

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-02926

BETWEEN

**THE SOUTHWEST TOBAGO FISHING ASSOCIATION LTD.
CLAIMANT**

AND

**THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO
TOBAGO HOUSE OF ASSEMBLY
THE ENVIRONMENTAL MANAGEMENT AUTHORITY
PETROLEUM GEO-SERVICES LIMITED
DEFENDANTS**

BEFORE THE HONOURABLE MADAM JUSTICE J. JONES

Appearances:

**Ms. D. Moore-Miggins for the Claimants
Ms. D. Baptiste-Samuel instructed by Ms. G. Jankey for the First Defendant
Ms. J. Phillips holding for Mr. A. Pascall for the Second Defendant
Ms. N. Sharma instructed by Ms S. Khan for the Third Defendant
Dr. R. Ramlogan for the Fourth Defendant**

JUDGMENT

1. This case raises the question of the jurisdiction of the High Court with respect to liabilities created by the Environmental Management Act Chap.35:05. (“the Act”). The Claimant, the Southwest Fishing Association, is a limited liability company. Its members, described as “fisher folk”, approximately 60 in number, are registered with the Fisheries Division of the Tobago House of Assembly. The Claimant alleges that its members are

the users of and have an economic interest in the traditional fishing grounds off the Tobago coast (“the traditional fishing grounds”).

2. By this action filed on the 29th July 2008 the Claimant sought an injunction against Petroleum Geo- Service Ltd (“PGS Ltd”), the Fourth Defendant herein, restraining it from the conduct of seismic surveys in the traditional fishing grounds. In response PGS Ltd. disputed the Claimant’s right to an injunction and submitted that the Court has no jurisdiction with respect to this dispute.

3. By the time the injunction was listed for hearing, on the 12th August 2008, the actions complained of had ceased and on the 29th September 2008 PGS Ltd., by way of an undertaking, confirmed its continued intention not to do any further surveys in the area pursuant to the relevant Certificate of Environmental Clearance.

4. The injunction out of the way I am left with the question of whether this Court has the jurisdiction to deal with the dispute. Accordingly on the 12th August 2008 it was ordered that the question of the jurisdiction of the Court be dealt with as a preliminary issue and the action stayed except insofar as it was necessary to serve the other defendants herein and deal with the preliminary issue.

5. Although invited to do so no submissions were made by the State or the Tobago House of Assembly (“the THA”) with respect to jurisdiction. Submissions were however made by the Environmental Management Authority (“the Authority”) to the effect that

the Court had no jurisdiction to hear the dispute. At the end of the day the issue for my determination is whether the jurisdiction of this Court is ousted by virtue of the provisions of the Act.

The Action filed

6. The Claimants have brought this action against four defendants, the Attorney General on behalf of the State; the Tobago House of Assembly (“the THA”); the Environmental Management Authority (“the Authority”) and PGS Ltd.

7. As against the State and the THA, the Claimants allege that the grant of a licence to PGS Ltd. to conduct seismic surveys in the traditional fishing grounds adversely affects the economic interests of its members and that:

- (i) the Claimants are entitled to be consulted before the grant of any such licence or any decision is taken which adversely affects their economic interests;
- (ii) the grant of and the support of such licence by these two defendants is wrongful and amounts to a wrongful interference with the business relationships of the Claimants and its members;
- (iii) in granting the licence the State was negligent and in breach of section 14 of the Petroleum Act in failing to ensure that PGS Ltd. was granted a non-exclusive right both in form and in substance in respect of the traditional fishing grounds;

(iv) in failing to protect the said economic interests of the Claimants, the said traditional fishing grounds and the sea bed from the adverse impact of the seismic surveys before it supported the grant of the said licence the THA was negligent and/or in breach of its statutory duty under section 25 and the fifth Schedule of the Tobago House of Assembly Act.

8. As against the Authority, the Claimants seek a declaration that it was negligent and/or in breach of its statutory duty under section 37 of the Act by failing to ensure that the conditions stipulated in Clause ii (f) of its Certificate of Environmental Clearance were complied with before PGS Ltd. commenced the seismic surveys.

9. As against PGS Ltd. declarations that:

- (i) it is not entitled to conduct seismic surveys in the said waters without first complying with the conditions of the Authority as recorded in Clause (ii)(f) of the Certificate of Environmental Clearance; and
- (ii) by failing to negotiate a mutually acceptable agreement with the Claimant it is in breach of the Certificate of Environmental Clearance granted it.

10. In addition the Claimants seek damages and other consequential orders.

The facts

11. The relevant facts are as revealed by the evidence filed in support of the application for the injunction and the Statement of Case filed herein. At this stage and for these purposes they are not in dispute.

12. PGS Ltd. intended to conduct seismic surveys in the traditional fishing grounds and for that purpose was required by the Act to apply for a Certificate of Environmental Clearance (“CEC”) from the Authority. During the period the 1st to 6th June 2008 PGS Ltd. held meetings with Tobago fisherfolk, some of whom were members of the Claimant. At those meetings PGS Ltd advised that as part of the requirements to obtain a CEC it was required to hold consultations with fisherfolk, fishing communities and organisations. At those meetings PGS Ltd. made various presentations to the effect that the conduct of seismic surveys in the area would have no effect on the fishing in the area and that if it did compensation would be paid. The members of the Claimant were not satisfied with the representations made by PGS Ltd. and advised the meetings of their dissatisfaction. They were advised by PGS Ltd. that it would continue the discussions in an attempt to assuage their fears.

13. On or around the 8th June 2008 the Claimant received from PGS Ltd. an e-mail of containing a CEC which it says was granted to it by the Authority allowing it to conduct a multi-client two dimensional seismic survey around Tobago. Sent with this communication was a copy of two documents described as “working draft documents” entitled (i) “Types of Fishing and Compensation Model.doc” and (ii) “Fisherman’s Earning Estimator v2 xls”.

14. A copy of CEC, No. CEC2224/2008, subsequently came into the hands of the Claimant. Insofar as it is material by clause(ii)(f) under the heading “Mitigation Measures: PRE-SURVEY PREPARATION” the CEC provides that:

“The Applicant shall formulate, in consultation with the relevant resource user groups (i.e. fishers, other operators within the project area, etc.) a mutually acceptable agreement to treat with but not necessarily be limited to, the following:

- Required conduct of fisherfolk/other operators during the survey operations to minimise loss/ damage to life/property;
- Restricted access to the project area during survey operations;
- Compensation for loss of revenue to resource users resulting from the restricted access to the area, where applicable, and from the loss/damage to life/property and
- Environmental and safety precautions and protocol.

Written documentation of this agreement shall be made available to the EMA/DNRE upon request;”

15. The copy of the CEC put into evidence was undated and unsigned. Although there is some confusion as to when the CEC was in fact granted it is not in dispute that a CEC in those terms was granted to PGS Ltd. by the Authority. Neither is it in dispute that PGS Ltd. began their surveys on or around the 17th June 2008. At that time no agreement had been concluded between it and the Claimant or the Claimant’s members. Further at least one member of the Claimant suffered damage as a result of the surveys conducted.

16. By a letter dated the 14th July 2008, the Claimant, through its Attorneys, wrote the Chief Executive Officer of the Authority advising that:

- (i) contrary to the terms of the CEC no mutually acceptable agreement had as yet been formulated between PGS Ltd and the Claimant;
- (ii) despite this the seismic survey had begun; and
- (iii) one of the Claimant's members had already suffered damage and as yet received no compensation for same.

17. The letter further advised that the Claimant considered that the Authority was in breach of its statutory duty under section 37 of the Act; put the Authority on notice that it intended to institute legal proceedings against certain parties including the Authority and that it would be seeking an injunction to restrain PGS Ltd. from continuing its seismic survey. The letter also called upon the Authority to do its statutory duty within 24 hours. No response was received to the letter.

18. The Claimant's case therefore is based on a breach by PGS Ltd. of a condition in their CEC; the failure of the Authority to properly monitor the licensed activities of PGS Ltd. and the negligence of the State and the THA in allowing the licensing of such activity. The Claimant also claims, as against the State and the THA that the grant of such a license is a wrongful interference with the business relations of it and its members. With respect to the relief sought by this action, declarations apart, the Claimant seeks damages and an injunction.

The Law

19. In so far as the jurisdiction of the High Court is concerned the start must be the dicta of Willes J. in **The Wolverhampton New Waterworks Company v Hawkesford (1859) 6 C.B.(N.S.) 336 at 356:**

“There are three cases in which a liability may be established founded upon a statute. One is, where there is a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue, merely, but provides no form of remedy: there the party can only proceed by action at common law. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.”

20. In my opinion this is the approach which ought to be adopted. Using this approach it is necessary to examine the provisions of the Act as well as the nature of the

relief sought by the Claimant to ascertain whether the liability sued upon was created by the Act and if so whether the Act creates a special and particular remedy for enforcing it. If the answer to both these questions is yes then the Claimants are out of court at least with respect to those liabilities founded upon the Act.

The Environmental Management Act

21. To put the application in its proper context and prior to a detailed examination of the relevant sections it may be more appropriate to give a general overview of the Act. The Act establishes a regulatory framework for the management of the environment by the State. In this regard the Authority is designated the body to perform the function of environmental management on behalf of the State. To this end the Act mandates that the composition of the board of directors of the Authority reflect various disciplines which in the opinion of the legislators are necessary to ensure the proper management of the environment.

22. For the purposes of the Act environmental control is divided into six distinct categories: protection of natural resources; pollution and hazardous substances; air and noise pollution; water pollution; wastes and hazardous substances and spills. In addition for the purpose of control and determining the impact of certain activities on the environment the Minister responsible for environmental management (“the Minister”) is empowered by the Act to designate a list of activities which require a licence, termed in the Act, a certificate of environmental clearance. One of the duties of the Authority is to

issue such licences and to monitor the performance of the licensed activity to ensure compliance with the terms and conditions of the CEC.

23. The Act also establishes a specialist tribunal, the Environmental Commission (“the Commission”), vested by the Act with the powers of a superior court of record and with all the powers inherent in such a court. Its function is to assist in the enforcement of the decisions of the Authority and to provide a forum whereby appeals from such decisions may be heard. The Commission is also empowered by the Act to deal with civil actions by private parties for the violation of certain specified environmental requirements. These civil actions are referred to in the Act as ‘direct private party actions’. In addition the Act authorises both the Authority and the Commission to make assessments of compensation, termed “administrative civil assessment”, for certain of the damage suffered by virtue of breaches of the Act.

24. Section 81 of the Act establishes the Commission and delimits its jurisdiction. In particular section 81(5) states:

“(5) The Commission shall have the jurisdiction to hear and determine-

- (a) appeals from decisions or actions of the Authority as specifically authorised by under this Act;
- (b) applications for deferment of decisions made under section 2 or deferment of designations made under section 41;

- (c) applications made by the Authority for the enforcement of any Consent Agreement of any final Administrative Order, as provided in section 67;
- (d) administrative civil assessments under section 66;
- (e) appeals from the designation of environmentally sensitive areas or environmentally sensitive species” by the Authority pursuant to section 41;
- (f) appeals from a decision by the Authority under section 36 to refuse to issue a certificate of environmental clearance or to grant such a Certificate with conditions;
- (g) appeals from any determination by the Authority to disclose information or materials claimed as a trade secret or confidential business information under section 23(3);
- (h) complaints brought by persons pursuant to section 69 otherwise known as the direct private party action provision and
- (i) such other matters as may be prescribed by or arise under this Act or any other written law where jurisdiction in the Commission is specifically provided.

25. By section 82, the Chairman and Deputy Chairman apart, the members of the Commission shall “be qualified by virtue of their knowledge of, or experience in environmental issues, engineering, the natural sciences or the social sciences.”: section 82(3). Both the Chairman and Deputy Chairman are required to be Attorneys at Law. With respect to the decisions of the Commission, the Act provides that such decisions shall be final on a question of fact and the amount of any administrative civil assessment.

An appeal shall however lie on any question of law to the Court of Appeal: sections 86(5) and 89(11).

26. By section 37 of the Act the Authority is required to monitor the performance of the licensed activity to ensure compliance with the conditions of the CEC and the information provided in any environmental impact assessment. Sections 63 to 65 empower the Authority, by way of the issue of a notice of violation or an administrative order, to ensure compliance with its environmental requirements. The exercise of this power is triggered once the Authority reasonably believes that a person is in violation of an environmental requirement.

27. The first step is a notice of violation: section 63. The notice of violation shall include a request that the person make modifications to the activity or representations to the Authority with respect to the violations. Upon a failure to resolve the violation at this stage the Authority may issue an Administrative Order with directions aimed at ensuring compliance with the terms and conditions of the CEC: section 65. These directions include the power to direct that the violation immediately cease or that the offender immediately remedy the damage: section 65 (1)(b).

28. The directions contained in the Administrative Order are deemed to be final and conclusive after the expiry of 28 days unless (i) an extension of time for compliance is granted by the Authority; (ii) a consent agreement is arrived at or (iii) an appeal to the

Commission is filed. An Administrative Order may also include a proposed administrative civil assessment.

29. In addition to its powers of enforcement by way of an Administrative Order, where it reasonably believes that a person is currently in violation of any environmental requirement, the EMA may seek a restraining order or other injunctive relief or an order for the closure of any facility: section 68.

30. With respect to the payment of compensation for breaches of the Act, by section 66, both the Authority, for the purpose of an administrative order, and the Commission, pursuant to section 81(5)(d), may make an administrative civil assessment of:

- (a) compensation for actual costs incurred by the Authority in responding to environmental conditions or circumstances arising out of violations referenced in the administrative order;
- (b) compensation for damages to the environment associated with public lands or holdings which arise out of the violation referenced in the Administrative order;
- (c) damages for any economic benefit or amount saved by any person through failure to comply with applicable environmental requirements and
- (d) damages for the failure of a person to comply with applicable environmental requirements in an amount which shall not exceed (i) in the case of an individual \$5,000.00 for each violation or in the case of a continuing violation \$1,000.00 a day for each such instance,(ii) in the case of a person other than an individual,

\$10,000.00 for each violation or in the case of a continuing violation \$5,000.00 a day for each such instance.

31. This compensation is only enforceable upon the Commission making an order determining the amount of such assessment: section 67(2).

32. Pursuant to section 67 therefore compensation for breaches of liabilities established by the Act are only enforceable if awarded by the Commission. Further, save insofar as section 66(d) may resemble damages properly so called, the compensation provided by section 66 is with respect to (i) compensation for the cost incurred by the Authority in responding to the damage caused by the breach or (ii) compensation for the damage to the environment with respect to public lands or holdings; or (iii) in the nature of a penalty quantified by reference to the money saved by the offender in not complying with the environmental requirement. Insofar as section 66(d) may allow the payment of compensation related to the actual damage suffered by a person it must be noted that in this instance the damages or compensation awardable is not at large but the Act provides an upper limit with respect to such compensation measurable by the character of the offender and the period of time the violation continues rather than the damage suffered.

33. Section 69 of the Act deals with civil actions by private parties termed 'direct private party actions'. It provides:

- (1) Any private party may institute a civil action in the Commission against any other person for a claimed violation of any of the specified environmental

requirements identified in section 62, other than paragraphs (c),(d), and (l) save where:

- (a) the Complainant has given written notice of such claimed violation to the Managing Director of the Authority at least sixty days prior to the commencement of the civil action;
- (b) the complainant has served a copy of the complaint on the Managing Director within 28 days of the date of which the complainant was first authorised to bring such an action.
- (c) The Authority has not commenced an enforcement action under sections 63 to 67 inclusive or through other appropriate means available to it under section 68 regarding such claimed violation; and
- (d) The Authority has not elected to assume responsibility for taking enforcement action under sections 63 to 68 inclusive within sixty days after the filing of a direct private party action by the complainant.

34. While not a matter for me the drafting of the provisions dealing with the access to the Commission by the private citizen by way of direct private party action leaves much to be desired. It is clear however that by the use of the words “in the Commission” the civil action referred to by section 69 are complaints brought by private persons or bodies to the Commission referred to in section 81(5)(h) as ‘direct private party actions’. With respect to direct private party actions section 89(2) provides: “The Commission shall not have jurisdiction over any private party action unless the complainant has given proper

notice to the Authority of not less than sixty days before bringing such action as required under section 69”.

35. It is clear therefore that the Act provides that the primary responsibility for ensuring compliance with the requirements of the Act lies with the Authority. In this regard it is the Authority which is endowed with certain coercive powers to ensure compliance with the Act. In addition the Act vests the right to apply for a restraining or similar order in the Authority. In contrast while the Act allows for actions by private parties for claimed violations of certain environmental requirements such action is by the Act subject to certain constraints. In the first place the action must be brought in the Commission. In the second place the right of a private party to sue is limited to certain violations. Further, unlike damages awardable by the civil court, the compensation payable to the private party for the breach of an environmental requirement is limited with respect to the quantum allowable to a specific amount per day for each violation.

36. While section 69 of the Act is not the best drafted section it is clear that the intention is that in order to pursue such an action, the private party must give the Authority sufficient notice of the alleged violation, at least 60 days, so as to allow the Authority the opportunity to assume the responsibility for taking enforcement action. It is only if the Authority fails to take enforcement action that the civil action can be pursued.

37. It is undisputable that the Act creates new liabilities where none previously existed. It is equally indisputable that there is contained in the Act a means of enforcing these new liabilities and providing remedies for the breaches. Consistent with the intention of the Act some of these new liabilities are enforceable only by the Authority while others, subject to the right of the Authority to assume responsibility for the enforcement of these liabilities, are enforceable by private persons.

38. Further it is clear that while the intention of the legislature is to have all of the remedies established by the Act for a breach of the liabilities created by it available to the Authority the remedies available to private parties are limited notably with respect to the non-availability of the remedy of injunction and the limits to compensation awardable. Despite this it seems to me that the situation falls squarely under the third category identified by Willes J in the Wolverhampton case. The Act creates new liabilities not existing at common law and at the same time gives special and particular remedies for enforcing same. In the instant case the remedies given by the Act must be followed. In this regard I note that this conclusion was also arrived at by Master Doyle with respect to the liabilities created by the Act in the case of **Karan Ramlal v Simon Macoon and Indira Ramsanahie HCA No. 2812 of 2004.**

39. Declarations apart the Claimant seeks injunctive relief, both restraining and mandatory, and damages. With respect to the liabilities created by the Act the remedy of injunction is by the Act limited to the Authority. Further by deeming the Commission a superior court of record, in my opinion, the power to grant such an injunction is with

respect to the liabilities created by the Act limited to the Commission. Similarly the ability to provide compensation or damages for breaches of the Act termed in the Act administrative civil assessments is, by section 67 vested in the Commission alone.

40. With respect to the declarations sought in this action, declarations 1 to 5 deal either with the economic interests of the Claimant in the traditional fishing grounds or the liability of the First and Second Defendants under other legislation, declarations 6 to 8 however, in my opinion, are based on liabilities created by the Act. In those circumstances I am of the opinion that this Court has no jurisdiction to make these declarations nor to award damages pursuant to such declarations. In my opinion even if the Court had the jurisdiction to make the declarations or award the damages sought given the fact that Parliament has in its wisdom by the Act established a specialist tribunal to deal with these very matters this Court would decline to exercise jurisdiction.

41. With respect to the declaration sought at paragraph 9, in my view, as drafted this declaration may apply equally to the liabilities created by the Act as well as the liabilities referred to in declarations 1 to 5. The position is the same with respect to the claim for damages and compensation made at paragraphs 12 and 13 of the Claim Form.

42. In the circumstances given the fact that the claims against the Third and Fourth Defendants are all based on liabilities created by the Act I am of the view that insofar as the Claimant seeks relief against these Defendants I have no jurisdiction to deal with those claims. The Third and Fourth Defendants are therefore discharged from any further

responsibility in this action and paragraphs 6, 7, 8, 10 and 11 of the Claim Form are struck out.

Dated this 16th day of March, 2009.

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Judith A. D. Jones
Judge