BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0185

BETWEEN

VIRGIN ISLANDS ENVIRONMENTAL COUNCIL

Claimant

-AND-

THE ATTORNEY GENERAL

Defendant

-AND-

QUORUM ISLAND BVI LIMITED

Interested Party

Appearances:

Mr. Stephen Hockman QC and Mr. Mark Beard of Six Pump Court, Temple, London for the Claimant
Mrs. Joanne Williams-Roberts, Solicitor-General for the Defendant
Mr. Gerard St. Clair Farara QC and Dr. Lloyd Barnett of Farara Kerins for the Interested Party

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2009: April 27, 28, 29, 30
2009: September 21

CATCHWORDS:

Administrative law - Judicial Review – Attorney General as a proper Defendant – Amendments to Statement of Claim – Delay – Grounds for claim for judicial review - procedural impropriety – bias and predetermination – non-disclosure of documents – lack of reasons for decision – Illegality – whether Hans Creek is a fisheries protected area under Regulation 51(5) of the Fisheries Regulations 2003 – Fisheries Act 1997 – whether Regulations 51(1) and 64(1) of the Fisheries Regulations create prohibition and a criminal offence – Section 29 of the Constitution –International Treaty Obligations – Irrationality and the Wednesbury unreasonableness – whether Decision to grant planning approval was so outrageous that in its defiance of logic or of accepted moral standards that no sensible person could have arrived at it.

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** Marine protected areas are safe havens for underwater plants and animals. They are valuable tools for protecting coral reef-habitats and managing near-shore fisheries while playing an essential role in the overall conservation of marine biodiversity. These were some of the factors which motivated a coalition of local fishermen, concerned residents, scientists and environmental activists, known as Virgin Islands Environmental Council ("VIEC") to institute the first environmental case in the British Virgin Islands ("the BVI"). The claim for judicial review seeks an order in terms of the prerogative writ of *certiorari* to quash the decision ("the Decision") of the then Chief Minister and Minister of Planning ("the Minister") granting planning approval to the Interested Party, Quorum Island BVI Limited, for the development of a five-star hotel, marina and golf course ("the Beef Island Project").[1]

Brief background facts

[2] The Claimant, VIEC is established under the BVI Business Companies Act 2000 (as amended) as a company limited by guarantee of its members with no share capital. It is purportedly a non-profit environmental organisation whose objects include promoting environmental democracy, public participation, access to justice on environmental issues and the enforcement of environmental legislation.

[3] Initially, VIEC applied for leave to make a claim for judicial review against the Minister and the Attorney General Chambers. Leave was granted ex parte on 20th August 2007 and VIEC was permitted to amend the application to reflect the Attorney General as a party and not the Attorney General Chambers. Subsequently and acting on legal advice, VIEC applied to delete the Minister as a Respondent thereby leaving the Attorney General as the sole Respondent/Defendant. On 7th November 2007, before Olivetti J and with all three parties being represented by Counsel, the Court ordered that the Attorney General be substituted as the sole Defendant in these proceedings.

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[1] See Approval Letter dated 31st January 2007 at Tab. 29, First Affidavit of Edward Childs.

[4] Quorum is a company incorporated in the BVI and is the developer of the Beef Island Project. On 28th September 2007, it was granted leave to be joined as the Interested Party in these proceedings. Quorum owns 659.2 acres of land on Beef Island which includes the site upon which the Beef Island Project is proposed to be built.

[5] On 6th August 2006, Quorum submitted two applications, D267/06 and D268/06 seeking planning approval for the Beef Island Project. By a letter dated 31st January 2007 ("the Approval Letter"), the Minister informed Quorum's Chief Executive Officer, Mr. Hung of the Decision granting planning approval.

[6] At the time of the Approval Letter, Quorum was owned by Applied Enterprises Limited ("Applied"), a company incorporated under the laws of Hong Kong to whom a license to hold 9,999 shares in Quorum was issued by the Governor of the BVI on 24th January 2007.

[7] About the same time that the applications for planning approval were being submitted on 6th August 2006, Quorum and Applied entered into a Joint Venture Agreement (the "JV Agreement") on 11th August 2006 with InterIsle Holdings Limited ("InterIsle"). The JV Agreement was subject to certain preconditions, including the obtaining by Quorum of planning approval of the master plan for the Beef Island Project, InterIsle would purchase a 50% interest in Quorum for $21 million and be jointly responsible for obtaining financing for the Project. Also, on 11th August 2006, the said parties entered into a Development and Management Agreement ("the Development Agreement"), whereby, subject to completion of the sale of 50% of Quorum to InterIsle, InterIsle would undertake and be responsible for the management of the Beef Island Project.

[8] On 29th June 2009, InterIsle applied with the concurrence of Quorum and the Governor's issuance of a license, to purchase and hold 50% of the shares in Quorum and for Charles H.F. Garner and Federico J. Sanchez Ortiz to be directors of Quorum. This represented an investment of approximately $21 million by InterIsle in Quorum. It was made pursuant to the JV Agreement.

[9] Shortly after, VIEC brought this claim for judicial review challenging the lawfulness of the Decision taken by the Minister. Quite properly, VIEC does not ask the court to adjudicate upon the merits of the Beef Island Project or whether it may result in adverse environmental impacts.

Preliminary Issues

[10] Several preliminary issues arise for determination before the grounds for judicial review can be properly addressed. These are:

(1) Is the Attorney General a proper party to these proceedings?

(2) Should VIEC's application to amend the statement of claim be granted?

(3) Was there delay in bringing the claim for judicial review?

(4) Should Calvin Smith be added as a Claimant? (which is made in the alternative in the event that VIEC is found to not have standing to bring this claim for judicial review) and

(5) Does VIEC have standing to bring this claim?

[11] Although the Attorney General and Quorum comprehensively dealt with issues (4) and (5) in their written submissions, both parties have prudently abandoned them during the course of the hearing.

Attorney General as defendant

[12] At the outset of the hearing, a point in limine arose which had to be decided first as, if upheld, may have precluded further consideration of the substantive issues in this claim for judicial review. Learned Queen's Counsel, Mr. Farara, appearing for Quorum had raised the issue that the Attorney General is not a proper party to the claim for judicial review and that the proper defendant is the Minister whose decision is being called into question since serious allegations are being made against him, for instance, that he "was permitting the commission of a criminal offence."

[13] Mr. Farara QC submitted that it has long been established that the Attorney General is not a proper or necessary party to a claim for judicial review and that judicial review

proceedings involving the prerogative writs are not 'civil proceedings' within the meaning of the Crown Proceedings Act[2]. ("the CPA"). According to him, such proceedings relate to private rights and not to public rights. His submissions were endorsed by the Learned Solicitor General.

[14] After hearing submissions from all parties, I ruled that the Attorney General was a proper defendant to these proceedings. I gave oral reasons for my decision which I have now reduced to writing.

[15] A convenient starting point is section 13(2) of the CPA which provides that "*Civil proceedings against the Crown* may *be instituted* either *against the Attorney General* or *against an authorised officer in his official name*".[3]

[16] On a proper reading of section 13(3), it is clear that civil proceedings against the Crown **may** be instituted **either** against the Attorney General **or** against an authorised officer in his official name **but** not against both. However, the CPA does not define civil proceedings. It does however, set out in section 19, the proceedings against the Crown which falls under the CPA. Section 19(2) states as follows:

> "Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only-
>
> (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Ordinance had not been passed and the Crown Suits Act had not been repealed, might have been enforced or vindicated or obtained by the proceedings mentioned in paragraph 2 of the Schedule or by an action against the Attorney General under the Crown Suits Act;
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> (b) all such proceedings as any person is entitled to bring against the Crown by virtue of this or any other Ordinance, or any law;

[2] Cap. 21 of the Revised Laws of the Virgin Islands, 1991.
[3] This provision is different from section 13 of the Crown Proceedings Act of Jamaica which expressly states that civil proceedings against the Crown must be instituted against the Attorney-General.

> and the expression "civil proceedings by and against the Crown shall be construed accordingly."

The type of proceedings mentioned in paragraph 2 of the Schedule is "proceedings against Her Majesty by way of monstrans de droit."

[17] Both the Attorney General and Quorum rely heavily on the case of **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd**[4] for a definition of "civil proceedings." It was held (by the Court of Appeal of Jamaica) that:

> "The definition of 'civil proceedings' in the Crown Proceedings Act excluded proceedings which would be taken in the Crown side of the Queen's Bench Division, i.e. the prerogative writs of certiorari, mandamus and prohibition…Section 13 of the Act required that the Attorney General was a proper party to any civil proceedings by or against the Crown. However, as the Act did not apply to the Crown side proceedings the Attorney General was neither a necessary or proper party to the action."[5]

[18] The Privy Council agreed with the Court of Appeal. At page 747(e), Lord Oliver stated:

> "Should the Attorney General be named as the respondent in these proceedings instead of the Minister of Foreign Affairs, Trade and Industry? As regards the last of these questions, their Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not 'civil proceedings', as defined by the Crown Proceedings Act, and that the appellant and not the Attorney General was the proper party to the proceedings…."

[19] Both parties fortified their arguments by relying on the cases of **Attorney General v Claude Jardim**[6] and **Chandresh Sharma v Attorney General**[7] where similar judicial pronouncements were made. In the latter case, Nelson JA stated (at para 36):

> "…the Attorney General has appeared in response to an order that the proceedings be served on him. But judicial review proceedings should specify the public authority, public body or person exercising a public duty or function against whom relief is sought. I would therefore hold that the present proceedings are not

[4] (1992) LRC (Const), 720 Jamaica pg. 721(c).
[5] At page 721 of the Court of Appeal judgment.
[6] Civil Appeal No. 134/98, pg 2, per Bernard C; (2003) 67 WIR 100.
[7] C.A. No 115 of 2003, Trinidad and Tobago, para. 36- per Nelson J.A.

properly constituted but would not on that ground alone refuse leave to apply for judicial review."

[20] In the recent Saint Lucian case of **Richard Frederick et al v The Comptroller of Customs and the Attorney General**[8], our Court of Appeal made similar pronouncements but went a step further after considering CPR 2000. At page 8 of the judgment, George-Creque J.A. stated (at para. 29):

> "…the object of the CPA was to provide for the institution and maintenance of actions by and against the Crown in much the same way as between subjects (as distinct from as between a subject and the state or the Crown) in respect of liabilities arising in contract, tort or like actions committed by its servants or officers. The purpose was to take away the immunity from suit previously enjoyed to a large degree by the Crown and thereby rendering the Crown liable in respect of the acts of its officers. As earlier stated, the claim made in this case does not fall into those classes of 'civil proceedings' but is more in the nature of a review of the exercise of the power used by the Comptroller held up against the fundamental protections guaranteed by the Constitution as the benchmark for such review."

[21] Her Ladyship expressly stated that claims for judicial review are not "civil proceedings" for purposes of the CPA. She said (at para. 32):

> "In my view, the observation of Lord Bingham in **Gairy and Another v Attorney General of Grenada**[9] to the effect that claims for judicial review and claims for constitutional redress may fairly be regarded as "sui generis" is apt as there is no doubt that public law proceedings are a peculiar specie of civil proceedings falling outside the ambit of ordinary types of "civil proceedings" contemplated by the CPA."

[22] Unquestionably, the case of **Richard Frederick et al**[10] fortifies the submission of Mr. Farara QC and the Learned Solicitor General that judicial review proceedings involving the prerogative writs are not 'civil proceedings' within the meaning of the CPA.

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[8] HVCAP 2008/037, Judgment delivered on 6th July 2009 [unreported].
[9] [2002] 1 AC 167, [2001] 3 WLR 779.
[10] See also Webster J [Ag] in **Monica Ross v Minister of Agriculture, Lands and Fisheries et al,** Claim No. 255 of 2001 –Saint Vincent & the Grenadines, paragraph 14 where the learned judge stated that judicial review proceedings are excluded from the CPA.

[23] But, the key issue which arises here is whether or not the Attorney General is a proper or necessary party to a claim for judicial review. George-Creque J.A. in **Richard Frederick et al** stated that "…CPR 2000 recognises this peculiar specie of civil proceedings by providing a regime or rules in Part 56 which are applicable only to proceedings of this kind…"[11] At paras. 31 and 34, she said:

> "CPR 2000 does not seek to define "civil proceedings". Rule 2.2(2) says in effect that "**civil proceedings**" **for the purposes of the rules**, **includes judicial review** [emphasis added] … under Part 56. However, it does not follow as a matter of principle that all proceedings brought against a public officer, such as the Comptroller, are "civil proceedings" for the purposes of the CPA"….
>
> "**Once such proceedings are viewed and placed in their proper context under CPR the argument as to whether the Attorney General alone can be a proper party loses force** [emphasis added]. By then, it ought to be readily apparent that the CPA has no applicability in such proceedings. **What is clear is that a claim form seeking constitutional redress must be served on the Attorney General.**[12] **This however does not preclude other persons being joined as defendants.** This is clear from the general tenor of CPR 56." [emphasis added]

[24] Section 2(a) of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act, 2000 may also shed some light on this issue. It defines "action" as "*a civil proceeding commenced in such manner as may be prescribed by rules of court and includes a claim under the Eastern Caribbean Civil Procedure Rules, 2000, but does not include a criminal proceeding by the Crown.*"

[25] So, it seems to me that it is perfectly proper to bring a claim for judicial review against the Attorney General alone. In fact, case law in our courts is replete with such examples.[13] In addition, Part 56.11.2 empowers the judge to allow any person or body appearing to have a sufficient interest in the subject matter to be heard whether or nor served with the claim form as well as direct the manner in which such person or body may be heard.

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[11] See paragraph 32 of the **Richard Frederick** judgment [supra].
[12] CPR 56.9(2).
[13] See **Richard Frederick et al** [supra]; **Hilroy Humphreys v The Attorney General of Antigua & Barbuda**, P.C. Appeal No. 8 of 2008, judgment delivered on 11th December 2008; **The Attorney General of Saint Lucia v Martinus Francois**, Civil Appeal No. 37 of 2003, judgment delivered on 18th February 2004.

[26] Even if I am wrong to conclude that the Attorney General is the proper defendant before the Court, one needs to look at the history of these proceedings. At an ex parte hearing on 20th August 2007, leave was granted to VIEC to amend the application to reflect the Attorney General as a party and not the Attorney General Chambers. Subsequently, and acting on legal advice, VIEC applied to delete the Minister as a Respondent thereby leaving the Attorney General as the sole Respondent. On 7th November 2007, before Olivetti J, and in the presence of all Counsel, the Court ordered that the Attorney General be substituted as the sole Respondent. Any argument that the Attorney General was not the appropriate defendant should have been raised at that time. In fact, if the Attorney General was dissatisfied by that Order, she should have appealed it.

[27] Moreover, it concerns me greatly that such an important issue which may have precluded further consideration of the claim for judicial review was raised, for the first time, in Quorum's skeleton argument which was served on VIEC five working days before the hearing of the claim. The point was repeated in the skeleton argument of the Attorney General, served on VIEC three working days before the said hearing date. In my opinion, to wait until the eleventh hour to make such a submission flies in the face of the overriding objective of CPR 2000. It was observed in **St Lucia Furnishings Ltd v St. Lucia Cooperative Bank Ltd**[14] that the overriding objective of the rules is to deal with cases justly. The court took the view that shutting out a litigant through a technical breach of the rules will not always be consistent with the overriding objective because the civil courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The court approved the flexible approach adopted in the case of **Biguzzi v Rank Leisure plc**[15].

[28] Also, I observe that when the court sanctioned VIEC's application to delete the Minister as a respondent on 7th November 2007, none of the parties objected and from that date onwards, all parties were proceeding on the basis that the proper parties were before the court, and as a matter of fact, none of the interlocutory hearings could validly have taken

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[14] St Lucia Civil Appeal No. 15 of 2003; 24th November 2003.
[15] [1999] 1 WLR 1926.

place without the proper parties having been before the court. Furthermore, by consent order dated 2nd April 2009, which identified certain preliminary matters, namely: (1) VIEC's application for leave to add a new Claimant and (2) leave to amend the Statement of Claim; there was no suggestion from the Attorney General or Quorum that the wrong defendant was before the court.

[29] Furthermore, nothing precluded the Minister from taking part in these proceedings and/or making submissions. Indeed, the Learned Solicitor General made adequate submissions on his behalf.

[30] On 28th April 2009, I ruled that the Attorney General was a proper defendant to these proceedings and that there was no need to add the Minister. I also awarded costs to VIEC; such costs to be assessed and to be borne equally by Quorum and the Attorney General.

Application to amend the claim

[31] In correspondence dated 11th January 2008, Quorum indicated its intention to resist VIEC's application to amend the Statement of Claim filed on 18th December 2007 and 8th January 2008 respectively. Quorum challenges the application on two grounds namely:

1. The application to amend was filed over three months after the first hearing and the first case management conference of 28th September 2007 which is contrary to CPR 56.11(1) and 56.11(2) (c) (ii) and
2. VIEC has not produced any evidence of changed circumstances which it became aware of only after the first case management conference.

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[32] In claims where the relief sought includes an administrative order, CPR 56.11 is enlightening. CPR 56.11(1) provides that "*the judge must give directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.*" Pursuant to CPR 56.11(2)(c)(ii), the directions include "*to allow the claimant to amend any claim for an administrative order.*" CPR 26(1)(2)(w) gives the court the general power to "*take any other step, give any other directions, or make any other order for the purpose of managing the case and furthering the overriding objective*".

[33] Quorum argues that VIEC's application to amend was filed too late in the proceedings and that the court should not countenance such delay. This was also endorsed by the Attorney General.

[34] A brief chronology of events may assist in resolving this issue.

20th August 2007	Olivetti J granted leave to make a claim for judicial review to be filed by 4th September 2007. By that Order, **first hearing was to take place on 28th September 2007 at 9.00 a.m**.[emphasis added]
28th September 2007	(1) Leave granted to Quorum to be joined as an Interested Party. (2) Court gave some directions about service of evidence and ordered that **further directions be given on 7th November 2007**.
7th November 2007	(1) Further case management directions were given. (2)Attorney General was substituted as the sole respondent. (3) Trial Window 3rd to 5th March 2008.
15th January 2008	(1) Time for the claimant to file and serve its evidence in reply – by consent extended to 8th January 2008. (2) Claimant's applications for leave to add a new claimant and for leave to amend the Statement of Claim filed on 18th December 2007 and 8th January 2008 respectively adjourned sine die.
2nd April 2009	**Consent Order** – (1) The Claimant's applications for leave to add a new claimant and for leave to amend the Statement of Claim filed on 18th December 2007 and 8th January 2008 adjourned sine die on 15th January 2008, to be considered at the trial of the matter. (2) The Claimant to lodge and serve by 30th March 2009 its skeleton arguments and proposed amendments to the Statement of Claim. (3) The Defendant and Interested Party to lodge and serve by 20th April 2009 its skeleton submissions and any proposed amendments to their respective defence of the claim.

[35] VIEC argues that although, in a formal sense, its application to amend the Claim was made subsequent to the first hearing, the application was made as promptly as was practicable following the service of the evidence filed by the Attorney General and Quorum and following VIEC receiving proper legal advice. In its evidence[16], VIEC alluded to the

[16] See Sixth Affidavit of Dr. Quincy Lettsome at paras. 11-18.

insurmountable obstacles it encountered in getting local lawyers to represent VIEC. Eventually, VIEC had to resort to instructing counsel in London. At paragraph 14 of his Sixth Affidavit, Dr. Lettsome said: *"To the claimant's surprise, however, due to the political nature of the case, the Claimant found that its requests for legal advice were turned down by every local firm [it] approached."*

[36] Mr. Hockman QC submits that in any event, the hearing which took place on 15th January 2008 was effectively the first hearing in this matter within the proper meaning of CPR 56.11. I agree. He submits that VIEC's application to amend the Statement of Claim was filed and served seven days prior to that hearing and was adjourned sine die by the court at the request of the parties pending the resolution of a preliminary issue under the Public Authorities Protection Act.[17]

[37] The principal amendment sought is contained in paragraphs 85 a-e and 85 j-l of the Amended Statement of Claim. In paragraph 85 a-e, VIEC includes an additional issue namely "Unlawfully taking into account material not in the public domain". It is an issue that VIEC became aware of after the Attorney General and Quorum provided their evidence. Pursuant to CPR 20, this constitutes a clear change in the circumstances. In paragraphs 85 j-l, the proposed amendments are titled "Outline Planning Permission." Also, in my view, after reading these paragraphs, VIEC merely seeks to clarify its position on this issue.[18]

[38] The general principle governing amendments is that they should only be allowed if no injustice is caused. In the specific case of judicial review, amendments are allowed fairly freely. This is illustrated in a statement in *de Smith, Woolf & Jowell on Judicial Review of Administrative Act*[19], on a permissive approach, where the Learned Authors state "…*The guiding principle is that the court will normally permit such amendments as may be required to ensure that the real dispute between the parties can be adjudicated upon."*

[17] Cap. 62 of the Revised Laws of the Virgin Islands.
[18] See paragraph 85l.
[19] Sixth Edition, 2007, para. 16-040 citing the Administrative Court's decision in the case of *W* (2004) EWHC 2027 (Admin) (A/Doc 3).

[39] In my judgment, the proposed amendments seek to clarify VIEC's case following the concessions it made at the hearing of the preliminary issue on 20th February 2008. They also attempt to narrow the issues between the parties and do not cause any prejudice to the Attorney General and/or Quorum, neither of whom have filed and served any evidence to that effect. In addition, no injustice is alleged.

[40] Bearing in mind the overriding objective of dealing justly with the case according to CPR 1.1.1, I will grant the amendments sought: see also CPR 26.1(2)(w).

Delay

[41] This is a free-standing issue. Quorum is aggrieved that VIEC waited until the very last day of the statutory 6-month limitation period to bring an ex parte application seeking leave to make a claim for judicial review. Learned Queen's Counsel Mr. Farara QC submits that VIEC should have launched its challenge earlier since (1) it was aware of the history of planning and other approvals,[20] (2) it did not alert Quorum or the Attorney General of its intention to challenge the lawfulness of the Decision[21] and (3) it pursued political means to have the Decision revoked.[22]

[42] Mr. Farara QC submits that even though the Court of Appeal has ruled that the claim is not statute-barred, VIEC is still guilty of undue or unreasonable delay within the meaning of CPR 56.5(1) and as such, the court ought to refuse the relief which VIEC seeks. Learned Queen's Counsel contends that the time limit of 6 months imposed under the Public Authorities Protection Act for commencement of claims against the Crown is not to be used as if it were an entitlement since it is a maximum not to be exceeded. He refers to the cases of **R v Herrod, ex parte Leeds City Council**[23] and **Jones v Solomon**.[24] In the latter case, Sharma JA at page 679g stated: "*It is well established, and all the authorities speak with one voice, that where an application for judicial review is sought it is*

[20] Paragraphs 146 to 149 of the Interested Party's skeleton argument for hearing 27th April 2009 filed on 20th April 2009.
[21] Ibid. Paragraphs 150 to 151.
[22] Ibid. Paragraph 152.
[23] (1976) QB 540 per Lord Denning MR at 557.
[24] (1991) LRC (Const) 646.

fundamental and critical to this sort of relief that it should be made promptly; and that the power to grant leave is discretionary and not as of right."

[43] Mr. Farara QC contends that since this matter concerns a major development requiring the expenditure of very substantial sums of money on designs, consultants and technical experts, the period of delay of almost 6 months is exceptionally long and inordinate. According to Mr. Farara QC, the evidence shows that Quorum was severely prejudiced and suffered extensive losses because of the delay[25].

[44] CPR 56.5 deals with delay. CPR 56.5(1) provides as follows:

> "In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application."

[45] The courts have stressed the importance of prompt applications for leave, particularly where third parties might be affected by the outcome of the judicial review application[26].An application for leave to make a claim for judicial review must be made promptly and, in any event, within the six months from the date on which the grounds for the application first arose, unless the court considers that there is good reason for extending the period. The fact that the application was made within the time specified, does not mean that it has been made 'promptly' according to Lord Ackner in **Stratford-on-Avon District Council, ex parte Jackson**.[27] Put differently, the time limit given by statute is promptitude; the reference to an application being made within six months appears secondary to that requirement. Permission may be refused on the basis of delay under CPR 56.5 even though it is made within the time limit fixed by statute or Rules of Court: see Lord Steyn in **R (on the application of Burkett) v Hammersmith and Fulham London Borough Council**.[28]

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[25] See the Affidavit of Federico Sanchez paras. 42-55.
[26] **R. v. Independent Television Commission, ex p. T.V.N.I.**, The Times, December 30, 1991.
[27] (1985) 3 AER 769 at 772d
[28] [2002] UKHL 23, [2002] 3 All ER 97 at paragraph 18 recognising the good sense of the approach of Mr. Justice David Pannick QC in **R v Rochdale, ex p B, C and K** [2000] Ed CR 117.

[46] Even though VIEC was granted leave to make the claim for judicial review, the court still retains a residual discretion under CPR 56.5(2) to refuse leave or refuse relief at the substantive hearing where there has been undue delay and the court considers granting leave or relief would cause substantial hardship or substantial prejudice.[29]

[47] In that light, I will consider the issue of whether or not there was undue delay for the purposes of CPR 56.5(2). To begin with, the courts insist on strict observance of time-limits. It is not in dispute that VIEC applies for leave to make its claim for judicial review within the statutory 6-month limitation period; albeit on the last day. The issue of whether an applicant for judicial review has been guilty of undue or unreasonable delay will depend on the circumstances of the particular case and decisions of the courts serve merely as guidance. In **Jones v Solomon**, the Court of Appeal of Trinidad and Tobago found that the claimant was guilty of undue delay having applied for judicial review after two and a half years had expired. In **Fishermen and Friends of the Sea v The Environment Management**[30], the Privy Council upheld the trial judge's finding that a two month delay, where the statute required such a claim to be brought within three months, was undue delay.[31] In **The Honourable Patrick Manning and 17 Others v Chandresh Sharma**[32], the respondent applied for leave to make an application for judicial review nearly four years after Part II of the Freedom of Information Act, 1999 came into force[33]. The Privy Council agreed with the Court of Appeal that the trial judge was wrong to refuse leave on the ground of delay.[34]

[48] It is therefore important that I look at the circumstances of this particular case to determine whether VIEC is guilty of undue delay to necessitate a refusal of the remedy it seeks. VIEC identifies a plethora of circumstances namely:[35]

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[29] **R. v Dairy Produce Quota Tribunal for England and Wales, ex p. Caswell** [1990] 2 W.L.R. 1320, H.L.
[30] (2006) 2 LRC 384.
[31] See also **Chitala (Secretary of the Zambian Democratic Congress) v AG** (1996) 2 LRC 485 at 487d; **Caswell v Dairy Produce Quota Tribunal for England and Wales** [supra]
[32] Privy Council Appeal No. 22 of 2008, Judgment delivered on 3rd August 2009.
[33] Part II of the 1999 Act came into force on 30th April 2001.
[34] See paragraphs 13, 17-21 of the judgment.
[35] See paragraph 114 of Claimant's skeleton argument for hearing 27 April 2009.

1. the courts have conclusively determined that the Claim was brought within the statutory time limit imposed by the Public Authorities Protection Act;

2. the difficulties which VIEC experienced in accessing information relevant to the Decision;

3. the conduct of the Government in concealing the Second Report and Letter from Dr. Nurse and the Report from Dr. Grigg;

4. the change in Government and VIEC's attempt to lobby the new Government to reverse the Decision;

5. the difficulties in finding legal representation[36];

6. the strong merits of the Claim;

7. the absence of any statutory requirement (save for CPR 56) to bring the claim promptly and

8. the fact that the Attorney General does not seek to argue prejudice whilst Quorum's evidence essentially amounts to a general assertion that it should be granted the consent it was promised some 14 years ago. However, it was never intended, or at any rate could not have lawfully have been intended, that Quorum's application for planning consent should circumvent the legal requirement of the planning process[37].

[49] As I stated earlier, application of the promptness test involved a court looking at the particular circumstances of the case. A critique of the above circumstances demonstrates some very exceptional circumstances why the application seeking leave to make a claim for judicial review was not instituted until the very last day before the statutory 6-month limitation period would have expired. Significantly, is the fact that the courts have conclusively determined that the Claim was brought within the statutory time limit imposed by the Public Authorities Protection Act.

[50] I agree with Mr. Hockman QC that Quorum's evidence relating to losses suffered since the Decision should not be given any, or any significant weight since, according to the Attorney

[36] In **R. v. Stratford-on-Avon District Council, ex p. Jackson** [1985] 1 W.L.R. 1319, the Courts have accepted that the delay that occurs in obtaining legal aid is a good reason for extending time limit but delay caused by the applicant's lawyers will not be a good reason: **R. v. Isle of Wight County Council, ex p. O'Keefe** (1990) 59 P & CR 283 (leave granted because complicated points of law involved).
[37] Ibid, paragraph 115.

General's case (and admitted by Quorum[38]), outline planning permission only has been granted for both applications, which necessarily requires further consent before work can commence. Therefore, any post-Decision costs were incurred at Quorum's own risk. Mr. Hockman QC also rightly points out that if Quorum seeks to argue that there was a certainty that the further consents would be granted, it betrays the true nature and extent of the predetermination argument about which VIEC complains.

[51] Suffice it to say that Quorum was cognizant of the controversial nature of the Beef Island Project and, in the circumstances, took the risk.

[52] Having regard to all of the circumstances, I find that VIEC did not unduly delay in instituting the application for judicial review, even though it was done on the last day before the statutory 6-month limitation period would have expired. I am also cognizant that the application raises important environmental issues which should be considered even if the delay is not satisfactorily explained[39] (not a finding of the court in the instant matter).

Judicial Review

[53] In **Council of Civil Service Unions v Minister for the Civil Service**[40], the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. In this case, Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "Wednesbury unreasonableness" and procedural impropriety. He explained them in this way:

> "By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

[38] Quorum changed its position at the hearing stating the approval granted was full approval.
[39] **R. v. Secretary of State for the Home Department, ex p. Ruddock** [1987] 1 W.L.R. 1482 (question of legality of telephone tapping raised issues of general importance; Court held that it was wrong to leave substantive issues unresolved).
[40] [1985] A.C. 374 at 410-411.

> By irrationality, I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".

Grounds for claim for judicial review

[54] I now turn to examine the substance of the claim for judicial review. VIEC challenges the lawfulness of the Decision under three discrete heads:

1. Procedural Impropriety;
2. Illegality and
3. Irrationality

1. Procedural Impropriety

[55] Under this ground, VIEC makes three assertions namely: (a) bias and predetermination (b) breach of natural justice and (c) lack of reasons for the Decision.

(a) Bias and Predetermination

[56] VIEC alleges that the Minister was biased in making the Decision and that the Decision was predetermined. In this regard, VIEC makes three points. First, VIEC asserts that the sequence of events and the evidence demonstrate "an unlawful usurpation" by the Government of the usual statutory planning process to fulfill the plain obligations in the Development Agreement. Secondly, the existence of the Development Agreement "demonstrates that the Minister apparently felt obliged to grant planning permission, or at the very least, demonstrates that the Government (by way of the Minister) always intended

to grant planning permission" and thirdly, the Development Agreement "unlawfully purports to fetter the discretion of the Minister in respect of planning applications contemplated in the Agreement".

[57] It is a basic principle of natural justice that no public authority can lawfully exercise a power of decision in a matter in which it has an interest of its own to pursue (*nemo judex in sua causa*). This principle is variously expressed as being a rule against bias and a rule against predetermination. It has also been described as an aspect of the requirement that decisions must be made fairly. In **Steeples v Derbyshire County Council**[41], the court held:

> "That, although the decision of the planning committee had been fairly and properly made, natural justice required that the decision to grant planning permission should be seen to have been fairly made; that in deciding whether the decision was seen to have been fairly made the court had to ask whether a reasonable man, who was not present when the decision was made and was unaware that it had in fact been fairly made, but who was aware of all the terms of the council's agreement with the company, would think that there was a real likelihood that the agreement had had a material and significant effect on the planning committee's decision to grant permission; and that applying that test, the decision was not seen to have been fairly made and was either void or voidable as being in breach of natural justice."

[58] The appropriate tests to apply in deciding whether the decision is to be seen as fair has been succinctly put by Webster J in **Steeples** at page 287:

> "First, … through whose eyes do I look? It seems that I should look through the eyes of a reasonable person hearing the relevant matters…
>
> Secondly, what knowledge should I impute to the reasonable person? There are alternatives. The first is that he is to be taken to know only of matters known to the public to have occurred before the decision (perhaps including matters known to the public before the issue of proceedings). The second alternative is that he is to be taken to know of matters, whether in fact known or available to members of the public or not, which are in evidence at the trial. In my view, the second alternative is the lower one…
>
> Thirdly, is a decision unfair only if it is actually seen to be unfair? Or is it unfair if there is a real likelihood that it would be seen to be unfair? Or is it enough in order

[41] (1985) 1 WLR 256, pg. 258, paragraph 3, letter C.

to show that it is unfair, that there is a reasonable suspicion that it will be seen to be unfair? Which of these tests is to be applied may depend, in my view, on the nature of the decision-making body in question. Where the body is a judicial tribunal it may be that any doubt that justice is seen to be done is enough…On the other end of the scale, where the body in question is primarily administrative, it may be that its decisions are invalid (when they are in fact fair) only when they actually appear to be unfair…

.

Fourthly, what amounts to a fetter upon the discretion in question? In the absence of direct authority on this question, it seems to me that anything constitutes a fetter for this purpose at the very least if a reasonable man would regard it as being likely to have a material and significant effect one way or another on the outcome of the decision in question; and it may very well be that something appearing to have less of an effect than that might constitute a fetter.

Fifthly, what knowledge is to be imputed to a hypothetical reasonable man about the workings of the county council and their committees? …the hypothetical reasonable man is to be taken to know all the relevant facts, then there is no good reason why those facts should exclude the fact that the county council have delegated their planning powers to, inter alia, the planning committee in question.

Sixthly and finally, is the hypothetical reasonable man to be taken to have attended the meeting or to know of my conclusion that the decision was in fact fairly made?...he is not to be taken to have attended the meeting or to know that in fact the decision was fairly made."

[59] VIEC contends that the historical chronology of events and its compressed timing demonstrate a clear case that the Minister was in fact biased when he made the Decision and that the Decision was predetermined. The evidence shows the following:

1. In May 2004, the Minister and other governmental officials traveled to Hong Kong to meet with Mr. Hung and the Minister repeated his commitment to seeing the development of a five-star resort and golf course at Beef Island.

2. In June 2004, Mr. Hung returned to the BVI to work with the Beef Island Project's consultant team on review and updating the planning and development of the Project.

3. On 22nd August 2004, the Minister wrote to Mr. Hung informing him of the Government's expectations and requirements for the development project to proceed[42]. This letter in effect states:

[42] Exhibit of the Affidavit of Edward Childs, Exhibit EC22.

> "On behalf of my Ministerial colleagues, I hereby express our collective appreciation for your presentation last week on the Beef Island Project - Five Star Resort, A Signature Golf Course and Marina.
>
> As we have stated in our previous meetings and other communications, **this project remains a top priority of my Government and a vital component of our tourism agenda** [emphasis added]. It is my fervent desire to see ground broken on this project on or before June 2005….
>
> In closing, **I wish to reiterate my Government's firm commitment to seeing this project completed during this term of office** [emphasis added]. Accordingly, we will work to establish a clear process for receiving the requisite Government approval. We look forward to our October meeting."

4. On 4th November 2004, Mr. Hung and his consultant team made a full presentation to Government on the revised development plan. In attendance were the Minister, other Government Ministers and Government Officials.

5. In December 2004, representatives of Quorum met with representatives of Government to commence negotiations with the intention of agreeing a Development Agreement.

6. On 17th December 2004, the Physical Planning Act 2004 ("the Planning Act") came into force.

7. On 2nd December 2005, the Development Agreement was signed[43] following approval by the Executive Council.

8. On 1st March 2006, the Executive Council directed that pursuant to section 38(1)(b) of the Planning Act, tourist development projects with a value in excess of $10 million must be referred to the Minister for decision.

9. On 29th June 2006, the first public meeting was convened at East End to present the Beef Island Project to the public.

10. In August 2006, Quorum appointed Dr. Leonard Nurse to review the Environmental Impact Assessment (the "EIA") of the Beef Island Project, which was prepared by Applied Technology Management ("ATM") and submitted in July 2006.

11. On 6th September 2006, Dr. Nurse issued his initial review of the EIA[44], upon which the authors of EIA and ATM provided comments[45].

[43] See Trial Bundle, Volume 2/226
[44] First Affidavit of Edward Childs - Tab. 24 of Edward Child's Exhibit
[45] Exhibit FS8 [4/Doc 23].

12. In September 2006, the Government requested that Quorum assist in the establishment of the Environmental Review Committee ("ERC"), pursuant to clause 5.3 of the Development Agreement (with three appointments made by the Government and three appointments made by Quorum).

13. A number of meetings were held by the ERC to review the EIA material submitted in support of the applications for planning permission. The initial meetings were held on 5th, 6th and 9th October 2006.

14. On 16th October 2006, Quorum made a second presentation to the public at a meeting organised and chaired by the Town and Country Planning Department. The presentation included the identification of changes made to the Master Plan by Quorum in response to public concerns voiced during the first public meeting and in response to other consultations.

15. On 21st November 2006, the Chief Planner, Mr. Louis Potter, wrote to the Minister identifying two issues that needed to be resolved before planning permission could be granted, including that planning permission could not be lawfully granted for the Beef Island Project as proposed, since in the opinion of the Chief Planner, "*… it is realistic to consider that the major components of this project* ***may*** *have an adverse impact on the marine protected area…*"[46] .

16. On 27th November 2006, a Report from the Conservation and Fisheries Department was submitted to the Minister, which expressly stated that the Project should be rejected. No response was ever received by the Minister[47].

17. On 7th December 2006, the findings and recommendations of the ERC, which included a recommendation to reject the planning applications based on the likelihood of adverse impacts to the Hans Creek area, were submitted to the Town and Country Planning Department.

18. On 7th December 2006, the Planning Authority met to consider the merits of the application for planning permission for the Beef Island Project and adjourned without resolution to a proposed date of 15th January 2007. The meeting did not take place due to the Minister's direction that the applications be referred to him for determination.

19. On 11th December 2006, the Chief Planner sent a Memorandum to the Minster's office which gave an update on the Planning Authority's review of planning applications, indicating that the consensus of the Authority at the 7th December meeting was that the members request further time to review the applications, pursuant to Section 29(4) of the Planning Act.[48]

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[46] Exhibit LP3 [3/96-97]
[47] Exhibit QL3 [1/133-178]
[48] Exhibit LP3[3/94-178]

20. On 10th January 2007, Dr. Nurse provided further observations on the EIA, upon which the authors of the EIA and ATM made comments[49].

21. On 17th January 2007, Dr. Nurse wrote to Quorum confirming that, in his opinion, the outstanding environmental issues had been satisfactorily resolved by ATM[50].

22. On 19th January 2007, Quorum sent Dr. Nurse's letter of 17th January 2007 to the Minister, together with Dr. Nurse's earlier two reports and ATM's comments.

23. On an unknown date in January 2007, the Minister commissioned an environmental report of the Beef Island Project from Dr. David Grigg ("the Grigg Report")[51] who prepared and submitted it to the Minister in January 2007. A stamp of the Minister's Office shows that the Grigg Report was received on 29th January 2009.

24. On 31st January 2007, the Minister granted planning permission by way of the Approval Letter[52].

25. On 1st March 2007, Quorum wrote to the Minister seeking clarification of a litany of issues in the Approval Letter[53]. Quorum received no reply to their inquiry.

[60] Mr. Hockman QC asserts that this is a clear case in which the Decision was either not, in fact made or, alternatively, not objectively seen to be made. He further asserts that this conclusion is supported by Quorum's own evidence[54] that well in advance of Planning Approval it committed itself to substantial costs and invested extraordinary amounts of money and time preparing for the construction. Thus, the overwhelming inference to be drawn, says Mr. Hockman QC, is that Quorum was confident that the Government was committed to a decision in its favour.

[61] For Quorum, Dr. Barnett submits, first, that the events in history do not, in any way, suggest that the Minister was biased in making the Decision and/or that the Decision was predetermined and secondly, it was the Minister's business to make decisions on the objectives of planning policies. To substantiate his submissions, Dr. Barnett relies on the case of **Persimmon Homes Teesside Limited v R on the Application of Kevin Paul**

[49] Exhibit FS9 and FS 10 respectively [4/Doc. 23]
[50] Exhibit FS11 [4/Doc. 23]
[51] Exhibit LP4 [3/179-188
[52] First Affidavit of Edward Childs, Tab 29.
[53] Exhibit FS 14 [4/Doc. 23]
[54] First Affidavit of Sanchez, page 19, paragraphs 51 to 55.

Lewis[55]. At paragraph 45, Pill LJ referred to **R (Alconbury Ltd) v Environment Secretary** [2003] 2 AC 295 and specifically, to the dictum of Slynn of Hadley who stated:

> "The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines"[56].

[62] Lord Hoffmann stated, at paragraph 123:

> "It is the business of the Secretary of State, aided by his civil servants, to develop national planning policies and co-ordinate local policies. These policies are not airy abstractions. They are intended to be applied to actual cases. It would be absurd for the Secretary of State, in arriving at a decision in a particular case, to ignore his policies and start with a completely open mind"[57].

[63] Dr. Barnett submits that there is nothing in the evidence to show or to infer that the Minister had a closed mind. In **Persimmon Homes Teesside Limited**, Pill LJ stated, at paragraph 63:

> "Councilors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councilors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed mind at the time of decision."[58]

[64] Dr. Barnett also cited the cases of **Save Guana Cay Reef Association Ltd and Aubrey Clarke ex p. The Queen v Wendell Major et al** and **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (No. 2)**[59]. The

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[55] (2008) EWCA Civ. 746; Judgment delivered on 1st July 2008.
[56] At paragraph 45.
[57] At paragraph 123
[58] At paragraph 63.
[59] (2004)UKPC 6, pg 94.

former case concerns a proposed development of a small island in the Bahamas archipelago. There was also a development agreement and plan which went so far as to state that the Government agreed in principle with the development. The agreement stated as follows: *"The Government will facilitate on an accelerated basis all necessary approvals, permits, agreements, licenses and concessions hereinbefore and hereinafter requested and required by the Developers…in connection with the completion operation and maintenance of Development"*[60]. Ganpatsingh J.A. delivering the judgment of the Court held that "*the Cabinet was undertaking no more than an obligation to ensure that those processes would be facilitated and dealt with on an expedited basis.*"[61] The learned Justice of Appeal continued (at paragraph 29):

> "In these types of investments, policy considerations play a significant part. In this case, Crown and Treasury Lands are to be used in a way which would advance the public interest, in the sense that this community will not only be served by but, will have the use of the facilities constructed thereon…In **Re Robert Bropho and Robert Tickner**[62], Wilcox J of the Federal Supreme Court of Australia at paragraph 32 said:
>
> > 'Many decisions committed to Ministers by statute have political implications; no doubt that is why they are committed to Ministers rather than to public servants…The political implications of a prospective decision include not only its likely electoral consequences,…but also its compatibility with the philosophy, policy and program of the government. These are matters about which a Minister is entitled to have the views of other members of the government, even though he or she has the ultimate individual responsibility for what is decided. It seems to me that, at least where a statute empowers a Minister to make a decision relating to a matter of general community concern as distinct from determining the legal rights of a particular person and where the statute does not specify any precise procedures or criteria, the Minister is entitled to consult other members of Cabinet before determining the appropriate decision. Of course, even in such a case, the ultimate decision must be that of the Minister."

[60] Paragraph 26, Clause 6.8. of the Development Agreement.
[61] At paragraph 27 of the judgment.
[62] Nos. WA G 2003 of 1992 and 9 of 1993 Fed. No. 24 Aboriginal Heritage (1993) 40 FCR 165.

[65] Then, in **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (No. 2)**[63] the Privy Council in a majority judgment delivered by Lord Hoffmann, commenting on the potential environmental losses that would result from the construction of a hydro-electric dam in the forest of Belize, stated as follows:

> "Despite these potential environmental losses, the government of Belize has decided to give its approval to the construction of the dam. It considers that the losses are outweighed by the advantages to the community in being able to generate more of its own electricity. That is a decision which the government is entitled to make… But the question of whether or not the dam should be built raises no issue of human rights. It is a matter of national policy which a democratically elected government can decide. [64]

[66] In order to determine this question of whether the Minister was biased when he made the Decision and whether the Decision was predetermined, I need to consider all of the relevant facts in the present case. Like Mr. Hockman QC, I also believe that the relevant chronology of events begun on May 2004 when the Minister and other government ministers went to Kong Kong. This was followed by the Minister's letter of 22nd August 2004 to Mr. Hung wherein he expressed his government's firm commitment to seeing the Beef Island Project completed during this term of office and that the Project remains a top priority of his government. Some four months later, negotiations commenced with the intention on agreeing a Development Agreement. A year later, on 2nd December 2005, the Development Agreement was signed following approval by the Executive Council.

[67] The year 2006 was an eventful one. On 1st March, the Executive Council directed that tourist development projects with a value in excess of $10 million must be referred to the Minister for decision. Then, on 29th June 2006, the first public meeting was convened. During the course of the next seven months of consultation, members of the public and various statutory consultees, including the Planning Department and the Conservation and Fisheries Department expressed concern about the adverse impact of the Project. The placing of a golf course and a marina adjacent to Hans Creek, alleged to be a Fisheries

[63] (2004)UKPC 6, pg 94.
[64] Per Lord Hoffman at Pg 101, para. f, [9].

Protected Area and the last virginal mangrove system in the BVI, engendered considerable opposition from the public who felt that that would result in an increased risk of sedimentation and of toxic chemicals being released into the water and that would have devastating effect to the fisheries industry of the BVI. Because of grave concerns in the consultation about the likely impact on Beef Island in general, as part of the decision-making exercise, Quorum appointed Dr. Nurse to review the EIA of the Beef Island Project. Dr. Nurse issued his First Report in September 2006 upon which ATM made comments.

[68] In September, the Government also requested that Quorum assist in the establishment of the ERC. Later that year, a number of meetings were held by the ERC to review the EIA material submitted in support of the applications for planning permission. In October, Quorum made a second presentation to the public. In November, the Chief Planner identified two outstanding matters that needed to be resolved before planning permission could be granted. In the same month, the Conservation and Fisheries Department wrote a report to the Minister stating that the Project should be rejected outright. In December 2006, the findings and recommendations of the ERC were submitted to the Town and Country Planning Department. Also, the Planning Authority met to consider the merits of the application for planning permission. It was adjourned without resolution to 15th January 2007. That meeting never took place due to the Minister's direction that the applications be referred to him for determination.

[69] In January, 2007, the Government commissioned an environmental assessment from Dr. Grigg. VIEC alleged that this was secretly done just prior to the Decision. Learned Queen's Counsel questions the reason for the Grigg Report and argues that even if the Report had given the Government complete clearance to the Decision, it would have been an irrational decision to rely on a scanty report of 8 pages. In passing, it appears to me that Learned Queen's Counsel evaluates the Grigg Report not for its quality but its quantity. Having carefully scrutinized the Report, I am afraid that I cannot say the same. I find the Report to be concise. Every key issue has been addressed.

[70] On 31st January 2007, the Minister granted planning approval with a number of stringent conditions attached. In essence, the Decision was arrived at 32 months from the date of the visit to Hong Kong.

[71] It is trite law that once consultation is embarked upon, it must be carried out properly. To be proper, consultation must be undertaken, at a time when proposals are still in a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: **R v Brent London Borough Council, Ex p Gunning**[65].

[72] As part of the consultative process, Dr. Nurse issued his First Report in September 2006 wherein he stated:

> "Thus, given the public concerns already raised about potential project impacts on Hans Creek and the salt ponds, it is recommended that a specific sub-section of the report should be allocated for the presentation of coherent mitigation plans for these areas. This will also serve the purpose of reassuring the various interest groups that a serious attempt is being made to offer practical, well researched and scientifically sound mitigation options for these very contentious elements of the project."[66]

[73] As a result of this Report, a number of meetings were held to review the EIA. This was followed by a second presentation to the public. The presentation included the identification of changes made to the Master Plan by Quorum in response to public concerns voiced during the first public meeting and in response to other consultations.

[74] In the instant matter, the formal consultation lasted for 7 months, i.e. 29th June 2006 to 29th January 2007 (the day that he received the Grigg Report). On 29th June 2007, members of the public were consulted. The First Nurse Report was received on 6th September 2006 upon which the authors of EIA and ATM commented. Then, there were more meetings and

[65] (1985) 84 LGR 168.
[66] Trial Bundle, Volume 2/321, page 17 of Dr. Nurse's Report.

a second public consultation. In my judgment, adequate time was given for the consultation exercise. It also seems to me that the product of consultation was taken into account when the Decision was taken. I believe that the conditions attached to the Approval Letter are indicative of such.

[75] It is true that the Grigg Report[67]; the Second Report prepared by Dr. Nurse on behalf of Quorum ("the Second Nurse Report")[68]; and a letter from Dr. Nurse to Smith's Gore[69] ("the Nurse's letter") were not disclosed to the public, the Planning Authority or Quorum and this is a flaw in the consultative exercise. However, the exercise was not flawed by any significant non-compliance with the **Gunning** criteria. Thus, the assertion by VIEC that the events in history and their compressed timing demonstrates a clear case of bias by the Minister and that the Decision was pre-determined is against the weight of the evidence. Further, to say that because the Executive Council directed that tourist development with a value in excess of $10 million should be referred to the Minister demonstrated "an unlawful usurpation" by the Government of the usual statutory planning process to fulfil the plain obligations in the Development Agreement is implausible. That power is conferred upon the Minister by virtue of his office by the Executive Council, which is made up of parliamentarians from the Opposition as well as the Government.

[76] There is also no evidence to demonstrate that the Minister or the Government has any pecuniary or other personal interest in the matter. May I add that there is nothing unprincipled about the Minister wishing to see this Project (which appeared to be pending for a very long time) fructify during his term in office; particularly when the Beef Island Project is intended to boost tourism, one of the mainstays of this economy.

[77] Further, there is no evidence as alleged by VIEC to show that the public has reason to suspect that the Decision was a mere formality, to suspect that its outcome had been predetermined, to suspect at the very least that when the Decision was made there was a

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[67] Stamped as being received by the Chief Minster's Office on 29 January 2007, two days before the planning Approval.
[68] Dated 10 January 2007.
[69] Dated 17 January 2007.

strong bias[70] in favour of the Decision which was in fact made, and to suspect accordingly, that it was not a proper decision at all. If this Decision was a mere formality, why would it take 7 months to grant planning approval, worse yet, if it was outline planning approval? Why would the Minister attach a string of conditions to be satisfied? In my opinion, the Decision has none of these components.

[78] Whether I apply the test advocated by Mr. Hockman QC[71] or the test advocated by Dr. Barnett[72], or both, it seems to me that a decision to quash the planning permission on this ground is not justified. It would be damaging to the democratic process if the decisions of elected leaders are to be quashed based on bare allegations and speculative assertions. In **Grape Bay Ltd. v A-G of Bermuda**[73], Lord Hoffmann, delivering the judgment of the Court said at page 585:

> "…But the Constitution lays down a separation of powers between the executive, legislature and judiciary. On a matter such as the desirability or otherwise of franchise restaurants, which is a pure question of policy, raising no issue of human rights or fundamental principle, the decision-making power has been entrusted to those Bermudians who constitute the legislative branch of government and not to judges….The issues which they raise are pre-eminently matters for democratic decision by the elected branch of government. The members of the legislature are not required to explain themselves to the judiciary or persuade them that their view of the public interest is the correct one."

[79] I conclude by adopting the judicious words of Pill LJ in **Persimmon Homes Teesside Ltd** where he stated[74]: "*It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence.* ***Clear pointers are required*** *if that state of mind is to be held to have become a closed, or apparently closed mind at the time of the decision.*" [emphasis added]. To my mind, there are no "clear pointers" which shows that the Minister acted improperly before making the Decision.

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[70] See **Porter v Magill** [2002] 2 AC 357 for the test of bias or apparent bias. See also **Persimmon Homes Teesside Limited** [supra], paras 43 -60.
[71] See: **Steeples v Derbyshire County Council** [supra].
[72] See: **Persimmon Homes Teesside Limited** [supra].
[73] [2000] 1 W.L.R. 574 P.C.
[74] At paragraph 63.

[80] For the reasons given, I find that the history of events and its timing do not support the forceful submissions advanced by Mr. Hockman QC and consequently, VIEC has not made out a case that the Decision was not fairly made or not seen to be fair.

The Development Agreement

[81] VIEC contends that the existence of the Development Agreement demonstrates that there had been bias and predetermination in the making of the Decision in that the Minister "*apparently felt obliged to grant planning permission, or at the very least, demonstrates that the Government (by way of the Minister) always intended to grant planning permission*"[75] to Quorum and further, that the Development Agreement "*unlawfully purports to fetter the discretion of the Minister in respect of planning applications contemplated by the Agreement.*"

[82] Mr. Hockman QC argues that the Development Agreement is a contractual obligation on the part of the Government and it must have had a material effect upon the Decision to approve the planning for the Project thereby amounting to unlawful predetermination. He relied on clause 3.4 of the Development Agreement[76] which provides that [and this is an obligation on the Government] *"Upon application to facilitate development and planning approval to be given for each phase of the development within two months of submission to the Government and/or to the requisite agency or statutory body of the development plans or detailed development plan for each such phase*".

[83] Mr. Hockman argues that the Government in this case, like the County Council in **Steeples**, committed itself to granting planning permission to Quorum. The penalty clause in **Steeples**[77] stated: "*…the council shall use its best endeavours to procure that the various conditions outlined…shall be obtained and satisfied as the case may be by the dates provided therein and if the council shall fail to use its best endeavours and if as a result thereof this agreement is determined as aforesaid then the council shall forthwith*

[75] Claimant's Skeleton Arguments pg 42 para. 100.
[76] Exhibit 7 to the Affidavit of Bertrand Lettsome, pg. 206.
[77] See page 265 of the *Steeples* case.

upon such determination pay by way of liquidated damages to KLF the sum of £116,875…."

[84] Learned Queen's Counsel contends that in the event of Government's failure to comply with its obligations under Clause 10 of the Development Agreement in relation to planning approval, the Government is committing itself to being subject to not just a liquidated sum by way of damages, as in the **Steeples** case, but to unlimited damages, injunctive relief and specific performance[78].

[85] The submission made on behalf of Quorum by Dr. Barnett is forceful and succinct. He submits that the statutory scheme and purpose in relation to planning and development approvals in the BVI, contemplates and permits the prior entering into of development agreement between the government and the intended developer prior to the decision (whether by the Planning Authority or the Minister) on an application for planning permission. Section 32 (1) of the Planning Act expressly states as follows:

> "On the advice of the Authority and the Chief Planner, and with the agreement of any other Government authority who may be a party to the agreement, **the Minister may enter into an agreement containing such terms and conditions as he thinks fit with an applicant for development permission or with any other person interested in that land** [emphasis added] for the purpose of regulating the development of the land proposed by the application."

[86] Dr. Barnett contends that, contrary to VIEC's submissions, the Development Agreement proceeded on the basis that it would be required of the developer to obtain the approvals as stated by the laws of the Virgin Islands and there are only two undertakings given in respect of this: (1) to facilitate the process, which he submits, is a legitimate undertaking having regard to the importance of avoiding delay, much of which had already occurred and (2) inferentially to grant the approvals if the statutory requirements were fulfilled, which he submits, was a proper legal position to take.

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[78] Clause 10 of the Development Agreement states that "*In the event that either party to this Agreement shall commit any serious acts of non-performance amounting to a material breach of the Agreement …(a) in the case of the Government, to a failure to grant,…the Party claiming who has proven the material non-performance shall be entitled to seek all remedies available to it in Courts, including injunctive relief, specific performance and damages for breach of contract*".

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[87] On a proper reading of the Development Agreement, there is no obligation on the part of the Minister to grant planning approval to Quorum since other requisite approvals would have to be obtained first in accordance with the applicable legislation. Clause 1.2 expressly states:

> "This Agreement is without prejudice to compliance by the Parties or either of them with the laws of the British Virgin Islands, specifically but not limited to the laws relating to **physical planning and development, building control and environmental management and protection.**"

[88] Paragraph 10 of the Preamble is also important. It states that *"The Development is planned and intended to be carried out in a manner which minimizes any material adverse effects on the environment and…the Government shall engage a qualified person for the purpose of reviewing and advising on the steps necessary in order to ensure that this objective is achieved…"*

[89] Paragraph 12 provides that "*The Government and the Developer have agreed that in order to execute the Development in a timely and effective manner, certain facilities, exemptions and permits as outlined in this Agreement shall be considered for approval pursuant to the terms of this Agreement".*"

[90] Clauses 3.1, 3.22 and 3.23 of the Development Agreement are very significant. Clause 3.1 provides as follows:

> "It is agreed that **certain governmental, planning and other approvals are a critical precondition to the Developer** [emphasis added]…. Accordingly, the Developer agrees to submit applications to the relevant authorities under British Virgin Island law, for obtaining all relevant licenses, approvals, exemptions …";

[91] Clauses 3.22 and 3.23 deal with environmental and safety measures and provisions for the Government to take measures to prevent pollution from vessels in the waters of the marina and bays of the Virgin Islands.

[92] The Development Agreement also provides that the Developer shall carry out such EIAs as a precondition to approval[79]; each detailed EIA will be reviewed in accordance with the requirements of the relevant legislation and that the appointment of a team of persons, to conduct a review designated to achieve those requirements of the relevant legislation [80].

[93] Clause 6.1 states that the development can only be carried out if the approvals are obtained and Clause 10 states that the Government will be liable under this clause for not giving approval only if the legislative requirements are fulfilled and the various conditions are satisfied.

[94] The evidence reveals that the Minister, when called upon to make the Decision on the applications for planning permission, did not consider himself bound by the terms of the Development Agreement except to the extent that it represents a declaration of government policy. He adopted a cautious approach and sought independent expert advice from Dr. Grigg which led him to impose more stringent restrictions in the Approval Letter than the Planning Authority had recommended in its Option 1 for approval of the applications. The Minister did not approve the Outer Marina and beach creation at Bluff Bay, both of which were important components in the Development Agreement which were approved by Executive Council.

[95] Mr. Hockman QC submits that this case is similar to **Steeples**. But, like Quorum and the Attorney General, I see many distinguishing features. For example, in **Steeples,** the land which was to be developed was the county council's own land. It was the county council itself which was making the application to its own planning authority and the county council was granting approval to itself. At page 264C of **Steeples**, Webster J stated:

> "…the council will by the determination date and to the reasonable satisfaction in all respects of KLF construct or have constructed at its own expense on the development area and where appropriate available for connection to the development area gas, electricity and water supplies, toilets…to provide adequate

[79] Clause 5.2.
[80] Clause 5.3

> facilities for not less than one and a half million visitors per annum and also to construct on the area…a car park of suitable materials."

[96] Undoubtedly, Webster J was able to find that there was bias in the development agreement because the county council had an interest in the land as it was the owner. It entered into an agreement and sought from itself planning permission; quite different from the case at bar. There is not an iota of evidence to demonstrate that the Minister had any pecuniary or personal interest in the Beef Island Project.

[97] I am satisfied that the Development Agreement expressly provides that Quorum would have had to obtain firstly, the approvals required by the laws of the Virgin Islands and that certain other preconditions would have had to be met for the provisions of the Development Agreement to be effective. I am unable to find any clause in the Development Agreement containing any provision by which the government would be liable for a failure to secure planning permission for the development or any aspect thereof. As I see, nothing pressured the Minister to grant planning permission to Quorum. There is no evidence of potential bias. A mere allegation is not sufficient.

[98] Moreover, the Development Agreement does not unlawfully fetter the discretion of the Minister in respect of the planning applications. Such agreements are provided for by the Planning Act as a matter of law and declared legislative policy. The terms of the Development Agreement makes the entire development subject to compliance with applicable law. In addition, it seems to me that the Minister demonstrated independent judgment and exercise of discretion. Otherwise, he would have granted all aspects of the applications without any restrictions.

[99] Taking all matters into consideration, I am unable to find that the existence of the Development Agreement demonstrates that there was bias and predetermination in the making of the Decision and that the Agreement unlawfully purports to fetter the discretion of the Minister in respect of planning applications.

(b) Non Disclosure of Documents

[100] VIEC contends that the Minister took into consideration the Grigg Report; the Second Nurse Report and the Nurse's letter before making the Decision. The gravamen of this contention is that the Minister acted contrary to the principles of natural justice and procedural fairness by taking into account materials which were not in the public domain rendering the Decision unlawful. VIEC alleged that these bodies and interested persons were denied the proper opportunity to be consulted upon these documents making the consultative process inadequate and unlawful.

[101] It is not disputed that the Grigg Report, the Second Nurse Report and the Nurse's letter ("the Documents") were not disclosed to the public, the Planning Authority, the Conservation and Fisheries Department and the EIA Review Committee (which was specifically convened for the purpose of reviewing the environmental impact of the Beef Island Project pursuant to the terms of the Development Agreement).

[102] Mr. Farara QC submits that the consultation exercise involved in making the Decision was extensive and fair and the fact that the Documents were not made available to the public or to the Planning Authority does not in anyway diminish the fairness of the process. He next submits that the Documents did not raise any alarming or new issues which warranted going back to the public or to the members of the Planning Authority, whether collectively as an authority or individually as representatives of various government agencies concerned with planning approvals, environmental protection and conservation. He refers to the evidence of Quorum's witnesses and the Chief Planner which he asserts, discloses that changes were being made at various stages to the Master Plan, taking account of the views expressed at the public meetings and the views or consensus which came out of the environmental review committee's meeting and other representations that were made by Town and Country Planning itself and others, and these were made available to the Minister prior to making the Decision.

[103] Mr. Farara QC submits that the first report of Dr. Nurse ("the First Nurse Report") highlighted certain issues and made recommendations with ATM making comments. As a

result, Dr. Nurse produced the Second Nurse Report, which essentially, accepted that certain of the matters he raised in the First Nurse Report had been addressed by Quorum and changes were made to the EIA and the Master Plan. Following the Second Nurse Report, the Nurse's letter was written which concluded that the remaining issues had been satisfactorily addressed by Quorum and were matters to be addressed in an environmental management plan.

[104] As far as the Grigg's Report was concerned, Mr. Farara QC submits that pursuant to section 38(4) of the Planning Act, the Minister is empowered to consult with any person as he sees fit. In any event, argues Mr. Farara QC, the Minister was under no legal obligation to disclose the said documents and by him not doing so, he did not cause any disadvantage to anyone who had or may have had an interest in this matter or cause them to suffer loss. Learned Queen's Counsel submits that whilst the consultative process might not have been perfect, it was nonetheless adequate and fair. In my opinion, whilst it may be true that the Minister was under no legal duty to disclose the Documents, he is under an express or implied duty to act fairly which may necessitate disclosure of advice, expert or otherwise, which he receives from those within it in the course of arriving at its decision.

[105] It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case. In **R. v North Devon HA Ex p. Coughlan**[81], the Court of Appeal found that although there were criticisms to be leveled at the consultation exercise and although it ran some risks, it was not flawed by any significant non-compliance with the criteria laid down in **Gunning**. Lord Wolff MR articulated and stated the limitations of this principle in the following terms:[82]

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject-matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

[81] [2001] Q.B. 213.
[82] See paragraph 112 in **R v North and East Devon, Ex p. Coughlan.**

[106] Each case must be considered on its own particular facts and circumstances. It is a matter for the court to determine, notwithstanding that there may have been some shortcomings in certain aspects of the consultative process or that the process may not have been a perfect one, whether that would render the Decision unlawful. Taken as a whole, the consultative exercise employed in this matter leading up to the Decision, may not have been perfect but it was fair and adequate. The public had opportunities to voice their concerns and objections to the Project. So also did other key stakeholders. Ultimately, the Minister made the Decision which was fair or seen to be fair.

[107] In addition, although the Minister did not disclose the Documents to the public, there is no indication of what weight, if any, he attached to them. However, it must be assumed that he fairly took into consideration everything that was before him, before coming to the Decision. Even though it may have been the ideal position for the Documents to be disclosed to the public and/or to Planning Authority, the fact that they were not, does not make the decision-making process unfair or improper.

[108] In **Edwards v Environment Agency**[83], Auld L.J. stated at paragraph 91:

> "Focusing more closely on the issue thrown up by this case, namely whether fairness in decision-making subject to public consultation requires internal workings of a decision-maker also to be disclosed as part of the consultation, the answer given by the House of Lords in **Bushell v Secretary of State for the Environment** (1981) AC 75 and a number of other authorities since, is generally not…"

And at paragraph 103, he continued:

> "In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in **Bushell** require a decision-maker to disclose its own thought processes for criticism before reaching its decision".

[109] Lord Diplock's rationale in **Bushell** for internal decision-making not to be subject to disclosure, does not in any way, override the requirement of fairness. What is fair depends

[83] (2007) EWCA Civ. 877 at H5 per Auld LJ, paras. 91 and 103 respectively.

on the nature of the subject-matter. Fairness requires that objectors should be given adequate information to enable them to challenge the accuracy of any facts and the validity of any argument which can be seen by the decision-making body as truly likely to influence to be influential in its decision-making process.

[110] In turning to apply that overriding principle of fairness to the facts of this case, the Second Nurse Report and the Nurse's letter in effect concluded that the remaining issues had been satisfactorily addressed by Quorum and were matters to be addressed in an environmental management plan. The Grigg Report did not reveal any new information that was not known to the public or to the Planning Authority. The effect of the Documents was to increase the number and strictness of the conclusions in Option 1 (Alternative 2) from the Planning Department. With these new and expanded conditions, the Chief Planner has stated his unqualified agreement.[84]

[111] VIEC's submission that the Approval Letter does not accord with Alternative 2 prepared by the Planning Department is not accurate. The Approval Letter incorporates both the conditions recommended in Alternative 2 and the additional conditions recommended in the Documents.

[112] For all of these reasons, the contention that the Minister acted contrary to the principles of natural justice is untenable.

(c) Failure to give reasons

[113] Section 38(5) of the Planning Act permits the Minister, in his discretion, to provide reasons for any decision on an application for planning permission referred to him. The section states:

> "A determination of the Minister under this section **shall** be on such terms and conditions as the Minister may determine and **may** be accompanied by a written statement of the reasons for the determination of the application."[emphasis added]

[84] See First Affidavit of Louis Potter, paras. 15 and 16.

[114] Mr. Hockman QC submits that the Approval Letter failed to give any reasons for granting planning permission for the proposed development. He asserts that as a matter of fairness and natural justice and as acknowledged by the common law in the case of **Re Hanoman (Carl)** [85], the circumstances of the present case, for example, the nature and scale of the proposed development, its complex and controversial nature, the potential for detrimental environmental impact and the impact of the proposal on an area designated under the Fisheries Act and Regulations as a Protected Area demanded that the Minister gives reasons for the Decision.

[115] A failure to give reasons for a decision **may** be a good ground for judicial review. Where reasons should be given, they need to be stated "in sufficient detail" to enable the [Claimant] to know what conclusion [the decision-maker] has reached on the principal important controversial issues" (**Bolton Metropolitan Borough Council v Secretary of State for the Environment [1995] 3 PLR 37, 43C, Lord Lloyd**). The reasons must be adequate and intelligible and must enable the reader to understand what conclusions were reached on the principal issues relevant to the determination: **South Buckingham District Council v Porter (No. 2)**.[86]

[116] Not every decision maker is required to give reasons. In **R v Civil Service Appeal Board ex parte Cunningham**[87] (a case relied upon by VIEC), the Board was the decision-maker carrying out a judicial function, and when it was asked to give reasons for its decision concerning an unfair dismissal claim, it refused on the ground that it employed simple and informal procedures and in order to ensure a non-legalistic approach to the merits of each individual case, it had adopted a policy of not giving reasons for any award. The Court of Appeal found that such a body discharging a judicial function was required to give reasons for its decision in respect of such disputes. The court also found that the award was incompatible with awards in similar matters by the industrial tribunals, which rendered giving reasons for its decision necessary.

[85] 65 WIR 157.
[86] (2004) 1 WLR 1953.
[87] (1991) 4 AER 310.

[117] The case of **ex parte Cunningham** is distinguishable from the instant matter. Here, the Minister is not carrying out a judicial or quasi-judicial function and the enabling statute does not require him to give reasons for his decision. Further, a challenge based upon failure to give reasons will only succeed if the party aggrieved can satisfy the court that they have genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision: see **South Bucks District Council v Porter (No. 2)**[88], and **Westminster City Council v Great Portland Estates plc**[89]. There is no evidence to demonstrate that VIEC has been prejudiced in any way by the lack of reasons of the Minister for his Decision, and further, there is no evidence that VIEC, the Planning Committee or any one else requested of the Minister to provide any reasons and he refused to do so.

[118] The Minister's failure to provide reasons for the Decision does not make the decision-making process unfair or improper. Accordingly, this ground of challenge has no merit. The case of **Re: Hanoman (Carl)**[90] is not helpful. Bernard CJ considered the duty to give reasons in the absence of statutory requirement in Caribbean law. This is not the same in the BVI.

(2) Illegality

[119] In the realm of public law, illegality, as a ground for judicial review means a failure to understand the law which regulated the decision-making process[91]. The learned authors of *de Smith*[92] summarizes the general principles on illegality as follows:

> "An administrative decision is flawed if it is illegal. A decision is illegal if: (1) it contravenes or exceeds the terms of the power which authorises the making of the decision; or (2) it purports an objective other than that for which the power to make the decision was conferred.
>
> **The task for courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the**

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[88] (2004) 1 WLR 1953 per Lord Brown at para. 36.
[89] (1985) 1 AC 661 at pg 673 D-F.
[90] 65 WIR 157.
[91] See Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service** at 410.
[92] Supra.

power in order to determine whether the decision falls within its "four corners". In doing so, the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will –seeking to ensure that the exercise of power is what Parliament intended." [emphasis added]

[120] The main thrust of this ground, as advanced by VIEC, is that the development proposals will, in part, involve development within an area declared a "marine protected area" pursuant to Regulation 51 (5) of the Fisheries Regulations 2003, namely Hans Creek, Beef Island. VIEC asserts that Hans Creek was declared a fisheries protected area in accordance with the relevant statutory provisions. Quorum and the Attorney General insist that Hans Creek has never been declared a fisheries protected area within the meaning and power granted under the Fisheries Act.

[121] The key issue which falls for determination is whether Hans Creek is a protected area within the meaning of the various statutory provisions. Before I attempt to resolve this issue, I should say that I have positively found from the evidence that the proposed project will, in part, involve development within the Hans Creek area.

Is Hans Creek a Fisheries Protected Area?

[122] Section 13(1)(b) of the Fisheries Act provides that "*The Minister may, by Order published in the Gazette, declare any area of the fishery waters together with the area of land up to the high watermark adjacent to the fishery waters to be a protected area.*"

[123] By subsection (2), an Order made under subsection 13(1)(b) may prohibit fishing within the protected area of any fish or identify a specified part of the protected area to be used as a shelter for such purpose as the Minister may specify in the Order.

[124] Section 79(1) of the said Act provides that "*The Minister may make Regulations for the better carrying into effect of the Provisions of this Act.*" Subsection (2) lists from (a) to (x) the types of matters in respect of which the Minister can make Regulations. Of some relevance is (j) which in effect provides that the Minister may make Regulations regulating or prohibiting the entry into any fishing priority area or protected area declared as such

under the Act or any class of vessel and prescribing any activities which may not be undertaken in that area.

[125] Now, to the Fisheries Regulations 2003. The Preamble states that "*The Minister, in exercise of the powers conferred on him by section 79 of the Fisheries Act, makes the following Regulations.*" The Regulations are therefore expressly made pursuant to the power granted to the Minister under section 79 of the Fisheries Act, viz. for the better carrying into effect of the provisions of the Fisheries Act.

[126] Regulation 51(1) states as follows:

> "No person shall carry out any development activity, whether terrestrial or otherwise which may or is likely to adversely impact on a **marine protected area declared as such by the Minister by Order in the Gazette**." [emphasis added]

[127] Regulation 51(5) expressly provides:

> "Without prejudice to sub-regulation (1), the following areas identified in the maps in Schedule 5 are hereby declared to be fisheries protected areas
> (a)…
> (b) Hans Creek, Beef Island;
> (c)…"

[128] The case for Quorum that Hans Creek has never been declared a fisheries protected area within the meaning of the Fisheries Act is put on a number of different grounds by Dr. Barnett[93]. The first ground of challenge is that section 13 of the Fisheries Act speaks to an Order published in the Gazette, being made for the Minister to declare an area as a protected area and it is clear that Hans Creek has never been declared a fisheries protected area, since there was no such Order published in the Gazette[94]. He says that the inclusion of a statement in the Fisheries Regulations, which was expressly made under section 79(1) of the Fisheries Act, of certain areas as fisheries protected areas, including

[93] The Attorney General supports these submissions. She submits that the declaration made by regulation 55[sic] exceeds the power given to the Minister under section 79 of the Fisheries Act[93].

[94] A good example of an "Order", says Dr. Barnett, is the Physical Planning (Reference of Application to Minister) Order 2006, which was expressly made pursuant to section 39(1) of the Planning Act.

Hans Creek, is ineffective and contrary to the powers granted to the Minister in that regard under the Fisheries Act.

[129] Quorum's second ground of challenge is that no power to declare fisheries protected areas is conferred by or under section 79 of the Fisheries Act. According to Dr. Barnett, this section authorizes the Minister to make Regulations "for the better carrying into effect" of the provisions of the Act. One such matter relates to regulating or prohibiting fishing in a protected area "declared as such under the Act".

[130] The third ground of challenge is that 'Orders' are different from 'Regulations', even though they are both, by definition, types of 'subsidiary legislation'. In that context, Dr. Barnett refers to section 43 of the Interpretation Act[95], which expressly defines 'subsidiary legislation' to mean:

> "any **regulation**, rule, by-law, proclamation, order in council, **order**, direction, notice, form, or other instrument made under any law or other instrument and having legislative effect".[emphasis added]

[131] Learned Counsel submits that an "Order" is a different legislative instrument from "Regulations", a by-law, a proclamation and an order in council. And so, when Section 13(1)(b) states that the Minister **may** "declare any area of the fishery waters…" by '**Order**' published in the Gazette, this is not the same as the Regulations. [emphasis added]

[132] Delegated legislation of which regulations, orders, orders in council and by-laws are different types, derive their validity by reference to the specific provisions of the enabling statute. He cited the case of **Maharashtra State Board of Secondary and Higher Education v Kurmarsheth**[96], where the Supreme Court of India was called upon to determine the validity of subsidiary legislation, namely Regulation 104(3) of the Maharashtra Secondary and High Secondary Education Boards Regulations 1977 made under an Act. Balakrishna Eradi J, states at page 1095, the following[97]:

[95] Cap. 136
[96] (1985) LRC (Const) 1083.
[97] Interested Parties Submissions pg 14.

> "The legislature has thus maintained in the Senate in question a clear distinction between 'by-laws' and 'regulations'. The by-laws to be framed under section 38 are to relate only to procedural matters…More important matters affecting the rights of the parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under section 36. The legislature, while enacting sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and by-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under section 36 was not intended as a power merely to frame by-laws, it is not open to the court to ignore the same and treat the regulations made under section 36 as mere by-laws in order to bring them within the scope of justiciability by applying the test of reasonableness."

[133] And at page 1097, the learned judge continued:

> "In light of what we have said above, the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate;(2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution."[98]

[134] In summary, Dr. Barnett submits that (i) Regulation 51(5) does not constitute an "Order" of the Minister and the Minister does not purport to make such an Order under section 13 of the Fisheries Act and (ii) to the extent that Regulation 51(5) of the Fisheries Regulations purports to declare Hans Creek a fisheries protected area, that Regulation does not fall within the provisions, scope and ambit of the power conferred by and under the Fisheries Act, and is therefore *ultra vires* and of no effect as subsidiary legislation.

[135] In a nutshell, the case for VIEC is that the status of Hans Creek as a protected area was never in dispute at the time of the Decision and that the Attorney General has also accepted this[99]. Mr. Hockman QC contends that it is inappropriate for the Attorney General and Quorum to challenge the validity of the declaration of protected areas in Regulation

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[98] See also **Secretary of State for Education and Science v Tameside Metropolitan Borough Council** [1977] AC 1014 per Lord Wilberforce at A-B.

[99] See Trial Bundle Volume 3/96. Exhibit LP 3 to First Affidavit of Louis Potter. Under issue 2: Hans Creek Fisheries Protected Area, Mr. Potter wrote that "Hans Creek Fisheries Protected Area was declared by s. 51(5)(b) of the Fisheries Regulations 2003 S.I. 20 Gazetted on 19 June 2003…."

51(5) of the Fisheries Regulations in the context of litigation relating to a specific site and brought by a specific claimant. Such challenge should have been brought timeously in proceedings launched for that purpose and on proper notice to all those concerned. He laments that the Attorney General as a Government Minister would be given permission to challenge a provision in Regulations made by the Government itself.

[136] Mr. Hockman QC rightly submits that by virtue of section 79(1) of the Fisheries Act, the Minister is given a wide power to make regulations "*for the better carrying into effect of the provisions of this Act*". Also, by making the Regulations, the Minister intended that they be enforceable and valid. Pursuant to this enabling power, the Minister was entitled to make the Fisheries Regulations 2003 and within those Regulations, to declare protected areas, which includes Hans Creek, as he had done in Regulation 51(5) of the Fisheries Regulations.

[137] Also, by section 13(1)(b) of the Fisheries Act, the Minister **<u>may</u> by Order published in the Gazette**, [emphasis added] declare any area of the fishery waters to be a protected area, thus any protected area declared as such within the Fisheries Regulations becomes a protected area in accordance with the Fisheries Act. This is consistent with section 19(6) of the Interpretation Act, under which a statutory instrument is to be construed subject to the enactment under which it was made, and by section 56 of the Fisheries Act which equates Orders, Regulations or By-laws.[100]

[138] Dr. Barnett persuasively asserts that VIEC has misconceived the legal position and status of Hans Creek and further, has misconstrued Regulations 51(1) and 51(5) of the Fisheries Regulations. I am afraid that I do not agree with his assertion. On the other hand, I agree with Mr. Hockman QC that although Regulation 51(1) includes the word '**marine**' before the phrase '**protected area**', it is clear that the prohibition in that regulation was intended

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[100] Section 56 states that "Any Order, Regulation or by-laws made under this Act may provide that a breach of or non-compliance with any provision of the Order, Regulations or by-laws shall constitute an offence and may provide for penalties on summary conviction by way of a fine not exceeding one thousand dollars."

to apply to Hans Creek under Regulation 51(5) of the Fisheries Regulations. This is because:

a) The enabling legislation provides for "protected areas" without qualification: See section 2 of the Fisheries Act;

b) Hans Creek is a protected area declared as such by the Minister by Order in the Gazette[101];

c) It is clear from the wording of Regulation 51 as a whole that the protected areas listed in Regulation 51(5) were intended to be covered by the prohibition in regulation 51(1), the words "*Without prejudice to sub-regulation (1)*" clearly being intended to mean that, without prejudice to the generality of regulation 51(1), the areas listed in regulation (5) were clearly to be protected and covered by the prohibition; and

d) Otherwise, it would have been pointless for Hans Creek and the other sites mentioned in Regulation 51(5) to be declared as protected areas.

[139] Alternatively, as Mr. Hockman QC also correctly asserts, given the terms of Regulation 51(5) and the clear legislative intention to protect the fisheries of Hans Creek, the Minister should have applied a similar test as set out in Regulation 51(1), which is to be prohibited from approving any development which "*may or is likely to adversely impact on the protected areas*".

[140] Mr. Hockman QC suggested that it was incumbent on the Minister to ask himself whether there may be an adverse impact on Hans Creek and if so, to refuse permission. He says that there is no evidence to suggest that the Minister ever asked himself that question and by failing so to do, he misdirected himself. Furthermore, as VIEC asserts, the only logical answer was that there may be an adverse impact and to come to any other conclusion would have been outside the range of reasonable responses.[102]

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[101] Gazetted on 19th June 2003.

[102] See the affidavits of Lianna Jarecki at paragraph 8, Volume 1/328ff; affidavit of Cassandra O'Neal at paragraphs 8 to 29, Volume 2/325ff, Office from Chief Planner dated 21November 2007, Volume 2/305; Conservation and Fisheries Department Report dated 27 November 2006 [supra]; Environmental Review Committee recommendation dated 7 December 2006 [supra]; Second Nurse Report, Volume 4/Tab.9, Grigg Report, Volume 4/Tab.7 and Approval Letter, Volume 4/13.

[141] In my judgment, the Decision made by the Minister was illegal as it was made in contravention of Regulation 51(5) of the Fisheries Regulations read in conjunction with the applicable statutory provisions. Based on this finding, there is no need to burden this judgment with the submissions of Counsel on the other grounds but out of an abundance of caution, I shall press on.

Whether Regulation 51(1) and 64(1) of the Fisheries Regulations create a prohibition and a criminal offence?

[142] Regulation 51(1) of the Fisheries Regulations imposes an absolute prohibition on carrying out development activity that may or is likely to have an adverse impact on a **marine** protected area. Regulation 64(1) makes it a criminal offence to contravene "*a provision of these Regulations*."

[143] Dr. Barnett argues that Regulation 51(1) is of no effect to the extent that it purports to create a prohibition against development activity within certain areas, as that provision cannot and does not apply to Hans Creek, which is not a fisheries protected area. He submits that the offence only relates to a "marine protected area", of which Hans Creek is not.

[144] Based on my finding that Hans Creek is a fisheries protected area and that the word '**marine**' before the phrase '**protected area**' was intended to apply to Hans Creek under Regulation 51(5) of the Fisheries Regulations, it seems to me that any breach of the prohibition in Regulation 51(1) is a criminal offence. The very attractive arguments made by Dr. Barnett are unsustainable. And as I see it, it is unnecessary to explore this issue any further.

Article 29 of the BVI Constitution and International Treaty Obligations

[145] Mr. Hockman argues that the Decision also constitutes a breach of Article 29 of the Constitution, which provides as follows:

> "Every person has the right to an environment that is generally not harmful to his or her health or well-being and to have the environment protected, for the benefit

of present and future generations, through such laws as may be enacted by the Legislature including laws to

a) prevent pollution and ecological degradation;
b) promote conservation; and
c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[146] Mr. Hockman QC contends that (1) although the Decision was taken prior to the Constitution being enforced, it is incumbent upon the courts to uphold the rights and protections guaranteed in the Constitution and (2) the Decision breaches various international treaty obligations.

[147] First, it is plain that the Decision was taken prior to the new Constitution coming into force in June 2007 and, as such, is not impacted by the provisions. Secondly, no breach of any international treaty applicable to the Virgin Islands has been shown and such obligations cannot be the foundation for public law illegality. Having said that, states differ in the way that their municipal courts are either required or allowed to give effect to international obligations. In most states, a treaty requires legislative action before it can take effect[103]. But, I believe that our courts may give effect to international treaty obligations dealing with the environment [even though they are not incorporated into our domestic legal system] provided that they are compatible with the state's perception of the international treaty. For many of our Caribbean people, the ocean is the life-support for our planet: it provides much of the food we eat, the air we breathe and drives the climate we need to survive.

[148] Needless to say, a resolution of this issue adds little to the outcome given my finding that the Decision made by the Minister was illegal[104].

The Planning Approval

[149] Section 21(3) of the Planning Act in effect states that an application for outline development permission which requires an Environmental Impact Assessment "(EIA")

[103] See **Havis Francois et al v Cardinal Airlines Limited et al**, HCVAP 2006/019, Commonwealth of Dominica, judgment delivered on 22nd September 2008. In particular, see paragraphs 27 and 28.
[104] See paragraph 138.

cannot lawfully be entertained. As Mr. Hockman QC rightly pointed out, the wisdom behind a detailed application in the case of an EIA development is that, once it is accepted that the development is environmentally sensitive, it is essential that the full details of the proposal are spelt out before any form of development consent is given. He argues that to allow a merely outline consent might mean that the Planning Authority would have no alternative but to give a subsequent approval of details which, though within the scope of the outline consent, would be detrimental to the environment.

[150] Mr. Hockman's contention is that, the suggestion, made belatedly by Mr. Farara QC that the approval granted in the Approval Letter was full detailed approval, is undermined by the fact that one of the applications for planning permission, namely Application Number 268 which relates to the master plan, states in section 6 that the "approval sought" is "approval in principle".

[151] The Attorney General asserts that the planning approval granted by the Minister was outline permission, or approval in principle. VIEC submits that if that is so, then the Decision contravenes the prohibition under section 21(3) of the Planning Act against the grant of outline planning permission for EIA development. VIEC asserts that the Decision is therefore unlawful and ought to be quashed.

[152] Quorum insists that the Approval Letter does not state, expressly or impliedly, whether the approval that was granted was either "outline approval" or "approval in principle". In those circumstances, the Approval must be construed to be full approval, subject to the conditions stated in the Approval Letter.

[153] There is no dispute that the Beef Island Project is development that requires an EIA, pursuant to section 26 of Schedule III to the Planning Act. In fact, an EIA was undertaken on behalf of the applicant for planning permission, reviewed by the ERC, by Dr. Nurse on behalf of Quorum and by Dr. Grigg, on behalf of the Minister.

[154] It cannot be disputed that the proposed development was the subject of two planning applications, Application Numbers 267 and 268. The latter was an application for "approval in principle". I agree with Mr. Farara QC that the Approval Letter does not state whether the approval that was granted was either "outline approval" or "approval in principle". In those circumstances, the Approval must be construed to be full approval, subject to the conditions contained therein.

[155] Perhaps, I should resolve this issue by simply stating that since the Approval was given for proposed development involving Hans Creek, a fisheries protected area, the Approval is rendered illegal for that reason only.

(3) Irrationality

[156] VIEC asserts, and the onus is on them to prove, that the Decision was irrational in that it is "unreasonable" in the *Wednesbury* sense. In support of this submission, VIEC relies upon the matters pleaded in the amended statement of claim and those matters relied upon in support of its submission that the Decision was unlawful. Mr. Hockman QC submits that "*no Minister properly directing himself as to the relevant law, taking into account all relevant considerations and excluding all irrelevant considerations and ensuring procedural fairness, could have concluded that it was appropriate to grant planning permission*".

[157] On the other hand, Dr. Barnett argues that the process of reaching the Decision was legally and procedurally correct, proper and fair and it was a rational and reasonable one in the *Wednesbury* sense. He contends that the Decision was also within the ambit of ministerial and governmental discretion and policy making and it ought to be upheld by the court.

[158] Learned Counsel also submits that the *Wednesbury* unreasonableness must be allied with the principle that the court will not interfere in a matter which is fundamentally one of governmental or ministerial policy, as this is not a matter properly justiciable or reviewable

by a court of law, but purely a matter for the executive[105]. It is not the function of the courts to determine whether the decision was a right or wrong one[106].

[159] In the seminal decision out of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**[107], Lord Greene MR stated (at page 230):

> "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something over-whelming, and, in this case the facts do not come anywhere near anything of that kind…
>
> It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high policy of this kind…
>
> The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that is set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."

[160] Irrationality in judicial proceedings was also considered by the House of Lords in **Council of Civil Service Unions v Minister for the Civil Service** [supra], where Lord Diplock stated (at page 410 G):

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system… Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

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[105] See **C.O. Williams Construction Ltd v Blackman** [1994] 4 LRC 216; **Nothinghamshire County Council v Secretary of State for the Environment** [1986] AC 240, 247E-H, **Grape Bay v Attorney General for Bermuda** [2000] 1 WLR 574, 585C-F, **Save Guana Cay Reef Association Ltd & Clarke v Bakers Bay Ltd** (February 23, 2006) [unreported].
[106] **Ho-Ming-sai v Director of Immigration** [1994] 1 LRC 409, 413a.
[107] (1948) 1 KB 223.

[161] In **Nottinghamshire County Council v Secretary of State for the Environment**[108], the House of Lords held (at 241):

> "That in the absence of some exceptional circumstance such as **bad faith or improper motive on the part of the Secretary of State** [emphasis added] it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration that had been one for the political judgment of the Secretary of State and the House of Commons".

[162] In **R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co**[109], the Court held (at page 505):

> "…that, providing the Secretary of State took into account only relevant factors, he had a broad discretion whether a monument of national importance should be scheduled; that…there was nothing inherently wrong in considering the possibility that scheduling might give rise to a claim for compensation."

[163] Simply put, the issue to be determined is whether the Decision made by the Minister was so outrageous that it defies logic or accepted moral standards and that no reasonable authority could have arrived at that Decision.

[164] Putting the case for VIEC at its highest, it is this: since Hans Creek is a fisheries protected area and it is an absolute prohibition to carry out development activity that may or is likely to have an adverse impact on a protected area, then that makes the Decision an irrational one and the Minister acted unreasonably in the *Wednesbury* sense in granting the approval.

[165] The gravamen of this submission is that because the Decision is illegal, then it is also irrational. Suffice it to say, that while irrationality overlaps illegality, there is a stark difference between the two. If they were the same, why would the tests be different? Unreasonableness, in the *Wednesbury* sense, requires overwhelming evidence. In **Nottinghamshire County Council v Secretary of State for the Environment** [supra] the

[108] (1986) Law Reports, HOL, 240.
[109] (1990) QBD 1, 504.

House of Lords held that in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the decision-maker, it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration.

[166] It is therefore apposite for the court to look at the evidence when considering the reasonableness or rationality of the Decision. It is not disputed that Quorum owns the land. The idea of developing the property has been in the works for some time. The history is chronicled in some detail in the affidavit of Timothy Peck and Edward Childs in particular, and also in the affidavits of Derek Dunlop and Federico Sanchez and various contemporaneous exhibits.

[167] On 6th August 2006, Quorum formally submitted two applications, D267/06 and D268/06 seeking planning approval for the Beef Island Project which, if built, will be the largest private development in the BVI. The process of consultation had already begun before Quorum submitted its applications. This is because the Beef Island Project was in the making for a while. Environmental Impact Assessments were commissioned and the public as well as the Planning Authority, the Conservation and Fisheries Department and the EIA Review Committee all participated in the consultation exercise. As already indicated, the public as well as these bodies held very strong views about the Beef Island Project. The Conservation and Fisheries Department felt that planning permission should be refused outright. Ultimately, the Minister, in his discretion, approved both applications subject to nine conditions. Conditions (vi) to (viii) are relevant. Condition (vi) states: "eliminate the proposed outer marina from the master plan; condition (vii) - eliminate the proposed beach creation in the vicinity of the Little Cay Bay at Hans Creek from the master plan and condition (viii) - refrain from beach creation or improvement pending the results of site-specific analyses and approval of detailed construction parameters for each site.

[168] By attaching these conditions to the approval, it seems to me that the Minister gave sufficient thought to the Beef Island Project. On the converse, he could have granted outright planning permission which might have been outrageous. But, he attached

conditions in an effort to preserve Hans Creek. It seems to me also, that the Minister was concerned about developing the tourist sector and consequently, a more stable economy for the BVI. This is borne out in his letter of 22nd August 2004, "*this project remains a top priority of my Government and a vital component of our tourism agenda.*" It must not be forgotten that Quorum owns the land which it had been seeking for some time to develop.

[169] Moreover, nobody has suggested bad faith on the part of the Minister. Nobody suggests, nor could it be suggested in the light of the evidence as to the matters he considered before reaching the Decision, that he had acted for an improper motive. Nobody now suggests that the Minister failed to consult the Planning Authority, as is required by statute.

[170] In addition, upon a full and proper consideration of the evidence coupled with the evidence in the two affidavits of the Chief Planner concerning the process leading to the Decision and issuance of the Approval Letter, I am constrained to find that the process employed was both open and fair and the Decision was reasonable in the *Wednesbury* sense. I will therefore reject the so-called Wednesbury unreasonableness argument. I remind myself of the observation made by Lord Diplock in **Secretary of State for Education and Science v Tameside** [supra] at page 1064:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

[171] The Planning Act indicates that there is a plurality of objectives which the executive is empowered to weigh and to come to a determination as to what decision should be made in relation to planning applications. The multiplicity of factors which have to be taken into account are matters properly to be determined on policy considerations and an assessment of the pros and cons of the development proposal and it is not for the court to weigh and substitute its opinion for the executive decision. As was already alluded to, the decision whether to grant planning permission is a pure question of policy and the decision-making power has been entrusted to Virgin Islanders who make up the legislative branch of government and not to judges. The decision whether or not to grant planning approval to a foreign developer who already owns the land raises matters for democratic

decision by the elected branch of government. The members of the legislature are not required to explain themselves to the judiciary or persuade them that their view of the public interest is a correct one.

[172] In matters of this kind, the court must always bear in mind that it is not dealing with a judicial act but an executive act. Parliament has left it to the Minister to decide what he thinks necessary. He has to make a political and economic judgment. He may make a good judgment or a bad one. This court might or might not have been able to make a better one than he made but we remind ourselves that Parliament, no doubt for good reason, has not entrusted guidance to us.

[173] Despite the eloquent and able submissions of Mr. Hockman QC, in order to prove the *Wednesbury* unreasonableness, it requires something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. This ground of challenge fails.

Conclusion

[174] Having found that Hans Creek is a fisheries protected area, it follows that the Approval Letter issued by the Minister on 31st January 2007 is void for illegality.

[175] Both the Attorney General and Quorum submit that the Decision need not be quashed in its entirety. That said, I believe that I should venture a step further to assist in the resolution of this protracted, acrimonious and expensive skirmish although I am warned that it is not the business of the courts but a matter purely for the executive to determine how the applications for planning permission should be dealt with.

[176] Quorum made two applications for planning permission: one covering the master plan and the other the golf course. The master plan approval relates to several main components other than the golf course, but including a hotel, inner marina, residential development, commercial development and infrastructural development which may not have an adverse impact on Hans Creek and may not give rise to illegality. VIEC says that the Decision cannot be severed since it does not differentiate between the two aspects of the Project

but imposes a single set of conditions in respect of both proposals and that a proper analysis is that the Approval Letter constitutes one development consent within the meaning of section 20 of the Planning Act. Not to say too much, I believe that this may assist the decision-maker to whom I shall remit this matter.

Court powers in respect of quashing orders

[177] CPR 56.14(2) provides as follows:

> "If the claim is for an order or writ of certiorari, the judge may if satisfied that there are reasons for quashing the decision to which the claim relates-
>
> a) direct that the proceedings be quashed on their removal to the High Court; and
>
> b) may in addition remit the matter to the court, tribunal or authority with a direction to reconsider it in accordance with the findings of the High Court.

[178] In the circumstances, I am satisfied that there is a good reason for quashing the Decision in so far as it relates to the ground of illegality. I will remit the matter to the decision-maker and direct it to reconsider the matter and reach a decision in accordance with the judgment of this Court.

Costs

[179] The issue of costs has not been canvassed before me. That does not however preclude me from dealing with it. CPR 56.13(6) in effect states that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. The rules do not speak to costs of a successful applicant. In those circumstances, the normal rule will apply. Accordingly, the Attorney General shall pay to VIEC costs pursuant to CPR 65.5(1) and (2)(b)(ii) and Appendix A being $14,000. Quorum is to bear its own costs in these proceedings.

[180] In addition, on 28th April 2009, after the conclusion of the preliminary issue, I also awarded costs to VIEC; such costs to be assessed, if not agreed, and to be borne equally by

Quorum and the Attorney General. The parties may wish to make submissions on this aspect of costs unless agreement is reached. The latter is encouraged.

[181] Last but not least, I would like to commend all counsel for their sterling presentation and immeasurable assistance to this Court. For this, I am immensely grateful.

Indra Hariprashad-Charles

High Court Judge