IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HHIGH COURT OF JUSTICE
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)

CLAIM NO. NEVHCV 2016/0014

BETWEEN:

ANNE HENDRICKS BASS
Claimant

And

[1] DIRECTOR OF PHYSICAL PLANNING
First Defendant

[2] DEVELOPMENT ADVISORY COMMITTEE
Second Defendant

[3] CARIBBEAN DEVELOPMENT CONSULTANT LIMITED
Intervening Party

Appearances

Mr. Damian Kelsick and Mr. Garth Wilkin for the Applicant
Ms. Jean M. Dyer with Ms. Rhonda Nisbitt-Browne for the Defendants
Ms. Talibah V. O. Byron for the Intervening Party

2017: 2 to 5 October
2018: 25 January 21 May

Judicial Review – Planning Permission – Environmental Impact Assessment failing to address marine risks associated with coastal area abutting the property on which development project approved – Finding that Environment Impact Assessment so flawed that no reasonable decision maker could have relied on it – Delay – Reconsideration of the issue of delay on the hearing – Evidence showing that not caused by Planning Authority nor the Developer – Detrimental of good administration – substantial prejudice to Developer – Public interests issues - Delay substantial and will operate as a discretionary bar to relief.

The claimant, a bona fide developer and enthusiastic protector of the Nevis Island Administration, has brought a challenge against a decision of the Director of Planning and the Development Advisory Committee made on the 7th April 2015, by which planning permission was granted to the Caribbean Development Consultant Limited to construct a development project on piece of land near her property and the coastal area. She asserted that the decision was bad in law as being irrational as being grounded in an Environmental Impact Assessment which failed to address any impact that the project would likely have on the marine elements of the environment.

The Claimant became aware of the proposed development following May of 2014 when she saw clearing taking place on the land. In August 2014, the Nevis Historical Society sent her proposed plans of the development and 'encouraged' her to respond. She immediately wrote to the Deputy Premier, the Honourable Mark Brantley and expressed concerns about the likely environmental impacts. That same month, the developers, on the initiative of Mr. Brantley and through the firm of Brantley and Associates offered to sell the land, the subject of the proposed development. Mr. Brantley's wife, a real estate broker acted for the developers in the discussions that followed. The sale however, fell through in October 2014. There were no other direct discussions related to this development between the Claimant and any officials or the developer or its agents when on the 7th April 2015 permission was granted by the first Defendant to the developers to proceed with the development. This prompted the Claimant in May 2015 to restart her communications with Mr. Brantley expressing concerns but stating that she was not ready to take any official action. She assembled a team of legal and other experts to assess the 'shortfalls'' of the development. Her lawyers advised specifically that she should raise her concerns with the Planning Department. She forwarded this legal note to Mr. Brantley. The Claimant did not make any contact with the Planning Department but continued to engage Mr. Brantley in discussions. He did nothing to lead her to believe that he was acting on behalf of the Planning Department or even relaying any of her concerns. What happened next, and again on Mr. Brantley's initiative, was that the developers again offered to sell the property to the Claimant. Discussions on this sale, which was between Mrs. Brantley, the attorneys for the Claimant and the developer lasted from the 29th June 2015 to the 29th September 2015 when the developer's attorney advised in written communication that the developers were no longer interested in selling as their principals wished to proceed with the development. The Claimant assumed that her environmental concerns would be addressed but took no steps nor made no contact with anyone to enquire whether her concerns would be addressed. Work on the project resumed in December 2016. A pre-action letter dated the 11th of January 2016, was sent to the decision makers, the first and second Defendants, and within days filed an application for leave to apply for judicial review.

By consent, work on the development was stayed in January 2017. But by then the developers have expended several millions on the construction work and work-related contracts including those for construction services. They have employed workers both locally and overseas. Several of the units have been sold and the government has granted citizenship to those persons on the basis of the purchase of those units. Those persons are presently unable to occupy their units as the development is only one third completed and is presently uninhabitable.

On this claim, the Defendants have argued that the Environmental Impact Assessment was not inadequate and did address the marine component of the environment and that in any event, the grant of permission was not outside the range of reasonable responses available to the decision.

The Defendants and the Intervening party have also argued that should the court find any merit in the challenge, the court was entitled to and should in this case revisit the issue of delay and refuse to grant any relief.

Held: Dismissing the claim and making an order that costs to the Defendants and the Intervening Party to be assessed if not agreed within 21 days in accordance with the Order made on 25th January 2018:

1. The Court affirms its views at the leave stage that 'planning laws which mandates that an Environmental Impact Assessment must be provided and used as the basis of for the grant or refusal of planning permission, without specifying the form and contents of such EIA, impliedly require at its bare minimum, that such an EIA 'must be comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement *that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity'*. This implied statutory obligation imports a concept of reasonableness. Regardless, therefore, of whether or not the Nevis Physical Planning and Development Control Ordinance Cap 6.09 contain expressed and specific provisions or regulations which sets out the form and content, any environmental impact assessment required under this Ordinance which falls substantially short of this implied standard is deficient and woefully inadequate for the purposes of which it is required. The EIA in this case failed to address the impact any project would have on the marine zone abutting the land where the development is intended, such an EIA falls short of the standard to the extent that no reasonable decision maker could reasonably act on it.

   Applying: **The Land and Environment Court of NSW v Forestry commission of New South Wales** (1983) 49 LGRA 403 per Cripps J at 417; **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (No. 2)** [2004] UKPC 6

2. A court is permitted to revisit the issue of delay as a discretionary bar at the hearing of a claim for judicial review. Where the very issue has been fully ventilated at the leave stage, a court may yet refuse relief on the basis of delay where *inter alia* '*new and relevant material [on the issue of delay] is introduced on the substantive hearing, or if, exceptionally, the issues as they have developed at a full hearing, put a different aspect on the question of promptness'.* At the leave stage the court had considered that the Claimant had a good explanation for the substantial delay which indicated that she had acted with reasonable promptitude. However, the evidence which was led at trial including evidence elicited on cross examination made it clear that the Claimant was primarily responsible for the delay and had no good reason for the delay. Neither the Nevis Island Administration nor Mr. Brantley could have led her to believe that any environmental concerns were being addressed. She herself took no steps to enquire whether anyone would address these concerns. Her belief that the developers would not proceed on the basis of the approval granted was unfounded. For these reasons and having regards to the detrimental impact on good administration and the substantial hardship to the developer and prejudice to third

parties, delay will operate as a discretionary bar to relief. Such other public interest as exist did not affect the exercise of this discretion.

Applying: **Roland Browne v AG and PSC** [2010] ECSCJ No. 331; **R v Lichfield District Council and Christopher J.N. Williams ex Parte Securities Limited** [2001] EWCA Civ 304

3. Costs may be awarded against an applicant for judicial review where that person has acted unreasonably in filing a claim or in its conduct. Not long after the decision had been made, the Claimant had been fully advised as to her rights, the steps she was required to take on a challenge, and had her lawyers at readiness, yet ignored such advice and chose instead to express her concerns to a senior government official whom she knew had nothing to do with the process and the decision. The Claimant's disregard for her legal advice and her own lawyers who she had at readiness, and her institution of legal proceedings after such a delay was unreasonable in the circumstances of this case.

   Considering: In the Application of Cable & Wireless Jamaica Ltd Supreme Court No. M-98 of 1998 (Cited in Ramlogan R. 2007 "Judicial Review in the Commonwealth Caribbean" Commonwealth Caribbean Law Series, Routledge-Cavendish)

4. That a Defendant may be entitled to costs does not mean than an intervening party should also get his costs. The Intervening Party's entitlement to costs must be grounded on whether it can be shown that he has added to or has affected the outcome. In this case the Intervening Party has also had earlier consented to a stay which in turn has led to further hardship.

Case Considered:

1. *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (No. 2)* [2004] UKPC 6
2. *Blanchifield & Ors v. Attorney General of Trinidad and Tobago & Anor (Trinidad and Tobago) [2002] UKPC1 (22 January 2002)*
3. *Bow Valley Naturalist Society v Minister of Canadian Heritage [2001] 2 FC 461*
4. *Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell [1990]2 AC 737*
5. *Fisherman and Friends of the Sea v The Environment Management (2005) 66 WIR 358*
6. *Froyland Gilharry Sr. v Transport Board Civil Appeal No. 32 of 2011 (Belize) Court of Appeal (unreported)*
7. *In the Application of Cable & Wireless Jamaica Ltd* Supreme Court No. M-98 of 1998 (Cited in Ramlogan R. 2007 "Judicial Review in the Commonwealth Caribbean" Commonwealth Caribbean Law Series, Routledge-Cavendish
8. *John West v The Labour Commissioner SVGHCV2014/0025 (SVG) High Court, Eastern Caribbean Supreme Court*

9. *Julian v. Winfresh Limited SLUHCV2010/0756 (St. Lucia) High Court, Eastern Caribbean Supreme Court*
10. *Loris James v the Attorney General SKBHCVAP2011/0001 (St. Kitts and Nevis) Court of Appeal, Eastern Caribbean Supreme Court*
11. *Patricia Yvette Harding v The Attorney General of Anguilla [2015] ECSCJ No. 254*
12. *Public Service Commission v Davis (1984) 33 WIR 112*
13. *Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council HCVAP2008/004 (British Virgin Islands) Court of Appeal, Eastern Caribbean Supreme Court*
14. *R v Herrod, ex parte Leeds City District Council [1976] QB 540*
15. *R v Independent Television Commission ex p. T.V.N.I. The Times December 30, 1991*
16. *R v Lichfield District Council and Christophr J.N. Williams ex parte Lichfiled Securities Limited [200] EWCA Civ 304*
17. *R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham*
18. *R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile [2005] EWHC 1872 (Admin) (26 July 2005)*
19. *R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213;*
20. *R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile [2005] EWHC 1872 (Admin) (26 July 2005).*
21. *R v Port of London Authority, Ex parte Kynoch Ltd [1919] 1 KB 176*
22. *R v. Lord President of the Privy Council, Ex Parte Page [1993] AC 682*
23. *Roland Browne v the Public Service Commission HCVAP2010/0023 (St. Lucia) Court of Appeal, Eastern Caribbean Supreme Court*
24. *Sharma v Browne-Antoine and Another (2006) 69 WIR 379*
25. *The Attorney General of Guyana v Claude Jardim Civil Appeal No. 134 of 1998 (Guyana) Court of Appeal*
26. *The Honourable Patrick Manning and 17 others v Chandresh Sharma Privy Council No. 22 of 2008*
27. *The King v. Port of London Authority. Ex parte Kynoch, limited. Nov. 4, 1918*
28. *The Land and Environment Court of NSW v Forestry commission of New South Wales (1983) 49 LGRA 403 at 417*
29. *The Northern Jamaica Conservation Association et al v The Natural Resources Conservation Authority et al Claim No. HCV 3022 OF 2005 (Jamaica)*
30. *Virgin Islands Environmental Council v The Attorney General et al BVIHCV2007/0185 (British Virgin Islands) High Court, Eastern Caribbean Supreme Court*

JUDGMENT

[1] **RAMDHANI J. (Ag.)** This is a claim for administrative orders which was filed on the 18th January 2016. A full hearing was completed in the matter on the 11th October 2017, and by an order containing brief reasons on the 25th January 2018, the court dismissed the claim with costs to be assessed. There was an indication that full reasons would be provided. This fulfills that indication.

The Claim

[2] The claim for judicial review seeks orders to *inter alia* quash the 'decisions of the 1st Defendant and/or the 2nd Defendant made in or about April 2015 granting permission to Caribbean Development Consultant Ltd. to construct a 17 building, 51 unit development together with a guard house, restaurant, two parking lots, badminton courts and a volleyball site on 4.4 acres of coastal and at Liburd Hill, St. James, Nevis,' namely the HTRIP Candy Resort Villa Development.

[3] Permission had been granted for the Claim to challenge the decision on grounds that the decision was bad in law for being irrational, and that it was not within the range of reasonable responses available to the decision maker.

[4] The first and the second Defendants have joined issues with the Claimant. They have contended that the decision was not bad in law and that the Environmental Impact Assessment (EIA) which was done was not inadequate; that in any event, the decision to rely on the EIA was within the range of reasonable responses open to the decision maker. The Defendants and the Intervening have also argued that even if the court were to find that there are good reasons to quash the decision, the court should as an exercise of its discretion refuse to grant any relief having regards to the delay and its impact on good administration the prejudice which would be suffered by the Developers.

Background

[5] In 2014, the Intervening Party, Caribbean Consultants Ltd. sought permission from the Director of Physical Planning (DPP) and the Development Advisory Committee (DAC) to construct a development project known as the HTRP Candy Development Project (the Development). The initial proposal involved a development which comprised of 26 villas and 72 units, but this was scaled down on the request of the DPP to a development comprising 17 villas and 51 units.

[6] The DPP held adequate public consultations on the proposed development. In conformity with the statutory scheme, the DPP also decided very early in the application process that an Environmental Impact Assessment (EIA) was necessary and one was required of the Developers. The EIA report which was initially submitted related to the project as originally conceived, and after the project was scaled down the same EIA report was considered in deciding whether permission would be granted. Permission was in fact granted on the 7th April 2015.

[7] The grant of permission did not sit well with the Claimant, who is a citizen of Nevis and who owns a home on beachfront property at Liburd Hill, St. James Nevis, which is approximately a quarter a mile away from the Development. She is also a person well recognized to be involved in the preservation of the environment and is someone who had actually gotten the Nevis Island Administration's permission to undertake a project to protect and sustain the environment. Her complaint on this claim is that the development would have a detrimental impact on the marine environment abutting the Development. She has identified the EIA as being the main plank of her complaint contending that it was inadequate since it did not address the impact the Development would have on the identified marine environment.

[8] There were public consultations held. But the Claimant did not participate nor respond to encouragement that she respond. She chose instead to make contact with the Deputy Premier of the Island, to raise her concerns. This is turn led to him initiating two failed attempts by the Claimant and the Developer to respectively buy the land in question. (During all this, she employed experts and lawyers to advise her on the environmental concerns and her rights related to concerns which she believed existed. The last attempt to buy the property was aborted by the Developers on the 29th September 2015. The Claimant, however did not take any action until after she saw workers resume work on the development in December 2015. On the 13th January 2016, following a pre-action notice dated the 11th January 2016 and received by the first and second Defendants on the same 13th January 2016, she commenced proceedings for leave to apply for judicial review. At

the leave stage delay was raised as a bar to leave being granted, but leave was nonetheless granted as the court considered that the Claimant's uncontradicted evidence showed that both the Nevis Island Administration (the Defendants) and the Developer had engaged the Claimant to sell the subject property as a direct result of her complaints which in turn led to the delay. The court did not consider at that stage that the Claimant could be blamed for the delay. A public interests element had also grounded this discretion in permitting the Claimant to apply for judicial review. (The events would be more detailed below).

The Issues

[9] Having regards the claim, the evidence and the submissions filed by all sides there were essentially two main issues for the court determination on this matter.

[10] The primary and first matter for the court was whether the decision complained was a proper one or whether the decision to use the EIA to grant planning permission was so unreasonable that no reasonable Director of Physical Planning could have relied on it to grant permission?

[11] The second matter was whether the court, having considered the delay at the leave stage and granting leave notwithstanding, is permitted to revisit the issue of delay and consider whether it should operate as a discretionary bar?

Issue No. 1 - Whether the decision to use the EIA to grant planning permission was so unreasonable that no reasonable Director of Physical Planning could have relied on it to grant permission? - Discussions and Findings

[12] The contention that the Candy Development Project should not have been allowed to proceed, was grounded on allegations that there was an absence of a proper and adequate Environmental Impact Assessment (EIA) related to the Development, and that it was unreasonable for the Defendants to rely on the EIA submitted to grant permission.

There was no doubt in this case that one was required and there was also no doubt in my mind that such an EIA was required to be adequate for such a development. Was this EIA adequate?

[13] On the application for leave there appeared to have been an acceptance that the EIA did not address the environmental impact of the project of the abutting coastal area. The court at the leave stage had opined that for a development of this nature abutting the sea, it was necessary that the EIA address the impact that the development would have on that marine environment.

[14] At the hearing, the Defendants not only sought to have the court to reconsider its earlier thoughts on the matter, but also led evidence in an attempt to show that the EIA was not deficient but did in fact treat with the marine environment and that these were considered in the grant of permission. In the interests of justice, the Defendants were allowed to lead this evidence after they sought leave and was allowed to resile from their earlier concession that the EIA was in fact deficient. At paragraph 7 of her witness statement, Ms. Rene Walters stated:

> *"I deny that the EIA was not a complete and proper EIA as the Claimant alleged or at all. It is important to note that the Ordinance does not specify the form and content of an EIA. The Purpose an EIA is to identify potential environmental impacts for a proposed development. The EIA should also propose means to reduce or avoid any significant impacts identified. It therefore alerts the decision maker as to the modifications the project may need to prevent environmental deterioration. In this vein, whilst the EIA submitted by the Developer for HTRIP admittedly did not include a section specifically dedicated to the coastal area or marine environment, it nonetheless identified potential consequences HTRIP could have on the environment. It also outlined mitigative measures. It did so despite the indication on its face that it would not."*

[15] The DPP sought to explain that the earlier concession that the EIA did not address the marine environment was an error made when she was responding to the affidavit supporting the application for leave in 2016. She stated that when she was preparing for this claim, she realized that at the leave stage she had failed to review the EIA properly and had noted in EIA's overview at the time, that it stated that it will only consider terrestrial aspects of the project and that a later EIA would address the marine aspects;

she relied on that statement in the EIA to prepare that first affidavit. In her affidavit seeking leave to resile from the earlier concession, she stated that when she had originally reviewed the EIA 'she would have recalled that whilst it did not address the coastal impact in the usual way, it did address it in section 5.0 and 7.0.'

[16] This was a disastrous attempt. It became clear to the court from a careful examination of this evidence and the responses of Ms. Walters in cross examination, as well as her demeanour, that this attempt to claim that the EIA had dealt with the marine environment was an afterthought, was not to be believed, and one which fell way short of its mark. In this regard the court found the Claimant's analysis of this evidence in final arguments to accord with the court's own views in the matter of the credibility of Ms. Walters.

[17] I am further satisfied having examined the EIA and heard the evidence, that this EIA did not address or adequately address the marine environment which abutted the Development. Ms. Walter's evidence related to marine components including her references to sections 5.0, 6.0 and 7.0 of the EIA report, was affected by this court's view of her credibility as to whether when she had reviewed the report, and in any event, whether she had in fact considered these matters or whether these were all afterthoughts on the matter.

[18] Further and in any event, this aspect of her evidence was overshadowed by her various admissions in cross examination when she accepted that the EIA did not address a number of matters which it ought to have addressed. She accepted that the EIA should have addressed the impact on the coral reefs, but it did not do so. In this context she accepted that this Development had the potential to impact the coral reefs. She also admitted in cross examination that the EIA should have addressed but failed to address matters such as baseline water quality, coastal erosion, the sewage treatment plants actually constructed, and the 'other elements that can affect turtles' other than lighting. In short, the EIA's own admission that it did not treat with the coastal impact was not contradicted all by any evidence led by the Defendants.

[19] Further, the inadequacies of the EIA were also underscored by the uncontradicted expert's evidence of Dr. Morrison. I accept her evidence as credible and reliable.

[20] Her evidence assisted this court in confirming that inadequacies of the EIA. I am satisfied that the matters set out in sections 5.0 and 7.0 of the EIA could not address the concerns which were raised by Dr. Morrison.

[21] On the hearing of the application for leave this court opined that:

> "I agree that a report is not required touch on every aspect of investigation that may be available. I can hardly make the point more clearly than the passage above. I do note the emphasis placed by learned counsel for the respondent, but this very passage makes the important point that (and I will repeat for emphasis) when Cripps J stated:
>
> > *"In my opinion, there must be imported into the statutory obligation a concept of reasonableness … [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations."*
>
> The concept of reasonableness goes to the core of this EIA or any EIA which is required for planning permission by any legislation. Legislation which mandates that an environmental impact assessment must be provided and used as the basis for the grant or refusal of permission, impliedly required at its bare minimum that such an EIA must meet such standards as to be able to alert the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out the activity". In this regard the EIA must be comprehensive in its treatment of the subject matter and be objective in its approach. Regardless, therefore, of whether or not there are expressed and specific provisions or regulations which sets out the form and content, any environmental impact assessment which falls

substantially short of this implied standard is deficient and woefully inadequate for the purposes of which it is required.

[22] I see no reason to change these views and I now hold that this EIA was inadequate.

[23] The Defendants argued that even if the court were to find that the EIA was inadequate, it did not automatically mean that the decision granting permission was bad. The question for the court was whether acting on the said EIA was within the range of possible reasonable responses of a decision maker standing in the shoes of the Defendants.

[24] The Defendants relied on **Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment and Another (No. 2)** a case dealing with the reasonableness of the Departments of Environment's decision to act on a basis of an EIA which had some shortcomings. The PC stated:

> *(i) although the EIA contained a statement that the bed of the river was granite and there was substantial doubt whether or not this was accurate, even if the bed of the river should prove to be sandstone it cast no doubt upon the suitability of the site as a site for a dam. The geological error did not prevent the EIA from satisfying the requirements of the legislation or fronl forming a proper basis for an approval by the Department of Environment ("DoE"); and*
>
> *(ii) the decision whether the EIA complied with the Act and the Regulations made under it was primarily entrusted to the DOE and its decision to accept the EIA could not be set aside except on established principles of administrative law, namely on the ground of irrationality or that the DOE had acted so as to frustrate the purpose which an EIA was intended to serve."*

[25] The Defendants also pointed this court to a number of authorities which the court considered helpful in the task at hand, including **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1947] 2 ALL ER 680 and ***Secretary of State* for Education and Science v Tameside Metropolitan BC** [1976] 3 All ER 665 and 695. Reference was made to an observation made by Lord Diplock in the latter case where he stated:

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

[26] The Defendants also relied on **Nottingham County Council v The Secretary of State for Education** to argue that 'in the absence of some exceptional circumstances 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'.

[27] The **Nottingham County Council** case was about a policy and economic decision made by the Secretary of State and approved by the House of Commons. In particular, it related statutory guidance made by the Secretary of State and then approved by the House of Commons which was to inform expenditure in relation to local authorities. Some of these authorities complained that 'the burden which the guidance imposes on some authorities, … is so disproportionately disadvantageous when compared with its effect on others that it is a perversely unreasonable exercise of the power conferred by the statute on the Secretary of State. The authorities complained that the guidance was Wednesbury unreasonable. In rejecting this complaint, Lord Scarman stated:

> *"But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity.*
>
> *For myself, I refuse in this case to examine the detail of the guidance or its consequences. My reasons are these. Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses. The evidence comes nowhere near establishing any of these propositions. Nobody in the case has ever suggested bad faith on the part of Secretary of State. Nobody suggests, nor could it be suggested in the light of the evidence as to the matters he considered before reaching his decision, that he had acted for an improper motive. Nobody now suggests that the Secretary of State failed to consult local authorities in the manner required by statute. It is plain that the timetable, to which the Secretary of State in the preparation of the guidance was required by statute and compelled by circumstance to adhere, involved him necessarily in framing guidance on the basis of the past spending record of authorities. It is recognised that the Secretary of State and his advisers were well*

aware that there would be inequalities in the distribution of the burden between local authorities but believed that the guidance on which he decided would, by discouraging the high-spending and encouraging the low-spending authorities, be the best course of action in the circumstances. And, as my noble and learned friend Lord Bridge demonstrates, it was guidance which complied with the terms of the statute. This view of the language of the statute has inevitably a significant bearing on the conclusion of 'unreasonableness' in the Wednesbury sense. If, as your Lordships are holding, the guidance was based on principles applicable to all authorities, the principles would have to be either a pattern of perversity or an absurdity of such proportions that the guidance could not have been framed by a bona fide exercise of political judgment on the part of the Secretary of State. And it would be necessary to find as a fact that the House of Commons had been misled: for their approval was necessary and was obtained to the action that he proposed to take to implement the guidance."

[28] The House of Lords was at pains to point out that what was at stake was a policy and economic decision of the Secretary of State which had received the approval of the House of Commons. As I understand that case, the reasonableness challenge for such decisions had to be tailored to fit the context. In fact, His Lordship affirmed the continued relevance of the traditional Wednesbury test and did so by reference to Lord Diplock's speech in **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, where his Lordship stated:

> *The ground on which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways: by a mistake of law in misconstruing the limits imposed by statute (or by common law in the case of a common law power) on the scope of the power; by procedural irregularity; by unreasonableness in the Wednesbury sense; or by bad faith or an improper motive in its exercise.*

[29] Decisions which are 'Wednesbury reasonable' or irrational may often be seen as separate and apart from decisions made in bad faith or from an improper motive. Even so, there may equally be an overlapping of these qualities. As far as this case is concerned, the test is the 'Wednesbury' test of reasonableness or irrationality. As Lord Diplock stated in the Civil Service Unions case:

> *By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury *unreasonableness' (see* Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 ALL ER 680, [1948] 1 KB 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."

[30] This is the test and it is for a judge to accept the mantle of reasonableness and assess the decision.

[31] The Defendants' task was to grant planning permission and they had to follow the guidance contained in the legislation. So, again I ask myself the question, 'was the Defendants' reliance on this EIA within the range of reasonable responses that a reasonable person standing in their shoes would make? Was this decision to rely on this EIA irrational in that it defied logic in that no sensible person would have relied on it.

[32] As I noted at the leave state, this EIA only spoke to the land-based impact of the project. 'It did not address the impact that this project would have on the marine aspect of area.' The attempts by the Defendants to get this court to change that view was not supported by any credible evidence. What effectively one is left with is an EIA which has self admittedly failed to treat with the marine environment.

[33] How can a reasonable DPP or DPA having decided that an EIA was necessary for such a development, then go to rely on that EIA to grant permission where a significant part of the environment has not been addressed by the EIA. This defies logic. I humbly say that I am of the view that no sensible DPP or DPA would have relied on this EIA. I am fortified in my earlier view that "that is a startling omission that ought to tell any reasonable decision maker standing in the shoes of the Defendants and considering whether to grant planning permission that this EIA is not what it says it is. How can an environmental impact assessment be adequate when it excludes a substantial portion of the environment which is likely to be affected? In fact, most of the impact of any project which abuts the sea would be to the coast and marine life in that area. This environmental impact assessment omits that. This case is very different to the Belize case in which questions were raised as to whether the EIA accurately portrayed the river bed as being comprised of sandstone or

whether it was in fact granite. To my mind it would have been a different thing entirely in that case **if nothing was ever said in that EIA of the river**. This is more the case here. To put it one way, the EIA has ignored more than half the environment."

[34] The failed attempt of the Defendants to prove that the EIA did address the marine environment and that this was considered gave strength to the Court's conclusions. There has really been nothing shown which leads me to find that the decision which was made, and the reliance on the EIA was one on which a reasonable decision maker standing in the shoes of the Defendants could have acted on to grant permission.

[35] The Court affirms its views at the leave stage that 'planning laws which mandates that an Environmental Impact Assessment must be provided and used as the basis of for the grant or refusal of planning permission, without specifying the form and contents of such EIA, impliedly require at its bare minimum, that such an EIA 'must be comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement *that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity'.* This implied statutory obligation imports a concept of reasonableness. Regardless, therefore, of whether or not the Nevis Physical Planning and Development Control Ordinance Cap 6.09 contain expressed and specific provisions or regulations which sets out the form and content, any environmental impact assessment required under this Ordinance which falls substantially short of this implied standard is deficient and woefully inadequate for the purposes of which it is required.

[36] This court therefore finds that the Claimant has presented a meritorious claim for relief by way of judicial review.

[37] The question then for the court is whether the delay in this case should operate as a discretionary bar.

Issue No. 2 - Whether the court, having considered the delay at the leave stage and granting leave notwithstanding, is permitted to revisit the issue of delay and consider whether it should operate as a discretionary bar? – Discussions and Findings

[38] On the application for leave the issue of delay was addressed with regards the unchallenged evidence of the Claimant. She gave various explanations for the 9 months delay seeking effectively to lay much of it at the feet the Nevis Island Administration (effectively the Defendants) and the Developer.

[39] In granting leave to apply for judicial review, the court treated with the issue of delay and ruled as follows:

> *"There was a substantial delay before the Claimant moved to the court on her application for leave to apply for judicial review. The issue of delay was addressed at the leave stage and the court considering the evidence on the affidavits decided that it appeared that there was a valid objective reason for this delay. Both the Nevis Island Administration, through its high ranking officials and the Developer had engaged the applicant in discussions to sell the subject property after she had complained about the project and the deficient EIA. These discussions even went as far as a draft agreement of sale and purchase of the subject land, when the Developer withdrew from the sale. The applicant could hardly be blamed if she relied on these negotiations to not proceed to court earlier on this application for leave. Thus, even if there has been delay and there had been some impact on the developer, this delay would not operate in this case as a discretionary bar.*
>
> *"The exercise of this discretion has also been grounded in the finding that this application raises matters of considerable public interest, namely that this development project may arguably pose a considerable marine risk in the area where development is taking place. Further, it is in the public interests that in an economy which is substantially dependent on tourism and property development, that the planning department perform its duties related to planning permissions with regard to the proper principles. This would ensure that where an EIA is required it objectively treats in a comprehensive manner with the subject matters so that the Administration and the public could reasonably know what impact such a project would have on the environment."*

[40] At the hearing of this claim, this issue was raised frontally by the evidence which was led and elicited in cross examination of two primary witnesses, namely the Claimant herself and the Deputy Premier, the Honourable Mark Brantley.

[41] The Defendants have invited this Court to 'revisit the issue of unreasonable delay and to find that the grant of relief in the face of Ms. Bass' failure to act promptly would be highly detrimental to the requirements of good administration in that:

(i) members of the public, planning officials and also developers should be able to rely on planning decisions; and

(ii) they should know where they stand and how they can order their affairs in the light of the decision in question. They should not be in a state of flux.'

[42] The court has no doubt that it may revisit the issue of delay at the hearing of a claim for judicial review where delay was earlier dealt with at the leave stage. Rule 56.5(1) of CPR 2000 is the source of this jurisdiction. It states:

Delay

56.5(1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case where the judge considers that there has been unreasonable delay before making the application.

(2) When considering whether to refuse or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to:

(a) detrimental to good administration; or

(b) cause substantial hardship to or substantially prejudice the rights of any person.

[43] The operation of the rule in this context was explained by the Court of Appeal in **Roland Browne v. AG and PSC** [2010] ECSCJ No. 331, where the Court held that:

"That at the hearing of the judicial review claim, apart from considering the merits of the claim (usually on the grounds of either illegality, irrationality, and or unfairness) the judge may revisit the issue of unreasonable delay where the claim has merit, in determining whether to grant the relief sought. There is no unqualified right to any of the remedies claimed. In exercising its discretion as to whether to grant any relief the court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person, or substantially prejudice the rights of any person. Despite the success of the judicial review claim, the relief

may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule."

[44] In deciding whether to revisit this issue I have found the learning in **R v Lichfield District Council and Christopher J.N. Williams ex parte Lichfield Securities Limited** [2001] EWCA Civ 304 as instructive and helpful. Speaking of promptitude and delay, the UK Court of Appeal stated:

> *"[34] The critical question in this case, however, is at what stage or stages the prescribed tests may be applied or – importantly – reapplied. Here the Rules and the Act provide most of the answer. Regardless of whether it involves repetition of arguments on promptitude already considered at the leave stage, undue delay is placed by s.31(6)(b) on the agenda at the substantive hearing. On this short ground it seems to us that, notwithstanding Keene J's finding of promptness, the related question of undue delay lay within Turner J's jurisdiction at the substantive hearing. Thus far we respectfully endorse Simon Brown J's conclusion in RSPB. But it does not follow, in our judgment, that the judge at the substantive hearing should proceed as if the issue had never previously arisen in the case, at least where it had been properly argued out by the parties at the leave stage. It is necessary to place beside Simon Brown J's example of a full divisional court being told that it is bound by a single judge's view of promptness equally undesirable – and today more likely – situation of one judge of the Administrative Court effectively acting as a court of appeal from another, or (as happened here) deciding an issue without reference to a fellow judge's earlier decision inter partes on substantially the same question and upon the same materials. While ultimately it is a matter for the judge hearing the substantive application, we consider that the appropriate course in a situation as arose both in RSPB and before Turner J is that the respondent should be permitted to recanvas, by way of undue delay, an issue of promptness which had been decided at the leave stage in the applicant's favour only (i) if the judge hearing the initial application has expressly so indicated, (ii) if new and relevant material is introduced on the substantive hearing, (iii) if, exceptionally, the issues as they have developed at a full hearing, (iii) if, exceptionally, the issues as they have developed at the full hearing put a different aspect on the question of promptness, or (iv) if the first judge has plainly overlooked some relevant matter or otherwise reached a decision per incuriam. This is, today, no more practical case management under the Civil Procedure Rules, in particular CPR 3.1(2) (k), which permits the court to exclude an issue from consideration, but more generally under CPR 1.4(2)(c) and the overriding objective set out in CPR 1.1. It also gives effect to the principle of judicial comity at first instance spelt out by Robert Goff LJ in R v Greater Manchester Coroner, ex parte Tal [1985] QB 67, 81A-C. The second judge, in addition, must have in mind the need to prevent circumvention of CPR 54.13, which provides: "Neither the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed.""*

[45] It is with these principles in mind that I have chosen to revisit this issue. By submissions, the Claimant has also accepted that even though this court at the leave state did not expressly state that delay as an issue would be revisited, this court was nonetheless entitled to consider the other gateways set out in **Lichfield's** case.

[46] When this matter was traversed at the leave stage, the Claimant's evidence had been uncontradicted and the court was left with the view that the Nevis Island Administration as a whole including the first and second Defendants had somehow allowed the Claimant to lulled into a sense of security. Further, that Mr. Mark Brantley, the Deputy Premier had himself acted as an agent of the Developers.

[47] New evidence at the trial, especially the evidence of the Claimant under cross examination and that of Mr. Brantley revealed that this factual impression was not only wrong but that the Claimant was herself substantially the cause of her own delay. Further, having regards to the evidence while the court is satisfied that the Claimant intended that Mr. Brantley should use his position as Deputy Premier to somehow revoke the Defendant's grant of permission, her assumptions on this were unjustified. In this context the Developers' own role in the delay did not excuse the Claimant's substantial delay.

[48] As events unfolded, the court is satisfied that the Claimant became aware of the Development about 8 months before planning permission was granted when she first expressed her concerns to the Deputy Premier, Mr. Brantley. Mr. Brantley primary response to her involved a suggestion that she should consider buying the land from the developers. He later informed her that they were willing to sell, and he then introduced the Claimant to his wife who acted as a real estate agent for the developers. Those talks fell through and the developers were no longer interested in selling as they had 'modified their plans to build a more high-end product'.

[49] At that stage the Claimant must have known that an application for planning permission was pending before the Defendants. There were public consultations on the proposed development, but the Claimant did not participate. A comment from her on this was that

she 'received no notice of a public hearing' on the project. But she herself stated in that email sent to Mr. Brantley dated the 14th August 2014, that… "but just Monday and again today – I received from the Nevis Historical Society a proposed plan for development called Candy Resort to which we are encouraged to respond'. This court has found that before planning permission was granted, she took no steps to discover whether her concerns were being addressed. She stayed aloof of the process.

[50] When she first emailed Mr. Brantley in August 2014, she told him that she was not ready to take any official action.

[51] Evidence at trial showed that Mr. Brantley had no communication with the Defendants on any of the concerns which were raised with him. He could not have been expected to have such conversations as these were matter statutorily entrusted to the Defendants. He himself had no ministerial or other authority over the planning department.

[52] Upon learning that permission that had been granted in April 2015. About two months later she began to assemble her legal and expert team. No reason for this period of delay was revealed at trial. The Claimant sought legal advice and again sent emails to Mr. Brantley raising her concerns about the legal and environmental shortcomings of the development. She attached a legal opinion from her lawyers. That legal opinion spelt out to the reader that the Claimant was being advised to make contact with the Defendants and raise her concerns. Mr. Brantley's evidence that he did not raise these concerns with anyone was therefore not surprising.

[53] What is also significant for this court is that under cross examination, when asked what is was that she expected Mr. Brantley to do with her concerns, she stated, ''that was a matter for him'. she also gave evidence that he was 'welcome to use the information [of her concerns] however [he thought] best'. These statements and her evidence generally convinced this court that she knew of the separation of roles between the Deputy Premier and the Defendants.

[54] This was clearly someone who was well aware of her rights on the matter (she admitted as much at the trial) and did know what steps she had to take and how expeditiously she had to act is she were to challenge the decision to grant permission.

[55] The Claimant's lack of alacrity is to be viewed in context of her communications with Mr. Brantley, his responses and her subsequent conduct. In cross examination she accepted that Mr. Brantley never addressed her concerns in that he never gave her any indication that he was going to take any steps related to those concerns. It is significant to the court that the only email to her in response from Mr. Brantley on her concerns was one dated the 29th June 2015 where he told her that 'quite out of the blue' that the Developers had again expressed an interest in selling the subject property.

[56] At the trial the court became satisfied that the Claimant was aware that Mr. Brantley was again not speaking for the developers. He had made this quite clear to her. I accept his evidence on this. It is likely that she intended that Mr. Brantley would communicate with the Defendants and have them revoke their grant of permission. This is a troubling matter as even though this Claimant was surely acting as a of protector the environment, she was being advised by highly respected and skilled lawyers and she would have been aware that Mr. Brantley could not openly seek to direct the Defendants relating to any grant of permission. This was a matter which required an open and transparent approach. At the least she should have written to the Defendants copying all her concerns she had shared with Mr. Brantley.

[57] This court finds that the Claimant knew that neither the Nevis Island Administration (Mr. Brantley) nor the Defendants had anything to do with the discussions with the Developer. Those talks fell through and this was made known to the Claimant by a letter dated the 29th September 2015 from the attorney for the Developers, which informed the Claimant that 'its Board of Directors have met and decided for financial reasons, it is not in their best interest to proceed with the sale. As you may be aware, the property is an approved development for economic citizenship and several of CDCL's existing and reserved clients wish for the company to proceed with the intended development."

[58] At the leave stage the court had considered on the uncontradicted evidence of the Claimant, that it had been reasonable for her to assume that the Developers had been made privy to her concerns and that Mr. Brantley was acting as an agent of the Developers and that he had somehow expressed that he was addressing those concerns as an official of the Nevis Island Administration. However, having regards to the court's finding on the extent of the interaction between the Claimant and Mr. Brantley, the court finds that there was really no good reason why the Claimant should have assumed that the developers would themselves address the concerns as she stated at the leave stage and in her witness statement at trial. Such a conclusion is also supported by the fact that after the first sale attempt fell through the Claimant must have known that no one had taken any steps to address her stated concerns.

[59] As regard her belief that Mr. Brantley was communicating her concerns to the planning, she accepted in cross examination that when she sent her email dated 26th June 2015 to Mr. Brantley she was merely expressing a preliminary concern. She accepted that she was not ready for him to take any 'official action'. This contradicts her statement that she expected him to relay her concerns. Thus, it ought not to have surprising to the Claimant that by September 2015, there was no official action taken to address any of her concerns. With the advice that she was receiving it is also difficult to see how she could have assumed that Mr. Brantley would have the kind of influence over the Planning Department so that the permission could be rescinded; she must be taken to know that he did not have that kind of authority.

[60] This court finds that there could have been no reasonable basis for her to not take any steps to challenge this decision or have her concerns addressed before she saw workmen on the site in December of 2015. Having found that the Claimant knew that Mr. Brantley was not acting as an agent for the Developers, and could not speak for the Planning Department, the Claimant ought to have been more alert to the sale falling through on a second occasion. In any event even if the Claimant is not fully responsible for all the two periods which involved the failed attempts to buy the subject property, she had no good

reason for the other various periods of delay. Having regards to Mr. Brantley's responses to her, she ought to have realized that she should take the steps her lawyers were advising her to take, and to take those steps expeditiously. In fact, the Claimant's evidence made it quite clear that she had her lawyers at readiness.

[61] This Claimant had been driven into action well before permission was granted. Since that time, she was seized of the environmental concerns and had started making contact with Mr. Brantley. Whilst the period of delay is to be counted from the date the decision is made, the Claimant's awareness that a development was being contemplated is relevant in considering the reasonableness of the Claimant's conduct and whether she acted promptly. This was a Claimant who was more prepared to engage senior government officials but was not at all inclined to engage the proper channels to address her concerns with the Defendants. She was a well informed and advised person and yet she deliberately chose not to follow the normal channels. Let me hasten to add, that in my view there is nothing wrong with someone speaking to a Minister of government with regards a decision taken by an independent statutory body. But where that persons intends to affect the decision-making powers of that independent body or seek to have a decision made by that body varied, then it would not be proper to simply communicate with government minister who have no control over that body. That person should also make contact with the instant body and communicate his or her concerns. This is how persons should communicate with government officials in matters such as this. The Court has accepted that the Claimant is a protector of the environment, but her insistence to communicate only with Mr. Brantley on this issue was at least unhelpful and at most inappropriate. Wherever on that scale this falls, these are the kinds of approaches which often affect the integrity of governments of the region. It made the delay worse. It has troubled the court.

[62] This court's conclusions on the question has delay has opened the door for the court to reconsider the issues related to those other matters which the court must consider when deciding whether to refuse relief on grounds of delay. CPR Rule 56.5(2) states clearly that the court must have regard to whether there has been substantial detriment to good administration, and or any hardship or prejudice which may be caused to any third party.

Detrimental to Good Administration

[63] There is little doubt that the delay and the time spent on this matter has had an effect on good administration. As Lord Diplock pointed out in **O'Reilly v Mackman** [1983] 2 A.C. 237, 280-281:

> *"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."*

[64] How substantial would be the detriment to good administration in any given case would depend on the length of the delay, and the impact it has on the administration.

[65] An important consideration is the impact that passage of time will have on the re-opening of a decision as Lord Bridge pointed out in **R v Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell** when he stated:

> *"Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened."*

[66] In this case, not only has the developers expended considerable sums on the actual projects, but there have been many contracts entered with third parties and other government departments have been engaged as a direct result of the project. For instance, several persons have been granted citizenship having purchased units in the project. What happens to this project will have far reaching consequences for those persons and may go to the root of their grant of citizenship. The integrity of the functioning of the Nevis Island Administration will likely be affected by the re-opening of this decision.

Substantial Hardship

[67] The Claimant in this case must be taken to know approximately six months before she filed her application for leave that this is the kind of project which would require substantial investment.

[68] Moreover, as the evidence has revealed, the developers have to date completed one third of the project. There was a stay by consent on further construction works. This has meant that the six buildings comprising 18 condominium units which have been constructed are now unconnected to the utilities grids. Major aspects of these units have yet to be completed. While the developers have entered into sale and purchase agreements for a number of the units, the units cannot be occupied. The government has granted citizenship to the buyers on the basis of the purchase of those units. Those persons are presently unable to occupy their units as the development is only one third completed and is presently uninhabitable

[69] The developers have so far expended several millions of dollars. They are contractually bound with regards several of their units and may face legal consequences of this project is to be shelfed. Embarrassment is being caused by this delay.

[70] After months of work, stoppage has also caused workers being laid off and an adverse impact on cash flow. Foreign workers have also been laid off and some have had to return to their countries. This has resulted in the loss of approximately EC$90,000.00 in application fees for work permits and housing costs for workers. To date, the developers have spent over EC$2,000,000.00 in wages and salaries and paid over EC$400,000.00 in social security and related payments. There is presently a monthly maintenance costs of approximately EC$23,000.00. The delay has also costs deterioration and destruction of materials and tools. This is estimated at approximately EC$583,000.00.

[71] It has been stated that the delay and the litigation has now caused the developers to further scale down their project to one third of what had been approved. This will have an economic cost for the developers.

[72] The court is convinced that the developers have been significantly affected by the delay and this claim for judicial review.

Public Interest

[73] On the leave application, the court had considered that the public interests had also supported the claim going forward. Leave was granted as it was considered that the application had raised matters of considerable public interest, namely that this development project may arguably pose a considerable marine risk in the area where development is taking place. Further, that it was also in the public interests that in an economy which is substantially dependent on tourism and property development, that the Planning Department perform its duties related to planning permissions with regard to the proper principles. This would ensure that where an EIA is required it objectively treats in a comprehensive manner with the subject matters so that the Administration and the public could reasonably know what impact such a project would have on the environment.

[74] That such public interest matters may impact the grant of leave and relief was supported by the case **R v Pembrokeshire County Council Coast National Park Authority, ex parte Hardy and Maile**. However, even in that case, the judge had refused the grant of leave to apply for judicial review because any public interest could still not outweigh the hardship and prejudice which would be caused to the interested parties. Like this case, the judge in Maile had no doubt that the issues raised in Maile were of 'considerable public importance' nor did the judge doubt the 'genuineness of the claimant's concerns'.

[75] These public interest matters together what was believed to be the Claimant's reasons for the delay had grounded the grant of leave. The court has now found that the Claimant has not acted reasonably in delaying more than 9 months to take action. This coupled with the substantial hardship which will likely be caused to the developers and third parties and the

adverse impact on the Nevis Island Administration has altered the court's views on whether the court should grant relief in this case.

[76] For all these reasons, delay will operate as a bar to relief in this case.

Costs

[77] That leaves one matter. That is the issue of costs. The court is well aware that costs in these proceedings should not be granted against an applicant unless the Applicant has acted unreasonably in making the application or in its conduct. The Claimant's conduct has grounded a costs order in this case. (See **In the Application of Cable & Wireless Jamaica Ltd** Supreme Court No. M-98 of 1998 (Cited in Ramlogan R. 2007 "Judicial Review in the Commonwealth Caribbean" Commonwealth Caribbean Law Series, Routledge-Cavendish).

[78] This is a Claimant who being aware of public consultations on the proposed development, failed to participate. Even though well advised, she chose to engage politicians when she should have engaged the Planning Department. She may have intended a soft approach on the mater, but it led to an administrative bind and has adversely affected the third party. This Claimant ought to have gone about this in the way she had been advised.

[79] That a Defendant may be entitled to costs does not mean than an intervening party should also get his costs. His entitlement to costs must be grounded on whether he added to or affected the outcome. The Developer was also allowed to intervene. This is not a case where the Intervening Party's presence did not add at all to the outcome. Their presence in the proceedings was also relevant to show the hardship which flowed from the challenge to the decision under challenge. The Developer actually consented to work stopping on the development as part of their role in these proceedings which in turn has led to further prejudice.

[80] For these reasons, costs will be awarded in favour of the Defendants and the Intervening Party to be assessed if not agreed as stated in my order made in January 2018.

Disposition

[81] Having found that there is merit to the challenge against the decision, the court has nonetheless in the exercise of its discretion refused relief on the basis of delay. The Claim is therefore dismissed and costs is granted to the Defendants to be assessed if not agreed within 21 days of the order made on 31st January 2018.

[82] The court would like to express its gratitude to counsel for their assistance and for their patience.

Darshan Ramdhani
High Court Judge (Ag.)