

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 199 of 2008

BETWEEN

ENVIRONMENTAL MANAGEMENT AUTHORITY

APPELLANT

AND

FISHERMEN AND FRIENDS OF THE SEA

RESPONDENT

Civil Appeal No. 219 of 2009

BETWEEN

ENVIRONMENTAL MANAGEMENT AUTHORITY

APPELLANT

AND

SOUTH WEST TOBAGO FISHERMEN ASSOCIATION

RESPONDENT

PANEL: I. ARCHIE, C. J.

A. MENDONCA, J. A.

P. JAMADAR, J. A.

APPEARANCES:

Mrs. D. Peake S.C. and Mr. V. Paul for the Appellants.

Dr. R. Ramlogan and Ms. M. Narinesingh for the Respondent in C.A. No. 199 of 2008.

Mr. C. Gift and Ms. R. Gift for the Respondent in C.A. No. 219 of 2009.

DATE OF DELIVERY: 28th of June, 2010.

I have read the judgment of P. Jamadar, J.A. and I agree that the appeals in both matters be allowed.

I. Archie
Chief Justice

I have read the judgment of P. Jamadar, J.A. and I also agree that the appeals in both matters be allowed.

A. Mendonca
Justice of Appeal

JUDGMENT

Delivered by P. Jamadar, J. A.

INTRODUCTION

1. These two appeals though not formally consolidated were heard together by agreement. Both have come before the Court of Appeal by way of Case Stated pursuant to section 87 of the Environmental Management Act, Chapter 35:05¹. Section 87 provides that where it is contended that a decision of the Environmental Commission² is erroneous in point of law, an appeal may be lodged and Case Stated for the opinion of the Court of Appeal on the point or points of law alleged to be in error. By this section the Court of Appeal is given the specific powers to “reverse, affirm or amend the determination in respect of which the case has been stated or (to) remit the matter to the Commission with the opinion of the Court of Appeal thereon”.³

¹ Hereinafter referred to as “the Act”.

² Hereinafter referred to as “the Commission”.

³ See Section 87 (4) of the Environmental Management Act.

2. The first appeal⁴ stated as the main issues for determination by the Court of Appeal the following:

1. Whether the Commission has jurisdiction pursuant to sub-section 81 (5) (a) of the Act, to hear appeals from any decisions or actions taken or made by the Environment Management Authority⁵ specifically authorised under the Act, or whether that jurisdiction is limited under the sub-section to only appeals specifically authorised under the Act.
2. Whether in the circumstances of this case the Respondent had *locus standi* to appeal the impugned decisions or actions of the Authority to the Commission under sub-section 81 (5) (a) of the Act.

3. The second appeal⁶ stated as the main issues for determination by the Court of Appeal the following:

1. The identical issue stated as 1. above in relation to the first appeal.
2. Whether the Commission has jurisdiction pursuant to sub-section 81 (5) (f) of the Act to hear an appeal by a third party (the Respondent) from the decision of the Authority made under section 36 of the Act.
3. Whether the Commission has jurisdiction pursuant to sub-section 81 (5) (i) of the Act to hear by way of appeal a decision of the Authority on any matters as may be prescribed by or arise under the Act.
4. Whether in the circumstances of this case the Respondent had *locus standi* to appeal the impugned decisions or actions of the Authority to the Commission under sub-sections 81 (5) (a), (f) or (i) of the Act.

SUMMARY OF CORE FACTS

4. In the first appeal, Atlantic LNG Company began construction work in furtherance of a liquification of natural gas project without having obtained a Certificate of Environmental

⁴ Civil Appeal No. 199 of 2008 **Environmental Management Authority v Fishermen and Friends of the Sea.**

⁵ Hereinafter referred to as “the Authority”.

⁶ Civil Appeal No. 219 of 2009 **Environmental Management Authority v South West Tobago Fishermen Association.**

Clearance⁷ as required by the law. This non-compliance was brought to the attention of the Authority by the Respondent in May 2003 by a formal complaint and the Authority then issued a Notice of Violation⁸ pursuant to section 63 of the Act to Atlantic LNG. Subsequently, in August 2004 at the request of Atlantic LNG the Authority stayed the NOV. The Respondent discovered that this stay had been granted and by Notice of Appeal filed in June 2007 appealed to the Commission against the decisions and/or actions of the Authority: (i) to stay the NOV, (ii) not to inform the Respondent of the actions taken by it with respect to the NOV, (iii) in a failure to supply the Respondent with information requested, and (iv) in a failure to deal with the NOV as prescribed by section 63 (2) of the Act.

5. In the second appeal, the Authority issued a CEC to Petroleum Geophysical A.S.⁹ in June 2008, to carry out a seismic survey off the coast of Tobago for the exploration of crude oil and natural gas. In July 2008 the Respondent wrote to the Authority complaining about PGS's non-compliance with parts of the CEC and an alleged breach by the Authority of its duty to monitor the performance of and ensure compliance with any conditions in the CEC (pursuant to section 37 of the Act). In December 2008 the Respondent brought an appeal before the Commission against the Authority pursuant to sub-sections 81 (5) (a), (f) and (i) of the Act.

6. In both appeals the issues raised concern mainly the jurisdiction of the Commission and the *locus standi* of the Respondents under three sub-sections of the Act.¹⁰

RULINGS OF THE COMMISSION

7. In the first appeal the Commission made the following rulings. On the issue of jurisdiction, the Commission interpreted sub-section 81 (5) (a) of the Act as conferring jurisdiction on it. The Commission came to this conclusion having relied on their interpretation of the ordinary meaning of the words read in the context of their grammatical meaning and the legislators' intentions as gleaned from the Act, and it determined that the words "specifically authorised" qualified the words "decisions or actions" in the sub-section. On the issue of *locus*

⁷ Hereinafter called "CEC".

⁸ Hereinafter referred to as "NOV".

⁹ Hereinafter called "PGS".

¹⁰ That is, sub-sections 81 (5) (a), (f) and (i).

standi, the Commission determined, that the Authority having assumed responsibility for issuing a NOV (against Atlantic LNG) upon complaint by the Respondent and having done so, that action created in the Respondent a legitimate expectation that the Authority would pursue this process in accordance with the provisions of the Act. And, that the alleged failure of the Authority to do so conferred in the Respondent the necessary *locus standi* to appeal to the Commission.

8. The Commission also determined that it did not have the jurisdiction to make prerogative orders and in particular orders for certiorari or mandamus. However, the Commission opined that matters filed in the High Court seeking judicial review of the decisions or actions of the Authority can properly be heard by the Commission by way of appeal (pursuant to the jurisdiction conferred on it by sub-section 81 (5) (a) of the Act), and went further to state that in any such matters “leave to an applicant for judicial review should be denied and the parties should be referred to the correct forum, the Environmental Commission”.¹¹

9. In the second appeal the Commission ruled that the Commission had jurisdiction under any one and/or all of sub-sections 81 (5) (a), (f) and (i) of the Act, and that the Respondent had *locus standi* accordingly. That is, the Respondent had *locus standi* because, under sub-section 81 (5) (a) it was appealing a decision or action of the Authority, under sub-section 81 (5) (f) it was appealing a decision of the Authority under section 36 of the Act, and under sub-section 81 (5) (i) it was alleging that the Authority had breached its duties and responsibilities under sections 35, 36 and 37 of the Act (that is, in relation to matters prescribed by or arising under the Act).

THE FIRST APPEAL

(I) Section 81 (5) (a) of the Act

10. This issue raises for determination the proper interpretation to be given to sub-section 81 (5) (a) of the Act. Specifically, the question for determination is whether the words “as specifically authorised under this Act” qualify the word “appeals” or the words “from decisions or actions of the Authority”, as they appear in sub-section 81 (5) (a) of the Act.

¹¹ See paragraph 43 of the Case Stated by the Commission.

The sub-section states as follows:

- (5) The Commission shall have jurisdiction to hear and determine –
 - (a) appeals from decisions or actions of the Authority as specifically authorised under this Act;

11. In my opinion the words “as specifically authorised under this Act”, qualify the word “appeals”. Therefore, under sub-section 81 (5) (a) of the Act, the Commission has jurisdiction to hear and determine only appeals (from decisions or actions of the Authority) that are specifically authorised under the Act.

12. This is so for several reasons. On the basis of purely grammatical and textual considerations, this is the best construction to be given to sub-section 81 (5) (a) of the Act. It is accepted that on a purely literal interpretation, the sub-section permits a measure of ambiguity as evidenced by the competing arguments. However, I am of the view that the word “appeals” operates as the primary object noun in sub-section (5) (a) and as such is the object noun that is qualified by the words “as specifically authorised under this Act”. The word “as” in the sub-section functions as a preposition and therefore points to the relationship between the primary object noun (“appeals”) and the rest of the sentence following the preposition “as” (“specifically authorised under this act”).

13. Therefore, when one asks the question: Appeals from what? The sub-section answers: From decisions or actions of the Authority. But, when one asks the question: What does the Commission have jurisdiction to hear and determine? The answer is: “Appeals (from decisions and actions of the Authority) as specifically authorised under this Act”.

14. In my opinion, the Commission was therefore wrong in law to construe sub-section 81 (5) (a) of the Act as conferring jurisdiction on the Commission to hear appeals from all or any decisions or actions of the Authority and/or any such decisions or actions as specifically authorised under the Act.

15. However, since I have accepted a reasonable measure of grammatical ambiguity in the sub-section, it is my view that the construction and interpretation that I have adopted is to be preferred for several other and cumulatively reinforcing reasons.

16. First, the interpretation given to the sub-section by the Commission could not likely have been the intention of Parliament when one considers the provision in its broader textual context. If the interpretation of the Commission is correct then sub-sections (5) (e), (f) and (g) would all be rendered superfluous. Further, when one reads sub-section (5) (a) in the context of sections 81 (1), 81 (3), 81 (5) (i) and also section 85 (1) and (3), and the consistently declared intention in the Act to limit the jurisdiction of the Commission to circumstances where that jurisdiction is “conferred upon it by this Act”,¹² “as specifically authorised under this act”,¹³ and “specifically provided,”¹⁴ and where every appeal “shall be filed within twenty-eight days of the service on the person seeking to appeal the decisions of the Authority ... or within such other time as may be prescribed ...”¹⁵, it is to my mind apparent that the intention of Parliament was to limit appeals to those which are specifically authorised by the Act. That is to say, for the time being, to those actions and decisions taken by the Authority under sections 23 (3)¹⁶, 30, 40¹⁷, 46¹⁸ 48 (4), and 65 (2) of the Act.

17. It is to be noted that in all of the situations in which appeals are specifically authorised in the Act, except for an appeal pursuant to section 46 and sub-section 81 (5) (e), in every instance where the Act creates the right of appeal it also specifies who is entitled to appeal. In the case of section 46, I am of the view that because section 41 of the Act deals with the designation of certain portions of the environment as an “environmentally sensitive area” and with the designation of any plants or animals as an “environmentally sensitive species” requiring special protection, and because any such designation must be published in the *Gazette* (and would thereby be public notification of the particular designation), it is clear that by reason of the public notification of the designation it is intended that any member of the public is to be given the right

¹² See section 81 (1) and (3) of the Act.

¹³ See section 81 (5) (a) of the Act.

¹⁴ See section 81 (5) (i) of the Act.

¹⁵ See section 85 (1) and (3) of the Act.

¹⁶ See section 81 (5) (g) of the Act.

¹⁷ See section 81 (5) (f) of the Act.

¹⁸ See section 81 (5) (g) of the Act.

to appeal. Therefore, in the case of section 46 there was obviously no need to specify who in particular is entitled to appeal. Any person is permitted to appeal to the Commission from designations made by the Authority pursuant to section 41 of the Act.

18. This understanding confirms, in the context of sub-section 81 (5) (a) and related provisions, that the intention of Parliament was to confer jurisdiction in the Commission in relation only to appeals in those circumstances specifically authorised under the Act. That is to say, sub-section 81 (5) (a) operates somewhat as an enabling section. It confers jurisdiction in the Commission where certain persons are granted the *locus standi* in the Act to appeal particular decisions or actions of the Authority.

19. Second, the interpretation given to this sub-section by the Commission can lead to absurdity, and Parliament is presumed to intend that legislation makes sense and is reasonable. In my opinion the interpretation given by the Commission to sub-section 81 (5) (a) can lead to results that are manifestly illogical, counter-productive and senseless.

20. The most obvious illustration of absurdity on the construction given by the Commission, is that appeals could only be entertained from decisions or actions that are “specifically authorised”. The result is that there can be no appeal against decisions or actions taken by the Authority that are unauthorised! Such a result is illogical and senseless, because if jurisdiction was being conferred to hear appeals from all actions and decisions of the Authority, then surely Parliament would have intended that unauthorised actions or decisions be included.

21. Further, if the interpretation given by the Commission were to be followed, the result would be that every authorised action or decision of the Authority could be subject to an appeal to the Commission. This would therefore include every possible decision or action taken by the Authority. For example, decisions or actions taken under section 34 of the Act, which deals with the development, promotion and implementation of environmental incentive programmes. It would also include pure administrative decisions or actions, such as those taken under section 9 (delegation of functions or powers), section 11 (appointment of personnel), section 20 (general powers linked to performance of functions) and section 21 (appointment of inspectors). Finally,

since the Authority is a body corporate governed by a Board of Directors (section 6 (1) of the Act), is it that all authorised decisions or actions of the Board are also subject to an appeal to the Commission? And if so, under the Freedom of Information Act, is it that all decision or actions of the Board are to be disclosed upon request according to law? In my opinion none of the above could have been the result intended by Parliament when it enacted sub-section 81 (5) (a) of the Act.

22. Third, the status of the Commission as a superior court of limited jurisdiction supports the interpretation given by this court to sub-section 81 (5) (a) of the Act. The Authority is clearly a public authority discharging a public function. It is also in this context an inferior tribunal for the purposes of public law. As such any decisions and/or actions taken by the Authority are potentially reviewable by way of judicial review proceedings in the usual manner. That is to say, any such review is governed by the Judicial Review Act, the relevant rules of procedure,¹⁹ the common law principles that inform this right of action and the constitutional mandate of the Supreme Court (as a court of unlimited jurisdiction with power to exercise judicial supervision and governance over all public authorities that are subject to public law). Any person who has the necessary standing and is not otherwise barred and who may not have access to the Commission to challenge decisions of the Authority, will be generally entitled to invoke the jurisdiction of the Supreme Court to judicially review the decisions or actions of the Authority. Such actions under the existing regime of the CPR, 1998 are generally heard in a timely and expeditious manner. In addition, in any such actions the courts enjoy the plenitude of powers that a court of unlimited jurisdiction is vested with, to make such orders and shape such remedies as are necessary to do justice in a particular case. And finally, all such proceedings are subject to the Constitutional and procedural safeguards and regimes that exist to ensure that the process of judicial review is fair and timely and in service of good public administration.

23. Therefore the construction and interpretation given in this judgment to sub-section 81 (5) (a) of the Act does not deprive any person of their constitutional rights to access to justice and the protection of the law. The assertion by the Commission that it is vested with the jurisdiction

¹⁹ The CPR, 1998, Part 56 and RSC, 1975, Order 53.

to deal with all reviews of the decisions and actions of the Authority²⁰ and to claim this through sub-section 81 (5) (a) seems, with the greatest respect to its members, to be overreaching its limited jurisdiction.

24. In this regard I think the following comment of Baroness Hale in **Suratt & Ors v The Attorney General of Trinidad and Tobago**,²¹ in relation to the Equal Opportunity Tribunal established under the Equal Opportunity Act, 2000, is apt:

But the EOA clearly does not contemplate that the Tribunal should have an unlimited or inherent jurisdiction. Its jurisdiction is limited by section 41 (4) ...

The powers in section 41 (4) (b) and (c) are clearly intended to be used, and used only, in connection with the jurisdiction conferred by section 41 (4) (a). If there were any doubt about that, these paragraphs should be interpreted so as to be in conformity with the Constitution. Their scope is in any event defined by the EOA in the circumstances prescribed by the EOA.

25. It is to be noted that the Equal Opportunity Tribunal, established by section 41 (1) of the Equal Opportunity Act, was established as a superior court of record using language almost identical to that used in section 81 (3) of the Act.

26. In my opinion the interpretation that I have given to sub-section 81 (5) (a) of the Act fits in with the general scheme of the Act and also with the establishment of the Commission as a superior court of record with limited jurisdiction.²² That is to say, and in so far as precedent is concerned and by way of analogy, the approach taken to the interpretation of sub-section 81 (5) (a) of the Act is consistent with the approach taken by the Privy Council to tribunals which are established by statute and are considered superior courts of limited jurisdiction.

²⁰ A jurisdiction which if vested in the Commission would exist without the explicit Constitutional and procedural safeguards stated above.

²¹ Privy Council Appeal No. 84 of 2006, at paragraph 49.

²² See sub-sections 81 (1), (3) and (4) of the Act.

27. Fourth, the effect of the interpretation given to sub-section 81 (5) (a) of the Act by this Court, appropriately limits the jurisdiction of the Commission without denying any person access to justice or the protection of the law. In this way the Authority is subject to both the general supervisory jurisdiction of the Supreme Court and also the limited jurisdiction of the Commission in relation to decisions and actions taken or omitted to be taken by it. The device which determines the appropriate course of action is section 9 of the Judicial Review Act. Generally speaking, matters which can properly be heard and determined by the Commission in the first instance are to be taken up before that court. And, again generally speaking, matters for which there are no alternative procedures available to question the impugned decisions or actions, may be reviewable by way of judicial review in the usual manner.²³

(II) Locus Standi

28. In relation to the first appeal, it is noteworthy that the Respondent in this appeal has not been able to identify in its grounds of complaint (appeal) any decision or action of the Authority “specifically authorised under the Act”. Therefore, in my opinion the Commission was wrong in law in its interpretation of sub-section 81 (5) (a) of the Act and in its application on this basis to the Respondent, so as to vest jurisdiction in itself to hear the appeal and/or *locus standi* in the Respondent to bring the appeal.

29. The first appeal is therefore allowed.

30. On the question of costs the Court will hear arguments from the parties before arriving at a decision.

THE SECOND APPEAL

(I) Section 81 (5) (a) of the Act

31. The discussion above also disposes of the first issue in relation to sub-section 81 (5) (a) in this appeal. That is to say, the Commission was wrong in its interpretation of sub-section 81 (5) (a) as to the jurisdiction that it conferred on the Commission and/or in its view that the sub-section vested *locus standi* in the Respondent.

²³ See the Judicial Review Act, 2000; the RSC, 1975, Order 53; and the CPR, 1998, Part 56.

(II) Section 81 (5) (f) of the Act

32. The sub- section states as follows:

5. The Commission shall have jurisdiction to hear and determine –

(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;

33. In light of the discussion in relation to sub-section 81 (5) (a) above, it is my opinion that the right of appeal under the Act is limited to those persons upon whom the right is specifically conferred. In relation to sub-section 81 (5) (f), a decision under section 36 to refuse to issue a CEC or to grant a CEC with conditions²⁴, the right of appeal is specifically given to “the person seeking such certificate”, as provided for in section 40 of the Act. Therefore, in so far as this Respondent is attempting to appeal the Authority’s decisions or actions in relation to the granting on conditions of a CEC, it has no such right of appeal and no *locus standi* to appeal to the Commission on this matter.

(III) Section 81 (5) (i) of the Act

34. The sub-section states as follows:

5. The Commission shall have jurisdiction to hear and determine –

(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.

35. In my opinion, the jurisdiction of the Commission that is conferred by this sub-section is limited to “such other matters ... where jurisdiction in the Commission is specifically provided”. It is to be noted that this sub-section does not state that it provides access to the Commission by way of appeal. I am of the view that the word “matters” is the primary noun object of the sub-section and is qualified by the phrase “where jurisdiction in the Commission is specifically

²⁴ See section 36 of the Act.

provided”. This is so for the same and analogous textual and interpretative reasons that were articulated above in relation to sub-section 81 (5) (a).

36. When one asks the question: What other matters? The answer that the sub-section provides is: Such other matters “as may be prescribed by or arise under this Act or any other written law”. However, when one asks about jurisdiction, that is, what jurisdiction is vested in the Commission? The answer is as stated above.

37. In my opinion the sub-section is conferring a jurisdiction in the Commission to hear and determine all or any matters which are prescribed by and/or arise under the Act or any other written law, but only where the jurisdiction in the Commission to hear such matters is specifically provided for. The discussion above in relation to sub-section 81 (5) (a) is apposite and will not be repeated, save to say that it applies in totality to the approach taken in interpreting this sub-section.

38. In my opinion the Commission was therefore wrong in law in its interpretation of sub-section 81 (5) (i) of the Act and in its application on this basis to the Respondent, so as to vest jurisdiction in itself to hear the appeal and/or *locus standi* in the Respondent to bring the appeal. The matters challenged by the Respondent were simply not matters in which jurisdiction and/or *locus standi* can be vested in the Commission or the Respondent.

39. The second appeal is therefore also allowed.

40. On the question of costs the Court will hear arguments from the parties before arriving at a decision.

P. Jamadar
Justice of Appeal