EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: NEVHCV2016/0073

Between M&M Transportation Services Limited

Claimant

and

Nevis Air and Sea Ports Authority
Oral Brandy, General Manager of the Nevis Air and Sea Ports Authority

Defendants

Before: His Lordship Justice Ermin Moise (A.g)

Appearances:

Mrs. Sherry-Ann Liburd-Charles with Ms. Jenise Carty of counsel for the claimant
Mr. Terrence Byron with Ms. Farida Hobson of counsel for the Defendants

Mr. Prince Mills present on behalf of the Claimant Company
Mr. Colin Dore and Mr. Joseph Liburd on behalf of the 1st defendant
Mr. Oral Brandy present on his own behalf as the 2nd Defendant

2019: February, 19th and 20th
March, 6th (Closing Submissions)
April, 12th

JUDGEMENT

[1] Moise, J (A.g.).: This is a claim for judicial review of the decision of the 1st defendant to implement a new schedule for passenger ferries operating between the islands of St. Christopher and Nevis. This new schedule came into effect on 2nd November, 2015. The claimant, having been granted leave to bring this claim, seeks a total of 12 orders for relief. In essence however, these can be summarized as an order of certiorari quashing the decision of the 1st defendant, certain declarations that the decision was unlawful, unfair and in breach of certain legitimate expectations which the claimant asserts to have had. Further, the claimant seeks an award of damages which it claims to have suffered as a result of the implementation of the ferry schedule. The matter came for trial on 19th and 20th February, 2019, after which the parties were invited to file and exchange written submissions to be presented at a hearing on 6th March, 2019. After consideration of the

evidence and the submissions of the parties, I have determined that the claim should be dismissed with no order as to costs. These are my reasons for doing so.

The facts

[2] The twin island federation of St. Christopher and Nevis is separated by sea. The claimant operates a passenger ferry service commonly known as the Carib Breeze/Carib Surf. WESK Limited operates the Mark Twain and the MV Sea Hustler (which I understand to be a cargo vessel which also carries passengers). F&F Transportation Limited operates the Carib Queen as a passenger vessel. Together these three ferry operators provide an invaluable service to the citizens and visitors of the federation. On a daily basis persons commute between St. Christopher and Nevis for the purposes of work, school, business, leisure and to connect with their families. As I understand it, sometime in 1999 an initial schedule was put in place after collaboration between the ferry operators who existed at the time and officials from the Ministry of Communications and Works. This schedule remained in place until 2006 when the Department of Maritime Affairs assisted in implementing a new schedule after consultation with the St. Christopher Air and Sea Ports Authority (SCASPA), the Nevis Air and Sea Ports Authority (NASPA) and the ferry operators. This schedule remained in place until it was altered effectively on 2nd November, 2015.

[3] The facts reveal that as a result of the 2006 schedule the claimant operated its ferry out of Nevis at 8:00am, 10:30am, 1:00pm and 5:00pm from Mondays to Saturdays. It departed out of Basseterre at 7:00am, 9:30am, 12 noon and 4pm. It would seem from the schedule, giving due consideration to the departure time of the remaining ferry operators and the representations of the parties, that the claimant's departure times included what can be described as the peak hours of operation. That much is a finding of fact which I am prepared to make after consideration of all of the evidence.

[4] In his witness statement, Mr. Prince Mills, who is the Managing Director of the claimant, indicates that sometime in October, 2015 the claimant resumed operation of its ferry between Charlestown and Basseterre, having been out of operation for approximately one month to carry out maintenance work on its vessels. Upon resumption of operations, the claimant received a letter from the 1st defendant instructing that it cease operations until such time as it met with the 1st defendant to address a number of concerns regarding the resumption of the claimant's operations.

In his letter to the claimant dated 6th October, 2015 the following was noted by the 2nd defendant in his capacity as General Manager of the 1st defendant:

> ***"It was recently brought to our attention that*** *the Caribe Breeze made a run today, supposedly resuming its schedule after being absent for approximately two months. Both your curtailing of operation and your resumption were not communicated to us. It was only July 30th, 2015 that we wrote to you expressing our displeasure with this practice and asked of you to properly inform us of your changes in the service. It* ***appears that our concern has been disregarded."***

[5] Despite the fact that the claimant asserted in the witness statement of Mr. Mills that it had taken his ferries out of operations for only one month in October of that year, the evidence suggests otherwise. By letter dated 27th July, 2015 the claimant wrote to the 1st defendant indicating its intension to resume operations as of Wednesday 29th July, 2015. In that letter the claimant indicates that ***"on March 1st****, 2015 the vessels were taken out of service for overhaul and dry docking in St. Kitts, however, we have received invoices for berthing and ticket booth rental* ***for the following months. Please make adjustment to the account."*** It would seem to me that from the content of that letter it can be inferred that during that year in particular the claimant's vessels were out of operation at two intervals and for an aggregate period of significantly more than one month. From the content of the letter it would seem that the vessels were out of operation between 1st March, 2015 and 29th July, 2015. The 2nd defendant responded to the claimant's letter on 30th July, 2015 and stated the following:

> ***"We appreciate the official communication on the recommencement. However, we*** *also believe that it is in order that we are properly informed when service is suspended for whatever reason it may be. This will help us to better monitor and control the operations at the Charlestown dock and make timely adjustments to your account if necessary."*

[6] At paragraphs 6 and 7 of his witness statement the 2nd defendant sought to explain the challenges which were experienced when the claimant ceased operations without first communicating with NASPA. It is convenient that this evidence is reproduced in full. He states as follows:

*"**Shortly after the** culmination of the culturama festival in 2015, the claimant ceased its daily service between St. Kitts and Nevis for an extended period. As a result of this, there were no ferries leaving Basseterre at mornings, which became a great inconvenience to persons travelling between both islands. In an effort to meet the demands of the traveling public, NASPA met with the other ferry operators and discussed with them about filling the void, which had been left by the claimant. It was proposed that one ferry would overnight in St. Kitts and one in Nevis so that both operators could start operating from 7:00am. Both WESK Ltd. and F&F Transport agreed to do this.*

*On or about September or October 2015, it was brought to my attention that a sign was posted at the ferry terminal indicating that the claimant would be resuming operation the following day. No representative of NASPA was informed of the **claimant's intention to resume operation. On being notified of the claimant's intention,** I contacted Mr. Prince Mills and informed him that the claimant could not resume operations until they had met with the representative of NASPA. This was not the first time that M&M Transport Ltd was told to inform NASPA of their suspending and recommencing of service. It was addressed previously in three (3) letters: dated 1st December, 2014, in a letter dated July 30th, 2015 and in a letter from NASPA dated 6th **October, 2015."***

[7] According to the evidence of the 2nd defendant, it was against this backdrop that the claimant was invited to a meeting to discuss these issues. He states that due to the fact that the other ferry operators would be affected by the decisions reached, representatives from WESK Limited and F&F Transport were asked to attend the meeting. This meeting took place on 8th October, 2015. The claimant sent Mr. Verdel Hull, a boat captain from its operations, to attend the meeting on its behalf. F&F Transport did not attend that meeting but there was a representative from WESK Limited present. Mr. Hull in his evidence claims to have been unaware that WESK Limited was invited to the meeting and was of the view that the meeting was to be held with the claimant and the defendants only to discuss the issue of the resumption of the claimant's operations. However,

the correspondence dated 7th October, 2015 to Mr. Mills did in fact indicate that the meeting would be held with "all ferry operators". I accept the defendants' evidence that all ferry operators were invited to this meeting due to the importance of the issues to all of them.

[8] During this meeting the issue of the ferry schedule arose and the defendants expressed the view that the schedule should be reviewed. Mr. Hull, in his evidence insisted that it was the representative of WESK Limited who raised the issue of a review of the schedule. Mr. Brandy accepted during his evidence that the other ferry operators did in fact complain to him about the schedule at various times. Mr. Brandy indicates that the representatives of the ferry operators present at the meeting on 8th October, 2015 were invited to send in proposals for a new schedule to be put in place. Mr. Hull's states that he insisted that discussions regarding the schedule should be held with ferry owners. An account of his further involvement in this matter is contained within paragraph 7 of his witness statement. He states as follows:

> ***"Mr. Colin Dore then indicated that the owners can send suggestions to the*** *defendant****s as the defendants needed some sort of proposal to "work with". I then*** *informed the defendants that one year prior I had prepared a draft proposed schedule for the claimant and that I would submit same to the defendants. At around 3:34 pm on said 8th Octo****ber, 2015 I submitted the 2014 proposal to the defendants…"***

[9] Mr. Colin Dore, chairman of NASPA, sent a proposal of his own via email at 8:37pm that evening. This draft schedule contained alternating departure times for weeks 1 and 2. The 2nd defendant states that this proposal was put forward so that no ferry operator would have an advantage over the other. In that schedule therefore, the peak periods of operations would alternate between ferry operators on a weekly basis. In his witness statement Mr. Mills states that the 2nd defendant made contact with him on 9th October, 2015 regarding this proposal. He states that his response was that he could not entertain the proposed schedule as he had noticed a discrepancy between the times for week 1 and week 2. He states that he asked the 2nd defendant to clarify this for him. According to his account the 2nd defendant undertook to provide this clarification but did not do so.

[10] The 2nd defendant gave a different account of the conversation between himself and Mr. Mills. He states that he in fact contacted Mr. Mills via telephone. During that conversation Mr. Mills indicated

that he was not in agreement with alternating schedules for week 1 and week 2 as set out in the proposal. He states that as a result of these concerns further consideration was given to the schedule and it was decided that the claimant would maintain a fixed schedule. I accept Mr. Brandy's version of this conversation where he states that the objection raised by Mr. Mills was to the alternate operation of the schedule. In fact Mr. Mills admitted that much during cross examination when he stated that he did not like the alternating between week 1 and week 2. Upon Mr. Mill's objection the schedule was further revised and emailed to him and the other ferry operators on 13th October, 2015. In that email, it was noted that the departure times for the claimant would remain fixed and that the times for the Mark Twain and Carib Queen would alternate on a weekly basis. There was also a recommendation that the MV Sea Hustler move back to the 6:00pm departure time from the 4:30pm which was initially recommended by Mr. Hull in his proposal. In that email it was noted that a meeting was tentatively scheduled for Monday 19th October, 2015 to finalize the Friday and Saturday evening runs.

[11] The 2nd defendant states that he made a further phone call to Mr. Mills to seek his opinion on this latest proposal. He states that Mr. Mills responded that he still had some concerns but would work with it in the meantime. Mr. Mills' account is different in that he claims to have heard nothing from the defendants after his conversation on 9th October, 2015 until 14th October, 2015. His account is as follows:

> ***"I did not hear from the defendants until 14th*** *October, 2015 when I received an email from the second-nam****ed defendant along with a "proposed ferry schedule" attached to*** *the email. I verily believe that the schedule sent to me on 14th October, 2015 was a final schedule. The email of 14th* ***October, 2015 stated that "this schedule is for Monday to Saturday". There was no indication about the schedule being a proposed schedule."***

[12] An email was exhibited and dated 13th October, 2015. Another email was also dated 14th October, 2015 which indicated that a meeting was tentatively set for Monday 19th October, 2015. I accept that an email was sent to Mr. Mills on 13th October, 2015 after a conversation with Mr. Brandy. It is not clear to me as to the why a further email was sent on 14th October, 2015 but that email also contained a draft of the revised schedule. I do take the point that this email invited the claimant to a meeting tentatively set for that Friday afternoon where the Friday and Saturday runs were to be

finalized. However, I do not come to the conclusion that this proposal was in its final stage at the point of receipt of the defendants' email of 14th October, 2015. It was still open to the parties to express their opinion on the departure times set in the schedule. It would seem that this much was the purpose of Mr. Brandy's contact with Mr. Mills. The 2nd defendant then sent an email on 18th October, 2015 informing all operators that the meeting would instead be held on 20th October, 2015 at 10:20am. The email states as follows:

> *Dear All,*
>
> *Kindly note that the meeting as mentioned in the previous correspondence is scheduled for Tuesday 20th October at the Cotton Ginnery Mart at 10:20am. We are requesting that Caribe Breeze delay its departure to 11am to accommodate the meeting which we intend to start promptly.*
>
> *The most recent schedule will be refined if needs be and FINALIZED. Matters* ***pertaining to the port's expectations, including policies and procedures will be briefly*** *discussed. The schedule to be discussed at the meeting is attached.*
>
> *Please make a special effort to be present.*
>
> *Regards*
> *Oral Brandy, General Manager, NASPA*
> *Colin Dore, Chairman.*

[13] To this email a further revised schedule was attached. The 2nd defendant states in his evidence that the schedule was further revised to bring it more in line with the proposals made by Mr. Hull in his draft schedule sent via email on 8th October, 2015. For my part, after perusing both proposals, I noticed that a number of the recommendations made by Mr. Hull were included in this schedule attached to the email of 18th October, 2015. However, the morning schedules were altered and in total the claimant was scheduled to leave St. Kitts at 7:00am and 9:30am and 4:00pm. It was scheduled to leave Nevis at 8:00am, 1:00pm and 5:00pm. In Mr. Hull's proposed schedule the claimant would have a total of 4 runs per day. In the schedule attached to the mail of 18th October,

2015, this was increased to 6. Although the entire schedule of the MV Sea Hustler was not included it was recommended that its 4:30pm run be returned to 6:00pm. Again the weekly schedule for the claimant would be fixed and that of The Mark Twain and the Carib Queen would alternate between weeks one and two.

[14] Mr. Mills raised a complaint in his evidence that the meeting was tentatively set for 19th October, 2015 and that it was shifted to the 20th on short notice. Before the court is an email dated 18th October, 2015, which indicated that the meeting was scheduled for 20th October, 2015. It would seem from the evidence that 19th October, 2015 was initially set as a tentative date for the meeting during the 2nd defendant's communication on 14th October, 2015. Mr. Mills states in his witness statement that he had already made arrangements to attend a meeting on 19th October, 2015 and due to the short notice of the change to the 20th he was unable to attend the meeting. In the witness box he states that when he received the notification of the meeting he was working for the government of Montserrat and was not able to leave to attend a meeting. I find this evidence to be somewhat unreliable as Mr. Mills speaks to having already been working in Montserrat when he received the notification of the meeting on 18th October, 2015 and yet he states that he made arrangements to be present for the meeting on the 19th of October, 2015 in Nevis. In any event, under cross examination he accepted that he did not communicate his unavailability for the meeting and sent no correspondence stating his position on the issues to be discussed. What is apparent is that the claimant did not send a representative to the meeting on 20th October, 2015 during which time the ferry schedule was finalized.

[15] The meeting was held on 20th October, 2015 as planned and, according to the evidence of the 2nd defendant, the following persons were present:

(i) Mr. Colin Dore, Chairman of the 1st defendant;
(ii) Mr. Oral Brandy, the 2nd defendant;
(iii) Mr. Ken Pemberton, Charlestown Ports Manager;
(iv) Mr. Kenny Warner, Supervisor, Charlestown Port;
(v) Mr. Everette Mason, representative of the St. Christopher Air and Sea Ports Authority;
(vi) Mr. Kevin Freeman, representative of the St. Christopher Air and Sea Ports Authority;
(vii) Mr. Edmead, from the Maritime Department;

(viii) Mr. Herbert, Director of WESK Limited.

(ix) Ms. Connie Skeete, from WESK Limited.

[16] Mr. Brandy indicates in his witness statement that the only change made to the schedule which was sent out on 18th October, 2015 was that the departure time for the claimant from the Charlestown port on weekdays would shift from 5:00pm to 5:30pm as a ferry was needed to depart from Nevis after 5:00pm. However, I do note that in the final and detailed schedule sent to all the parties the MV Sea Hustler retained its 4:30pm departure time which was initially proposed in the schedule sent by Mr. Verdel Hull. It was further noted that the schedules for F & F Transport Limited and WESK Limited would alternate on a weekly basis as it relates to the operations of the Carib Queen and the Mark Twain. In the more detailed schedule contained in the correspondence the departure times for the MV Sea Hustler are identical to that which was proposed by Mr. Hull.

[17] Mr. Mills states in his witness statement that he received notification of this final schedule on 29th October, 2015. However, the 2nd defendant has exhibited an email to his witness statement indicating that the schedule was emailed to all the ferry operators on 26th October, 2015. I note that Mr. Mills as well as Mr. Hull were recipients of that email and in cross examination Mr. Mills accepted that he remembered receiving the email on 26th October, 2015. In this email, details of the meeting held on 20th October, 2015 were attached and the claimant was informed that the new schedule would commence on 2nd November, 2015. Further to this, the attachment informed of the change from the 5:00pm to 5:30pm run of the claimant and the reasons for such a change. A 6:00am departure from Nevis was introduced due to what was described as a growing demand for persons attempting to get to St. Kitts on time for early morning flights out of the island's airport. The claimant was further informed that a review of the ferry schedule would take place after a further period of 6 months. When questioned in cross examination Mr. Mills stated that he did not disagree with Mr. Brandy's comment that there was additional time to make known any issues or complaints regarding the schedule. He made no such complaints.

[18] I make one further observation as it relates to the ferry schedule implemented on 2nd November, 2015. In the schedule proposed by Mr. Hull on behalf of the claimant, the Carib Breeze would have had a total of 4 runs per day between Basseterre and Charlestown. In the ferry schedule finalized on 20th October, 2015 those runs were increased to 6 and were fixed on a weekly basis. By

contrast, the Mark Twain would have 6 runs per day and the Carib Queen, 4 runs per day. This position would however alternate for these two ferry operators between weeks 1 and 2. The Sea Hustler, which is also operated by WESK Limited, would retain a time schedule initially proposed by Mr. Verdel Hull. This ferry now operated out of Basseterre at 6:00am and 3:00pm (neither of which has been described as peak hours) and out of Nevis at 8:30am and 4:30pm. I note that the claimant has complained that when added to the Mark Twain's schedule the MV Sea Hustler's scheduled ensured that WESK Limited had a total number of 10 runs per day and that the defendants failed to take into consideration that although it is a cargo boat the Sea Hustler also carries passengers. Mr. Brandy in his evidence on oath stated that when "when we did that we looked at the main passenger ferries and that the Sea Hustler was a cargo vessel." I also note that in Mr. Hull's own proposal, WESK Limited would also have an increased aggregate of runs amounting in total to 8 as opposed to the 4 runs he proposed for the claimant.

[19] A hard copy of the schedule was attached to a letter dated 26th October, 2015 and served on the claimant. For convenience I repeat the content of this letter:

23rd October, 2015

Captain Prince Mills
M&M Transportation Limited
Basterre,
St. Kitts

Dear Sir,

Over the years, the Nevis Air and Sea Ports Authority has made every effort to provide a very convenient, controlled and structured operation for sea vessel operators and the general public. We have in addition made our facility, including the entire waterfront very pleasing to its users.

However, in recent years, the Port Authority has had to contend with a number of issues in relation to the ferry operation between St. Kitts and Nevis. Such matters have not only affected the way we function but have negatively impacted the quality of service rendered to the general public. The many who travel inter-island for work, school, meetings, business, pleasure and medical reasons deserve the best service and expect nothing less.

As the Port Authority, we believe it is important that we take whatever steps necessary to improve on the way in which our facility is being used. It is to this end that we have recently taken certain measures which include stipulating the times that ferries depart our dock with passengers. We have disclosed the times permitted for individual ferries

and a detailed copy of all the vessels together. While it is not in our interest to construct schedules, it is absolutely relevant that we seek to have some order and organization with regard to what happens at the port, in the interest of all.

We have already met and had discussions with our counterparts at the St. Christopher Air and Sea Ports Authority of our intention to regulate the departure time from the berth at Charlestown. Please be further advised that this change will take effect from Monday 2nd November, 2015. We therefore expect that you will sufficiently reorganize your operations and post the adjusted departure times for the attention of your passengers.

On this issue and other matters of great concern we strongly advise you of the following:

1. *The enclosed times of operation at the port must be adhered to at all times and any departures from it authorized;*
2. *Disruptions in the service of any ferry must be properly communicated to the Port Authority and the General Public in a timely manner. Similarly, resumptions must be reported in advance;*

3. *Ferries are expected to depart on time, every time in order to have a smooth and fair operation*

4. *Operators must ensure that every passenger registers his or her name before boarding vessel*

5. *We expect all operators to be represented at ferry meetings convened by the Port Authority*

6. *Berthing spaces must not be unduly occupied at any time*

7. *Information such as the number of persons on board vessel must be given when requested by an authorized officer on the port;*

8. *Operators and their agents shall comply with the procedures, orders and policies stipulated by the Authority. Part VIII Section 58 of NASPA Act.*

The foregoing was listed as a reminder of some of the significant matters that we are asking to pay close attention to. NASPA will not continue to tolerate defiance, indifference and disregard for the rules of the port. We will enforce and implement whatever penalty is available to us under the Ports Act in order to ensure compliance.

It is the intention of the management of NASPA to have occasional meeting with ferry operators to discuss and resolve matters which concern you. We ask your understanding and cooperation among yourselves as ferry operators and with the Port Authority.

Respectfully

Oral Brandy
General Manager

[20] The schedule came into operation on 2nd November, 2015 with no objection raised by the claimant until 11th January, 2016. In his letter of that date, Mr. Mills wrote to the 2nd defendant complaining primarily of the inclusion of the 4:30pm service provided by the MV Sea Hustler vessel operated by WESK Limited. He states in his letter that there appeared to have been an oversight in that whilst all ferry operators were granted 6 ferry trips per day, WESK Limited also operated the MV Sea Hustler in addition to the Mark Twain. He complains that the net effect of this was that WESK Limited was allowed to operate 8 trips were day whilst the other operators had 6. I note that in arguments it was noted that the total number of trips operated by WESK Limited was in fact 10. Mr. Mills complains more particularly about the fact that the MV Sea Hustler departs Nevis at 4:30 in the afternoon. In his letter he states that this departure time was implemented unilaterally by WESK Limited without approval of the authority and without any consultation with the claimant. Mr. Mill's complaint is that this trip by the MV Sea Hustler will attract a sizeable portion of passengers leaving Nevis in the afternoon, therefore reducing the number of passengers travelling with his vessel at 5:30pm. In his letter he gives notice of his objection to "exclusion from consideration in arriving at the new schedule of the operation of the MV Sea Hustler as it also carries passengers". He further requests an immediate review of the schedule and that changes be made to ensure an equitable result. He states that although the claimant would continue to abide by the schedule as advised by his legal representative, he would do so under protest.

[21] I note at this stage that, contrary to Mr. Mill's assertion in his letter, the times allotted to the operations of the MV Sea Hustler were not done unilaterally and without consultation. As I indicated earlier, the 4:30pm time slot in particular was a recommendation which first emerged as a result of the schedule attached to Mr. Hull's email. Whilst it is true that the defendants indicated at different stages in the deliberations that the MV Sea Hustler would revert to its 6:00pm run it would seem that this was removed in the final draft and the recommendations of Mr. Hull implemented instead. In these circumstances I do not accept the protestations of Mr. Mills as being accurate; especially in relation to this 4:30pm time slot. The difference between the final schedule and that which was proposed by Mr. Hull in relation to the afternoon time slots was that the claimant was shifted from leaving Nevis at 4:00pm to leaving at 5:30pm. His vessel would be leaving the port at Basseterre,

St. Kitts at 4:00pm instead. Further, I note that these changes would have been communicated to the claimant in the correspondence sent to Mr. Mills and Mr. Hull on 26th October, 2015. It is worth repeating that Mr. Mills accepted in cross examination that he received the changed schedule and that there was additional time to make known any issues or complaints regarding the schedule. He did not make any such complaint.

[22] The 2nd defendant responded to Mr. Mills' letter on 13th January, 2016 and asserted that every ferry operator was given the opportunity to be a part of the deliberations. He welcomed the claimant's cooperation and sought its continued understanding. In response to this the claimant, through its solicitors, wrote to the defendants, raising the following issues:

(i) NASPA's failure to take into consideration that WESK Limited operates the MV Sea Hustler as a passenger ferry;
(ii) WESK Limited, as per the new schedule, would have 10 trips per day;
(iii) WESK Limited's unilateral change of its departure time from Nevis of the MV Sea Hustler from 6:00pm to 4:30pm; and
(iv) A request for a review of the new schedule and to make changes there to ensure an equitable result for all ferry operators.

[23] In light of the foregoing, the claimant threatened legal action against NASPA if these issues were not addressed. NASPA in turn responded by a letter from its own attorneys dated 14th April, 2016. In that letter it was indicated that the claimant's request for a review of the schedule was already projected and that there was no refusal to have the schedule reviewed by interested parties. The letter also stated that the claimant was slotted into the schedule at peak times at mornings and afternoons to and from Nevis based on the times submitted to the defendants. It was also pointed out that WESK Limited was the operator of two ferries and received an accumulated number of trips as a result. The claimant was reminded that proposals were invited from all ferry operators prior to implementing the new schedule and it is worth noting that in Mr. Hull's proposal made on behalf of the claimant he allotted 4 trips per day to the claimant and 8 in total to WESK Limited if one considers the departure times of the Sea Hustler as contained in that schedule.

[24] By a further letter dated 15th July, 2016 the claimant was invited to a meeting to discuss a review of the schedule, among other things. The evidence also suggests that on 26th July, 2016 the claimant put in its own request for new departure times and that this was in fact granted effective 20th September, 2016. The effect of this change was a return to the departure times allotted to the claimant's operations prior to the change of 2nd November, 2015.

[25] Notwithstanding this, the claimant was not satisfied with these events and wrote to the defendants on 3rd November, 2016 seeking compensation for losses it claims to have suffered. It was claimed that the schedule introduced on 2nd November, 2015 cost the claimant losses in the sum of $265,000.00 and that the claimant was willing to settle for the sum of $250,000.00 plus costs of $25,000.00. In the interim, the claimant had applied for leave to make a claim for judicial review on 16th June, 2016 and was granted leave on 21st June, 2017. As I understand it, the delay in the grant of leave was occasioned by discussions which ensued between the parties. On 5th July, 2017 the claimant filed its claim for judicial review.

The Issues

[26] In its written submissions the claimant raised 4 issues for the court's consideration. These are:

(a) Whether the decision to implement a new ferry schedule was unlawful and/or outside of the 1st defendant's statutory authority as contained in the Nevis Air and Sea Ports Authority Act;

(b) If the decision of the first defendant was lawful, whether it is subject to judicial review on the following grounds:

(i) Whether the decision was made with actual or perceived bias in favour of WESK Limited;
(ii) Whether the 1st defendant consulted adequately prior to making the decision;
(iii) Whether the claimant had a legitimate expectation to be properly consulted prior to the implementation of the new schedule and if yes, whether this legitimate expectation was breached by the 1st defendant;
(iv) Whether the decision was made fairly;

(v) Whether the defendants took into account irrelevant considerations and/or failed to consider relevant considerations.

(c) Whether the claimant is entitled to damages against the 1st defendant as a consequence of its direct financial losses suffered as a result of the decision;

(d) What sums should be awarded in damages to the claimant.

[27] Before I go on to consider the issues raised by the claimant, it may be convenient at this stage to address two submissions made by counsel for the defendants. Firstly, Mr. Byron points out in his submissions that by the time the fixed date claim was filed the decision of the 1st defendant to implement the ferry schedule had already been reviewed and a new ferry schedule put in place to which the claimant expressed approval. As such, he argues that there is no basis upon which to seek an order of certiorari against the decision of the 1st defendant. Secondly, the defendants' counsel argues that, given this is a claim for judicial review, the claimant is not entitled to any damages unless it can show that such losses are recoverable by way of a corresponding civil cause of action.

[28] In its first submission, counsel for the defendant points to the claimant's own letter dated 3rd November, 2016 in which it expressed satisfaction with a decision of the defendants to revise the ferry schedule which was the cause of its initial complaint. At the time of the filing of the claim therefore, the decision which the claimant has sought to impugn was no longer in effect. In fact, the schedule was altered in favour of the claimant in September, 2016. The fixed date claim was filed on 5th July, 2017. The defendants argue that the court is unable now to make an order of certiorari quashing a decision that was no longer in effect at the time of the filing of the claim. In support of that submission counsel for the defendants refers to the case of *R(Edwards) v. Environmental Agency*[1] where Lord Hoffman noted the following at paragraph 65:

> ***"...*** *the relevance of the AQMAU reports has been completely overtaken by events. We no longer need to rely upon predictions. We know what has actually happened. As AuId*

[1] (2009) UKHL 22

LJ ***said in the Court of Appeal (at para. 126) "it would be pointless to quash the permit*** *simply to enable the public to be consulted on out-of-****date data." To this pointlessness*** *must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision. In my opinion, therefore, the judge and the Court of Appeal were right to exercise their discretion against quashing the permit. I would dismiss the appeal.*

[29] I am not at all sure that Lord Hoffman's dictum is of assistance to this matter, given the peculiar circumstances being considered in that case. Mr. Bryon further relies on the case of *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex Parte Everett*[2] where Lord Justice O'Connor pointed out that ***"judicial review is a discretionary remedy and one must look at the position at the time when the application came before the learned judge".*** For my part, I agree with this submission. There is no longer any need for an order of certiorari given that the decision which the claimant finds offensive is no longer in effect and was not so at the time of the filing of the fixed date claim in July, 2017. The grant of an order of certiorari is discretionary and I can find no justifiable reason to exercise this discretion in the present circumstances of this case, given that this decision is no longer in effect. I would therefore decline to grant this relief. However, in the event that I am wrong, I would have also declined to grant this order for reasons I will outline later in this judgment.

[30] The second issue raised by the defendants is that the claimant has no entitlement to damages. Mr. Byron points firstly to the fact that the claimant has actually not requested damages in its claim form. All it seeks is "an order that the claimant is entitled to damages against the 1st defendant for loss and damage suffered as a result of the decision made by the 1st defendant on 23rd October, 2015." Whilst I agree that this is not couched in the usual way, I take it that an order that the claimant is entitled to damages would enable the court to grant the damages in any event. I am of the view that this is sufficient to conclude that the claimant has pleaded its claim for damages and I therefore disagree with that submission.

[31] However, the defendants go further in their submissions and argue that damages is not available as a remedy in judicial review proceedings for losses caused by unlawful administrative action.

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[2] (1989) Q.B. 811

Reliance is placed on the Privy Council decision in the case of *Dunlop v. Woolahra Municipal Council*[3]. In that case the Privy Council agreed with the decision of the judge below where he found that ***"the failure by a public authority to give a person an adequate hearing before*** *deciding to exercise a statutory power in a manner which will affect him or his property,* ***cannot by itself amount to a breach of a duty of care sounding in damages."*** It would appear that English authority has frowned upon the notion that damages is a remedy available to a litigant in judicial review proceedings, unless he can show that his losses flow from a corresponding cause of action in private or other substantive area of law. In a fairly recent case of the UK Supreme Court[4] Lord Mance had this to say:

> *"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."*

[32] Lord Mance was echoing sentiments expressed by senior judges of the UK courts for some time. For example, in 2005 in the case of *R. (On The Application Of Quark Fishing Limited) v Secretary of State For Foreign And Commonwealth Affairs*[5] the House of Lords noted the following:

> ***"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] It may be argued that these principles are precisely what the CPR was designed to implement when it states the following in rule 56.8:

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[3] (1982) A.C. 158

[4] The Financial Services Authority (a company limited by guarantee) v Sinaloa Gold plc and others and Barclays Bank plc [2013] UKSC 11

[5] [2005] UKHL 57

56.8 (1) The general rule is that, where permitted by the 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.

(2) In particular the court may, on a claim for judicial review or for relief under the Constitution award **–**

(a) damages;

(b) restitution; or

(c) an order for return of property to the claimant;

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.

[34] The argument therefore is that unless the claimant can show that he could have issued a claim for damages as a remedy outside of these judicial review proceedings he is not entitled to it; unless of course he has pleaded and proven that he is a victim of maladministration or the defendant is guilty of *misfeasance in public office;* which is a tort in and of itself. This is perhaps distinct from a claim brought under the constitution where the court has been granted broader powers to award any relief which it deems fit in the circumstances. Under the common law powers of judicial review this has not been the case. Lord Mance himself noted that there must be proof of malice in order to substantiate a claim for damages.

[35] I note that in the case of *WESK Limited v Saint Christopher Air And Sea Ports Authority*[6] Ventose J expressed some doubt as to whether the legal principles expressed in the UK's highest courts are binding upon us in this jurisdiction. Justice Ventose goes on to advocate for some consideration to be given to a development of the common law to recognize the right to damages as a stand-alone remedy in such cases. He states the following at paragraph 34 of his judgment:

> *"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."*

[36] Whilst I to share a similar sentiment, I am not at all sure that it is appropriate for me in these circumstances to move away from such long standing judicial reasoning. The defendants argue that the Privy Council case of *Dunlop v. Woolahra Municipal Council* should put Ventose J's advocacy to rest, given its binding effect on this court. In any event, counsel for the claimant refers the court to Halsbury's laws of England which states that ***"on an application for judicial review,*** *the court may award damages providing that a claim for damages was included in the application and, if the matter had been brought by an ordinary claim, damages would be* ***available."*** Therefore, counsel for the claimant does not necessarily seek to argue for this development in the law advocated by Ventose J, but rather argues that there is in fact evidence to prove malfeasance on the part of the defendants sufficient to establish the claimant's entitlement to damages. Mrs. Liburd-Charles refers the court to the case of *Southern Developers Ltd. v. Lester Bird et al*[7], where the court of appeal determined that where the claimant's case marks out the parameters of misfeasance it may be sufficient to set out a case for damages. However, for reasons which I will explain later in this judgment, I do not find that there is malfeasance on the part of the defendants and for that reason, among others, I agree with counsel for the defendants and would deny damages as a remedy to the claimant in this case. Perhaps at this juncture it would

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[6] SKBHCV2017/0241
[7] HCVAP 2006/020A

assist to address the other remedies which the claimant seeks as this would clearly outline my reasons for disagreeing with the submissions of counsel for the claimant as it relates to its entitlement to damages.

Was the decision unlawful and/or outside of the 1st **defendant's statutory authority** as contained in the Nevis Air and Sea Ports Authority Act?

[37] The general powers of the Nevis Air and Sea Ports Authority is contained in section 21 of the Nevis Air and Sea Ports Authority Act[8] which states as follows:

> *21. 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.*
>
> *(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.*
>
> *(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:*
>
> *(a) to operate the ports as appears to it best calculated to serve the public interest;*
>
> *(b) to regulate and control navigation within the limits of such ports and their approaches;*
>
> *(c) to maintain, improve and regulate the use of such ports and the services and facilities therein as it considers necessary or desirable;*
>
> *(d) to provide for such ports and the approaches to the ports such air traffic control services, beacons, buoys and other navigational services and aids as it considers necessary or desirable;*
>
> *(e) to exercise the duties and functions relating to shipping, aviation and navigation exercisable under the provisions of any other law; and*

[8] CAP 8.05 of the Laws of Saint Christopher and Nevis

(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.

[38] The parties have also referred to section 58 of the Act which states as follows:

58. Power of General Manager in relation to ship and aircraft.

(1) Notwithstanding the provisions of any regulations made under section 65 the General Manager or an officer authorised by him or her may

(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 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.

(2) In case of any refusal or neglect or of any failure to comply with any direction given under subsection (1), the Authority may, without prejudice to any proceedings being instituted against any person, cause to be done all such acts as are in its opinion reasonable or necessary for the purpose of carrying out such direction and may hire and employ such persons as it considers proper and necessary for such purpose.

(3) All expenses incurred in doing such acts shall be paid and borne by the person or persons who refuse, neglect or fail to comply with any direction given under subsection (1).

[39] It is now a well-established principle that the court may quash the decision of a public authority if that decision was made outside of the powers conferred upon it by law, whether statutory or otherwise. The basis of the claimant's arguments here is not complex. It is argued simply that the 1st defendant had no express authority, under the Act, to implement a ferry schedule. It is argued

further, that the schedule which was implemented also included departure times for the port in Basseterre and that the 1st defendant had no legislative authority to do so. The defendant responds to this contention by pointing to the opening paragraph of the decision of Ventose J in the case of *WESK Limited v. SCASPA (above)* where he states that SCASPA ***"is responsible for setting the schedule that all ferry operators must follow."*** Mr. Byron's argument is simply that the legislation which empowers SCASPA to set ferry schedules is identical to that in Nevis and that it stands to reason that if SCASPA is held to have this power then so does NASPA.

[40] I express some doubt as to whether Ventose J was stating a binding precedent here. It is unclear to me as to whether this was an issue which was properly canvassed before him. However, I do not agree with the submissions of the claimant. The legislation provides authority to NASPA *to operate the ports as appears to it best calculated to serve the public interest; regulate and control navigation within the limits of such ports and their approaches and to maintain, improve and regulate the use of such ports and the services and facilities therein as it considers necessary or desirable."* I find that these powers are broad and properly encompass the actions which were taken at the meeting of 20th October, 2015; bearing in mind that representatives of SCASPA and the Department of Maritime Affairs were present and had an input in the final schedule to be implemented. Counsel for the claimant sought to argue that the 1st defendant had never implemented a ferry schedule in the past and that this was a testimony of its lack of authority. I do not accept that submission for three reasons:

(a) The fact that the authority had not been exercised in the past does not mean that it is not available under the broad terms of the legislation;

(b) It appears by way of evidence presented by the claimant that the 1st defendant was in fact involved in the process of the implementation of the ferry schedule in 2006. In addition to this it was the defendants, pursuant to their duty under section 21 of the Act, who had to step in to ensure that the void left as a result of the claimant's cessation of operations was filled by implementing a new, yet temporary schedule, with the other ferry operators in September/October, 2015;

(c) The evidence suggests that representatives from SCASPA were present at the meeting when the ferry schedule was finalized and there appears to be no indication that the terms of the new schedule were not fully endorsed and implemented by SCASPA for the vessels departing from its port. There was also a representative from the Department of Maritime Affairs present. I understand the department to have been involved in the deliberations leading to the implementation of the previous schedule. In my view, this suggests that the schedule was not a unilateral action of the defendants as argued by counsel for the claimant but that the stakeholders were given an opportunity to be a part of the process in the exercise of the broad powers contained within the legislation.

[41] Taking all of this into account I am satisfied that the actions of the 1st defendant in engaging the various stake holders in implementing the 2015 ferry schedule was not unlawful given the express and broad powers contained in section 21 of the Act.

If the decision of the first defendant was lawful whether it is subject to judicial review?

[42] The second heading under which the claimant has distilled the issues for consideration is whether the decision of the 1st defendant to implement the ferry schedule is subject to judicial review. Essentially, the grounds upon which this submission is based can be further categorized into three subheadings:

(a) Whether there was actual or apparent bias in favour of WESK Limited;

(b) Whether there was adequate consultation prior to the implementation of the new ferry schedule; and

(c) Whether the decision was irrational and/or unreasonable

Bias

[43] The claimant refers the court to the case of *Porter v. Magill*[9] where it was established that the issue of bias must be considered from the perspective of the fair minded and informed observer. Counsel further refers to the case of *Flaherty v. National Greyhound Racing Club*[10] in support of her submissions that a two stage approach ought to be taken in determining whether there was bias on the part of the defendants. Firstly, the court must consider the circumstances which have a bearing on the suggestion that the defendants were bias and secondly the court must consider whether these circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the decision maker was bias.

[44] Over the years the common law has created a number fictional personalities and clothed them with the ideals that often escape even the best of us. The fair minded and informed observer is one such character. As Baptiste JA[11] notes ***"[t]****he fair-minded and informed observer is a legal construct upon whom remarkable qualities have been grafted geared no doubt to insulate the administration of justice from the contaminants of unfairness and partiality. The court no doubt is the touchstone and carries the mantle of the fair minded and informed* ***observer."*** As counsel for the claimant rightly points out, the fair minded and informed observer is not too quick to find bias and impropriety on the part of a public authority. He is also not to shy in speaking out when there is an apparent bias after he has considered all of the circumstances of the case.

[45] In her legal submissions, counsel for the claimant outlines a total of 11 instances of bias on the part of the defendants in favour of WESK Limited. I would summarize these concerns as follows:

(a) The fact that WESK Limited was invited to the meeting on 8th October, 2015, allegedly without the claimant's knowledge and that there were prior discussions between the defendants and WESK Limited without the involvement of the claimant;

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[9] [2001] 2 AC 357
[10] [2005] EWCA Civ. 1117
[11] Amory v Sharpe et al SKBHCVAP2009/013

(b) The fact that the schedule was revised at the behest of WESK Limited and in order to correct what the defendants say was an imbalance in the schedule due to the fact that the claimant had the lion's share of the peak hour runs to the exclusion of the other ferry operators;

(c) That the defendants acted in bad faith and that their actions and the process was undertaken to cause harm to the claimant.

(d) That WESK Limited benefited most from the change in the schedule;

(e) That WESK Limited was the only ferry operator present at the meeting on 20th October, 2015; and

(f) The proposed schedule sent on 8th October, 2015 was pre-determined given that it was sent a mere few hours after Mr. Hull's own proposal.

[46] For my part, giving due consideration to all of the facts in this case, I do not agree with the submission that a fair minded and informed person would come to the conclusions drawn by the claimant. The court must observe the background leading towards the decision to engage in the process of changing the schedule; a process to which the claimant never registered an objection. I find as a matter of fact that the claimant suspended its operations for an extended period without prior notification to the defendants. This prompted the defendants to seek the assistance of the remaining ferry operators, including WESK Limited to fill in the void left by the claimant, given the fact that the claimant had enjoyed almost exclusive rights to operate his ferry during peak hours to the exclusion of the other operators. The evidence suggests that the defendants had previously complained to the claimant about this type of behavior and the disruption which it causes. It was against that backdrop that the meeting of 8th October, 2015 was held. The 2nd defendant states that all ferry operators were invited due to the fact that this is a matter which affected them. I accept that as a matter of fact. In the end WESK Limited attended the meeting upon invitation in much the same way that it agreed to assist in filling the void which was left by the claimant when it ceased its operations. I do not agree that a fair minded and informed observer, with knowledge of that fact would consider WESK Limited's presence at this meeting is evidence of bias;

[47] The mere fact that WESK Limited raised the prospect of a review of the ferry schedule cannot be indicative of bias. Firstly, in his evidence Mr. Brandy indicated that both WESK Limited and F& F Transport raised the issue of the imbalance in the ferry schedule with the defendants at various intervals. I accept that evidence as being truthful. WESK Limited further raised the issue at the meeting on 8th October, 2015 in the presence of Mr. Hull and no adverse decisions were made against the claimant during this meeting. In fact, Mr. Hull indicated that he too had given thought to the change in the ferry schedule and had, as far back as 2014, drafted a proposal for the claimant in that regard which would have also reduced the number of trips which the claimant operated per day. He offered to send this to the defendants for consideration and the evidence suggests that some of what he proposed in that schedule was eventually included in the final schedule which was implemented.

[48] Counsel for the claimant argues that the evidence suggests that the defendants held conversations with WESK Limited in the absence of the claimant and that the court should consider this as evidence of bias. However, the evidence also suggests that there were discussions held privately with Mr. Mills during which his opinions were sought. It does not appear from the evidence that Mr. Mills was as engaged as he could have been in putting forward his own concerns. I do not find that this amounts to evidence of bias on the part of the defendants. On the contrary the evidence suggests that the lines of communication were open to the claimant sufficient to enable it to be a part of the process.

[49] I also do not agree with counsel for the claimant where it is argued that the defendant's own proposal to the claimant a few hours after Mr. Hull's email is indicative of the fact that the proposed schedule was premeditated. In any event, even if the court were to find that the defendants had given prior thought to what a new schedule should look like, this would not be evidence of bias. To my mind, what occurred on 8th October, 2015 was an opening of communication with all parties with a view to reviewing the schedule. Further to this, it would seem that as early as 8th October, 2015 Mr. Mills was fully aware that a process had begun to review the schedule. He raised no objections to this and never stated that he was opposed to this review. In cross examination he accepted that the schedule sent by Mr. Hull was sent on behalf of the claimant, despite the fact that Mr. Hull was not given the authority to do so. At no point did he seek to disabuse the minds of the

defendants of the fact that the proposed schedule of Mr. Hull was a representation of what was being proposed by the claimant.

[50] I also note the claimant's contention that the schedule was weighted in favour of WESK Limited. I make a number of observations in that regard:

(a) Whilst the claimant has stated that WESK Limited makes a total of 10 runs per day I note a majority of these runs have not been described as peak hour runs. The MV Sea Hustler leaves St. Kitts and 6:00am and 3:00pm. None of these appear to be peak hours. Mr. Bandy in his evidence accepted that WESK Limited made more runs collectively if you consider the MV Sea Hustler. He however, also notes that consideration was not only given to the number of runs per ferry but the timing of those runs to cater for peak hours and make the schedule more equitable;

(b) The times ascribed to the MV Sea Hustler were all recommended by Mr. Hull and at no point did the claimant object to what was contained in that proposal. As I indicated earlier, Mr. Hull's proposal, sent on behalf of the claimant, allotted a total of 8 runs to WESK Limited if the Sea Hustler's times are taken into consideration. By contrast he recommended 4 runs for the claimant. This is the claimant's own employee who's recommendations were made available to the defendants in the process of deliberations;

(c) It would seem that the claimant's main objection to the operation of the MV Sea Hustler was that it was scheduled to leave Nevis at 4:30pm. It is claimed that this departure time would capture a substantial number of passengers who leave work in Nevis at 4:00pm and travel on to St. Kitts. However, I note that in Mr. Hull's own proposal the claimant was scheduled to leave Nevis at 4:00pm and the MV Sea Hustler at 4:30pm. If this was adopted then it would be difficult to accept that the claimant's 4:00pm departure time would capture a majority of the passengers he now complains about. At no point did he seek to inform the defendants of his objection to this recommendation. Given that Mr. Hull had recommended that the claimant's departure time out of Nevis be shifted from 5:00pm to 4:00pm, one would have thought that such a recommendation would have taken in account

the financial viability of such a shift; given that it was coming from the claimant's own employee who operates as a boat captain;

(d) Of all of the vessels mentioned in evidence, the MV Sea Hustler was the only one described as carrying cargo. Mr. Brandy states that consideration was given to the MV Sea Hustler as a cargo vessel. To my mind, it would seem reasonable to assume that persons travelling between these two islands would also need a cargo vessel at various times as part of the services provided. I do not find Mr. Brandy's considerations to be unreasonable, especially in light of the fact that this was in line with the recommendations of Mr. Hull. I take the point that the operations of the MV Sea Hustler would also include passengers. Mr. Brandy suggested in evidence that given that WESK Limited operated these two vessels he did not think it unreasonable that this operator would have an aggregate number of trips which was higher than the remaining ferry operators. The claimant also has two vessels, but nothing in the evidence suggests to me that a request had been made to have these vessels operate alongside each other with separate departure times. In essence the claimant has two vessels but provides only one ferry service.

[51] Finally, as it relates to the issue of bias, the claimant asserts that the fact that WESK Limited was the only ferry operator who attended the meeting on 20th October, 2015 is evidence upon which the court can so conclude that the schedule was bias in WESK's favour. I do not accept this submission. The claimant as well as the other ferry operator was invited to the meeting. He did not appear, and no representative was sent. The claimant made no attempts to inform the defendants of its inability to attend nor did it seek to have the meeting rescheduled. Even after the meeting took place and he became aware of the new schedule, Mr. Mills raised no objections.

[52] Taking all of these into account, I do not agree that a fair minded and informed observer would conclude that there is evidence of bias and bad faith on the part of the defendants.

[53] For these reasons I also not accept the claimant's contention that there is evidence of misfeasance in public office. I refer to the words of Baptiste JA in the case of *Elvis Daniel v Public Service Commission*[12] where he states that ***"[a]n allegation of bad faith is a serious matter and is not***

[12] SVGHCVAP2016/0007

to be lightly made. Bad faith must be clearly alleged and proved. Mere error or irrationality does not of itself demonstrate bad faith. Bad faith is not to be found simply because of ***poor decision making."*** I note that there was nothing in the Fixed Date claim aimed at specifically pleading bad faith. No doubt the claimant is aggrieved at the schedule which was implemented and seeks to move the court into finding that the evidence rises to the level of bad faith. However, as Webster JA[13] has noted ***"[t]here is no gainsaying the gravity of the allegation of bad faith, and*** *the evidential burden on the respondent is commensurate with the seriousness of the allegation."* Whilst the court has always jealously guarded its role in ensuring that there is no unreasonable and unlawful abuse of executive power, it has always been cautious to note that there must be cogent and sufficient evidence to substantiate serious and grave allegations of bad faith and misfeasance in public office. It is perhaps important to be reminded of the dictum of Lord Hobhouse in the case of *Three Rivers District Council v Governor and Company of the Bank of England*[14] where he states that:

> ***"The tort of misfeasance in public office is a tort which involves bad faith and*** *in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading then at trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally* ***consistent with mere negligence."***

[54] In these circumstances, I do not agree that the evidence presented substantiates the submissions that there was misfeasance on the part of the defendants.

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[13] Attorney General v Kenny D Anthony SLUHCVAP 2009/031
[14] [1956] AC 736 at 770

Failure to consult and legitimate expectation

[55] The claimant submits that where there is a legitimate expectation that a decision maker will consult before taking a decision, it will be required to act in accordance with that expectation unless there are good reasons not to do so. Counsel refers to the case of *R v. Brent ex parte Gunning*[15] where the requirements of this duty to consult were stated to be as follows:

(i) Consultation is taken at a time when the relevant proposal is still at a formative stage;
(ii) Adequate information is provided to the consultees to enable them properly to respond to the consultation exercise;
(iii) Consultees are afforded adequate time in which to respond; and
(iv) The decision maker gives conscientious consideration to the consultees' responses.

[56] Counsel for the claimant argues that a holistic approach ought to be taken in order to assess whether there was sufficient consultation and finds support for this argument in the case of *R (Sardar) v. Watford BC*[16]*.* For my part, I note that the duty to consult also carries with it a general requirement that the process be fair and not predetermined by the decision maker. Ramdhani J states the following at paragraph 118 in his decision in *Shawn Richards et al v The Constituency Boundaries Commission et al*[17]

> *"One of the underlying themes is that consultations must be performed by the decision-maker with an open mind and at a formative stage. It is also important to note that the decision maker cannot have a predetermined option, such that the consultation is a sham. He may have a preferred option; but he must disclose that to the potential* ***consultees as such 'so as to better focus their responses'"***

[57] The question for consideration is whether the process of consultation employed by the defendants has violated these principles. As far as the claimant is concerned the defendants have breached all

[15] [1985] 84 LGR 168
[16] [2006] EWHC 1590
[17] SKBHCV2013/0241

of the requirements of the Gunning case. The submissions put forward by counsel for the claimant are extensive but can be summarized as follows:

(a) The invitation to Mr. Hull to submit a proposal was a farce as the defendants already had a proposal in place. In essence the argument is simply that the process was no longer in its formative stage when Mr. Hull was called upon to submit a proposal. Counsel contends that Mr. Hull's proposal was sent via email at 3:34pm and that a proposed schedule was sent by the defendants at 8:37pm on the same date;

(b) The claimant was not given sufficient information to enable him to understand the proposal and express meaningful views upon it. Counsel notes that after the proposal was sent on 8th October, 2015 the claimant immediately informed the defendants that he could not entertain the proposal without first being given an explanation as to the changes between weeks 1 and 2. Instead the defendants failed to provide any explanation and sent a new proposal on 14th October, 2015 removing his 10:30am departure from Charlestown and 12:00noon departure from St. Kitts.

(c) That the claimant had a legitimate expectation given the number of years it had operated the 10:30am departure from Nevis and the 12:00noon departure from St. Kitts that those departure times would not unilaterally be removed without first being given an opportunity to be heard.

(d) That the defendants on 14th October, 2015 informed the claimant that the MV Sea Hustler would return to its 6:00pm departure time as opposed to 4:30pm. However, on 23rd October, 2015 this was changed with no communication with the claimant;

(e) That the claimant was not given adequate time to respond.

[58] The defendants do not generally take issue with the claimant's submissions that there ought to have been consultation. However, in his evidence Mr. Brandy insisted that there was in fact adequate consultation. In cross examination, Mr. Mills for the claimant acknowledged that he did receive the various emails and did have at least one telephone conversation with Mr. Brandy. When asked if the telephone conversation of 9th October, 2015 was consultation he accepted that it was.

He also accepted that he was invited to the meeting of 20th October, 2015 and did not communicate his inability to attend.

[59] Taking the evidence as a whole, I do not accept the submissions of counsel for the claimant that the principles established in the case of *R v. Brent ex parte Gunning* were violated by the defendants in any way. Firstly, I do not find as a matter of fact, that the invitation to Mr. Hull to submit a proposal was a farce. Mr. Dore, in his evidence stated that the draft which he proposed was constructed at about 4:30pm on the afternoon of 8th October, 2015 and I see no reason to doubt his evidence. In any event, as I stated earlier, even if it were true that the defendants had previously drafted a proposal, I would not have found that to be unreasonable. As Ramdhani J notes, whilst the defendants ought not to have a pre-determined option it is open to have a preferred option, as long as this is disclosed to the claimant so as to enable him to give an input and raise any issues which he may have. At paragraph 118 of his judgment he also accepted that the decision maker may formulate the options which he wishes the consultee to consider. What he must keep at all times is an open mind to the issues which may be raised by those who may be affected by his decision. I refer to the case of *Coughlin et al v. North & East Devon Health Authority*[18] where Lord Wolf noted the following at paragraph 112 of his judgment:

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

[60] To my mind, what commenced on 8th October, 2015 was a series of proposals with a view to introducing a new ferry schedule. I am not of the view that this constitutes a predetermination of the ferry schedule prior to the process of consultation.

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[18] [2000] All ER 850

[61] I also do not agree with the submissions that the claimant was not given sufficient information to assist him in expressing meaningful views on the proposals. Firstly, as I stated earlier, I find that in fact what the claimant objected to during his first conversation with Mr. Brandy was the alternating of the schedule between weeks 1 and 2. He certainly has not provided evidence to the court as to what, if any, other concerns he had at the time and what further information or clarification he sought from the defendants and did not receive. The evidence of the defendants was that the schedule was further revised to take his concerns into consideration and a new proposal sent to him on 13th October, 2015. There is nothing in the evidence which suggests to me that the claimant had raised any of the concerns which he now claims to be aggrieved by during his conversation with Mr. Brandy. After the conversation on 13th October, 2015 he did say he had some concerns but would work with the schedule. The evidence does not establish what these concerns were. However, Mr. Brandy indicates that the defendants further revised the schedule to bring it more in line with what Mr. Hull had proposed. I see no reason to doubt that evidence.

[62] It is also important to place into context the grievances which the claimant raises in these proceedings insofar as the revised schedule was concerned. Mr. Mills claims that over the years the 10:30am run from Nevis had become very lucrative for his business. Counsel claims that given that he had maintained this run for so many years, a legitimate expectation arose that it would not be removed without proper consultation. What troubles my mind about this argument however, is that the first person to recommend the removal of this departure time was Mr. Hull. In his own proposal he recommends that this 10:30am run be removed. When cross examined on this Mr. Mills accepted that this was proposed by Mr. Hull. He states that he never gave Mr. Hull the authority to make such a proposal but does accept that this proposal was made on behalf of the claimant and that he never sought to inform the defendants of his objection to such a move. Mr. Brandy in his own evidence states that the 10:30am run from Nevis was given to the other operators to alternate weekly, given that the recommendation for its removal came from Mr. Hull. It is difficult to conclude that this court should have placed an obligation on the defendants to provide further information and clarification for the claimant about a fact which was first introduced in the discussions by the claimant's own employee.

[63] I note further, that the recommendation for the removal of the 10:30am run was kept in all of the proposals emailed and discussed with the claimant from as early as 13th October, 2015. He never

states in his evidence that he objected to this. Regarding the 12:00noon departure time, the evidence suggests that in its schedule of 8th October, 2015 the defendants recommend that this be kept but alternated on a weekly basis with the other ferry operators. The claimant rejected that suggestion and in the revised schedule on 13th October, 2015 these runs were replaced with a midday run to alternate between the Carib Queen and the Mark Twain. This proposal was communicated to the claimant on 13th October, 2015 and Mr. Mills made no objections to this as far as the evidence presented is concerned.

[64] I note further, as I have stated earlier, that the first proposal for the 4:30pm run of the MV Sea Hustler was made by Mr. Hull. Again the claimant never informed the defendants of its objection to this. I do note that there was a proposal by the defendants to move the Sea Hustler back to 6:00pm. It is unclear from the evidence as to what this was predicated upon. This was eventually abandoned at the meeting of 20th October, 2015, which the claimant did not attend. In that regard I refer to the case of *Fishermen and Friends of the Sea (Appellant) v Environmental Management Authority and others*[19] where Lord Carnwath stated the following at paragraph 35 of his judgment:

> ***"****It is particularly difficult for the appellant to complain, given its unexplained failure to take any part in the statutory consultation process, or to raise any complaint about the scope of the TOR (which was finalised in December 2016) at an earlier stage.****"***

[65] In my view therefore, where the court, whether by the common law or otherwise, imposes a duty on a public body to consult, there must of necessity, be a corresponding duty on those who may be affected by the decision to properly engage the process of consultation. That much appears to be what Lord Morris insinuates in the case of *Port Louis Corporation v Attorney General of Mauritius*[20] when he notes that ***"the requirement of consultation must be subject to a*** *condition or assumption that the local authority [the consultee] will be ready and* ***willing to avail itself of a reasonable opportunity to state its views."***

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[19] [2018] UKPC 24
[20] [1965] UKPC 17

[66] When I examine the grievances raised by the claimant at this stage and the effect which it claims the revised schedule had on its operations, I am of the view that there was adequate time within which to bring such issues to the attention of the defendants; whether by email, during the telephone conversations between Mr. Brandy and Mr. Mills or by ensuring that a representative was present at the meeting on 20th October, 2015 to put the claimant's concerns before the various stakeholders who were present. Indeed, the claimants seek to impugn the very decision to have the ferry schedule reviewed in the first place and there is no evidence to suggest that at any point did Mr. Mills in particular object to reviewing and implementing a new schedule. Mr. Hull appeared to be of the view that a new schedule should have been considered as far back as August 2014 and made some recommendations which were taken onboard by the defendants. As early as 14th October, 2015 it would have been apparent that a meeting would be scheduled for finalization of the new schedule and the claimant did not take the opportunity to request more time to consider the issues prior to it being finalized or to raise an objection to the time frame within which the meeting was to be held. I express difficult in accepting that the process of consultation was so unfair so as to warrant the court's intervention in granting the relief which the claimant now seeks.

Unfairness and/or Unreasonableness

[67] I come now to the final issue for consideration as put forward by the claimant. That is whether there is substantive unfairness or unreasonableness on the part of the defendants.

[68] Counsel for the claimant makes two submissions in relation to the issue of unfairness. It was argued firstly that the defendants did not give the claimant an opportunity to be heard prior to its removal of the claimant's 10:30am departure time from Nevis and 12:00noon departure time from St. Kitts. I have already addressed my reasons for disagreeing with that submission. It would suffice to say that this removal of the 10:30am slot was first recommended by Mr. Hull and was part of the deliberations from the onset of the exercise which commenced on 8th October, 2015. Further, the removal of the 12:00noon run from St. Kitts was first recommended on 13th October, 2015. For reasons which I have already explained I am not satisfied that the claimant had no opportunity to raise any objection to these alterations to the schedule.

[69] Counsel for the claimant also submits that the departure times had to be considered in the context of a fair and reasonable distribution of the ferry business among the parties. In that regard, the number of passengers who travelled over a particular period and the departure times ought to have been considered. The claimant states that prior to the new schedule a total of 42 passengers would travel on its 5:00pm run out of Nevis. After the implementation of the new schedule this dropped to 14 passengers. Given that persons would leave work at 4:00pm it is claimed that it would be unreasonable to have the Mark Twain leave at 4pm and the MV Sea Hustler at 4:30pm. Counsel for the claimant argues that the defendants ought to have consulted their berthing records in order to seek that information prior to changing the schedule. Mr. Brandy admitted in his evidence that he did not consult these berthing records. In that regard, it is submitted that the defendants arrived at the decision in an arbitrary, unlawful and unfair manner. I do not agree with that submission.

[70] In order to place this into context I must return to the initial schedule proposals of Mr. Hull and Mr. Dore. Prior to the change in the schedule the claimant left Basseterre at 4:00pm in the afternoon and Nevis at 5:00pm. In 2014, Mr. Hull, in giving consideration to a change in the schedule drafted a proposal which recommended that the Claimant would leave Nevis at 4:00pm and included no further departure times in the evening for the claimant. I find it difficult to accept as a matter of fact, that the claimant's own employee would remove altogether such a lucrative departure time in his own proposal and that the claimant would make no attempt at all in the discussions, from 8th October, 2015 to 2nd November, 2015 to make these concerns known to the defendants. Nothing in the evidence points to this. In essence counsel suggests that the defendants ought to have consulted their own records in order to determine the effect this new evening schedule would have on the claimant, in the face of a recommendation of the claimant's own representative which sought to remove this afternoon departure time from the schedule altogether.

[71] Further, the claimant takes issue with the fact that the MV Mark Twain left Nevis at 4:00pm and the MV Sea Hustler at 4:30pm. What I observe however, is that the Carib Queen left St. Kitts at 4:30pm and that this position was to alternate between the Mark Twain and Carib Queen on a weekly basis. This was therefore not a consistent feature. Given that Mr. Hull recommended a removal of the afternoon run altogether I am not an all satisfied that this is evidence of unfairness.

[72] I note that the claimant states that during the discussions there was a representation made that the MV Sea Hustler move back to a 6:00pm departure time. I do sympathize with that submission. In his evidence, Mr. Brandy indicates that on 18th October, 2015 this was changed so as to bring the schedule more in line with Mr. Hull's recommendations. This was contained in the final draft of the schedule emailed to the claimant on 26th October, 2015. Yet he claims to have been totally surprised that the MV Sea Hustler was operating at 4:30pm. It was not until 11th January, 2015 did he raise any objections.

Irrelevant Considerations

[73] Counsel for the claimant refers the court to the case of *Associated Provincial House v. Wednesbury Corporation*[21] for its often cited precedent that a public body, when reaching a decision, must take into account all relevant considerations and disregard any considerations which are irrelevant to the matters to be decided. Counsel also refers the court to the case of *Secretary of State for Education v. Tameside MBC*[22] where Lord Diplock stated that ***"a public body is not*** *only required to direct itself properly as to the nature and scope of its decision making functions, but it is also required to take reasonable steps to acquaint itself with the relevant information to enable it properly* ***to perform the relevant function."***

[74] On these authorities it is submitted that the defendants failed to take relevant matters into consideration and/or took irrelevant matters into consideration. One such matter was the fact that WESK Limited operated two ferries which carried passengers. I have addressed my conclusions on this particular point earlier and do not wish to repeat them now, except to say that this is not a ground on which I am prepared to impugn the decision of the defendants. I would only add that I doubt very much that there would be anything wrong if any of the companies involved were to increase their capacity to service the ferry routes by including an additional vessel in their fleet. The claimant owns two vessels but operates one service. Nothing in the evidence suggests that it proposed to operate two separate services by the use of these vessels. The MV Sea Hustler on the other hand is described as a cargo boat which also carries passengers. I accept Mr. Brandy's

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[21] [1948] 1KB 223
[22] [1977] AC 1014

explanation of the considerations which were made, especially in light of what was before the defendants as a recommendation made by Mr. Hull on behalf of the claimant.

[75] It is also submitted that the defendants failed to consider that the removal of the 10:30am and 12:00 noon slots from the claimant would cause undue hardship to its operations. For reasons which I have already explained I do not accept this submission.

[76] As it relates to the assertion that the decision of the defendants was irrational, counsel simply bases her argument on the "totality of what transpired". I believe I have assessed my own findings sufficient to state at this stage that I do find that there was any irrationality on the part of the defendants in the process of their decision making.

Delay

[77] During the course of the submissions I raised one concern with counsel on both sides regarding the issue of delay in this matter. I refer to rule 56.5 of the CPR which states as follows:

> *(1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.*
>
> *(2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to* **–**
>
> *(a) be detrimental to good administration; or*
> *(b) cause substantial hardship to or substantially prejudice the rights of any person.*

[78] In the case of *Roland Browne v The Public Service Commission*[23], Edwards JA noted that the issue of delay is relevant not only at the state of an application for leave but may also be considered by the court at the substantive hearing for judicial review. At paragraph 24 of her judgment she states as follows:

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[23] SLUHCVAP 2010/023

It would seem therefore from the authorities mentioned 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. Where the claim lacks merit there is no need to apply the considerations under CPR 56.5. Even if the court accepts that the defendant has acted unlawfully, 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. To sum it up, 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.

[79] I have already denied the remedies which the claimant seeks. However, I raised the issue of delay as I am of the view that had the claimant succeeded in impugning the decision I would have considered denying the remedies on the ground of delay; especially as it relates to the claim for damages. There is no unqualified right to remedies in judicial review claims and the court is entitled to consider, even at this stage whether it would be detrimental to good administration to grant such relief on account of delay. In the case of ***O'Reilly v Mackman***[24] Lord Diplock defines this concept as follows*:*

> ***"****The public interest in good administration must require 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****."***

[80] Therefore, the intention behind the notion of good administration is that an individual who is aggrieved by a decision of a public authority ought not to sit idly by for an unreasonable period of time before moving the court to review this decision. I observe that the courts have been somewhat

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[24] [1983] UKHL 1

flexible with the issue of delay in more recent times. Delays in excess of 2 years have been accepted as reasonable. However, this issue must rest on the peculiar facts of each case. In cases, such as the present, where the claimant seeks to prove that he has suffered damages for a continuous period of time, this principle becomes even more apt.

[81] The claimant seeks to review the very decision of the defendants to engage the process of implementing a new ferry schedule and argues that even this is ultra vires. Yet, Mr. Mills would have been aware of this intention as early as 8th October, 2015 and made no objections to it. The final schedule was disclosed on 26th October, 2015. In it, the 10:30am and midday runs were removed and a 4:30pm departure time for the MV Sea Hustler was implemented. Yet the claimant was aware as early as 26th October, 2015 that this schedule would come into effect on 2nd November, 2015 and made no objections, neither did he seek to move the court to review this decision. This ferry schedule was implemented for most of the month of November, all of December and 11 days in January, before the claimant made his objections known. Despite this, it was not until June, 2016 that he first sought leave to review this decision which was granted almost one year later. Yet the claimant seeks to move the court to grant in excess of $200,000.00 in damages against the defendants. I express some doubt as to whether, even if the court had found in favour of the claimant, it would have been in the interest of good administration to grant such a remedy given the delay in bringing this claim.

[82] For all the reasons I have outlined in this judgment I make the following orders:

(a) The claim is dismissed and the remedies sought by the claimant are denied;
(b) There will be no order as to costs pursuant to rule 56.13(6) of the CPR

Ermin Moise
High Court Judge

By the Court

Registrar