IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 60 of 2010

YA'AXCHE CONSERVATION TRUST **CLAIMANT**

AND

WILBER SABIDO **DEFENDANTS**
CHIEF FOREST OFFICER
ATTORNEY GENERAL
BELIZE HYDROELECTRIC DEVELOPMENT AND MANAGEMENT COMPANY LTD.

Hearings
2010
24th September
29th October
1st December

Mrs. Magali Marin-Young for the Claimant.
Mr. Andrew Bennett for the 1st and 2nd Defendants.
Mr. Nigel O. Ebanks for the 3rd Defendant.

LEGALL J.

JUDGMENT

The Permission

1. The claimant is a company that has been managing the Golden stream Corridor Reserve in Belize for almost ten years. The claimant

company is also a local conservation, non-governmental organization, working to promote conservation and sustainable land use in the southern part of Belize. In Belize, there is also the Bladen Natural Reserve (BNR) situate at the Toledo District. BNR was declared a reserve on 9th June 1990 by Statutory Instrument No. 66 of 1990. By letter dated 3rd December, 2008, the claimant was appointed as interim managers of the BNR, under the supervision of the Forest Department, by the Chief Forest Officer acting on behalf of the Forest Department of the Ministry of Natural Resources and the Environment.

2. The first defendant is the Chief Forest Officer, a public officer employed by the State. The second defendant represents the State. The third defendant is a company (BHD) registered under the laws of Belize, with registered offices situate at Punta Gorda Town, Toledo, Belize.

3. The third defendant intended to conduct feasibility studies and surveys of about four miles of the Central River in the north of Belize, which is part of the BNR in the Toledo District, for the purposes of establishing a hydroelectric project or facility in Belize. By letter dated 21st July, 2009, the president of the third defendant wrote a letter to the Forest Department seeking permission to conduct the hydroelectric feasibility studies of the Central River, for the purpose of conducting longitudinal and topographical surveys and acquiring hydrologic data. The intention seems to have been to conduct the

studies to determine whether the area was suitable for the establishment of a hydroelectric facility in Belize.

4. On 13th October, 2009, the Chief Forest Officer, purportedly acting as administrator under the National Parks Systems Act Chapter 215 (the Act), granted permission to the No. 3 defendant, under section 6 of the Act, to conduct the studies. Section 6 of the Act states:

> "6. No person shall, within any national park, nature reserve, wildlife sanctuary or natural monument, except as provided under section 7, or with the written authorization of the Administrator-
>
> (a) permanently or temporary reside in or build any structure of whatever nature whether as a shelter or otherwise;
> (b) damage, destroy or remove from its place therein any species of flora;
> (c) hunt any species of wildlife;
> (d) remove any antiquity, cave formation, coral or other object of cultural or natural value;
> (e) quarry, dig or construct roads or trails;
> (f) deface or destroy any natural or cultural features or any signs and facilities provided for public use and enjoyment;
> (g) introduce organic or chemical pollutants into any water;
> (h) clear land for cultivation;
> (i) graze domestic livestock;

(j) carry firearms, spears, traps or other means for hunting or fishing;
(k) introduce exotic species of flora or fauna."

5. The permission granted to the No. 3 defendant is about four pages long, containing about 26 paragraphs, which I have attached as an Appendix to this judgment. The claimant alleged that the permission granted to the No. 3 defendant by the Chief Forest Officer was contrary to the Act. The claim form itself does not state which section of the Act it is alleged the permission violates; but it seems from the written submissions by the claimant, the heart of the claim is that the permission violates section 6 of the Act. The claimant also applied for an order to quash the permission, and for damages.

Allegations

6. The allegations of the claimant are that the permission authorized the No. 3 defendant in the BNR, to clear one area of primal forest, cut tracks, build structures on the streams and river therein, which caused irreparable harm to the BNR, contrary to the intention of the Act as a whole; and particularly section 6 of the Act. Therefore, the Chief Forest Officer exceeded his jurisdiction when he granted the permission which authorized the above mentioned acts. The claimant's contention is that the administrator, in the exercise of his powers under section 6 of the Act, cannot ignore the purpose of the BNR as outlined in, and as shown by, the intentions of the Act as a

whole; and as stated specifically in the long title, and sections 3, 4 and 6 of the Act. The long title states:

> "An Act to provide for the preservation and protection of highly important natural and cultural features, for the regulation of the scientific, educational and recreational use of the same and for all other matters connected therewith or incidental thereto."

7. Section 3 gives the Minister the power to declare, among other things, a nature reserve. Section 4 of the Act states:

> "4. Save as hereinafter provided-
>
> (a) no person shall be entitled to enter any national park except for the purpose of observing the fauna and flora therein and for the purpose of education, recreation and scientific research;
> (b) no person shall be entitled to enter any nature reserve or in anyway disturb the fauna and flora therein;
> (c) no animal shall be hunted, killed or taken and no plant shall be damaged, collected or destroyed in a national park or nature reserve;
> (d) no person shall hunt, shoot, kill or take any wild animal, or take or destroy any egg of any bird or reptile or any nest of any bird, in any wildlife sanctuary;
> (e) no person shall disturb the natural features of a natural monument,

but may use the unit for interpretation, education, appreciation and research."

8. Based on the above provisions of the Act, including section 6, and the reading of the Act as a whole, and the intention of the Act, the Administrator, says the claimant, exceeded his jurisdiction when he granted the permission to the No. 3 defendant – a company involved in the commercial business of building and operating an hydroelectric dam on the central river which runs through the BNR.

Application for Judicial Review

9. The claimant therefore by application dated 26th January, 2010 applied for permission to apply for judicial review; and on 17th February, 2010, Conteh CJ granted the permission. The claimant on 1st March, 2010 applied for judicial review and asked for the following against the defendants:

"(i) A declaration that the permit or permission issued by the Chief Forest Officer in favour of Belize Hydroelectric Development and Management Company Ltd, dated the 13th day of October, 2009 is ultra vires the National Parks System Act, Chapter 215 of the Laws of Belize;

(ii) An order quashing the permit or permission or authorization issued by the Chief Forest Officer in favour of Belize Hydroelectric Development and Management Company Ltd. dated the

13th day of October 2000 as being ultra vires the National Parks System Act, Chapter 215 of the Laws of Belize;

(iii) Damages to compensate the damage caused to Bladden Reserve;

(iv) Such other orders ….."

10. Section 6 of the Act generally prohibits certain acts mentioned in the section from being done in a nature reserve. But these same acts may be done with the written authorization of the Administrator. Parliament has enacted that, though the acts mentioned in paragraphs (a) to (m) of section 6 are generally prohibited, the Administrator is authorized by writing to permit those same acts. Parliament has empowered the Administrator to authorize the acts in section 6, and once the administrator has complied with the dictates of parliament, and authorized those same acts in writing, there is no legal basis for holding that the Administrator did not act within the four corners of the section – that the Administrator did more than the section authorized, or exceeded his jurisdiction. It is therefore important to examine the permission granted to the No. 3 defendant to determine whether or not it authorized any act or acts mentioned in section 6(a) to (m).

11. Clause 1 of the permission states that the No. 3 defendant is authorized to enter and conduct studies into a portion of the BNR during the period September 30th 2009 to August 30, 2010, to do all acts that are reasonably necessary. The clause states that whether any act is reasonably necessary is to be determined by the Forest

Department, in consultation with the BHD and the Hydrology Unit. There are several other clauses of the permission. The No. 3 defendant has according to the permission: (a) to inform the Forest Department at least one week in advance of its intention to enter the BNR for purposes of conducting the studies: clause 2; (b) to undertake minimal clearing of forest-under story, and installing hydrological gauging stations: clause 3; (c) not to set any fire (except campfire), cut any secondary hardwood seed trees. and not to interfere with any infrastructure, and not to cut or interfere with any primary hardwood trees: clause 4; (d) no machinery or equipment, other than those reasonably required, shall be brought on the BNR; and the equipment must minimize the impact on the reserve: clause 6; (e) not to hunt, fish or disturb in any manner any wild life in the BNR, nor to collect or remove any species of flora from the BNR: clause 8; (f) not to disturb, in any manner, whatsoever any archaeological monuments, artifacts or natural features of cultural or other valuable significance; (g) not to conduct any activity in BNR, other than the activities specified in the permission; clause 11; (h) not to construct or erect any structure whatsoever in the BNR: clause 12; and (j) not to carry out any activities or do any act, which in the opinion of the Chief Forest Officer may cause any harm, injury or damage or loss to the environment, flora or fauna within BNR: clause 18. The permission is subject to the provisions of the Act and Regulations, and any term or condition of the permission contrary to the Act and Regulations, shall be of no effect: clause 26.

12. The above gives a general picture of the terms of the permission granted to the No. 3 defendant. When one examines the permission and section 6, there is no term of the permission which is contrary to, or violates, the provisions of section 6(a) to (m). And the claimant, on whose shoulder the burden and standard of proof lie, has failed to show which clause or clauses of the permission violate section 6 of the Act, or violate the Act as a whole.

13. As I understand the claimant, the permission to build structures, clearing of forest, and taking of machinery and equipment into the BNR was contrary to the intention of the Act as a whole, which intention is to prevent physical damage to the BNR and preserve the natural and cultural features of the BNR, and to further the purpose of a nature reserve as defined in section 2 of the Act. But the intention of the Act is contained in all of its provisions, including section 6, and the permission itself does not authorize anything that is not contained in section 6. The permission is not contrary to other sections of the Act, such as section 4 and 5 which permit: "education, recreation and scientific research;" and: "study and observe the fauna and flora in the BNR." The carrying out of scientific research and study would involve the matters stated in the permission. The permission therefore is not contrary to sections 4, 5, or 6 of the Act.

14. Mrs. Marin Young submits further that the permission violates the purpose and intention of the Act as a whole; and relies on ***Blue Mountains Conservation Society Inc. v. Director General of National Parks Wildlife 2004 NSWEC 196*** in which the applicant

sought from the court an injunction to restrain the use of the Blue Mountain Natural Park for the purpose of a commercial film production and associated activities. The court had to consider the National Parks and Wildlife Act 1974 (NSW), (NPW Act 1974), which is fundamentally different from the Act, and which did not have a section in terms of section 6 of the Act. On the court's interpretation of the NPW Act 1974, the court said that it did not think that the production of a commercial film was appropriate public recreation "in the context of the Act or in the context of the purpose of reserving land as a National Park."

15. ***Packman v. Minister for the Environment 1993 31 NSWLR 65***, also relied on by the claimant, was also a case under the said NPW Act 1974, section 151(1) of which authorized the Minister to grant licences to occupy or use lands within a National Park. The Minister agreed to grant a licence for vehicular access, by road through a National Park, to private land adjacent to the park. On a challenge to the Minister's decision, the court held, on their interpretation of the NWP 1974 Act, that the power of the Minister can be exercised only for a purpose which promotes the use and enjoyment of the land as a public park or for public recreation. Since the purpose of the licence was to provide access to private property, the Minister exceeded his power under the NPW 1974 Act.

16. The views expressed by the court in ***Packman*** and ***Blue Mountain*** cases were based on the courts interpretation of the provisions of the NPW Act 1974, which again was fundamentally different from the

Act, and which did not have provisions in terms of section 6 of the Act. I think reliance on these cases to support the submission that the court must look at the Act as a whole in its interpretation of section 6, is misconceived and without merit, when the permission and section 6 of the Act are carefully considered. The NPW 1974 Act did not have a section such as section 6.

17. Though, in my view, the permission is not contrary to section 6 of the Act, under which it was made, nor the Act as a whole, there is evidence of the claimant that the third defendant committed acts of damage to the BNR, prior to the granting of the permission. There is conflicting evidence about the extent of the damage. Paul Walker, a zoologist was contracted by the claimant to conduct damage assessment to the BNR prior to the issuing of the permission. There is evidence that the No. 3 defendant was conducting studies in the BNR, as well as in another reserve, the Colombia River Forest Reserve, prior to obtaining the permission. Mr. Walker stated in his damage assessment report that several miles of access trails were cleared within the BNR by the No. 3 defendant, most of which were 2 to 3 feet wide; but caused minimal impact, except that it provided increasing access to the BNR by looters, hunters and others, from the village of San Pedro, Columbia. Mr. Walker's report details miles of road and other works and damage by the number 3 defendant in the Columbia Reserve, which is not a party to this claim.

Damage to BNR

18. On 5th August, 2009, prior to the permission, the Forest Department conducted an assessment of damage to the BNR by the No. 3 defendant; and the department assessed the damage to BNR by the No. 3 defendant to an amount of BZ$32,000.00 which the No. 3 defendant paid. After the permission was issued to the No. 3 defendant, the Forest Department by letter dated 7th January, 2010, informed the No. 3 defendant that is would undertake an evaluation of the activities of the said defendant in the BNR, as a result of complaints of damage to the BNR made by persons. The department told the said defendant to cease activities in the BNR until evaluation was completed, and a report on the matter was made by the department.

19. The evaluation was completed and a report dated 15th February, 2010 was made. The Forest Department found, according to the Report, that there were a total of three camp sites found at BNR; the vegetation was cleared and leveled to facilitate helicopter landing; no large trees or shrubs were found in the area of the sites; that the area cleared was about 25 by 25 meters and about 50 meters from a river. The report further states that the sites were clean; but garbage was buried and covered with soil. There were also, according to the report, excavation of Maya ruins, perhaps by laid off workers of the No. 3 defendant; and that hunting appeared to be out of control, because gunshot shells were found. The report also found trails in the BNR. The Report concluded though that: “There was no major

contravention to the conditions stipulated in the permit granted to BHD by the Forest Department."

20. Two witnesses for the applicant, namely Lisel Alamilla, who is the Executive Director of the applicant, and Nicanor N. Requena, who is a Fisheries Consultant and Chairman of a community based group named the Bladen Nature Reserve and Columbia River Forest Reserve Committee, swore to affidavits in which they painted a somewhat larger picture of damage to the BNR. Lisel Alamilla swore that an evaluation around February 2010, it was observed that several helicopters landing sites were cleared; within the BNR; there were blocked creeks and tributaries within the BNR; that there was soil erosion along the slopes that were cleared; that there was looting of archaeological sites within the BNR; and that there were trails that were cut within the BNR, and that these trails facilitated entry in the BNR by looters from Guatemala, called Xateros, and local hunters and looters were extracting leaves and fauna, and raided archaeological sites.

21. Mr. Requena, in his affidavit supported Lisel Alamilla, and added that he saw Guatemalan hunters and Xateros grazing horses on the helicopter landing sites within the BNR, cleared by the No. 3 defendant. He swore that creeks and tributaries of the Central River were blocked by the No. 3 defendant to gain access to their camping sites, still remained blocked; and that there was erosion occurring. The evidence is that by establishing the trails and camping sites, facilitated the hunters and looters with access to the BNR.

22. Mr. Mark Tippets, a director of the No. 3 defendant swore that Lisel Alamilla wanted the No. 3 defendant to sign an agreement with the claimant to jointly conduct the feasibility studies, and that the claimant wanted the defendant to pay a fee to the claimant, as well as salaries to personnel of the claimant taking part in the intended studies. The No. 3 defendant said that the claimant's demands were refused, not only because they were exorbitant, and that the personnel of the claimant did not have the skills required for the studies, but also because the defendant had a valid permission to conduct the studies. The defendant then swore that the claimant said that if it did not agree to the demands "it would intensify opposition" to the defendant's work. The defendant then denied that it caused the alleged or any damage to the BNR or denied that it violated any terms or conditions of the permission.

23. The defendant said that it agreed to pay and did pay the $32,000.00 mentioned above to the government after the evaluation of damage to the BNR by the Forest Department, under protest, and in order to bring the controversy to an end. The defendant said that the damage caused to the BNR occurred because of the many incursions of Guatemalan hunters and looters in the BNR and that the damage was not caused by the No. 3 defendant.

24. Only one witness was called and gave oral evidence in this case, and the oral evidence was confined to cross-examination. All the other evidence were by affidavits. There is no doubt in my mind that some unauthorized damage was done to the BNR, but was it done by the

No. 3 defendant or was it done by the Guatemalan hunters and looters, as well as local hunters and looters? The claimant and witnesses swore that they saw damage to BNR, but no one swore that he saw the defendant or its workers incurring the damage. The burden is on the claimant to prove, on a balance of probabilities, not only that the unauthorized damage was done to the BNR; but that it was the defendant or its agents or servants who did the damage or caused the said damage to be done. From the circumstances of the case, the unauthorized damage could have been done by the defendant, servants or agents or by the looters and hunters. The claimant and witnesses simply said that damage was done by the third defendant; but what was the basis for saying so? Were the defendant, servants, or agents seen committing the damage to BNR, or did they admit the damage or were there circumstantial evidence pointing to them as having committed the damage to the BNR? The burden is on the claimant. I am not satisfied, on a balance of probabilities, that the claimant discharged the burden of proving that the No. 3 defendant, servants or agents directly caused the unauthorized damage complained about.

25. The building of trails by the No. 3 defendant without effectively monitoring the trails, no doubt facilitated entry into the BNR by hunters and looters, who proceeded to hunt and no doubt caused damage to the BNR. The defendant admitted that these looters caused damage to BNR. Though there must have been other means of access to the BNR by these hunters and looters, apart from the trails, there is no doubt that the trails facilitated that access, and the defendant should have realized that the trails ought to be monitored so as to

prevent entry to the BNR by looters and hunters. Though I am not satisfied, on a balance of probabilities, that the defendant directly caused the damage to BNR, I am satisfied on the evidence that the trails built by the No. 3 defendant facilitated access by looters and hunters who did cause damage to the BNR, and therefore the defendant must take some liability for that.

Compensation

26. The claim form in this matter, does not make any specific claim against the No. 3 defendant that it breached any term of the permission or that it breached any provision of the Act. But the claim form states as follows:

> "(iii) Damages to compensate the damage caused to Bladen National Reserve."

27. I have held above that the No. 3 defendant must take some liability for damage caused by the looters and hunters, Guatemalan and local. But what is the extent of the value of damage done by these hunters and looters? Mr. Paul Walker gave an "estimation of costs" of remedying the damage, that is to say $125,000.00, to both BNR and the Columbia Reserve; but how much of the estimated remedial cost is attributable to the damage caused to the BNR by the looters and hunters? Since I have held that I am not satisfied that the third defendant committed unauthorized damage to the BNR, evidence as to the value of damage caused to the BNR by the looters becomes

relevant. But I have no such evidence. Columbia River Forest Reserve has not made a claim in this matter for damage done to its reserve by the building of miles of roads, trails and other damage. It is not a claimant in the matter. The claim in the matter is for damage done to the BNR. I have no basis for assessing compensation as far as damage done by the looters and hunters to the BNR.

28. The claimant, in written submissions, seems to suggest that the claimant is entitled to bring an action against the third defendant for damages for trespass. A person in possession of land is entitled to bring an action against a trespasser. But the third defendant, in this claim brought by the claimant, had permission to enter the BNR. Moreover, there is no claim in this action for trespass against the third defendant.

29. The claimant further says that it is entitled to compensation from the No. 3 defendant for damage done to the BNR. As shown above by letter dated 3rd December, 2008 the Forest Department appointed the claimant, to use the words of the appointment letter, "as the interim managers of the Bladen Nature Reserve to manage the same subject to our supervision." The land comprising the BNR is not owned by the claimant, but by the State. Since no land of the claimant suffered any damage, it is not entitled to compensation for any alleged damage done to land, not owned by it, but owned by the State. There is no claim in this case by the State for compensation from the 3rd defendant for any alleged damage to the land in question.

30. Mr. Walker pointed out delightfully in his report, that in spite of the damage to the area, "the system will return to its former condition through natural growth and succession." I understand this to mean that nature will repair any damage caused. Happily too, is the fact that the period of the permission ended on 30th August, 2010; and the No. 3 defendant is no longer conducting activities in the BNR.

The Administrator

31. Before ending this judgment, it must be observed that section 6 expressly gives the authorization to the Administrator. The section does not mention the Chief Forest Officer. The Deputy Chief Forest Officer, Mr. Marcello Windsor, swore that, "no Administrator has been appointed ….." but "the Chief Forest Officer has been the Administrator for all nature reserves. ….."

32. It seems that although section 10 of the Act authorizes the Public Service Commission to appoint an Administrator, no one was ever appointed; but the Chief Forest Officer, who is responsible for the administration of the Act, carries out the functions of the Administrator and has in fact been the Administrator of all nature reserves. But the general rule is that where the legislature confers power on an authority or person, the exercise of that power should be exercised by that authority or person stated in the legislation, except in cases where it can be reasonably inferred that the power can be delegated to some other person. There are an abundance of legal authorities where action was held as ultra vires because decisions were taken by an authority or person to whom the power given by

statute did not properly belong: see for instance ***AllingLam v. Minister of Agriculture and Fisheries 1948 AER 780; Barnard v. National Dock Labour Board 1953 2 QB18; and Vine v. National Dock Labour Board 1957 AC 488***.

33. In this case before me no question of delegation arises: an Administrator was not appointed. This issue faced my brother Awich J, now Awich CJ Ag., in ***Satim v. Forest Department and US Capital Energy Belize Limited Clause N 212 of 2006 (Supreme Court unreported)*** where he held, having considered the absence in the Act of matters relating to the jurisdiction and required skills of the Administrator, and that the Chief Forest Officer is responsible for the administration of the Act, held that "the Chief Forest Officer may, lawfully, in place of the Administrator, issue written authorization under section 6 ….." I have been urged by Mr. Ebanks, for the No. 3 defendant, to follow the pronouncements of Lord Halsbury in Halsbury Laws of England 4th Edition Volume 26, paragraph 580 where it is said that it is the "modern practice that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance, unless he is convinced that the judgment was wrong."

34. But there is much doubt in my mind whether I could, considering the authorities above, follow the views of the learned judge in ***Satim***. However, there are special circumstances of this case before me which ought to be considered, namely, (1) that the permission is spent and expired; (2) that the No. 3 defendant is no longer undertaking

the studies in the BNR; and (3) that the claimant has not specifically taken the point. I therefore do not think any useful purpose would be served by holding that the Chief Forest Officer was not lawfully authorized to issue the permission, because the court does not act in vain; and holding that the Chief Forest Officer could not issue the permission would be a useless formality because the permission is already spent: see ***Mallock v. Aberdeen 1 WLR 1578 at p 1595***. But for the purpose of preventing this point from being raised in any future case, the Public Service Commission is urged to exercise its powers under section 10 of the Act and appoint an Administrator.

Conclusion

35. The permission granted to the defendant was not ultra vires section 6 of the Act or the Act as a whole. Though there was unauthorized damage to the BNR, the claimant failed to prove that the defendant, servants or agents directly caused that damage. The building of trails in the BNR facilitated access to the BNR by Guatemalan hunters and looters, as well as local looters and hunters, who caused damage to the BNR, but because of a lack of evidence of the value of the damage to the BNR; and because the land on which constitutes the BNR is owned by the State, and not owned by the claimant, the damage was not damage to the claimant's property but to the State's and therefore the claimant is not entitled to compensation for damage to land belonging to the State. Moreover, the claimant did not bring a claim for trespass against the No. 3 defendant.

36. I therefore make the following orders:

(1) The claims in this matter are dismissed.

(2) The claimant to pay costs to the defendants to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
1st December, 2010

SEE APPENDIX

P.T.O.