

Citation: BS 2014 SC 80
Title: THE QUEEN v. GRAY ET AL
Country: The Bahamas
Court: Supreme Court
Suit No.: 2013/PUB/jrv00034
Judge(s): Issacs, J.
Date: July 14, 2014
Subject: Judicial Review
Subsubject: Prerogative orders – Certiorari – Mandamus – Ultra vires - Order of certiorari sought to quash decisions made in relation to a captive mammal facility – Order of mandamus sought to compel the exercise of the Minister’s discretion in relation to matters pertaining to captive facility – Whether Applicant disclosed an arguable case – Neither Site plan approval nor premises licence could have been legally issued - No premises licence or site plan granted or could have been granted – Applicant made its case against the Respondents – Prerogative orders granted as prayed.

Appearances:

Frederick Smith, Q.C. and Roderick Malone with him for applicant.

Gary Francis and Melissa Wright with him for 1st — 4th respondents Charles Mackay and Rachelle Falcona with him (watching brief) for 5th respondent.

ISSACS, J.: On 6 February 2014 the applicant, re Earth, was granted leave to apply for certain prerogative orders relative to the construction and operation by Blue Illusions Limited (Blue Illusions) of a cruise passenger destination which includes a captive marine mammal facility at Blackbeard's Cay off the Northern Coast of New Providence. On 16 April the substantive hearing was held.

2. The reliefs sought by re-Earth are:

11. As against the 1st and 2nd respondents:

- a. An order of certiorari quashing their decisions to grant dolphin Import Licences to Blue Illusions or ordering them to revoke these licences.
- b. An order of mandamus requiring the 1st respondent to take action/exercise his discretion under section 35 of the Captive Dolphin Regulations to have the dolphins removed from the Facility site to an appropriate location.

12. As against the 3rd respondent (TPC):

- a. An order of certiorari quashing its decision of 24 July 2012 to grant Blue Illusions Preliminary Support of Application for Site Plan approval in relation to the Facility;
- b. A declaration that the TPC is in breach of its statutory duty under section 48(1) of the Planning and Subdivision Act to require Blue Illusions to cease the development of land which they are carrying out at Blackbeard's Cay without Site Plan Approval and to restore the land to its original use and condition;
- c. An order of certiorari quashing its decision to take no action; and
- d. An order of mandamus requiring it to take the action it is mandated to take under section 48(1) of the Planning and Subdivision Act by requiring the Developers to cease the development of land which they are or have been carrying out at Blackbeard's Cay and to restore the land to its original use and condition.
- e. An order restraining the TPC from granting Site Plan Approval in future without first holding a public hearing as required under section 14 of the Planning and Subdivision Act.

13. As against the 4th respondent (PM):

- a. An Order of certiorari quashing his decision as the Minister responsible for Crown lands to allow Blue Illusions to carry out the construction of the Facility on Crown land (including seabed) at Blackbeard's Cay without Site Plan Approval and to operate a captive marine mammal facility without a Premises Licence as required under section 6(1)(b) of the Marine Mammal Protection Act, in breach of covenants contained in Blue Illusion's sublease of crown land.
 - b. a Declaration that he is in breach of his duty to protect Crown Land in the interests of The Bahamas.
 - c. an Order of mandamus requiring him to consider according to law whether to exercise his powers in this regard to require Blue Illusions to cease and desist and restore the Crown land at Blackbeard's Cay to its former condition.
14. Finally, a declaration that the construction work carried out at the Facility site by Blue Illusions has been and is carried out in contravention of the Planning and Subdivision Act as it is being done without Site Plan Approval.

3. The decisions under review are:

- "a. The decisions by the 1st and 2nd respondents, (the Minister of Agriculture and Marine Resources and the Director of Fisheries and Marine Resources, respectively) on or around 19 July 2013 to grant Blue Illusions 8 permits for the importation of dolphins into a facility that was and is not compliant with the provisions of the relevant marine mammal protection legislation and in particular, a facility that was and remains unlicensed under s.6(1)(b) of the Marine Mammal Protection Act.
- b. The decision by the 3rd respondent, the Town Planning Committee ('TPC'), to grant Preliminary Support of Application for Site Plan approval ("Preliminary Support") for the Facility in the absence of a public hearing or any environmental impact statement and to a facility that was and is not compliant with the provisions of the relevant marine mammal protection legislation;
- c. Further in relation to the TPC, its breach of its express duty to take action against Blue Illusions in relation to its construction of the Facility without site Plan Approval ("SPA");
- d. The Prime Minister's failure to take action in relation to the construction and operation of the Facility on Crown land without the requisite approvals, permits and licences, in particular without SPA or a premises licence under the marine mammal protection legislation being in place and in breach of the terms of the crown lease/under lease/licence.

4. The respondents position is that the application is without merit as it fails to disclose that any decision taken by any of the respondents was ultra vires, unlawful, irrational and unreasonable. An examination of the process employed by the respondents to establish the facility at Blackbeard's Cay must be carried out to determine whether or not the respondents' position is correct.

5. With regard to the respondents' submission that the application has been brought outside the permissible six month period for bringing judicial review proceedings, that issue was addressed and determined in the applicant's favour at the ex parte hearing for leave to proceed. In essence an article of 23 April 2013 alerted the applicant that a dolphin attraction was included in the development and that decisions had been taken on 14 June 2013. By a variety of communications the applicant voiced its concerns but it was not until 19 July 2013 that the relevant licences were purported to have been issued. The instant action was launched on 6 December 2013 which is within six months of 19 July 2013, the permissible period for bringing judicial review. Although decisions had been taken on 14 June 2013, time cannot run before the respondents completed its process on 19 July 2013.

6. The issue of standing was also raised at the ex parte hearing and was also resolved in the applicant's favour. The judicial review arena is an ever expanding one, and in the instant case the applicant is one of few entities that have a direct interest in the welfare of dolphins. I adopt the view of Longley, J. on standing at paragraphs 150 through 154 in *The Queen et al v. Responsible Development for Abaco (RDA) Ltd et al 2009/PUB/jrv/FP/00013*.

7. The case of *Onus v. Alcoa of Australia Ltd.* [1981] 149 C.L.R. 27 offered in support of the respondents' position on standing is obviously an action between a private person and a limited company brought on the basis that the company was breaking the law. There was no element of public law in that case, the parties had no relationship. In the instant case the public law element is glaring as issues of the use of public land and public seabed came into play as well as the permissions granted by the executive to a private company to deal with an endangered species of mammals, all of which affect private citizens. In the circumstances the instant case is distinguishable from *Onus*.

8. The respondents have also submitted that the applicant has failed to disclose an arguable case, and therefore the leave granted to proceed ought to be set aside. (See *R v. Civil Service Appeal Board* [1991] 4 All E.R. 310.) This submission is based on the fact that "permits, approvals, leases and the like" have been produced to the Court. The production of these documents, however, answers only half the question, the unanswered half, which is the gist of the entire application, is whether or not these documents were issued in accordance with specific statutory pre-requisites.

9. Apart from the submissions on standing and arguable cause, the respondents rely on the documents produced in defence of the application. I must now move on to examine the process employed to issue the various licences and permits that are required for this project.

10. The starting point ought to be a perusal of the relevant statute law and regulations on which the applicant relies to make its case and I shall lay them out here for ease of reference.

11. Regulation 35 of the Marine Mammal (Captive Dolphin Facilities) Regulations (Capture Dolphins Regulations) provides:

35(1) "If a dolphin is determined, whether by the facility or the Minister, to be no longer suitable for use in any swim programme or otherwise, or if the Minister deems that it is no longer in the best interests of the dolphin to remain at the facility, that dolphin shall be taken into the care of a body appointed by the Minister and either rehabilitated for release to the wild in a responsible manner at the cost of the facility at which the dolphin was held or otherwise dealt with in a manner which the Minister deems to be in the best interest of the public or dolphin concerned."

12. Section 48(1) of the Planning and Subdivisions Act (PSA) PROVIDES:

48(1) The Committee shall require a person who acts in contravention of section 36 to cease such action and —

- (a) cause such building to be demolished;
- (b) effect alterations in the building or land to the satisfaction of the Committee; or
- (c) restore such building or land to its original use and condition,

As circumstances may require, and within such reasonable time, not being less than fourteen days, as may be determined by the Committee."

13. This section refers back to section 36 which lays out specific requirements for various uses of land in order to secure approval for any development or project.

14. Section 14 of the PSA provides:

"(1) Environmental Impact Statements.

- (1) An Environmental Impact Statement is required to be submitted to the Department as part of any proposed type of development which is —

- (a) likely to give rise to significant effects on the environment by virtue of its nature, size or location;
 - (b) of national importance;
 - (c) proposed for sensitive lands or for lands with natural importance;
 - (d) significant in terms of size or complexity;
 - (e) of a nature that may have potentially adverse environmental effects; or
 - (f) a development of Regional impact.
- (2) An Environmental Impact Statement shall be prepared in accordance with standards prescribed by the Minister.
- (3) Without prejudice to the generality of section 75, the Minister may make Regulations providing for —
- (a) the procedures for determining the scope of works to be carried out for an Environmental Impact Statement;
 - (b) the minimum contents of an Environmental Impact Statement;
 - (c) the qualifications, skills, knowledge or experience required of persons conducting and authoring an Environmental Impact Statement;
 - (d) the procedures for public participation in the Environmental Impact Statement process; and
 - (e) the type and extent of consideration by the Department, including the criteria and procedures and timing for review, of an Environmental Impact Statement.
- (4) An Environmental Impact Statement shall be circulated to relevant referral agencies for review and comment as part of the circulation of an application.
- (5) The Committee shall consider the findings of an Environmental Impact Statement and the comments received from referral agencies with respect to an Environmental Impact Statement in its deliberation of an application for Preliminary Support of Application or Approval."

15. Section 6(1)(b) of the Marine Mammal Protection Act (MMPA) provides:

- 6(1) No person shall operate a captive marine mammal facility for any purpose unless —
- (b) the premises are licensed to be operated as a captive marine mammal facility."

16. Apart from the provisions listed above I shall refer to other provisions as the need arises. Taking the issues in the order they were presented, the granting of dolphin import licences falls to be considered first.

DOLPHIN IMPORT LICENCE

17. Under Section 35(1) of the Captive Dolphin Regulations the removal of the dolphins from the facility shall be done if the facility or the Minister determine that the dolphins are no longer suitable for use in any swim programme or otherwise, or the Minister deems it no longer in the best interest of the dolphins to remain at the facility. It follows that an order of mandamus for the Minister to remove the dolphins to an appropriate location can only be made if the Court determines that one or both of the conditions has/have been established by the evidence.

18. From the documents disclosed on discovery and contained in an Affidavit of Marvin Hanna filed 18 April 2014 and from the 4th Affidavit of Fontini Duncombe a.k.a. Sam Duncombe filed 15 April 2014 (the Duncombe Affidavit), the following sequence of events are established.

19. On 31 May 2013 the 2nd respondent issued 8 import permits under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This date is significant

because approximately six weeks later on 19 July 2013 Blue Illusions applied under the MMPA for a license to import dolphins. That same day, 19 July 2013, a memorandum from the Permanent Secretary in the Ministry of Agriculture, Marine Resources and Local Government to the Director of Marine Resources advised that "... the Honourable Minister has approved the application to import the eight (8) bottle-nosed dolphins listed in your memorandum. Grateful if you would now urgently issue the requisite permit".

20. Also on 19 July 2013 the 1st respondent issued the license to import the 8 dolphins, a fee of \$400.00 was paid, a licence to operate a captive Marine Mammal Facility (Operator Licence) was issued and \$10,000.00 was paid. No application is disclosed, only a letter of 29 May 2013 from the Ministry of Agriculture, Marine Resources and Local Government to Blue Illusions advising that its application to operate a captive marine mammal facility is in evidence.

21. By Section 6(1)(b) no person shall operate a captive marine mammal facility unless the premises are licenced to be operated as such (Premises Licence). A premises Licence to import marine mammals is granted by the Minister under Section 3(1)(a) of the MMPA. The Minister may grant such a licence if he is satisfied that a marine mammal should be imported for captive purposes (see ss.5(1)(b) MMPA.)

22. There does not appear to be a Premises Licence issued by the Minister to Blue Illusions prior to the issuance of the import and operation licences. These licences are distinct from a Premises Licence. An Affidavit by Michael Braynen filed 15 April 2014 confirms that only an Import Licence and an Operator Licence was issued. Although there is no application for an Operator Licence included in the documents disclosed, such an application is referred to in the letter of 29 May 2013 from the Ministry of Agriculture, Marine Resources and Local Government to Blue Illusions.

23. On 6 January 2014 Blue Illusions applied for a Premises Licence for the first time as well as an Operator Licence (the first having expired on 31 December 2013. The Dolphins had arrived six months earlier on 23 July 2013 as stated in Blue Illusion's Annual Report. Section 6(1)(b) prohibits the operation of a captive marine mammal facility unless the premises are licenced.

24. The applicant has submitted that the 1st and 2nd respondents are required to consider whether the importation of the Dolphins was necessary for their preservation or for scientific research or educational purposes under the MMPA(see Section 5(1)(a)). Indeed there is no evidence provided that such a consideration was taken. However Section 5(1)(b) MMPA authorizes the Minister to grant an import licence if he is satisfied that "a marine mammal should be imported for captive purposes in a licenced facility". This subsection does not appear to be contingent on Section 5(1)(a) MMPA or any of the other conditions at (c) through (j). I am therefore unable to conclude that the consideration referred to must be satisfied before an Import Licence can be issued by the Minister. The requirement is arguably imposed by The Bahamas' Membership in UNEP's Specially Protected Areas and Wildlife Protocol (S.P.A.W.) I shall refer to SPAW later.

25. Given the above, although the Minister has the authority to issue an Import Licence under Section 5(1)(b), the decision to do so was clearly premature, there being no Premises Licence issued on 23 July 2013 when the facility commenced operations, and the 2nd respondent having issued 8 CITES import permits as early as 31 May 2013. There is also no evidence that Section 5(4)MMPA was complied with which requires the Minister to take into consideration relevant international practices and protocols.

26. There is also Regulation 4 of the Marine Mammal (Captive Facilities) Regulations which prohibits the issue of a premises licence unless the facility is located:

- (a) away from sources of odours, dust and air contamination
- (b) where it will be accessible to a supply of potable water and to sewerage system
- (c) in a well-drained area and where it will not be subject to flooding, and

(d) in an area where it will not be subject to any fuel, oil or toxic chemical pollution.

In all of the circumstances it is a reasonable conclusion that a Premises Licence could not be issued.

SITE PLAN APPROVAL

27. The applicant has submitted that the 3rd respondent's (TPC) decision to grant a Preliminary Support for Site Plan Approval was procedurally unfair because, inter alia, an Environmental Impact Statement was not submitted under the P.S.A. and no public hearing was held (as required) before granting the Preliminary Support.

28. On 11 June 2012 Blue Illusions wrote to the Director of Physical Planning stating that "plans and approval documents for the proposed ... redevelopment of ... Blackbeard's Cay were enclosed, and it sought "Approval-in-Principle for land use".

29. The TPC respondent on 26 July 2012 advising that the Committee had considered the application "at their meeting held on 24 July 2012 and resolved to grant Preliminary Support of Application Approval subject to the following conditions:

- (a) Separate applications are made respectively for (a) extension of the stingray and dolphin pen; (b) placement of groynes; and (c) excavation of the salt water pool;
- (b) Applications to design the new walkway system with the view to protecting existing mature trees or to arrange relocation where possible."

30. Under Section 4 of the PSA Preliminary Support of Application is defined as "the preliminary support of a site plan or subdivision application by the Committee, with or without amendments or conditions to the proposal which is further subject to either Site Plan Approval or Subdivision Approval once conditions are met. Preliminary Support of Application does not constitute approval of an application".

31. The definition expresses in clear language that a Preliminary Support of Application does not constitute approval of an application under Section 48(1) PSA (supra) their Committee shall require a person to cease any development if that person contravenes the provisions of Section 36 PSA which governs approvals for the development.

32. Under Section 36(2)(e) PSA Blue Illusions is required to secure a Site Plan Approval and by Section 36(4)(b) no development can proceed without one.

33. On enquiry by the applicants, Michael Major, Director of Physical Planning, on 10 June 2013 referred to the relevant approval having been granted on 22 November 2012 for a period of two (2) years. However, no such approval was disclosed in the discovery documents.

34. There is disclosed a Preliminary Support of Application Approval granted earlier on 26 July 2012. The applicant queries whether this earlier approval relates to land use as opposed to a site plan application. The question is made more poignant as no application for site plan approval has been disclosed in discovery, and no approved certified site plan is in evidence.

35. The applicant has also argued that Blue Illusions has not complied with the conditions attached to the Preliminary Support of Application Approval of 26 July 2012 by applying separately for the extension of the stingray and dolphin pen, for the placement of groynes, for the excavation of the salt water pool and for the design of the new walkway to protect mature trees. There is no Site Plan Approval in evidence, which would be issued on the satisfaction of the conditions attached.

36. The Affidavit of Craig Delancy, the Building Control Officer at the Ministry of Works and Urban Development, filed 15 April 2014 confirms that a letter of 11 June 2012, not an application form, was

sent by Blue Illusions to the Director of Physical Planning requesting a Preliminary Support of Application Approval for the proposed development and the request was approved for two (2) years from 24 July 2012 subject to the conditions enumerated above. There is no evidence that separate applications were made relative to these four conditions, and as stated earlier there is no Site Plan Approval in evidence.

37. What is offered as a Site Plan Approval is a building permit No. 119555. It is stated at paragraph 15 of the Delano/ Affidavit that the building permit is equivalent to the Site Plan Approval under the PSA.

38. "Building Permit" is defined at Section 4 of the PSA as a building permit issued under Sections 5 and 6 of the Building Regulations Act (Ch. 200). I note that Site Plan is not defined by the Act. Section 27(2) of the PSA however provides that no person shall undertake any development subject to site plan control unless the Committee has approved plans showing the location of all buildings and structures to be erected and nine (9) specific requirements are satisfied. Section 36(4) of the PSA makes it patently clear that a Site Plan Approval and a Building Permit are different in nature. A developer must obtain a Site Plan Approval before a building Permit is issued. There does not appear in the disclosure documents a Site Plan Approval.

39. In addition to the above the applicant has submitted that due to the nature of the development and its potential impact on the immediate environment Section 14 of the PSA requires an Environmental Impact Statement to be submitted to the Department as part of the development. Additionally section 14(3)(d) of the PSA provides that the Minister may make regulations providing for the procedures for public participation in the Environmental Impact Statement process. The section also requires the Environmental Impact Statement to be circulated to relevant referral agencies for review and comment (Section 14(4) PSA) and the Committee shall consider the Statement and comments thereon before issuing a Preliminary Support of Application (Section 14(5) PSA).

40. Further, section 37(1) of the PSA requires the Committee to hold public hearings to determine applications, inter alia, where a site plan approval is required under Section 36. There is also a process prescribed to organize the public hearing under Section 42(b) and (7) of the PSA. It does not appear from the documents disclosed or from the Affidavit evidence that a public hearing was ever contemplated by the TPC.

41. The applicant collected 64,631 signatures on a Petition to stop the development. Also by a letter of 27 May 2013 the applicant wrote to the Minister a letter signed by 7 local and 33 international conservation and campaign groups which stated in part:

"We have recently become aware that approval has been granted by the National Economic Council for a marine mammal facility to be built at Blackbeard's Cay. We have also been informed that preliminary approval has been granted for a similar facility in the Eastern end of Grand Bahama. Neither facility was made public, nor was any public consultation invited. We feel very strongly as a group of citizens and concerned international individuals and conservationist groups, that this is wrong for the Bahamas, and wrong for the international health of dolphin populations worldwide."

42. The applicant has submitted the following:

- "a. The Facility has no ability to quarantine animals properly as there is no way to prevent the water flow between pens, which are only separated by nets and there is no separate filtration system in evidence so that any diseases can be properly controlled and contained.
- b. Ocean noise at this location is likely to be a huge problem and can cause deafness in dolphins without proper controls in place. Requests for information (e.g. 12 June 2013 letter to the 2nd respondent at PD-1/pp. 64-65) as to what controls are in place have gone unanswered.

- c. Protection from hurricanes, storms or ocean surges are necessary and not in evidence at the site. A report requisitioned by Blue Illusions itself shows that the hurricane protocol in place is inadequate (SD4-85).
- d. Protection from the sun is necessary and not in evidence at the site.
- e. The water depth is insufficient. The deep finder reading was taken on Ms. Duncombe's visit to Blackbeard's Cay in September 2013 at mid tide just outside the perimeter of the dolphin pens. The readings indicated a depth of 7 feet at mid tide. This would be even lower at low tide. The marine mammal protection legislation requires minimum depths at low tide of 9 ft [section 37(2) of the MM (Capacitive Dolphins Facilities) Regulations [Tab 10].
- f. There is no evidence of a gates system to allow dolphins to be separated, therefore dolphins would have to be lifted over the current net system when they need to be separated or in the event of injury or medical attention being required, but there was no evidence of lifting apparatus.
- g. There is no evidence of any Protection from boat fuels or fuels being brought onto the island for use in the Facility. There is only one dock where the dolphins are kept. The report requisitioned by Blue Illusions does not address this issue. It merely states that neither fertilizers nor any other chemicals are being used in landscaping SD4-p85 para 2.
- h. There was no evidence of complete separation from the public therefore risking harassment by the public.
- i. There has been no response to the applicant's enquiries (e.g. 12 June 2013 letter to the 2nd respondent at PD-1/pp. 64-65) as to what is being done to ensure there is no Dolphin/human cross contamination of viruses and diseases and no cross-contamination with local dolphins.
- j. There is no evidence that a marine mammal inspector or designated veterinarian have been appointed or have visited the site and the dolphins to carry out inspections are required by law (section 7 of MMPA). Enquiries in this regard have gone unanswered also. The report requisitioned by the Blue Illusions (SD4-85 para.4) merely states that "the Department of Marine Resources inspects the facility to ensure compliance with the Marine Mammal Protection Act' without specifying who in that department carries out the inspections or whether such person is a duly appointed marine inspector per section 7 of the MMPA.
- k. The facility site is close to the channel used for cruise ships approaching the port and therefore must be subject to a risk of fuel and oil pollution.

In addition, the likely impact on the local marine environment which has not been controverted is as follows:

- a. Whilst deeper water is required for dolphins to be safely housed, if there is a plan to dredge the area to increase depth to levels required by the legislation, the necessary dredging will affect the coral and fishing beds downstream.
- b. The fecal matter produced by the dolphins in the sea pens is likely to negatively affect the entire area and in particular the coral located there. A Cozumel study conducted by Thomas, J. Goreau, Ph.d. President, Global Coral Reef Alliance dated 6 June 2003 demonstrated how the fecal matter produced by dolphins in sea pens can affect reef systems miles downstream (SA-1/p. 106-114].
- c. The Bahamas National Trust has earmarked the area just West of Blackbeard's Cay as its next major protected Marine Park (SA-1/pp. 131152)."

43. A response of 10 June 2013 from the Department of Physical Planning informed:

- "(a) Blue Illusions Limited received conditional approval (subject to approvals from relevant Government agencies for lands use, seabed lease, building permits, etc.) from the National Economic Council (NEC) on 22 November 2011 to redevelop Balmoral Island (now called Blackbeard's Cay()) as a Dolphin and Water Park Resort project;
- (b) Blackbeard's Cay Limited given conditional permission to Blue Illusions Limited access to the cay in accordance with NEC's approval noted above;

(c) Town and Planning Committee's Preliminary Support of Application approval granted on 22 November 2012 for a period of two (2) years."

44. Apart from this response the applicant's enquiries were met with silence. It seems even an objection from the Whale and Dolphin Conservation by its letter of 13 June 2013 to the Prime Minister, the Deputy Prime Minister and the Minister voicing its concerns appear to have fallen on deaf ears.

45. When the applicant pressed for a response by a letter of 16 July 2013, three days later the following actions took place:

- "(a) Blue Illusions submitted an application to import dolphins;
- (b) the 2nd respondent, the Director of Marine Resources, produced a memo to the 1st respondent, the Minister of Marine Resources, in relation to that application in which he listed 8 dolphins that Blue Illusions intended to import;
- (c) this memo and the applications were considered by the Minister;
- (d) the Minister decided to approve the application;
- (e) the Minister communicated his approval to the Permanent Secretary to the Director;
- (f) the Permanent Secretary in turn sent a memo to the Director informing him and asking him to issue the import licences;
- (g) the Director issued the licences on behalf of the Minister;
- (h) Blue Illusions paid the import licence fees;
- (i) A receipt was issued for the import licence fees;
- (j) The Ministry of Marine Resource issued Blue Illusions with an Operator Licence;
- (k) The \$10,000 Operator Licence fee was paid by Blue Illusions (l) Blue Illusions was issued with a receipt for the Operator Licence fee.

46. As stated above the Dolphins arrived on 23 July 2013, one day before the Animal Health Certificate of export issued by the Republic of Honduras expired (see para 13 of the Braynen Affidavit and the Exhibit thereto). The CITES convention licences to import eight dolphins was issued on 30 August 2013. In an undated report Dr. Albert Iglesias D.V.M. declared the dolphins to be in good general health as required under Section 9 of the Mammal (Captive Dolphin Facilities) Regulations, Section 4 of the Regulations provides, as stated above, that no facility shall be licenced unless such facility is located (a) away from sources of odours, dust and air contamination . (b) Where it will be accessible to a supply of potable water and to sewerage system (c) in a well-drained area and where it will not be subject to flooding and (d) in an area where it will not be subject to any fuel, oil or toxic chemical pollution. There appears no quarantine programme for the new dolphins on their arrival as required by Section 24(2) of the Regulations.

47. There is also a requirement before granting an import licence for the Minister to have regard to:

- a. UNEP's Specially Protected Areas and Wildlife Protocol ("SPAW") and
- b. The Convention on International Trade in Endangered Species. ("CITIES").

48. There appears no evidence that a public discourse was encouraged, it seems rather that such a discourse was avoided.

49. The Bahamas became a party to SPAW in March 2012 and by Article II it seems the import licence ought to have been denied as its purpose is a cruise passenger attraction. The membership in SPAW may indeed prohibit the import of marine mammals for anything other than preservation or scientific research.

The circumstances described leads to the conclusion that a Site Plan approval could not be legally issued.

THE PRIME MINISTER

50. The applicant has submitted that the Prime Minister's failure to prevent Blue Illusions from constructing and operating a dolphin facility on Crown Land, including the sea bed is ultra vires.

51. Reference was made to Section 54(1) of the Conveyancing and Law of Property Act which provides:

"Any power that immediately before the 10th day of July, 1973, was under section 24 of the Bahama Islands Constitution order, 1969, vested in the Governor of the Bahama Islands —

- (a) to make grants and dispositions of any lands or other immovable property in the said Islands or any interests in such property that were vested in Her Majesty or the Governor on behalf of Her Majesty as the property of the Crown for the beneficial interest of the said Islands, or
- (b) to exercise in relation to such property or interests any other powers lawfully exercisable by Her Majesty,

Shall be vested in the Minister, so however, that, wherever the employment of the Public Seal would have been required under that section, the official seal of the Minister shall be employed instead."

52. From the discovery documents two things happened on 15 March 2012, 19.142 acres of land were leased by the Crown to Blackbeard's Cay Limited, simultaneously the Crown issued a licence consenting to a sub lease of the land to Blue Illusions. Under clause 2 of the Licence Blue Illusions covenanted to pay the rent under the head lease as well as to obtain prior approval of all appropriate Government agencies for the development. It is in evidence by way of a letter of 8 January 2014 from the Department of Lands and Surveys that Blue Illusions paid the annual rent of \$100,000.00. The applications to the various Government agencies are referred to earlier, most of which applications were made considered approved and paid for all on 19 July 2013.

53. With regard to the seabed a 2.47 acre approval was granted on 25 January 2012 to Blackbeard's Cay Limited by the Minister responsible for lands for the renewal of the seabed Crown Lease. That was communicated by letter from the Director of Investments.

54. On 30 January 2012 the Department of Lands and Surveys wrote to Blackbeard's Cay Limited confirming that the Minister responsible for Lands and Surveys approved the renewal of the Crown Lease of the sea bed for ten years commencing 1 May 2006 on the same terms as the expired lease but with an annual rental of \$100.00.

55. The difficulty arises because, as seen by letter of 23 April 2001 from the Department of Lands and Surveys to Frederick Lunn, the seabed lease is for the purpose of a stingray attraction only and will be terminated if the area is not used for that purpose. Further Blackbeard's Cay Limited could not assign, underlet or part with possession, and required approval from the Department of Physical Planning for the erection of any structures on the seabed. Blackbeard's Cay Limited was also obliged to provide a survey plan of the proposed seabed at their own expense.

56. There has been no discovery of the expired lease, the renewed lease nor of the survey plan. There is evidence in the form of a letter of 7 January 2012 and a receipt that the annual fee of \$100.00 was paid by Blue Illusions. The necessary sub lease by Blackbeards to Blue Illusions is not in evidence nor is the requisite consent by the Prime Minister through the Department of Lands and Surveys.

57. In the circumstances the applicant has argued that in the absence of a Site Plan Approval and a Premises Licence, the Prime Minister's decision to allow Blue Illusions to operate on Crown Land is in contravention of the law and ultra vires.

58. Affecting the outcome of this judicial review is a report of 23 January 2014 by SEV Consulting Group to the Bahamas Investment Authority. This report was made at the request of the Investment Authority on 17 July 2013 and it states:

"Following receipt of your letter dated 17th July 2013, the owner of the abovementioned development requested that SEV visit the site to confirm whether the points raised about the dolphin facility had been addressed. SEV visited the site on 18th October 2013.

SEV can confirm the following:

1. The area where the dolphins are located is 10 feet in depth at low tide and 18 feet in depth at high tide.
2. Vegetation near to the dolphin enclosures has been removed. Neither fertilizers nor any other chemicals are being used for landscaping, only water and regular trimming.
3. A second barrier has been installed to prevent dolphins from escaping as well as to protect them from poaching.
4. The facility is permitted by the Department of Marine Resources. The Department also periodically inspects the facility to ensure compliance with the Marine Mammal Protection Act.
5. A hurricane protocol has been developed for the facility, but requires the following amendments:
 - a. A contact list for the hurricane response team should be included in the protocol.
 - b. At least 2 persons should remain at the facility during a storm. If only one person remains behind and that person gets injured, there is no one to help the injured individual or to care for the animals, particularly in light of the fact that access to the facility may not be possible for several days.
 - c. Designated safe zones for the animals at the facility during a storm should be presented in a graphic or map attached to the protocol.
 - d. If the animals need to be moved from the facility for their safety, alternative sites should be specified in the hurricane protocol as well as contact information for persons at alternative sites.
 - e. The protocol needs to indicate that the same steps will be taken once a tropical storm watch has been issued as tropical storms can quickly evolve into hurricanes.
6. Back of the house operations with regard to food preparation and care for the dolphins is up to industry standard with adequate refrigeration, proper food storage, clean running water and regular cleaning.
7. Based on the 2012 Smith Warner International Engineering Report, the shape of the island provides sheltering for the project site. For example, the northern coast experiences wave heights greater than 1.0m while the project site, which is located on the southern side, has waves with a range of 0.25m to 0.5m. The report does cite potential migration of sand into the dolphin enclosures during a hurricane or storm event from the east. It is therefore recommended that there be monitoring of water depth on an annual basis in the dolphin enclosures to ensure sand is not accumulating and decreasing water depth. If it is found that this is occurring, maintenance dredging will need to be done at the facility and appropriate mitigation actions taken during any dredging activities, including moving the dolphins away from the dredge site.
8. The construction of the boulder groyne on the eastern side of the dolphin enclosure provides additional wave sheltering.
9. Stingrays at the facility are those that were originally at Blackbeard's Cay and an additional eight were brought in from Spanish Wells. All of the stingrays have had their barbs removed, thus eliminating the risk of trainers and visitors being stung.
10. Open burning was observed during the site visit. It was confirmed that this was being done by the employees of Sandals Hotel which utilizes a portion of the cay. It is highly recommended that the Government address this issue with Sandals immediately as it

was confirmed that the burnings occur on a regular basis rather than proper disposal of trash generated by Sandals' guests. Photos are attached confirming this illegal practice.

11. The owner intends to clean up the water body to the rear of the property so that guests can use the area for kayaking."

60. There is no evidence that the recommended amendments to the hurricane protocol have been effected. As pointed out by the applicant there is nothing in the report to show that the facility is located in an area that will not be subject to fuel and oil pollution as required by rule 4(d) of the Captive Dolphin Regulations.

61. I must add that clause 1 of the report that the enclosure is 10 feet in depth at low tide and 18 feet in depth at high tide is challenged by the applicant who claims that a depth finder at mean tide at the edge of the location measured 9 feet in depth. Although the hard evidence of this measurement is not presented by the applicant, I am doubtful that the tidal difference is as much as 8 feet, such a change in depth ought to flood the facility which sits at the water's edge.

62. From the Delancy Affidavit Blue Illusions applied for and were granted business licences for a Water Park, Restaurant and Bar and a Gift and Souvenir Shop. The approval was communicated on 19 July 2013. The conditions were:

- "(i) The site must be kept neat at all time;
- (ii) All parking must be located on site;
- (iii) Approvals are in accordance with the Ministry of Works (Buildings Control Section), Department of Environmental Health Services and all other government/regulatory agencies."

63. An occupancy certificate was issued the previous month on 28 May 2013. An inspection was conducted on 17 July 2013 by the Ministry of Works and Urban Development, and the inspector concluded that all requirements had been met. It follows that the Prime Minister was perhaps given faulty advice with regard to the appropriate and lawful land use by Blue Illusions Limited.

CONCLUSION

64. All of the reliefs sought are contingent on the grant of a Premises Licence and a Site Plan Approval. Having found that neither have been granted nor could have been granted, the applicant has made out its case against the respondents and the prerogative orders sought, as laid out at paragraph 2 above, are granted as prayed.

65. Costs are awarded to the applicant to be taxed if not agreed.

Dated the 17th day of July A.D. 2014

Stephen G Issacs J.