

PRIVY COUNCIL APPEAL NO. 47 OF 2003

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

BETWEEN:

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

Appellants

-and-

**(1) THE DEPARTMENT OF THE ENVIRONMENT
(2) BELIZE ELECTRICITY COMPANY LIMITED**

Respondents

CASE FOR THE FIRST RESPONDENT

ANNEXE I

**A summary of the English scheme for dealing with Environmental
Impact Assessments.**

1. The English scheme implements two EU Directives: 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment ("the 1985 Directive"), and 97/11/EC ("the 1997 Directive), which amended the 1985 Directive. The Directives include the object of harmonising provision for environmental assessment among member states. The Courts share, with the legislative and executive agencies of the member states, the responsibility for the discretion conferred by the Directive (see Carnwath LJ in *R (ota Jones v Mansfield DC* [2003] EWCA Civ 1408 at

paragraph 60). This underpins the response of English Courts to claims based on failure to comply with the EIA process.

2. The recitals to 85/337/EEC include the following:
 - 2.1.1. "Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas **this assessment must be conducted on the basis of the appropriate information supplied by the developer**, which may be supplemented by the authorities and by the people who may be concerned by the project in question (emphasis added);
3. Article 2(1) requires member states to ensure that projects liable to have significant effects on the environment shall be made subject to a requirement for development consent and an assessment with regard to their effects. Member states have a discretion (Article 2(2)) to incorporate "the environmental impact assessment" into their own systems of planning control.
4. The remainder of the Directive sets out the requirements for the content of an EIA and makes provision for consultation with interested bodies and for publication "in order to give the public concerned the opportunity to express an opinion before the development consent is granted" (Article 6).
5. The Directive was initially implemented by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199). These are replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 1999/293 (the TCP Regulations). There are also regulations implementing the Directive for particular areas of activity, for example highways and harbour works.

6. The TCP Regulations take effect within the context of planning control. They provide additional conditions and procedures to be followed before planning permission can be granted for an EIA development (i.e. those for which an EIA is required).
7. Regulation 3(2) provides that the relevant decision maker (i.e. planning authority, Secretary of State or inspector as the case may be) "shall not grant planning permission unless they have first taken the environmental information into consideration". If the Secretary of State grants permission, in contravention of this Regulation, then their grant of planning permission is outside the powers of the Town and Country Planning Act 1990 for the purpose of s. 288 of that Act¹.
8. The environmental information is "the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development" (Regulation 2);
9. The consultation bodies are any body which the relevant planning authority would be required to consult [Regulation 2(1)], and, if not already included, the Principal Council for the area, the Countryside Commission, English Nature, and the Environment Agency.

10. The environmental statement "means a statement -

¹ This is a provision dealing with appeals to the High Court. Where an appeal is outside the powers of the Secretary of State then the appellant does not need to show substantial prejudice before an Order will be made quashing the decision. The Court still retains a discretion to refuse relief, as it would do on a judicial review. The reference to the Secretary of State here does not imply that the grant of planning permission in breach of Reg 3(2) would not be ultra vires in case of a grant by the planning authority. It would be but since that would be dealt with in an application for judicial review there is no need to make any reference to it.

“(a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

“(b) that includes at least the information referred to in Part II of Schedule 4”;

11. Schedule 4 mirrors the requirements of Article 5 and Annex IV of the Directive. It provides:

12. PART I

1. Description of the development, including in particular -

(a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed development.

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and

temporary, positive and negative effects of the development, resulting from:

- (a) the existence of the development;
- (b) the use of natural resources;
- (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the applicant of the forecasting methods used to assess the effects on the environment.

- 5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
- 6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.
- 7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information.

PART II

- 1. A description of the development comprising information on the site, design and size of the development.
- 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
- 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
- 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
- 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.

13. Part II of the TCP Regulations deals with screening, that is the decision whether the development is to be treated as an EIA development for which an ES is needed. This arises when the developer submits "a statement referred to by [them] as an environmental statement" (regulation 4(2)(a)), or the planning authority adopt a screening opinion to that effect (4(2)(b)), or the Secretary of State so directs (Reg 4(3)). Regulations 5 and 6 make detailed provision allowing the developer to apply for a screening opinion or direction to establish whether or not an ES is needed.
14. By Part III, if a developer submits a planning application for an EIA development without an ES, then the authority must give the developer a chance to submit a statement. If they do not, and the developer does not challenge the decision that this is an EIA development, then the application must be refused (Regulation 7(5)-(7)). Similar provisions apply to the Secretary of State (Regulations 8 and 9).
15. Provision is made in Part IV for a developer to seek a scoping opinion or direction from the planning authority or Secretary of State as to the information to be provided in an environmental statement. The authority or Secretary of State must consult with the consultation bodies before responding. By Regulation 12 the developer can, by notice start a procedure under which the authority and the consultation bodies have to provide information relevant to the ES. If requested to do so by the person proposing to submit a statement then they shall "enter into consultation with that person to determine whether the authority has in its possession any information which he or they consider relevant to the preparation of the environmental statement". If they have such information then they shall make it available.

16. Further statutory guidance about the content of an EIA is contained in *"Preparation of Environmental Statements for Planning Projects that Require Environmental Assessment - A Good Practice Guide"* (HMSO, 1995), and Circular 2/99: *"Environmental Impact Assessment"*. There are also EC Commission guidelines are contained in the *"Environmental Impact Assessment: Guidance on Scoping"* of 1996.
17. Part V makes provision for publicity and consultation where an applicant submits a statement "which he refers to as an ES". By Regulation 19, where the decision-maker is of the opinion that a statement that has been submitted requires further information in order "to be an ES" then they shall require further information from the developer. There are requirements for this further information to be publicised in much the same way as the original application or statement [19(3) –(7)].
18. By Part VI, documents associated with the application and the decision of the authority must be kept available for inspection by the public. This includes any scoping or screening opinion or direction and decision and the reasons for it.