed part of a district named Hope Town District, which comprises the townships of Hope Town, Man-O-War Cay and the Cay. The chairman of the District Council was Mr Walter Sweeting, who resided at Man-O-War Cay. Mr Sweeting wrote a letter dated 28 April 2005 to the Minister of Agriculture, soon after the commencement of the proceedings, which gives a vivid and apparently objective view of the local government position at that time. After referring to the reorganisation in 1999 and the problems which it brought for the Central District he wrote:

> "Second, the Hope Town District was established as a Schedule Two District based on the Bahamian population numbers. Under the mandates for a Schedule Two District, the Councillors of this district are unable to appoint Boards, such as Town Planning, Port Authority, Licensing etc, therefore all of the oversight and responsibility for the functions of these Boards falls solely to the seven elected members of the District Council. May we respectfully remind you that the elected members of the District Council, are essentially serving in a volunteer, community service position. They all have full-time employment in addition to their District Council service and often find it difficult to make the time to fulfil all their assigned functions.
>
> Third, the Townships of Hope Town, Man-O-War and Great Guana Cay are the fastest growing communities in the country

> and they are unique in their population demographics. They may be considered small with regard to the number of Bahamians, but in all three cases there are large numbers of foreign property owners. It has been said that they are non-Bahamians and therefore don't count. We must face the fact that they do count and their dollars are the primary fuel for the economy of these cays. Dealing with these foreign property owners and their interaction with the native Bahamian population presents a number of challenges which don't occur to such a degree throughout most of the rest of the country. This foreign segment of our population must be treated with respect and efficiently in a timely manner. If we do not recognise the importance of these people it will have a devastating effect upon the income of our local Bahamians who we are elected to represent.
>
> Now after nearly six years of functioning as its own District, it is apparent that the Hope Town District as it exists today, is simply not working."

The Crown and Treasury lands

9. The southern end of the development (including, but not limited to, the undeveloped preserve) consists of land which was (and on the appellants' case, ought still to be) in public ownership. According to the agreed statement of facts this consisted of 105 acres of Crown land vested in the Minister Responsible for Lands and Surveys ("the Responsible Minister") and 43 acres of Treasury land vested in the Treasurer of the Commonwealth of The Bahamas ("the Treasurer"). These acreages do not tally precisely either with the acreages in the Heads of Agreement executed on 1 March 2005 ("the Heads of Agreement", another document of crucial importance in this case) or with the acreages in the four leases and one licence eventually granted in July and August 2007 and put in evidence on 28 November 2007 (in each case after the Court of Appeal had reserved judgment). But the precise acreages are not material.

10. Under section 54 of the Conveyancing and Law of Property Act any power to dispose of Crown lands which was before independence vested in the Governor is exercisable by the Responsible Minister (that is, at present, the Prime Minister). Under section 5(3)(b) of the Ministry of Finance Act any power to grant a lease or licence of Treasury land for a term of more than three years requires the prior approval of the Governor General. This is a matter on which (under section 79 of the Constitution) the Governor General is under an obligation to follow the advice of the Prime Minister.

11. There was some inconclusive discussion before the Board as to the effect of the International Persons Landholding Act. Section 3 of that Act imposes a general requirement (subject to exceptions not material to this case) for a non-Bahamian individual or company wishing to acquire land in the Bahamas (for either a freehold or leasehold interest) to obtain a permit from the Investments Board established under section 12 of the Act. By section 12(1) the Board is to consist of the Prime Minister (as chairman) and such other members as may be appointed by the Prime Minister. It was suggested that the acquisition of Crown and Treasury lands by the respondent companies (all of which, although incorporated in the Bahamas, are treated as non-Bahamian under section 14(1) of the Act) may have infringed section 3. A permit was obtained from the Investments Board on 11 February 2005 for the acquisition of the 451 acres and it is not clear that no further permit has been obtained for the leases of Crown and Treasury land. In any event this point seems not to have been raised below and was not fully argued before the Board. Their Lordships would not wish to express a view on it without hearing fuller argument.

Statutory environmental protection

12. It is convenient to refer at this point to the existence (or non-existence) of other statutory provisions relevant to this appeal. As the President said in the Court of Appeal, the Bahamas has no comprehensive statute dealing with the protection of the environment. It has particular statutes such as the Wild Birds Protection Act, the Plants Protection Act and the Conservation and Protection of the Physical Landscape of The Bahamas Act, but the appellants have not placed any reliance on those statutes. It also has statutes controlling development and controlling ports and harbours (the Town Planning Act and the Port Authorities Act). These two statutes were referred to in the course of argument. The most important point to be noted is that there is no statute (comparable to those in force in all countries of the European Union) requiring an environmental impact assessment to be prepared and published before approval of major infrastructure works and other major developments. The preparation of the EIA in this case, and its submission to The Bahamas Environment, Science and Technology Commission (BEST Commission) was in accordance with what has become the usual practice, but it is not a practice required by statute.

13. Reference has already been made to a letter from Mr Sweeting describing the difficulties encountered by local government in the Hope Town District. The letter seems to contain one error in that Hope Town District appears to be a Third Schedule (not a Second Schedule) District for the purposes of the Local Government Act. It is for that reason that it does not have power to appoint Boards to perform functions under the Port Authorities Act and the Town Planning Act (see section 14(1)(a)(ii) and (iii) of the Local Government Act). Instead, as their Lordships understand the position, Third Schedule Districts merely have the right to make representations to the Port and Town Planning Authorities.

The NEC and the BEST Commission

14. The National Economic Council ("NEC") and the BEST Commission have important but non-statutory functions in public life in The Bahamas, and there have been many references to them in this appeal. Mr Wendell Major, the first respondent, is the Secretary to the NEC as well as Secretary to the Cabinet, the latter being a high public office provided for in section 113 of the Constitution. In his first affidavit he deposed that the NEC was established as a Committee of the Cabinet in 1973 in order to formulate economic policy. He added:

> "Its mandate was later broadened to include review of major economic proposals to determine their acceptability and their consistency with general economic and social objectives, to consider the desirability of sub-divisions of land throughout The Bahamas and to keep under constant review economic policies."

> The membership of the NEC coincides with membership of the Cabinet (although it is contemplated that the NEC might be reduced in numbers). Mr Major deposed that he signed the Heads of Agreement "in the dual capacity of Secretary to the Cabinet and Secretary to the NEC, on behalf of the Government of The Bahamas, recording the Government's agreement to the project."

15. The BEST Commission has been described in an affidavit of Dr Donald Cooper, Under-Secretary in the Ministries of Health and Environment, Agriculture and Fisheries and Office of the Prime Minister with responsibility for the management of the BEST Commission. It was established in 1994 with a chairman and board members drawn from various governmental and non-governmental agencies with environmental responsibilities in the Bahamas. Its functions include advising the Government on the environmental impact of various development proposals submitted to the Commission.

Summary of the facts

16. A large volume of affidavits and exhibits was placed before the courts below, and much of it has been placed before the Board. But having already referred to background matters their Lordships can summarise the facts quite shortly. More detailed reference will be made to the evidence in the discussion of particular issues in the appeal.

17. Planning for the development began in 2003 at latest. On 26 May 2003 a company incorporated in Georgia (which may be the parent company of the Bahamian companies mentioned below) contracted to buy the 451 acres of "private" land. The first public consultation meeting took place on the Cay on 19 February 2004. There was a second public consultation meeting on the Cay on 20 August 2004. The EIA (prepared by Dr Kathleen Sullivan-Sealey, an Associate Professor at the University of Miami together with other consultants, and running to about seventy pages) was submitted to the BEST Commission on 27 October 2004. On 19 November 2004 the developers had a meeting with the Prime Minister (The Rt Honourable Perry G Christie) and the Honourable Allyson Maynard-Gibson, the Minister of Financial Services and Investments.

18. In February 2005 Dr Michael J Risk, a marine bio-geologist, gave a written report to the objectors ("February 2004" in the heading of the report is an error). On 11 February the developers were granted a permit by the Investments Board in respect of the 451 acres. At some stage (the agreed statement of facts and issues states "in or around March 2005") the BEST Commission made twenty-three recommendations arising from its study of the EIA, and the developers responded with detailed addenda running to about fifty pages.

19. On 18 February 2004 attorneys acting for the objectors sent letters to the Prime Minister and several other ministers and officials objecting to the signature of the Heads of Agreement without further informed consultation. Only one of these letters was acknowledged. On 21 February there was a meeting with the Minister of Financial Services and Investments at which some (unspecified) variations in the draft Heads of Agreement were made. On 22 February the Heads of Agreement, as amended, were approved by the NEC and they were signed by Mr Major, on behalf of the Government, on 1 March. On 11 March the appellant, Save Guana Cay Reef Association Ltd ("SGCRA") was incorporated as a Bahamian company. It was initially the sole applicant for judicial review in proceedings commenced on 4 April 2005.

The Heads of Agreement

20. The Heads of Agreement are a forty-page document signed on 1 March 2005 by Mr Major on behalf of the Government and six Bahamian companies (some of which have since changed their names). All the companies ("the Developers") except Baker's Bay Foundation Ltd (a not-for-profit company) appear to be in common ownership and control. The agreement contains numerous recitals, the last of which is in these terms:

> "(J) The Government, being satisfied that the Development will impact positively and significantly upon the economy of the said Commonwealth and the Island of Abaco in particular, has approved in principle the development upon the terms and

> conditions hereinafter appearing and the entering into of [various leases]".

21. Clause 1 describes the proposed development (partly verbally and partly by reference to plans—"the general development plan") and contains an obligation for the Developers to carry out the development in accordance with the general development plan subject to them "obtaining all of the necessary approvals, concessions, agreements, licences and permits required." The general development plan was in two phases. Phase 1 included (in addition to most of the features already mentioned) a reverse osmosis desalination plant, a fully automated sewage treatment facility, a solid waste disposal facility and a community centre of not less than 3,500 sq ft. Phase 2 included the golf course (at present, their Lordships were told, under construction).

22. Clause 2 provided for environmental matters, and in particular for the Developers to observe the requirements of the EIA and the Environmental Management Plan. Clauses 3 and 4 provided for the employment and training of Bahamian personnel in the construction and operation of the development (although not to the complete exclusion of outsiders) and for the use of Bahamian services and (so far as available) local materials Clause 5.1 provided:

> "The Government hereby agrees in principle with the Development described herein and set out in the General Development Plan attached hereto subject to the requisite approvals of the relevant government agencies and as herein provided."

23. Clause 6 is of particular importance, since it has been attacked (on the one hand) as being *ultra vires* and (on the other hand) as an improper fetter on official discretion. By Clause 6.1 the government agreed to grant various leases described in the recitals to the agreement. It is common ground that the terms of these proposed leases are not defined with sufficient precision to constitute enforceable obligations. They were in effect "agreements to agree". Clause 6.1 also provided for the Government to grant concessions and exemptions available under the Hotels Encouragement Act. Clause 6.2 provided for the Developers to be granted import and export licences in connection with so much of the development as qualified for benefits under the Hotels Encouragement Act. Clause 6.3 provided for a franchise in respect of the desalination plant. Clause 6.4 provided for the Government to expedite approvals under the International Persons Landholding Act. Clauses 6.5, 6.6 and 6.7 provided for electricity, telephone and road infrastructure. Clause 6.8 has been the subject of a good deal of argument. It provided:

> "The Government will facilitate on an accelerated basis all necessary approvals, permits, agreements, licences and concessions hereinbefore and hereinafter requested and

> required by the Developers and each of them as may be appropriate in connection with the completion, operation and maintenance of the Development including (but not limited to) the following . . ."

There followed eight particular references and one general reference to approvals and licences from various bodies, including the Investments Boards, the Ministry of Public Works and "the applicable government agency with respect to the existence and location of the moorings, docks and marinas." The remaining provisions of the Heads of Agreement do not call for special mention.

The course of the litigation

24. These proceedings have followed a tortuous course with several apparent reversals of fortune. Leave to apply for judicial review was granted to SGCRA and a date set for the hearing. The applicant then applied for an interlocutory injunction. At a hearing on 26 May 2005 not only was an injunction refused, but the application was dismissed for want of *locus standi* on the part of SGCRA. On 23 November 2005 the Court of Appeal reinstated the application and the developers (although not then parties) gave an undertaking to stop work until the outcome of the judicial review proceedings was known. Mr Aubrey Clarke was joined as a second applicant. The affidavit evidence contains allegations of breaches of the undertaking, but that is not an issue for the Board.

25. On 30 January 2006 the applicants applied again for an injunction, and also asked for orders for cross-examination of deponents, and disclosure of documents. These applications were refused by Carroll J (Ag). The developers were at that stage joined as parties. The application was heard by Carroll J (Ag) over four days during February 2006. He then reserved judgment. On 25 April the developers applied to the Court of Appeal for release from their undertakings. On 8 May the Court of Appeal made an order releasing the developers from their undertakings as from 31 May if no judgment had been given by then. At the end of May an urgent application to the Judicial Committee of the Privy Council was refused, but the Judicial Committee granted an injunction on a further application at the end of July 2006, renewed at a further hearing in August 2006.

26. On 12 October 2006 Carroll J (Ag) gave judgment dismissing the application for judicial review. The applicants' appeal to the Court of Appeal was heard on 25 April and 17 May 2007, when the Court of Appeal reserved judgment. In July and August 2007 the leases and licence of Crown and Treasury lands were granted, as already mentioned, despite the fact that the Court of Appeal was still considering its judgment. On 18 February 2008 (Dame Joan Sawyer P and Ganpatsingh and Osadebay JJA) gave judgment dismissing the appeal.

Fundamental points bearing on the issues

27. The statement of facts and issues agreed by the parties sets out ten issues for decision by the Board. These are discussed below in turn. But there are some fundamental points to be made in order to put the particular issues in context (and to shorten the discussion of some at least of them). Most of these points were made in the judgments in the Court of Appeal, but they are sufficiently important to bear repetition.

28. First, the decision that the Government should support the proposed development was taken at the highest level, that is by the Cabinet. Under section 72 of the Constitution the Cabinet "shall have the general direction and control of the government of The Bahamas and shall be collectively responsible therefor to Parliament." Those wide, simple words (quoted by the President in her judgment) must be given their full force. The character of the decision is not altered by the fact that Mr Major (the Cabinet Secretary and Secretary to the NEC) was expressed in the Heads of Agreement as acting on behalf of the NEC, since its membership coincides with that of the Cabinet. It is a common feature of Cabinet government to establish and work through committees without the need for express statutory authority.

29. Second, the proposed development was on any view a major development with far-reaching economic, social and environmental consequences. It involved an investment of the order of US$500m. It involved large-scale infrastructure projects, both on land and in the sea. The population of the Cay was going to increase greatly, and the pattern of its economic life was going to be transformed. Any complex project of that sort requires a strategic framework of planning and decision at the outset, followed by detailed planning and detailed decisions on particular matters as it goes forward. In such a situation there is no fettering of official discretion in starting with a carefully-formulated general policy (In *re Findlay* [1985] AC 318, 335). Indeed, to start without a carefully-formulated general policy would be a recipe for bad administration.

30. The function of the Heads of Agreement was, in their Lordships' opinion, to provide such a framework. It is common ground that the provisions as to the granting of leases were too uncertain to be legally enforceable. Other provisions of the Heads did probably create legally enforceable obligations. But it is unnecessary to form a final view on that, since on any view the Heads constituted a considered political commitment on the part of the Government of the Bahamas, matched by the Developers' financial commitment to investment in the project. The provisions of Clause 6 of the Heads, which gave rise to much discussion, recognised that numerous detailed decisions (such as approval of the construction of each individual building on the development) would come later, and would be taken by authorities with more specialised functions.

31. Third, there is, as already noted, no comprehensive legislation for environmental protection in the Bahamas, and there is no statutory requirement for an EIA to be obtained before permission is given for a major project likely to affect the environment. Obtaining an

EIA for submission to the BEST Commission has become standard practice, but the primary purpose is to enable it to receive expert scrutiny by the Commission itself. The purpose is not (as with EIAs under European Union legislation, or the statutory provisions in force in Belize: see *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 [2004] Env LR 38) to inform public consultation. It might be preferable if that were a statutory requirement, but it is not. At present it is the BEST Commission that is expected to act as a watchdog in the public interest. The law of the Bahamas does not at present require (in the well-known words of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615),

> "The inclusive and democratic procedure . . . in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues."

32. That is not to say that the residents of the Cay had no expectation of any sort of public consultation as to the multi-million dollar investment that was going to transform their island. All the courts below accepted that the public had a legitimate expectation of consultation arising out of official statements recognising the need to take account of the residents' concerns and wishes. But taking their concerns and wishes into account does not of course mean that the plans for the development must necessarily be changed, if only because the residents' views were by no means single-minded (Ganpatsingh JA mentioned in his judgment his perception that "the community is bitterly divided between those who do and those who do not oppose the development").

33. If there is a legitimate expectation of consultation, it must be a proper consultation. Both sides referred in argument to the well-known observations of Lord Woolf MR in *R v North and East Devon Health Authority Ex p Coughlan* [2001] QB 213, 258:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council Ex p Gunning* (1985) 84 LGR 168."

The issues: consultation

34. The ten agreed issues fall into five groups: (1)(a), (b) and (c) are concerned with public consultation; (2)(d) and (e) with the effect of the Heads of Agreement; (3)(f) and (g) with irrationality and fettering of discretion; (4)(h) and (i) with the judge's interlocutory refusal of orders for discovery and cross-examination; and (5)(j) with the submission that the judge, Carroll J (Ag) could not be regarded as an impartial and independent tribunal. Their Lordships will consider the issues in that order.

35. The courts below were unanimous that there was a legitimate expectation of consultation, but that it had been adequately satisfied, primarily by the two public meetings held at the schoolhouse at the Cay settlement on 9 February 2004 and 20 August 2004. Minutes were taken of both meetings and the minutes are in evidence.

36. The first meeting was a Town Meeting called by the Hope Town District Council. It was attended by Mr Walter Sweeting (the Chief Councillor) and six other members of the Council; by Mr Robert Sweeting (the Member of Parliament for South Abaco); and by Mr Alexander Williams, an Administrator for Central Abaco, and some other officials. The meeting was attended by 60 to 70 people and lasted for 75 minutes.

37. Mr Walter Sweeting opened the meeting and Mr Williams then described what the "mammoth" development consisted of, saying that the project "if approved, will naturally change the island, and the way things are done for ever on the island." He had been asked by the Ministry of Financial Services and Investment to obtain the views and concerns of the people. The minutes then record people's concerns under nineteen brief heads, several (but not all) of which were environmental in nature. Mr Robert Sweeting MP then addressed the meeting. The minutes end with the following summaries:

> "The residents would like:
>
> (1) One hundred and twelve feet of beach space and adequate access.
>
> (2) Joe's Creek as part of their heritage if dredged the residents will lose their heritage.
>
> (3) Proper garbage collection/disposal facilities.
>
> (4) The retention of Crown land.
>
> (5) Full Bahamian participation in the construction of this project.

> Administrator's conclusion of the residents' main concerns:
>
> (1) The issue of the Government divestment of the remaining Crown land and Government land.
>
> (2) The issue of the environmental impact that construction will have as a result of the marina construction.
>
> (3) The issue of the geological impact on the small piece of land.
>
> (4) The impact it will have because of fertilisation for the use of the golf course.
>
> (5) The social and moral impact as it relates to the infrastructure to accommodate persons coming to live and to work and all the other contingencies.
>
> Residents' conclusion:
>
> The general consensus was that of opposition to the project. Some were in favour of a scaled down version eliminating the marina."

38. Mr William Sweeting made an affidavit about the meeting indicating that more than one further consultation meeting was proposed:

> "Mr Williams emphasised that the project was only at its infancy stage and that he had been asked by the Government to tell the people of Great Guana Cay about the project and to just get their views on it.
>
> Administrator Williams explained that there would be further follow-up meetings in which the project would be detailed and opportunities provided to the residents of Great Guana Cay to give their input.
>
> He also said that more information would be shared with them. He stated that the developers and governmental agencies would have follow-up meetings. He also emphasised that this meeting was just an introduction to tell the people that there was an intention to develop a project there in Great Guana Cay.

> The conclusion of that meeting was that the Government and the Developers would be coming to Great Guana Cay to conduct dialogue and meetings with the public."

In particular, Mr William Sweeting deposed that the Minister of Financial Services and Investments, the Hon Allyson Maynard-Gibson, proposed to have a meeting with the District Council and a number of residents of the Cay.

39. The second meeting on 20 August 2004 was attended by senior representatives of central government, including Dr Baltron Bethel (an investment consultant to the Ministry of Financial Services and Investments), Mr Michael Major (Director of the Department of Physical Planning) and Mr David Davis (Under-Secretary in the Office of the Prime Minister). It was also attended by representatives of local government and by representatives of the developers, including Dr Sullivan-Sealey, the main author of the EIA. The meeting was addressed by Dr Bethel and by Mr Gottlieb (an attorney representing the developers). Mr Mannell, another representative of the developers, then gave a powerpoint presentation covering many aspects of the proposed development, including the clean-up of the Disney Corporation pollution.

40. The minutes of the meeting record several questions and answers (in contrast to the unanswered questions posed at the first meeting). These covered a variety of topics, including the provision of copies of documents to interested parties; issues relating to the island's reef systems; and questions as to Crown lands, the private nature of the development, and public access to some of the beaches. Mr Robert Sweeting MP then addressed the meeting,

> "indicating that while he like many others would have wanted to see a less-developed and more pristine Great Guana Cay than what existed today, he also knew that the depressed economic state of the Cay had motivated many locals to move to New Providence in search of work. He recognised that with the proliferation of second homes came the impetus for repopulation of the Cay by Bahamians with historic roots."

Finally Dr Bethel referred to the EIA being reviewed by independent experts. The meeting occupied three hours.

41. The judge was in no doubt that the process of consultation was adequate (see especially paras 198 to 211 of his judgment). In the Court of Appeal the President did not deal expressly with this point, but agreed with the other members of the Court. Osadebay JA and Ganpatsingh JA dealt with it at paras 61 to 63 and paras 39 to 44 of their respective

judgments, expressing themselves in more measured terms than the judge, but both reaching a clear conclusion.

42. Miss Jordan (who put forward in a forthright way all that could be said in favour of the appeal) criticised these conclusions for overlooking the apparent promise (at the time of the first meeting) of more than one meeting being held in the future. In particular, she criticised the failure of the Minister for Financial Services and Investments to make good her promise of a meeting with members of the District Council and other residents. Miss Jordan also relied (citing *Bushell v Secretary of State for the Environment* [1981] AC 75, 96 and *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 563) on the need for the public to be adequately informed of the subject-matter of what is proposed before the consultation process took place.

43. These points are not without some force. It is unfortunate that the Minister did not make good her promise of a meeting. There is also some force in the point about informed consultation, but by the time of the second meeting the public seems to have been given a reasonably full picture of what was proposed, with copies of documents being on offer, and the main author of the EIA being present at the meeting. In the event the objectors seem to have obtained a copy of the EIA through the assistance of Dr Robert Silk, who obtained it from Dr Sullivan-Sealey herself, and regarded it as a good piece of work. The failure to publish the EIA earlier would have been more serious had it been addressed primarily to the general public (as with the European model of an EIA) rather than to the BEST Commission as an expert body. No doubt the process of consultation (like almost any other consultation) could have been improved on, but their Lordships consider that these imperfections fall far short of what would be needed to lead them to differ from the unanimous view of the courts below, with their experience of local conditions.

The issues: the Heads of Agreement

44. It is clear that not all the provisions of the Heads of Agreement created legally enforceable obligations, especially as regards the Crown and Treasury lands. Probably some of the other provisions did create legal obligations. But the Heads, whether or not legally enforceable at all, established a framework through which the planning and carrying out of the development could proceed with the Government's general blessing, subject to the grant of all necessary permits and licences being considered in due course by the appropriate specialised authorities (and subject, in the case of the Crown and Treasury lands, to the special statutory restrictions on their disposal). It is surprising and regrettable that the Government thought fit to proceed with the completion of the leases and licence while the Court of Appeal was still considering its judgment in this matter. But their Lordships are not persuaded that there was any element of excessive exercise of official powers in entering into the Heads.

The issues: irrationality and fettering

45. These issues can be considered quite briefly because they are covered by the general points already discussed. The proposed development represented a very important choice for the people of the Bahamas (and especially for those living on or near the Cay), with far-reaching economic, social and environmental consequences. It was eminently a decision to be taken at a very high level by democratically elected representatives. It was a decision with which the Court would be very slow to interfere. It required an overall strategic plan and the putting in place of the Heads as a framework for progress did not involve any improper fettering of official discretion.

The issues: discovery and cross-examination

46. The judge refused to make orders for discovery or cross-examination of some of the respondents' witnesses. He did not give reasons for his refusal, and it is regrettable that he did not give at least brief reasons. But it is apparent from the transcript that his reasons must have been that he regarded the order sought by the objectors as unnecessary and no more than a fishing expedition.

47. It is no longer the rule that disclosure should be ordered only where the affidavit evidence put in on behalf of the decision-maker can be shown to be inaccurate or misleading: *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650. Nevertheless orders for discovery and cross-examination are still exceptional in judicial review proceedings, for good reason. Such proceedings are essentially a review of official decision-making, and need to be determined without any avoidable delay. On a realistic analysis the only arguable ground for judicial review in this case was the alleged inadequacy of the public consultation, a topic on which there was quite a lot of documentary evidence. The judge's refusal of orders for discovery and cross-examination were well within the scope of his discretion.

The issues: apparent bias

48. Under section 15(a) of the Constitution every person in the Bahamas has the right to the protection of the law, and section 20(8) of the Constitution provides:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court

> or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

49. The final issue is whether Carroll J (Ag) constituted "an independent and impartial" tribunal. No imputation of actual bias is made against him, but it is said that he was an acting judge appointed on a temporary basis (that is on a six-month renewable contract) and that the Government of the Bahamas was at the time in default in failing to review judges' salaries. Miss Jordan added, in reinforcement of those main grounds, that the acting judge had been a senator in the governing party, and that the judicial review proceedings were of particular political sensitivity.

50. The test for apparent bias has been laid down by the House of Lords in *Porter v Magill* [2002] 2 AC 357. The opinion of Lord Hope of Craighead in that case (paras 95 to 103) invited the House to accept, as it did, a "modest adjustment" in the formulation of the English principle, so as to bring it fully into alignment with Strasbourg jurisprudence, in terms put forward by Lord Phillips of Worth Matravers MR *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, para 85:

> "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility [, or a real danger, the two being the same,] that the tribunal was biased." (Brackets added)

Lord Hope's formulation (para 103) omitted the words in square brackets.

51. Both before and since *Porter v Magill* there have been cases considering whether the fact that a judge has no long-term security of tenure would lead a fair-minded and informed observer to conclude that there was a real possibility of bias, because of the temporary judge's inclination to be over-deferential to those who had power to terminate or renew his appointment. The most important authorities are *Starrs v Ruxton* 2000 JC 208, *Millar v Dickson* [2002] 1 WLR 1615 and *Kearney v HM Advocate* 2006 SC(PC) 1. *Kearney* shows that there is no single test that is decisive. All the circumstances have to be taken into account. The decisive point invalidating the use of temporary sheriffs was the fact that under section 11(4) of the Sheriff Courts (Scotland) Act 1971 the appointment of a temporary sheriff could be "recalled" (that is, terminated) by the executive at any time and for any reason; this was reinforced by practical arrangements (for instance, an age limit) which had no statutory authority. *Kearney* upheld the validity of the appointment of temporary judges of the High Court of Justiciary, where those difficulties did not arise (see the opinion of Lord Hope at paras 51-53).

52. Section 95 of the Constitution of the Bahamas makes express provision for the appointment of an acting Justice of the Supreme Court. His or her appointment may be either for a fixed period or until revoked by the Governor-General acting on the advice of the Judicial and Legal Service Commission (established under section 116 of the Constitution). In this case the acting judge was appointed for a fixed period of six months. During that period he had the same security as a permanent judge in that he could be removed only for inability to discharge his functions, or for misbehaviour (section 96(4) and (5) of the Constitution). He was, their Lordships were told, approaching retirement age. Neither the fact that he had been a senator, nor the fact that judges' salaries were at the time perceived as less than generous, is relevant. Nor is the fact that the case may have been perceived as controversial. Their Lordships, like the courts below, reject the assertion of apparent bias.

Conclusion

53. At the beginning of the oral hearing Miss Jordan produced two documents described as *amicus curiae* submissions. Their Lordships declined to look at them. So far as they consisted of new evidence, they were much too late. So far as they consisted of legal submissions, the appellants had the opportunity of incorporating them into their oral submissions.

54. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The parties have 21 days to make written submissions as to costs.