IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA CIRCUIT

(CIVIL)

A.D. 2019

CLAIM NO. AXAHCV 2019/0004

BETWEEN:

SOF 82 ANGUILLA HOLDINGS, LLC

Claimant

and

EXECUTIVE COUNCIL (GOVERNMENT OF ANGUILLA)

Defendant

Appearances:

Ms. Tara Carter, Carter & Associates of Counsel for the Claimant

The Honourable Attorney General, Mr. Dwight Horsford, with him
Mrs. Nakishma Rogers-Hull of Counsel for the Defendant

2019: May 24;
June 28.

Judicial Review – CPR Part 56 – Refusal of Land Development Control Committee to grant planning permission – Appeal to the Executive Council – Section 7 Land Development Control Act – Decision of Executive Council confirming decision of the Land Development Control Committee – Reasons for decision – Whether the Executive Council failed to give reasons for its decision – Whether reasons given by Executive Council for confirming decision of Land Development Control Committee adequate – Standard of duty to give reasons – Adequacy of reasons – Certiorari – Whether decision of Executive Council can be quashed for failure to give adequate reasons – Late reasons – Whether court has jurisdiction to accept late reasons – Costs – CPR part 56 rule 56.13 – Assessed costs

JUDGMENT

[1] Innocent, J. (Ag.): The claimant is a hotel developer and the owner of the Four Seasons Hotel in Anguilla (the 'Development'). The claimant's predecessor, Barnes Bay Development Ltd entered into a Memorandum of Understanding

('MOU') with the Government of Anguilla on 30th September 2004. At that time the Development was intended to incorporate a Phase IV that would have included onsite mangers' and engineers' residences. Subsequent to the initial MOU the Government of Anguilla adopted the policy that the local economy would have developed sufficiently over time so that Anguillians would eventually develop private properties in close proximity to the Development to serve as employee housing. As a result, the claimant says it did not proceed with the planned development for employee housing.

[2] According to the claimants, the local economy began to spiral downwards over time resulting in the unwillingness of the banking industry to fund construction of private housing. In the circumstances, they say that the Government of Anguilla's vision to stimulate local housing did not materialize as anticipated and, the Developer was forced to seek private housing for its managers and temporary staff.

[3] The claimant says that the housing crisis was further exacerbated by the further decline in the banking industry and the passage of Hurricane Irma. The claimant contends that as the Development continued to expand additional storage became necessary for its efficient operation and the enhancement of the Development. It was also vital for the successful growth of the Development and its survival as a luxury tourism product to recruit a trained contingent of staff with international experience. Therefore, they argue that the provision of temporary housing for management and staff became an integral part of the operations of the Development.

[4] As a result of these considerations the claimant applied to the Land Development Control Committee (the 'LDCC') for permission to construct hotel storage facility, temporary staff housing and a three-bedroom general manager's unit.

[5] The application for planning approval was considered by the LDCC on 19th June 2018. The application was deferred to permit the LDCC to consult with other government agencies and stakeholders and for the claimant to make adjustments to the submitted application. The deferral notice was dated 27th June 2018 and was sent to the claimant by electronic mail.

[6] On 17th August 2018 the claimant received notification from the LDCC that the application for planning permission had been denied. This notice of refusal was dated 31st July 2018. The LDCC's reasons for refusing planning permission were as follows:

> "….. the development as proposed is contrary to the executed MOU between the Government of Anguilla and SOF-VII Anguilla Holdings LLC and the Aliens Land Holding License which stipulates that the project is a luxury real estate product. Based on this agreement the development therefore should be of a tourism nature only."

[7] On 5th September 2018 the claimant appealed to the Executive Council (the 'ExCo') against the LDCC's decision. The documentation submitted to the ExCo on appeal was of a very comprehensive nature and set out in detail the claimant's case and grounds for their dissatisfaction with the LDCC's decision.

[8] The claimant on the appeal raised the substantive point that the claimant was provided no opportunity to address the LDCC's concerns with respect to its findings on questions related to the MOU and the Aliens Land Holding License (the 'ALHL') and, that in any event, the MOU required mutual cooperation between the Developer and the Government of Anguilla particularly in light of the housing shortage on the island.

[9] Distilled to its essence the claimant's position was simply that the LDCC had not given sufficient consideration to the matters that plagued the Development in its

quest for economic viability in its operations; and, that the LDCC had erred by placing overreliance on the MOU and the ALHL thereby treating them both as being static and not relative to the changing socio-economic conditions in Anguilla.

[10] By letter dated 25th September 2018 the claimant's solicitor wrote to the Minister responsible reminding him that the claimant was awaiting the decision of the ExCo and that it was critical to the claimant's operations to have the appeal decided. This letter remained unanswered.

[11] The claimant's appeal was considered by the ExCo on 24th October 2018. However, there was no formal communication of the ExCo's decision to the claimant. The claimant took communication of the ExCo's decision informally.

[12] By letter dated 8th November 2018 addressed to the Minister of Lands and copied to the Honourable Attorney General the claimant's solicitor sought confirmation of the ExCo's decision and the reasons for the decision. There was no reply to the claimant's letter.

[13] The claimant again wrote to the Honourable Attorney General by letter dated 10th December 2018 requesting the reasons for the ExCo's decision failing which they would apply to the court for leave to apply for judicial review. This letter too remained unanswered.

[14] The claimant applied and was granted leave to file a claim for judicial review by an order of the Court contained in a judgment dated 25th March 2019. Leave was granted to the claimant to file a claim for judicial review to obtain a Writ of Certiorari to remove into the High Court for the purpose of it being quashed, the decision of the Executive Council (the Government of Anguilla) (the 'ExCo') contained in Executive Council Minute dated October 24, 2018 (EX MIN 18/554) refusing the applicant's appeal against the decision of the LDCC refusing the Applicant's application for planning approval to construct storage units and twenty-four (24) apartment units at West End, Anguilla on Block 17910 B, Parcel 198.

[15] The grant of leave was of very narrow compass to the extent that it was limited to the question of whether the ExCo had failed to give reasons for its decision and or whether those reasons were adequate.

[16] The claimant filed its Fixed Date Claim on 8th April 2019 claiming the following relief:

(a) A Declaration that the decision set out in the Executive Council Minute of 24th October 2018 – EX MIN 18/554 denying the Claimant's appeal from the Land Development Control Committee's refusal for permission to build dated 31st July 2018 is irrational, unreasonable, unfair, illegal and ultra vires.

(b) A Prerogative Writ of Certiorari quashing the Executive Council's decision on 24th October 2018 as set out in the Executive Council Minute of said date.

(c) A Prerogative Writ of Mandamus requiring the defendant to reconsider the appeal forthwith in accordance with the law (particularly the Land Development (Control) Act and Land Development (Control) Regulations; and the principles of natural justice and to provide detailed reasons for its decision.

(d) Damages including monetary compensation to be assessed by the court which were occasioned by the defendant's actions.

[17] The decision of the ExCo contained in EXMIN – 18/554 against which complaint is made was in the following terms:

"Council:

(i) considered an appeal against planning permission from SOF 82 Anguilla Holdings, LLC to construct storage units and twenty-four (24) apartment units at West End, Anguilla on Block 17910 B Parcel 198;

(ii) noted that the application was refused by the Land Development Control Committee because the development as proposed is contrary to the Aliens Land Holding License granted to SOF 82 Anguilla Holdings LLC dated 5 October 2011, and executed MOU between the Government of Anguilla and SOF-VIII-II Anguilla Holdings LLC dated 17 September 2010; and

(iii) noting the comprehensive details contained in the paper on this matter agreed that the appeal against planning permission from SOF 82 Anguilla Holdings, LLC to construct storage units and twenty-four (24) apartment units at West End, Anguilla on Block 17910 B, Parcel 198 should not be allowed."

[18] The claimant challenges what is contained in EXMIN – 18/554 on the grounds that first, it was never communicated directly to the claimant and second, what the defendant holds out as reasons for its decision is vague and inadequate; and thereby the claimant has been prejudiced by it. The claimant says that as a result of such prejudice the failure of the ExCo to give reasons and or adequate reasons for its decision creates doubt as to whether the ExCo had acted lawfully in accordance with its statutory mandate under section 7 of the Land Development (Control) Act (the 'Act'); and that ultimately the decision is tainted with irrationality, unfairness and is not in keeping with the principles of natural justice.

[19] The issues arising for consideration as I see it are:

(a) Whether the defendant failed to give reasons for its decision.

(b) Whether what is contained in EXMIN – 18/554 can properly be considered reasons for the ExCo's decision.

(c) Whether what is recorded in EXMIN – 18/554 amounts to adequate reasons for the ExCo's decision.

(d) Whether the court has jurisdiction to accept late reasons given as evidence in the course of proceedings for judicial review;

(e) If the answer to (d) above is yes, what are the guiding principles upon which the court can accept late reasons by affidavit evidence in a claim for judicial review; and,

(f) Whether the provision of late reasons for a decision can cure the previous inadequacy of reasons previously given.

(g) Whether the claimant has suffered prejudice as a result of the inadequacy of reasons.

(h) If the decision of the ExCo confirming the decision of Land Development Control Committee (the 'LDCC') recorded in EXMIN – 18/554 is found to be inadequate, whether the decision can be quashed.

Failure to give reasons

[20] The claimant contends that the ExCo failed to give reasons for its decision. This complaint is premised on what is primarily contained in the Affidavit of Roy Shanholtz filed in support of the claim for judicial review. In a nutshell the claimant says that having appealed to the ExCo it wrote copious letters to various ministerial heads, and the Attorney General requesting that it be provided with the ExCo's decision or its reasons for decision on the matter. The claimant complains that none of these numerous correspondence were replied to. The claimant says that notice of the ExCo's decision only came to its knowledge via a publication on a social media website; and that it has never received any formal notification of the ExCo's decision either from the relevant Ministry or the ExCo itself.

[21] In response, the defendant's contend, that the decision not having been communicated to the claimant is through no fault of the ExCo. This is highlighted in the Affidavit of Honourable Perin Bradley, the Deputy Governor where he states explicitly that when the ExCo decides appeals from the LDCC's decisions, it falls to the Ministry of Lands and Physical Planning to ensure that the ExCo's decision is communicated to the concerned parties. I accept this evidence as a rational and reasonable explanation for the failure. It is clearly in keeping with parliamentary procedure. The failure to communicate the reasons for the ExCo's decision was clearly a ministerial shortcoming and not that of the ExCo.

[22] The fact that the ExCo's decision was not formally communicated to the claimant was indeed unfortunate. However, as I see it this is now a moot point. The claimant in whatever manner obtained a copy of EXMIN – 18/554 and filed a claim for judicial review challenging what is contained in the ExCo's Minute. In the circumstances, it cannot be said that the ExCo failed to give reasons. It may be more appropriate to say that the decision of the ExCo was not communicated to the claimant. Therefore, it seems to me that what is of key relevance in this case is a determination of whether what is reported in EXMIN – 18/554 as the decision of the ExCo amounted to adequate reasons for the decision.

Adequacy of reasons

[23] The claimant's argument is that what is contained in paragraph (iii) of EXMIN – 18/554 does not provide adequate reasons for the ExCo's decision confirming the LDCC's decision. The claimant says that the use of the expression "noting the comprehensive details contained in the paper on this matter" renders the decision vague to the extent that it does not convey the identity of the "paper" referred to therein. In the circumstances, the claimant contends that the vagueness of the decision leaves doubt as to the manner in which the ExCo arrived at its decision and as to the nature of the material it relied on in coming to its decision. Therefore,

the claimant says that the ExCo has not complied with its duty to give reasons to the requisite standard.

[24] The defendant on the other hand contends that the decision reported in EXMIN – 18/554 provided adequate reasons for the ExCo's decision to confirm the LDCC's decision; and, that the reasons provided therein were adequate and conformed with the requisite standard under a duty to give reasons. Therefore, the defendant argues that what is contained in EXMIN – 18/554 cannot be cited for vagueness; and, that the ExCo was under no duty to give elaborate reasons for its decision given its statutory remit under section 7 of the Act which empowered it in the exercise of its appellate function to simply confirm or reverse the decision of the LDCC without the necessity for giving elaborate reasons.

Standard of duty to give reasons

[25] There is no contention between the parties that the ExCo was under a duty to give reasons for its decision. The disagreement lies in the extent to which the ExCo was required to give those reasons. In short, the issue that arises is whether the reasons given by the ExCo were sufficient to satisfy the legal standard of the duty to give reasons.

[26] The claimant in its submissions relied on the decision in Clifford Jackson v The Police Service Commission[1] where Astaphan J. (Ag.) cited extensively from Professor De Smith's treatise "Judicial Review"[2] at paragraphs [69] to [73] and paragraph [81] of the judgment in that case. The learning cited from De Smith's Judicial Review sets out the correct approach that a court should take in assessing the adequacy of reasons given by a public authority. I will not cite the text of De Smith's treatise[3] here as I consider the principles enunciated therein to be generally accepted as the correct approach to be applied.

[1] ANUHCV 2010/0487
[2] De Smith's Judicial Review, 7th Edition, 2013, Sweet & Maxwell
[3] De Smith's "Judicial Review", 7th Edition, Sweet & Maxwell (2013), 7-090 – 7-092; 7-099; 7-102 – 7-019

[27] Miss Carter appearing for the claimant also cited several cases in both her oral and written arguments before the court which I consider to be irrelevant to the point in issue and were clearly not capable of advancing the case for the claimant. Therefore, there is no need to refer to them in this decision.

[28] The defendant in its written and oral submissions have cited several cases, some, but not all of which I shall refer to here.

The Memorandum

[29] Before proceeding to the substantive issue I wish to consider several procedural points raised by the claimant regarding the admissibility and evidential value of the affidavit of Honourable Perin Bradley, Deputy Governor, the Deputy Governor, and the document exhibited to his affidavit, namely Executive Council Memorandum EX MEM 18/272 (the 'Memorandum').

[30] In the course of these proceedings the defendant relied on the affidavit of the Deputy Governor. The Deputy Governor in his affidavit replied to the claimant's assertions, particularly the assertion contained in the affidavit of Roy Shanholtz, that, essentially the claimant was not aware what "paper" that paragraph (iii) of EXMIN – 18/554 referred to. The Deputy Governor stated in his affidavit that:

"I say as a fact the "paper" referred to by the Executive Council in the Minuted decision dismissing or refusing the appeal is the Memorandum from the Minister submitted to Council on the appeal."

[31] Exhibited to his affidavit was a copy of the Memorandum. The claimant raised strong objection to this document and the Deputy Governor's qualification to swear to the affidavit in question.

[32] The pith and substance of the claimant's objections may be briefly summarized in the manner hereinafter appearing. In the claimant's written reply to the defendant's

written submissions, the claimant took the preliminary objection which I shall for the purpose of exposition set out in full hereunder:

"……. the learned Attorney General seeks to argue that the evidence of Mr. Bradley ought to be given weight in these proceedings simply on the basis of his constitutional appointment. We dispute this on the basis that a deponent must give evidence to which he has personal knowledge and if he does not have personal knowledge of such he must state the source of his information. On the 24th October 2018, Mr. Bradley was not clothed as Deputy Governor. He was not in attendance at the sitting. He therefore cannot say that it is a matter of fact that (the Memorandum) is the document referenced as the "paper" in the Executive Council Minute. There is nothing that authenticates that document. Furthermore, the document exhibited, if given any evidential weight at all, does not constitute reasons for the Defendant's decision."

[33] The claimant's objection is buttressed by the affidavit of Roy Shanholtz in reply to the Deputy Governor's affidavit. I will not go on to consider the contents of this affidavit as it raises issues of bias and procedural impropriety that do not feature in the present proceedings simply because they seek to infect the basis upon which leave to bring these proceedings was granted.

[34] In response to the claimant's objections, the defendant quite rightly describes the Memorandum as a confidential one from the Minister of Lands submitted to the ExCo on the occasion of the meeting of the ExCo when the appeal was determined. To my mind there can be no objection to this description given the substance of the document.

[35] The defendant in its written submissions advanced the argument that the ExCo was a constitutional authority by virtue of section 23 of the Constitution of

Anguilla[4] and, therefore, a "collective creature" whose decisions are recorded as minuted conclusions of its members.

[36] In answer to the claimant's submission, the defendant makes the further point that pursuant to section 31 of the Constitution of Anguilla the Governor is authorized to summon any public officer to be present at any meeting of the ExCo, whenever the Governor in his opinion, the business before the ExCo renders the presence of such public officer desirable. The presence, therefore, of such a person at meetings of the ExCo cannot invalidate the decision of the ExCo since it is the ExCo that decides and not the person invited.

[37] The claimant's posture towards the Memorandum appears hypocritical in my view, in light of its earlier procedurally preemptive application to the court seeking specific disclosure prior to the first hearing of the claim of the documentation upon which the ExCo relied on in its deliberations.

[38] I also find it seemingly odd, that the claimant would raise such strong opposition to the Memorandum considering it provides, in my opinion, meaningful insight into what precisely was before the ExCo when it deliberated on the appeal. It is based on this document that the court is placed in a better position to assess the adequacy of the ExCo's decision.

[39] Also, by way of general observation, the claimant too had placed before the ExCo its written case, and, the Memorandum quite clearly referenced the claimant's case on its appeal to the ExCo. There is no doubt, that the appeal was considered by the ExCo on paper.

[40] Therefore, I repeat my earlier finding that, in my view, the consideration of both the claimant's written submissions in support of its appeal and the Memorandum, together places the court in a better position to evaluate the question of whether

[4] Anguilla Constitution Order 1982 S.I. 1982 No. 334

the ExCo's reasons for confirming the decision of the LDCC contained in EXMIN – 18/554 were adequate. I will consider this point later on in this judgment as it relates to the adequacy of the reasons provided by the ExCo.

[41] On the question of the standard of reasons required and by which the ExCo was bound, the defendant argued that the appellate jurisdiction of the ExCo conferred by section 7 of the Act is at once a narrow and limited one. The defendant contends that the ExCo is given power merely to agree or disagree with the decision of the LDCC. However, what the ExCo cannot do in the exercise of its appellate jurisdiction, conferred by statute, is vary the decision of the LDCC or allow an appeal subject to conditions.

[42] The defendant accepts that the Act does not expressly impose a duty on the ExCo to give reasons. However, they concede that this duty is implied by law or more precisely under the common law, since the ExCo can be said to be exercising a quasi-judicial function. In short they rely on the decision of R v Civil Service Appeal Board ex parte Cunningham[5].

[43] I agree with the defendant's argument, that the claimant's criticism of the ExCo is not with its failure to give reasons but with the manner in which the ExCo formulated those reasons.

[44] However, notwithstanding that concession, it appears that the defendant has sought to qualify this argument by submitting that in any event the reasons given need not be elaborate but merely needs to tell the parties in broad terms the reasons for arriving at its decision; and in terms of the present case the reasons for confirming the decision of the LDCC. In support of this contention they cite the case of UCATT v Brain[6].

[5] [1991] 4 All ER 310
[6] [1981] ICR 542, at 551 E

[45] The Attorney General also relied on the decision in Westminster City Council v Great Portland Estates PLC[7] in support of the proposition that, notwithstanding the duty on a public body to give reasons, when so required by statute, that where the reasons were proper, adequate and intelligible, those reasons could be briefly stated. In that case the Council considered a planning inspection report and recommendation. Its comments were described as brief and terse.

[46] According to the Honourable Attorney General, the adequacy of the reasons given cannot be judged or assessed by reference to some abstract standard. He submitted that in the area of planning law, when it comes to deciding any particular case where it is argued that the reasons given are deficient, the alleged deficiency will only afford a ground for quashing the decision, if the court is satisfied that the interest of the applicant for planning permission has been substantially prejudiced by it. He argued that this proposition is supported by the decision in Save **Britain's Heritage v Number 1 Poultry Ltd**[8]. He goes on to conclude, that the claimant has not demonstrated that it has suffered any substantial prejudice resulting from any alleged deficiency in the reasons.

[47] In **Save Britain's Heritage** the owners of a group of buildings in the City of London proposed a redevelopment scheme involving the demolition of existing buildings protected by designation as part of a conservation area, and their replacement by a single modern building. The local planning authority refused their application for demolition of the buildings and erection of the new building. On the owner's appeal, the Secretary of State, accepting the inspector's recommendation, held that the architectural merits of the proposed replacement building was such as to override its stated policy set out in paragraph 89 of D.O.E. Circular 8/87, that listed buildings capable of economic use should not be abolished. One of the objectors to the proposed redevelopment sought to have the decision of the Secretary of State quashed on the grounds, inter alia, that he had failed to give

[7] [1985] 1 A.C. 661, at 673 D - G
[8] [1991] 1 WLR 153 at 167 C - E

sufficient reasons for his decision as required by statute. The application was dismissed by the Court Below. On appeal, the Court of Appeal quashed the decision of the Secretary of State. It was held that a challenge under the relevant statutory scheme to the adequacy of reasons given for a planning decision, the burden of proof was on the applicant to show that he had been substantially prejudiced by the deficiency in the reasons, by showing a failure to disclose how an issue of law had been resolved or a disputed issue of fact decided, or by demonstrating some other lack of reasoning which raised substantial doubts over the decision making process.

[48] I find the facts of Save **Britain's Heritage** quite distinguishable from the present case based on its peculiar factual and statutory matrices. First, unlike the present case there was a statutory yardstick by which the adequacy of the reasons could have been measured. Also, the reasons were held to be adequate because the reasons given incorporated the terms of the Secretary of State's Circular that highlighted a specifically defined governmental policy which was readily discernible and capable of being identified by the aggrieved party. This is not so in the present case. This clearly would have brought home to the aggrieved party the basis upon which the Secretary of State had arrived at his decision. This is clearly not the case here.

[49] I also hasten to add that when their Lordships handed down the decision in Save **Britain's Heritage** they made it pellucid that they disclaimed any intention to put a gloss on the statutory provisions by attempting to define or delimit the circumstances in which deficiency of reasons will be capable of causing substantial prejudice. Lord Bridge of Harwich gave some examples of what may be considered prejudice, he said at page 167 F-H:

"First, there will be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or

obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced where the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

[50] The learned Attorney General relied on the authority of Elliot & Others v Southwark Borough Council[9] for the proposition that, in planning law where the decision simply stated the statutory grounds of the decision, it was found to be adequate when considered against the background of the arguments advanced at the inquiry. He goes on to say that this was precisely what the ExCo had done. It referred to the matters it has considered and conveyed that it had agreed with the LDCC and denied the appeal. He further submitted that it must be borne in mind that the remit of the ExCo's appellate power under section 7 of the Act was merely to indicate whether it confirmed or reversed the decision of the LDCC. I disagree with the application of this principle to the present case. First, the claimant was not privy to all the material that the ExCo considered. By their own admission, the defendant says that it relied on the Memorandum. The pith and substance of the Memorandum were never communicated to the claimant via the ExCo Minute. Second, the ExCo Minute contained no statutory grounds or stated government policy for the decision.

[9] [1976] 1 WLR 499

[51] I understand the learned Attorney General's argument based on his written and oral submissions made before the court that, as he put it, it follows that, a low standard of reasons is required of the ExCo in the context of its function under section 7 of the Act. He goes on to argue by extension that unlike other tribunals, the ExCo is merely required to determine whether it agrees with the LDCC or not. Citing ex parte Cunningham he says the reasons for the Council's decision may be as brief as a few sentences if that is enough to convey the substance of the decision. Whereas this may be correct a statement of principle in certain circumstances, I am of the view that it is not applicable in the present case. I do not think that such a low standard of reasons would be required from the ExCo given the importance of the issues involved, not just for the claimant but also for the continued viability of the tourism industry upon which Anguilla relies for its continued economic sustenance.

[52] The learned Attorney General went on to argue that the ExCo considered the written points of contention by both parties and noting the decision of the LDCC, the ExCo confirmed the decision of the LDCC. He concludes that the ExCo essentially conveyed that it agreed with the LDCC, a power which was properly within its narrow and limited jurisdiction. I have no doubts, as I said previously, as to the manner in which the ExCo exercised its functions on the hearing of the claimant's appeal. However, the real issue to be decided is whether having carried out these functions, it gave adequate, discernable and intelligible reasons for its decision.

[53] In short the defendant's argument is simply that the reasons for the ExCo's decision were contained in the ExCo Minute and were therefore self-evident and, to that extent the ExCo had satisfied its obligation to give reasons. I do not agree that the reasons were self-evident.

[54] At this juncture, I wish to say that I do not find this to be a precise and or correct interpretation of the legal principles underlying the standard of reasons required of

a tribunal. I would qualify the Attorney General's submission with the proviso that this may not necessarily be the position in every case. Circumstances of a case may differ to the extent that more elaborate reasons may be required to convey the substance and essence of a tribunal's decision. Unless I am mistaken I do not think that the learned Attorney General has set out this proposition as a principle of general application.

[55] Reasons must be sufficient enough to enable the person affected to judge whether a legal challenge can or should be instituted. Proper and adequate reasons must generally set out the authority's findings of fact. It should show that all relevant matters have been considered and that no irrelevant ones have been taken into account. It should cite and apply any relevant policy statements or guidance and it should note any representations or consultation responses having been considered and taken into account. More importantly it should show by what process of reasoning the issues were resolved and how the various factors were weighed against each other. Further, where there is conflicting evidence, as was the case here, it ought to state its findings.

[56] The standard and adequacy of reasons have been aptly described by the House of Lords in the case of South Bucks District Council v Porter (No 2)[10], per Lord Brown at paragraph 36 where he says:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasons must not give rise to substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding

[10] [2004] 1 WLR 1953

some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such an adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration ….."

[57] Several special circumstances have triggered the Court's attention in the present case. First, unlike in the case of ex parte Cunningham, the Land Development Control Act and the Regulations made thereunder do not set out in statutory form what the LDCC or the ExCo ought to consider on the presentation of an application for planning approval and what the ExCo should consider on the hearing of an appeal against planning approval. Second, there is in existence no stated or readily discernible government policy or guidelines in relation to the type of development approval sought. Third, there is no statutory or other right of appeal against a decision of the ExCo.

[58] In my view the decision contained in the ExCo Minute simply says that they agreed with the LDCC's decision for the refusal of planning permission for the reasons already given by the LDCC. However, it appears to me that it does not convey in an intelligible manner, apart from repeating the reasons already given by the LDCC, the ExCo's reasons for agreeing with the LDCC. I say this, because the terms of the penultimate paragraph of the ExCo Minute contains the wording "noting the comprehensive details contained in the paper on this matter" creates some difficulty insofar as it has an element of vagueness and uncertainty.

[59] The question that immediately comes to mind, is whether, in relation to prejudice, could the claimant have discerned with any degree of certainty, or at all, upon a reading of the ExCo Minute as a whole, independently of the references to the MOU and the ALHL, the ExCo's reasons for their decision. In other words, did the ExCo Minute convey the basis upon which the ExCo confirmed the decision of the LDCC. Notwithstanding, the recent and untimely revelation by the ExCo that the ExCo Memorandum formed the basis upon which it formulated its decision, it

appears to me that when the decision was given and subsequently communicated to the claimant, it could not have been readily discernible what the words "comprehensive details contained in the paper on this matter" meant.

[60] In addition, the manner in which the reasons were formulated begs the question of the nature and substance of the "comprehensive details" referred to. More so, it more likely than not had the tendency to create doubt as to the "paper" that was referred to.

[61] Astonishingly, it was only after the matter had been set down for trial that the defendant disclosed in the affidavit of the Deputy Governor that the paper referred to was in fact the Memorandum. When the Memorandum is placed under close scrutiny it appears that given the matters contained therein it would have been impossible for the claimant to have discerned any intelligible reason or reasons for the ExCo's decision contained in the ExCo Minute. The Memorandum was indeed a comprehensive document that included substantial information that conflicted with what the claimant had presented on appeal. I am therefore of the view, having read the Memorandum, that the ExCo Minute failed to adequately or at all convey the manner in which the ExCo resolved these conflicts in arriving at their decision.

[62] In addition, the Memorandum contained information dealing with issues that were not canvassed by the claimant on their appeal. Without delving into the merits of the Memorandum, I have formed the view that what is contained in the Memorandum is not entirely mirrored in the ExCo Minute. In other words, the ExCo Minute does not convey in an intelligible manner, so that it was capable of causing the claimant to understand why the matter was decided as it was, what conclusions were reached on the principal important controversial issues, and how any issue of fact was resolved.

[63] The claimant is trenchantly opposed to the defendant's attempt to provide reasons (albeit late reasons) by evidence in the course of the proceedings.

[64] I have already said, that I accept, that in certain exceptional circumstances a court has the jurisdiction to accept late reasons. However, a level of caution is required to be exercised in this approach. The principled approach in the acceptance of late reasons and the reasons for the need for caution in accepting them was explored in the case of R (Nash) v Chelsea College of Art Design[11]. I do not find it necessary to reiterate this principle here as it can now be considered a moot point in light of the findings that I make below.

[65] In any event, the court is not satisfied that the affidavit evidence proffered by the defendant in response to this claim sufficiently advances its contention that adequate reasons have been provided. In providing reasons, a decision maker must be careful to provide the person affected with sufficient materials, which will enable them to verify whether it has made an error of law or fact in reaching its decision. The late reasons which are alleged to be set out in the defendant's evidence, in any event, do not meet the standard of adequate reasons.

[66] In my considered view, the Memorandum really does not advance the defendant's case. The Memorandum far from amounting to reasons was merely emblematic of one of the pieces of documentary material that the ExCo considered in its deliberations. It simply tells the claimant what was before the ExCo. The claimant is now put in the position of having to extrapolate from the Memorandum the reasons for the ExCo's decision.

[67] In my view, it is not consistent with the principles of good administration for persons adversely affected by decisions to be expected to extrapolate or infer from the circumstances, what are the true reasons for a decision[12].

[11] [2001] EWHC (Admin) 538

[12] Alexander Machinery (Dudley) Ltd. v Crabtree [1974] ICR 120 at 122

[68] The Memorandum amounts to no reasons at all. Taken at its highest, it appears to me that the evidence of the Memorandum, perhaps, was merely an attempt to explain the reasons for the ExCo's decision. In the circumstances, the issue now becomes that of whether this attempt at explaining the ExCo's decision is capable of curing the procedural impropriety against which the claimant has registered its complaint. By necessary implication I must also consider whether the court can accept the evidence of the Deputy Governor as explaining the ExCo's reasons.

[69] I have made some observations about the Deputy Governor's affidavit. First, it appears that the Deputy Governor was not present at the ExCo meeting when the appeal was adjudicated on and in fact he did not hold the position of Deputy Governor at the material time. Second, the Deputy Governor's affidavit does not say that he had discussed the Memorandum, with the other members of the ExCo and that they had authorized him to put if forward as the ExCo's reasons for their decision. Also, his affidavit does not indicate that he had consulted the record of the deliberations of the ExCo on the hearing of the appeal. In my view, the Deputy Governor not having been present at the ExCo meeting when the claimant's appeal was considered was not competent to give evidence that the Memorandum amounted to the ExCo's reasons or was capable of explaining the ExCo's reasons for its decision.

[70] I am fortified in my findings in relation to the Memorandum by the decision in R v Legal Area No. 8 Appeal Committee ex parte Angel[13] where Simon Brown J said:

"Naturally the Courts will look circumspectly at additional reasons; these clearly cannot carry quite the same authority as reasons properly given as part of the actual decision, and of course, anything suggestive of *ex post facto* reasoning, let alone anything in the way of inconsistency with previous reasons, would be particularly scrutinized. Certain bodies, moreover, will clearly be held to the

[13] (1990) 3 admin LR 189 at 205

reasons expressed with their decision – for instance, the Secretary of State on planning appeals and tribunals of the kind in question in *Alexander Machinery* and *ex parte Khan*. Furthermore, whenever as here a public body files evidence, it is desirable that each member should approve the supplementary reasoning disclosed in the individual deponent's affidavit as the actual basis for the decision earlier taken. But given these sorts of qualification, there seems to me much to be said in favour of allowing affidavits to supplement reasons, and little against either in the way of legal or practical objection. Of course, the supplementary reasons go only to the question whether the decision reached was erroneous in point of law; they cannot repair the breach of duty involved in having provided inadequate reasons in the first place …"

[71] The decision in R (Nash) v Chelsea College of Art Design[14] sheds more light on the approach that the court should adopt when an administrative body attempts to give evidence of reasons after the judicial review proceedings have commenced. Citing Hutchinson LJ in R v Westminster City Council ex parte Ermakov[15] at page 325g where he summarized his conclusions as follows:

"(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence—as in this case—which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say,

[14] At paragraph 4
[15] [1996] 2 All ER 302

merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.

(4) While it is true, as Schiemann J recognised in *Ex p Shield*, that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same, I agree with Rose J's comments in *Ex p Carpenter* that, in cases where the reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary

refusal of relief by introducing evidence of true reasons significantly different from the stated reasons are unlikely to succeed.

(5) Nothing I have said is intended to call in question the propriety of the kind of exchanges, sometimes leading to further exposition of the authority's reasons or even to an agreement on their part to reconsider the application, which frequently follow the initial notification of rejection. These are in no way to be discouraged, occurring, as they do, before, not after, the commencement of proceedings. They will often make proceedings unnecessary."

[72] In R (Nash) v Chelsea College of Art Design the court made the following observations regarding the giving of late reasons in cases where the duty to give reasons was implied:

"In my judgment, the following propositions appear from the above authorities:

(i) ……

(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:

(a) Whether the new reasons are consistent with the original reasons.

(b) whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision.

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are

> seeking to elucidate the decision should be approached more tolerantly.

To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

[73] Applying the principles set out in the cases cited above, I decline to accept the evidence provided by the defendant as amounting to reasons for the decision or even explaining the reasons for the ExCo's decision. Even if I were to accept the evidence put forward by the defendant, it would still be unable to cure the procedural defect. Adequate reasons for the decision ought to have been communicated to the claimant after the ExCo arrived at its decision.

[74] It appears to me that the decision communicated in the ExCo Minute was nothing more than an uninformed generalization. Therefore, I find that the reasons contained in the ExCo Minute were inadequate.

[75] I have, for the reasons stated herein, concluded that procedural impropriety has been established. CPR 56.14(2) provides as follows:

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

[76] In the circumstances, I am satisfied that there are good reasons for quashing the decision of the ExCo. Therefore, I will remit the matter to the ExCo and direct it to reconsider the matter and reach a decision in accordance with the judgment of this court. The defendant must make full disclosure of the factors, issues, features or elements of concern which are adverse to the claimant. Before arriving at its decision the ExCo will afford the claimant reasonable time to provide written representations in response thereto. The ExCo shall also afford the claimant the opportunity to attend before it for the purpose of making further representations. The ExCo is also directed to provide in writing the reasons for its decision.

Costs

[77] In deciding the question of costs the court is guided by the provisions of CPR Part 56.13 (4) and 56.13 (5) which states:

"(4) The judge may, however, make such orders as to costs as appear to the judge to be just including a wasted costs order.
(5) If the judge makes any order as to costs the judge must assess them."

[78] I am also guided by the principles set out in the case of Friar Tuck Ltd and Another v International Tax Authority[16] where it was held that rule 56.13(5) requires a judge who awards costs in judicial review proceedings to assess costs in accordance with the assessed costs regime referred to in rules 65.11 and 65.12.

[16] BVIHCVAP2017/0003 (March 12, 2019)

Order

[79] In the circumstances, the court's order is as follows:

1. The decision of the Executive Council (Government of Anguilla) refusing the claimant's appeal against the decision of the Land Development Control Committee refusing the claimant's application for planning approval and contained in Executive Council Minute dated 24th October 2018 is quashed.

2. The matter is remitted to the Executive Council (Government of Anguilla) for reconsideration in accordance with the court's judgment.

3. Costs to be assessed in accordance with CPR Part 65.11 and 65.12 within 14 days of this order unless otherwise agreed.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar