

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 382/13

In the matter of:

Roland Haus Co. Ltd

Appellant

v/s

Minister of Environment and Sustainable Development

Respondent

IPO:

- 1. Globe Prism Ltd**
- 2. The Permanent Secretary, Ministry of Housing and Lands**
- 3. District Council of Riviere du Rempart**

Co-Respondents

RULING

1. Counsel appearing for the appellant has moved that the witness for the appellant, Mr. Foondun, planner, be allowed to address all grounds relating to the High Water Mark ["HWM"]. The reason for the motion comes because when witness Foondun was to depone on the issue at the sitting of the 16th February 2017 there was an objection from Counsel appearing for Co-respondent no.2 on the basis that there was a previous ruling delivered by the Tribunal in July 2016 to the effect that it cannot determine where the High Water Mark is.

2. The co-respondents nos. 1 and 2 and respondent still object to the motion. After a perusal of the record, it would appear that with the passage of time and the bench having been reconstituted there was confusion around the nature of the ruling delivered by a previously constituted bench on a closely related issue, that is, the issue of Public Domaine but not strictly speaking on the issue of High Water Mark. The co-respondent no.2 had moved that the first ground of appeal be deleted because it required a determination on the issue of Public Domaine which this Tribunal is not empowered to do. The ruling was in favour of the Co-respondent no.2.

3. We have duly considered submissions made by all counsel. For all intents and purposes, we deem this a fresh point which has not been adjudicated upon by the presently constituted bench. The 'High Water Mark' is an issue of mixed law and fact. **Section 3(1)** of the **Pas Geometriques Act** stipulates "*The breadth of the Pas Geometriques shall be reckoned from the line of the seashore which is reached by high water at spring tide, and shall never be less than 81 metres and 21 centimetres.*"As per this section, the demarcation created by the line of the seashore at a particular level is the High Water Mark and it is the prerogative of the Chief Surveyor delegated by the Permanent Secretary of the Ministry of Housing and Lands to survey and make plans of any *Pas Geometriques*.

4. This Tribunal has to decide whether the EIA licence should have been granted for the present undertaking or not. For this purpose, Counsel for the Appellant seeks to have witness Foondun depone on issues for which he will have to make reference to the High Water Mark. As stated in our earlier ruling, the tools used by planners are the planning instruments such as the Outline Planning Schemes, the Planning Policy Guidance and all relevant Acts including Environment Protection Act. Some aspects of environmental law can be intertwined with planning law. Mr. Foondun is allowed to testify on planning policies and make reference to any relevant legislation which is within the purview of the planning instruments for the purposes of the present case.

5. Under **section 24 of the Environment Protection Act 2002**, to which reference is made under **section 23 of the EPA**, powers are given to the Minister to take a decision on the EIA, reference is made to '*policy and environmental guidance*'. Under **section 23 (2) EPA**:

"The Minister may-

- (a) Subject to section 24, approve the issue of an EIA licence on such terms and conditions as he may deem appropriate; or*
- (b) Disapprove the EIA and reject the application."*

Under **Section 24 of the EPA** which relates to EIA approval stipulates

"(1) In considering the approval of an EIA, account shall be taken of-

- (a) Such policy or environmental guidance as may be published in respect of an undertaking;*
- (aa) the environmental factors considered in the EIA;*
- (b) The measures proposed to minimize adverse effects on the environment, people and society;*
- (c) The alternatives proposed in the EIA;*
- (d) Such other matters as may be relevant in weighing the significance or insignificance of the potential environmental impact of the potential environmental impact of the undertaking"*

Now the empowering provision of **section 23 of the EPA** makes clear reference to **section 24** which refers to the consideration of such policy or environmental guidance as may be published which would apply to the undertaking. It has been submitted by Counsel for the Appellant that the location of the High Water Mark is an essential requirement of planning legislation and reference to it has been made in planning instruments such as the Planning Policy Guidance regarding the building set back. It has also been submitted that there are plans which have already been placed on record duly drawn and signed by the Government Surveyor which also show the High Water Mark.

6. While this Tribunal can appreciate that there exists a demarcation line which is the High Water Mark, the actual location of the marking (that is, the High Water Mark) on the seashore can simply be accepted as a matter of fact, as a pre-determined issue. Any inference solicited from the Tribunal as to where the demarcation line should be, if this is disputed by the relevant Ministry, will involve the Tribunal having to adjudicate on the issue and this should not be done. If this High Water Mark is being contested or its location on a map is being contested by the authority concerned, in the present instance the Ministry of Housing and Lands, then the Tribunal will be acting *ultra vires* if it were to decide between two versions as to where the HWM would be. This mark (HWM) is otherwise within the sole prerogative of the Ministry of Housing and Lands to determine.
7. This being said, it does not make sense to impose a blanket provision on a planner, precluding the expert witness from making any reference whatsoever to the High Water Mark, the moreso, if he is referring to it in the context of planning policies and environmental guidance or where the issue is undisputed by the Ministry of Housing and Lands. However, where it involves any inferences to be made by this Tribunal on a preferred version as to the location of the HWM, that will be outside our jurisdiction.
8. Learned counsel for the appellant has referred us to some grounds of appeal in relation to which appellant's witness seeks to make reference to the High Water Mark. We cannot at this stage pre-empt what the witness will state nor will we surmise. He cannot be precluded outright from making any reference to the High Water Mark, it will all depend on the context. If the issue of the HWM has been pre-determined by the relevant Ministry and the witness is simply making reference to it on the basis of unchallenged evidence such as documents, then we fail to see the basis for the objection by co-respondent no.2. However, as stated above if any reference made requires the Tribunal to adjudicate or form an opinion on where the HWM lies or that where it should normally be taken to lie, then Counsel appearing for the other parties may well object or take it up in submissions and invite the Tribunal to disregard such

evidence. The parties are therefore to take cognizance of this ruling and proceed according to the directions given.

Ruling delivered on 20th June 2017 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Dr. B. MOTAH

Assessor

Mr. M. BUSAWON

Assessor