THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0241

IN THE MATTER of Judicial Review of the Notice dated 6 February 2017 made pursuant to Section 61(1)(e) of the Saint Christopher Air and Sea Ports Authority Act CAP 8.01 of the Laws of the Federation of St. Christopher and Nevis

BETWEEN:

WESK LIMITED

Claimant

and

SAINT CHRISTOPHER AIR AND SEA PORTS AUTHORITY

Defendant

Appearances:

Dr. Henry Browne Q.C., with him, Mr. Victor Elliot-Hamilton for the Claimant
Mr. Fitzroy Eddy for the Defendant

2018: December 5
2019: January 15

JUDGMENT

[1] VENTOSE, J.: The Claimant performs a vital service to the twin island Federation of Saint Christopher and Nevis by operating a passenger cargo ferry, the M.V. Sea Hustler (the "Ferry"), primarily between Basseterre, Saint Christopher and Charlestown, Nevis. The Claimant has been operating the Ferry for approximately 20 years having received Cabinet approval to do so on 21 September 1999. The Defendant is responsible for setting the schedule that all ferry operators must follow. The ferries depart from and arrive at the Basseterre Ferry Terminal, which is controlled and managed by the Defendant. On 6 February 2017 the Defendant published a notice (the "Notice") as follows:

> The Saint Christopher Air and Sea Ports Authority (SCASPA), in accordance with Section 61 (e) (sic) of the Saint Christopher Air and Sea Ports Authority Act, hereby informs that all loading and unloading (handling) of commercial cargo by ferry operators at the Basseterre Ferry Terminal would be discontinued as of Monday, February 6th, 2017.
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> The recent increased volume of passenger traffic through the Basseterre Ferry Terminal and the heighten risk to such passengers due to the concurrent handling of commercial cargo has necessitated the cessation of the latter at this facility. All commercial cargo should be handled at the Bird Rock Cargo Port, which has the requisite infrastructure to accommodate this type of operation.

[2] The Claimant filed an application for leave to apply for judicial review on 21 August 2017, which was granted by Lanns J on 21 November 2017. The Claimant filed an application for judicial review on 7 December 2017 seeking: (1) a declaration that the Notice made by the Defendant on 6 February 2017 is unreasonable and irrational; (2) a declaration that the Notice was made in breach of the principles of natural justice; (3) an order of *certiorari* to quash the Notice; and (4) damages, including specific damages for loss of business profits of $193,893.51.

Ultra Vires

[3] It is an elementary principle of administrative law that a public authority must act in accordance with specific powers granted to it by statute. No doubt the Defendant is a public authority since it was established by section 3(1) of the Saint Christopher Air and Sea Ports Authority Act CAP 8.01 of the Laws of Saint Christopher and Nevis (2009 Revised Edition) (the "Authority Act") and exercises

statutory powers under the provisions of the Authority Act. The Saint Christopher Air and Sea Ports Authority (the "Authority") is given wide-ranging powers under section 3(2) of the Authority Act. The Authority shall consist of not less than seven nor more than eleven members appointed by the Minister (section 4(1)). The Authority may delegate to any member or committee of the Authority the power and authority to carry out on its behalf such duties as the Authority may determine (section 10(1)). The Authority shall appoint a General Manger (section 12(1)) who shall be the chief executive officer of the Authority and shall exercise all the functions entrusted to him or her by the Authority Act and any regulations (section 12(2)). Section 17 provides for the powers and duties of the Authority as follows:

> 17. Powers and duties.
>
> (1) Subject to the provisions of this Act, the Authority is hereby empowered to provide in accordance with the provisions of this Act and any regulations, a co-ordinated and integrated system of airports, seaports, lighthouses and port services and to levy charges and dues for the use of the facilities and services provided.
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> (2) Subject to the provisions of this Act, the Authority may, for the purpose of performing any of its functions under this Act, do anything and enter into any transaction which, in the opinion of the Authority, is necessary to ensure the proper performance of its functions.
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> (3) In particular and without prejudice to the generality of the provisions of subsections (1) and (2), it shall be the duty of the Authority
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> (a) to operate the ports as appears to it best calculated to serve the public interest;
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> (b) to regulate and control navigation within the limits of such ports and their approaches;
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> (c) to maintain, improve and regulate the use of such ports and the services and facilities therein as it considers necessary or desirable;
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> (d) to provide for such ports and the approaches thereto such air traffic control services, beacons, buoys and other navigational services and aids as it considers necessary or desirable;
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> (e) to exercise the duties and functions relating to shipping, aviation and navigation exercisable under the provisions of any other law; and
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> (f) to carry out exclusively the loading, unloading, landing and carrying of all goods to and from all ships and aircraft in a port:

> Provided that the Authority may, with the approval of the Minister, authorise in writing any person, corporation or other body to carry out the functions stated in this paragraph subject to such conditions, and restrictions as the Authority may consider desirable.

[4] At this juncture, it might be necessary to repeat the contents of the first paragraph of the Notice:

> The Saint Christopher Air and Sea Ports Authority (SCASPA), in accordance with Section 61 (e) (sic) of the Saint Christopher Air and Sea Ports Authority Act, hereby informs that all loading and unloading (handling) of commercial cargo by ferry operators at the Basseterre Ferry Terminal would be discontinued as of Monday, February 6th, 2017.

[5] That sentence informs of the following: (1) the Authority is acting pursuant to a specific power granted to it by section 61(1)(e) of the Authority Act; and (2) that the prohibition of "all loading and unloading (handling) of commercial cargo by ferry operators at the Basseterre Ferry Terminal" falls within the powers conferred upon the Authority pursuant to 61(1)(e) of the Authority Act.

[6] Section 61(1)(e) provides as follows:

> 61. Regulations.
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> (1) The Authority may, with the approval of the Minister, make regulations generally with respect to the maintenance, control and management of the ports and the approaches thereto, the services performed, the lighthouses, communication, navigation and other facilities provided by the Authority, and for the maintenance of order in any ship or aircraft, or on any premises used by or for the purposes of the Authority, or in any ship, aircraft or vehicle used by or for the purposes of the Authority, and for the carrying out of the provisions of this Act, and without prejudice to the generality of the foregoing, may make regulations with respect to
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> > (e) the regulation of traffic and navigation of ships and aircraft within the limits and approaches to a port and all matters relating to the protection of life and property;

[7] The question that arises is whether the Notice could properly be made pursuant to section 61(1)(e) of the Authority Act. It seems clear that section 61(1)(e) of the Authority Act gives the Authority the power to *make regulations* with respect to the regulation of traffic and navigation of ships and aircraft within the limits and approaches to a port and all matters relating to the protection of life and property.

The Notice purportedly made pursuant to section 61(1)(e) of the Authority Act simply directs that "all loading and unloading (handling) of commercial cargo by ferry operators at the Basseterre Ferry Terminal" would be discontinued on 6 February 2017. At the hearing, Counsel for the Defendant conceded that the power under section 61(1)(e) is to make regulations and the Notice was not a regulation made with the approval of the Minister. That concession was correctly made.

[8] There is no evidence that the Authority made any regulations pursuant to which the Notice was made or issued. Since the Notice was purportedly made pursuant to section 61(1)(e) of the Authority Act as it says on its face, the Notice is *ultra vires* the Authority Act because the specific power granted to the Authority to make regulations for the subject matter covered by section 61(1)(e) of the Authority Act does not give the Authority the power to give any directions in the form of the Notice. Section 61 does not grant the Authority to do anything but make regulations pursuant to which it may act in the form of giving directions or issuing notices. The Notice purportedly made pursuant to section 61(1)(e) of the Authority Act is therefore *ultra vires* the Authority Act.

[9] Could the Authority, having specifically identified the provision pursuant to which it purportedly issued the Notice, justify the lawfulness of the Notice on one or more sections of the Authority Act? In a letter dated 30 May 2017 to Mr. Dane Elliot-Hamilton, Counsel for the Claimant, from Mr. Fitzroy Eddy, Counsel for the Defendant, it was stated that the Authority "has the authority to regulate the loading and offloading of cargo at each port of entry" citing section 54(1)(a) and (b), and section 61(1) (e) of Authority Act. Section 54(1) of the Authority Act provides that:

> 54. Power of General Manager in relation to ship and aircraft.
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> (1) Notwithstanding the provisions of any regulations made under section 61, the General Manager or an officer authorised by him or her may
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> (a) direct where any ship or aircraft shall be berthed, moored, anchored or parked and the method of anchoring of ships

and parking of aircraft within the port and the approaches to the port;

(b) direct the removal of any ship or aircraft from any berth, station, anchorage or position and the time within which such removal is to be effected within the port and the approaches to the port; and

(c) regulate the moving of ships and aircraft within the port and the approaches to the port.

[10] It is doubtful that the Defendant can claim that the Notice was issued pursuant to section 54 of the Authority Act rather than section 61(1)(e) of Authority Act, which is stated on the face of the Notice. There is no evidence before the court that the Defendant cited the incorrect section in the Notice and at the hearing Counsel for the Authority correctly did not pursue this.

[11] Out of deference to Counsel, and because, first, the Claimant's case rested on the three main grounds of review and, secondly, the parties have filed submissions and authorities on them, I now briefly consider these grounds.

The Principles of Natural Justice

[12] The Claimant contends that the decision to issue the Notice was made in breach of the principles of natural justice. The Claimant further contends that, first, where a person has been permitted by a decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communicated to him some rational ground for withdrawing it and on which he has been given an opportunity to comment; and, second, where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires any decision to be made in accordance with the rules of natural justice. These are principles which have been established by a long line of authorities, including Pierson v Secretary of State for the Home Department [1997] 3 All ER 577 and the well known decision of Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374.

[13] In R v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531, the House of Lords opined that:

> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[14] The Claimant submits that the Defendant, in issuing the Notice, acted in breach of the principles of natural justice because, first, before the issuing the Notice, the Defendant did not inform the Claimant of its intended change of policy and invite the Claimant to comment upon on it. Second, the subsequent meetings between the Claimant and the Defendant were not directed towards addressing the appropriateness of the policy itself but rather concerned only the implementation of the policy with which the Claimant was expected to comply.

[15] The Claimant is correct that the Defendant did not provide it with a hearing before the decision to issue the Notice was made. The Defendant provided no evidence in their affidavit in opposition to justify its explanation that the Notice was issued for "the safety of passengers using the pier at the Basseterre Ferry Terminal" and "to avoid a catastrophic accident". The Defendant submits that the Notice was fair to the Claimant, but the issue is not of substantive fairness but of procedural fairness, namely, whether in all the circumstances the Claimant was treated fairly. In the premises, I hold that the Claimant was not affording a fair hearing when the Defendant issued the Notice in breach of the Claimant's right to natural justice.

Wednesbury Unreasonableness and Proportionality

[16] The Claimant argues that the decision of the Defendant to issue the Notice was: (1) unreasonable, irrational and arbitrary; and (2) not proportionate to the aim which it sought to achieve. The Claimant submits that the decision of the Defendant is unreasonable, irrational and arbitrary and that the correct test is whether the decision 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. The Claimant argues that for the following reasons, among others, the decision to issue the Notice was *Wednesbury* unreasonable: first, the Notice was issued with immediate effect without any basis to justify such urgency. Second, the Notice failed to ensure that adequate provision was made for the Claimant to load and unload cargo at the Bird Rock Cargo Port. Third, fuelling trucks of the same size as the fuelling truck that is usually loaded on the Ferry are allowed on the pier to fuel other vessels, and large vehicles are allowed on the pier to collect cargo from other vessels. These grounds provide sufficient justification to hold that the Authority acted unreasonably in issuing the Notice.

[17] The Claimant contends that, in assessing unreasonableness, the court may determine whether the decision was proportionate, which is a more stringent standard of review, the intensity of which depends on the importance of the subject matter. The Claimant also contends that this broad approach to *Wednesbury* unreasonableness utilises at its core the proportionality test as the standard of review. The proportionality test requires the court to determine: (i) whether the objective of the decision taken is sufficiently important; (ii) the measures taken are rationally connected to the objective of the decision-maker; and (iii) the means used to achieve the objective are no more than is necessary to accomplish the objective (de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing et al (1998) 53 W.I.R. 131). No doubt the broad approach to *Wednesbury* unreasonableness reflects the reluctance of the United Kingdom courts to accept proportionality as an

independent ground of review with Laws L.J. in R v Secretary of State for the Home Department, ex parte Mahmood [2001] 1 WLR 840 (at [19]) observing that:

> … the basic *Wednesbury* rule are by no means hermetically sealed one from the other. There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.

[18] The Claimant submits that the decision of the Defendant to issue the Notice was not proportionate to the objective of safeguarding or protecting public safety because, first, the Notice was not rationally connected to the objective since the Defendant's policy still allows large vehicles access to the pier although they are not permitted to drive directly onto the Ferry, and the Ferry is not prohibited from operating as a passenger-cargo ferry. Second, the Defendant could adequately regulate access to the pier to protect public safety by: (1) ensuring that passengers are kept seated and sequestered under the main terminal shed while cargo is being loaded on or off the Ferry; and (2) stipulating that no cargo be loaded on the pier at the same time as ferry arrivals or departures thereby ensuring that no passenger is on the pier at the same time when cargo is being loaded on or off the Ferry.

[19] At the hearing on 5 December 2018, the court invited the parties to file submissions and authorities on whether proportionality should be recognized as an independent ground of review in judicial review proceedings in the Federation of Saint Christopher and Nevis. I therefore wish to put to rest this issue. Lord Diplock in Council of Civil Service Unions, after classifying the grounds on which administrative action is subject to control by judicial review under three heads, namely, illegality, irrationality and procedural impropriety, stated (at p. 410):

> That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

[20] Time did not stand still and today I am happy to be associated with the following statement of the current position so masterfully articulated by Sykes J in The Northern Jamaica Conservation Association et al v The Natural Resources Conservation Authority et al (Claim No. HCV 2005/3022 dated 23 June 2006):

> Whether proportionality is part of the law of Jamaica in judicial review
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> 15. Hojapi suggested that the principle of proportionality is not part of the law of Jamaica in judicial review proceedings. I would not say that this is the first time proportionality is being applied to judicial review proceedings in Jamaica. What I would say is that I am not aware of any case where it has been applied. Unless precluded by the Court of Appeal or a decision of the Judicial Committee of the Privy Council on appeal from Jamaica any sensible development in the law should be considered and if found to be useful, applied. We do not live in a closed intellectual universe and it is certainly appropriate to look at other common law jurisdictions to see the developments there and if on examination those developments are sound and can be applied in Jamaica then there is no good reason not to do so. The point I made in my previous judgment was that it was becoming increasingly difficult to distinguish between the traditional grounds of judicial review and proportionality. Proportionality is a more refined technique of judicial review that enables the court to examine executive action in a more comprehensive manner without trespassing on the domain of the executive. I would have thought that was a good thing. In any event I applied proportionality principles as well as the "normal" administrative law principles.

[21] These statements directly apply here. I note that the Claimant supports the development of the common law to recognize proportionality as an independent ground of review whereas the Defendant is of the view that if this were to happen the courts would become involved in a process of policy evaluation involving compromises between competing interests which is best left to the National Assembly. I am simply not convinced. The Defendant concludes that proportionality was already an integral part of review but that the common law in Saint Christopher and Nevis "may someday include proportionality". I am of the view that there is no reason in principle, policy or precedent not to accept that the common law in the Commonwealth Caribbean, including Saint Christopher and Nevis, has now matured enough to recognize, and I do now declare that, proportionality as an independent common law ground upon which administrative

action is subject to control by judicial review. We do not need to await a decision of the Supreme Court of the United Kingdom for it to be recognized as such.

[22] In determining whether the decision to issue the Notice was proportionate, it is necessary to ask: first, is the objective of protecting public safety legitimate? Second, is the Notice suitable for achieving it? Third, is the Notice necessary, in the sense of being the least intrusive means of achieving the protection of public safety? It cannot be doubted that protecting the safety of the traveling public is a legitimate objective. The Notice is not rationally connected to the objective for the reasons explained by the Claimant above. Based on the evidence provided by the Claimant, the Notice was not the least intrusive means of achieving that objective. Consequently, I hold that the Notice published by the Defendant is not proportionate to the objective of protecting public safety.

The Award of Damages

[23] In its application for judicial review, the Claimant claimed damages, including specific damages for loss of business profits in the sum of $193,893.51. Is the Claimant entitled to damages? The Claimant accepts that as the law currently stands in order to claim damages in a judicial review application a claimant must show that it has a claim that arises in tort or contract. The Claimant, in submissions filed in support of its application for judicial review, argues that it pays the Defendant berthing fees in consideration for access to the Basseterre Ferry Terminal. The Claimant further argues that in the absence of any express term of contract, it would be an implied term that the Claimant would be provided with access to berthing locations so as to collect passengers and cargo as such a term would be necessary to give the contract business efficacy. At the hearing of the application, Counsel for the Claimant explained that there was a contract between the Claimant and the Defendant for the Defendant to provide services to the Claimant to access the port.

[24] However, in the affidavit filed in support of the application for judicial review, the Claimant makes no averments in relation to a contract between the Claimant and the Defendant and any breach thereof by the Defendant. Consequently, the

Claimant does not set out any facts in its affidavit, and in its application for judicial review, to justify the grant of damages for breach of contract. The Claimant is therefore not entitled to the awarded of damages as claimed.

[25] At the hearing on 5 December 2018, the court also invited the parties to file submissions and authorities on whether damages should be awarded at common law in judicial review proceedings independent of any claim in tort or contract. The Claimant surprisingly submitted that while it is open to the court to fashion new remedies to protect against abuses of power disclosed in applications for judicial review, it is not open to the court to disregard clear statements of principle in CPR 56.8, instituted by the court to guide the exercise of its jurisdiction. CPR 56.8 provides that:

> (1) The general rule is that, where permitted by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that—
>
> (a) Arises out of; or
>
> (b) Is related or connected to; the subject matter of an application for an administrative order.
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> (2) In particular the court may, on a claim for judicial review or relief under the Constitution award—
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> (a) damages;
>
> (b) restitution; or
>
> (c) and order for return of property to the claimant;
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> If the-
>
> i. Claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
>
> ii. Facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and
>
> iii. Court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy

[26] CPR 56.8(2) is not, and does not purport to establish, substantive law. It simply states that in judicial review proceedings, the court can grant these remedies,

including damages, if two conditions are met. First, the claimant must have included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates. Second, the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and the court must be satisfied that, at the time when the application was made, the claimant could have issued a claim for such remedy.

[27] CPR 56.8(2) establishes two bases on which a claimant can seek damages in judicial review proceedings. The first is where the claim for damages is included in the claim form, which arises out of the subject matter of the judicial review application. Where, for example, a person is dismissed from their employment in the public service and claims damages, their application for judicial review would outline the reasons why the dismissal is unlawful. If it is held by the court to be unlawful, then the "matter" – the unlawful dismissal resulting in a loss of salary – would represent the basis for the payment of damages caused by the unlawful administrative action because the breach of the employment contract would not be for cause. CPR 56.8(2)(i) in its use of the term "any matter" contemplates that the application for judicial review would contain the necessary facts to justify the remedy claimed. In a sense, CPR 56.8(2)(i) requires the claimant to set out the facts in his or her affidavit or statement of case to justify the grant of the remedy or relief claimed. Therefore, CPR 56.8(2)(i) implicitly requires the express requirement of CPR 56.8(2) (ii).

[28] The more difficult question arises in respect of CPR 56.8(2)(ii) and (iii), particularly (iii) which states that the court must satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy. What do the words "the claimant could have issued a claim for such remedy" mean? It suggests that the court must be satisfied that the claimant could have claimed damages in respect of a recognised cause of action. Therefore, CPR 56.8(2)(ii) states specifically what is implicit in CPR 56.8(2)(i), namely, the need for a "recognised cause of action" for damages for be claimed (CPR 56.8(2)(i)) and for it to be award based on the evidence provided (CPR 56.8(2)(ii) and (iii)).

[29] This effect of all of this is that damages can only be awarded in judicial review proceedings if the claimant bases his or her claim on a recognized cause of action at common law. In other words, CPR 56.8(2) is, first, ensuring that claimants do not believe that the remedies available are at large and, second, merely *reflecting* the common law position that there is no right to claim damages for losses caused by unlawful administrative action. If the common law were to change to allow a right to damages for losses caused by unlawful administrative action, CPR 56.8(2)(iii) would arguably be unnecessary.

[30] The Claimant further submits that, while there appears to be no real reason in principle why the court should not award damages for the unlawful actions of a public authority particularly in cases where the existing remedies of *mandamus*, *certiorari* or prohibition do not adequately protect against the abuse of power, CPR 56.8(2) makes it quite clear the need for a recognized cause of action. The Claimant continues that, first, a successful judicial review claim against a public authority may sometimes result in a pyrrhic victory because a quashing order will do nothing to stem the losses a claimant may have suffered as a result of the unlawful administrative action. Second, ordinary principles of compensatory damages taking into consideration remoteness, mitigation and causation would adequately protect the public authority from substantial awards of damages claimed by persons who may not have suffered any loss as a result of the decision of a public authority. Third, the rule should therefore be amended to make the award discretionary. The Claimant then concludes that unfortunately independent of a claim in contract, tort or equity the Claimant cannot claim damages in judicial review proceedings.

[31] The Defendant submits that CPR 56.8(2) does not create a new right or remedy in damages. The question was not whether pursuant to CPR 56.8(2) damages could be granted for unlawful administrative action. The Defendant correctly notes that it may appear on its face unjust or unfair to the Claimant who has been adversely affected by the decision of a public authority to be unable to claim damages where a recognized cause of action is not available. The Defendant continues that unless

and until CPR 56.8(2) is changed, the jurisdiction of the court to do otherwise is not available and the court must act within the confines of the rule. The Defendant concludes that the rule ought not to be extended to permit the court to exercise its discretion to make an award of damages in judicial review proceedings without the existence of a cause of action.

[32] CPR 56.8(2) does not address the question of whether damages can be granted in principle in judicial review proceedings but it premised on the fact that currently the common law does not recognize a right to claim damages for unlawful administrative action. The central question raised is whether the common law rule should change. The conventional view expressed by the House of Lords in R. (On The Application Of Quark Fishing Limited) v Secretary of State For Foreign And Commonwealth Affairs [2005] UKHL 57; [2005] H.R.L.R. 41 is that:

> The fact that our courts were able to strike down the Secretary of State's instruction as wrong in law is not enough. Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998.

[33] A similar view was echoed by the United Kingdom Supreme Court in The Financial Services Authority (a company limited by guarantee) v Sinaloa Gold plc and others and Barclays Bank plc [2013] UKSC 11 where Lord Mance (at [31]) stated that:

> Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty.

[34] While these authorities are highly persuasive, they are not binding on this court and it is open to a court to develop the common law to recognize the right to claim damages for unlawful administrative action. The reasons in favour of a change in the common law are compelling. However, a decision on this issue will have to wait another day when the court has the benefit of full arguments and comprehensive submissions and authorities.

Disposition

[35] For the reasons explained above, I make the following orders:

(1) A Declaration is granted that the Notice is *ultra vires* section 61(1)(e) of the Authority Act.

(2) A Declaration is granted that the Notice was made in breach of the principles of natural justice.

(3) A Declaration is granted that the Notice was irrational and unreasonable.

(4) A Declaration is granted that the Notice was not proportionate to the objective of protecting public safety.

(5) *Certiorari* is granted quashing the Notice.

(6) The Claimant is not entitled to damages as claimed.

(7) No order as to costs.

Eddy D. Ventose
High Court Judge

By the Court

Registrar