THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2018/0274

BETWEEN:

THE LANDINGS PROPRIETORS UNIT PLAN NO. 2/2007

Claimant

and

THE DEVELOPMENT CONTROL AUTHORITY

Defendant

and

TWO SEAS HOLDINGS LIMITED

Interested Party

BEFORE: Her Ladyship, the Honourable Justice Kimberly Cenac-Phulgence
(A JUDGE IN OPEN COURT)

APPEARANCES: Mr. Peter Foster QC with Ms. Rene St. Rose and Mr. Peter Marshall for the Claimant
Mr. Dexter Theodore QC with Mr. Adrian Etienne and Ms. Sueanna Frederick for the Defendant
Mr. Garth Patterson QC with Mr. Mark Maragh of Counsel for the Interested Party
Mr. Kurt Thomas holding a watching brief on behalf of the Attorney General

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2019: May 15, 17;
July 4.

JUDGMENT

Background

[1] CENAC-PHULGENCE J: Following the grant of leave to file a claim for judicial review by order dated 3rd July 2018, The Landings Proprietors Unit Plan No. 2 of 2007 ("The Landings") brought this claim for judicial review of a decision of the Development Control Authority ("the DCA") made on 16th April 2018. This decision

granted full approval to developer Two Seas Holdings Limited ("Two Seas") to develop a hotel ("the development") on Parcel 1257B 272, which is adjacent to and bounded by The Landings' condominium hotel ("the decision").[1]

[2] The essence of The Landings' claim is that the decision of the DCA is illegal, arbitrary, irregular, irrational, unfair, unreasonable, made in breach of the rules of natural justice, and an improper exercise of its discretion. In this regard, The Landings has several complaints. The Landings complains that the DCA failed to take into account material considerations, in particular, the potential negative impact of the development on The Landings' property.[2] The Landings complains that in addition, the DCA failed to take into account the Manual for Developers dated February 1988 ("the Manual"), which it contends is the DCA's established policy guide for considering applications to develop land in Saint Lucia, and which requires the DCA to consider the socio-economic implications of a proposed development on surrounding properties, pursuant to sections 4.8.1 and 4.8.3.[3]

[3] The Landings further contends that the DCA refused or failed to inform it of the full nature and impact of the development, including providing copies of any plans, drawings, and/or reports[4]. It is also the Landings' contention that the DCA refused or failed to consult or otherwise engage it with regard to: the height of the proposed buildings which would obstruct light to and hinder scenic views from its property; the density of the proposed hotel occupancy; noise, dirt and dust nuisance during construction; traffic nuisance during and post construction; the financial impact of lost revenues to its hotel operations and individual unit owners; and the scale, blend, design and diversity of the development, which it says is not in keeping with the surrounding hotel properties at Rodney Bay, Gros Islet.[5] This, The Landings says,

[1] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 7(i).
[2] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraphs 26 and 35.
[3] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraphs 29-31 and 34.
[4] Affidavit in Support of Fixed Date Claim Form of Anne Copeland filed on 13th July 2018, paragraph 38.
[5] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraphs 16 and 31.

is a breach of the rules of natural justice, a procedural irregularity, and therefore arbitrary, unreasonable and irrational.[6]

[4] The Landings also says that the decision of the DCA is illegal and irrational as the DCA approved plans for the development on property belonging to it. Accordingly, The Landings says that the DCA has approved an illegal trespass on The Landings' property by Two Seas.[7]

[5] The Landings contends that the DCA was required to have taken into account all the above considerations by virtue of and pursuant to section 23(1) of the Physical Planning and Development Act[8] ("the Act"), which requires that where an application is made for permission to develop land, the DCA shall have regard to the physical plan of the area within which the land is situated, if any, and to any other material considerations. The Landings contends that the obligation on the DCA to consider the potential negative impacts of the development on them, the guidelines contained in the Manual for Developers, and to engage them in the decision-making process are all 'material considerations' contemplated by section 23(1).[9]

[6] Accordingly, The Landings seeks the following relief:

i. A declaration that the decision of the DCA made on 16th April 2018 is illegal, arbitrary, irregular, irrational, unfair, unreasonable, made in breach of the rules of natural justice and an improper exercise of its discretion.
ii. An order quashing the decision of the DCA.
iii. An order for substantial damages arising out of the damage that is and will be caused by the development to it.
iv. Costs.

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[6] Affidavit in Support of Fixed Date Claim Form of Anne Copeland filed on 13th July 2018, paragraphs 48(i) and (ii).
[7] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 32.
[8] Cap 5.12 of the Revised Laws of Saint Lucia.
[9] Affidavit in Support of Fixed Date Claim Form of Anne Copeland filed on 13th July 2018, paragraphs 33, 41, 48(iii).

Preliminary Matters
A. Submissions

[7] As a preliminary matter, two issues arose concerning further submissions filed by the claimant. By order of the court dated 7th February 2019, the parties in the matter were ordered to file and serve submissions by 18th March 2019. The DCA and Two Seas filed their respective submissions on 18th March 2019. However, The Landings failed to file submissions by the date ordered and was subsequently given leave to file and serve same by 5th April 2019. The Landings filed its submissions on 28th March 2019 and thereafter filed further submissions, without leave of the court on 14th May 2019. Apparently, the submissions filed on 28th March 2019 and the further submissions filed on 14th May 2019 were not served on the other parties until the day before the trial. Both counsel for the DCA, Mr. Dexter Theodore QC ("Mr. Theodore QC") and Two Seas, Mr. Garth Patterson QC, ("Mr. Patterson QC") took objection to the further submissions filed without leave. This was the first issue.

[8] As the purpose of filing written submissions is to assist the Court to identify the issues for determination and distil the relevant facts and law, the Court did not see it fit to disallow the further submissions filed, in the absence of some injustice to the other parties. I find support for this position in the case of Roosevelt Skerrit v Thomas Fontaine.[10] In deciding that an order to file submissions by a set date did not prevent further submissions from being filed without leave after that date, the Court relied on the dicta of Sir Hugh Rawlins in Employers International and Others v Boston Life and Annuity Company Ltd[11]:

> "Written submissions, which are filed with an appeal, are intended to assist the court, by way of reference to the applicable principles, legal analysis and authorities to arrive at decisions that are sound, well-reasoned, correct in law, reliable and not delivered per incuriam."

[10] Claim No. DOMHCV2011/0388.
[11] BVIHCVAP2007/0005, delivered 21st October 2008 and re-issued on 6th November 2008.

[9] This however does not at all endorse the disregard for timelines set by the Court to enable matters to progress smoothly, a practice which is naturally frowned upon and is discouraged.

[10] The second and more important issue was that The Landings' submissions and further submissions sought to expand the scope of the claim beyond that presented in its fixed date claim form and affidavit in support of Anne Copeland, filed on 13th June 2018 and in respect of which leave to apply for judicial review was granted. Counsel for Two Seas, Mr. Patterson QC, helpfully drew the Court's attention to some of the paragraphs of the submissions and further submissions which introduced new matters. These are as follows:

i. In the submissions entitled 'Skeleton Argument of the Claimant Application for Administrative Orders' filed 28th March 2019: at paragraph 12 – "the EIA was prepared in advance of the application for development."

ii. In the submissions entitled 'Further Submissions of the Claimant Application for Administrative Orders' filed 14th May 2019:

    a. At paragraph 2.2(c) – "the Defendant did not consider the need to establish a Terms of Reference for this new particular development;"

    b. At paragraph 2.2(d) – "The defendant in fact failed to establish Terms of Reference for this development and failed to recognize that the EIA must be in accordance with their guidelines and policy, and on the principles of fairness and to discharge their duty, be prepared in accordance with Terms of Reference that consider the effect on the public and therefore including the claimant as an immediate neighbour;"

    c. At paragraph 2.2(f) – "The defendant took into consideration an EIA without giving the claimant the opportunity to properly and adequately review and comment on it, despite repeated requests from the claimant for all relevant information including plans and

reports in relation to the development and the requirements of the Act for public scrutiny of the EIA."

d. At paragraph 5 – relying on the case of Director of Physical Planning v Anne Hendricks Bass submitted that "the register must be in a form that allows the public to have access to sufficient information to allow them to be able to make proper assessment of the development that is contemplated." Further, that "the attempt to restrict the right to information entered in the register is in breach of the Act and is unlawful."

e. At paragraph 21 – "section 22(4)(e) provides for there to be public participation in the EIA process and public scrutiny of the EIS after it has been submitted to the defendant"

f. At paragraph 22 – section 2(3) of the Act provides for the EIS to include an assessment of the potential impacts of the proposed undertaking and the alternatives on the environment and identify and describe proposed measures to mitigate impacts of the proposed undertakings. It would be essential for the public to participate in the EIS process and to have an opportunity to scrutinize the EIS... The EIS is being prepared by an individual engaged by the developer, there must be participation in the process and a public scrutiny of the EIS to ensure the decision maker has comments from all parties, not just referral agencies. There was no referral agency asked to consider the effect on neighbouring properties, the Ministry of Tourism was asked solely to look at room carrying capacity. There was not a TOR for the application."

g. At paragraph 30 – "The Claimant further maintains that the permission granted to the Interested Party included permission to develop its land and groyne making the decision unlawful."

[11] These paragraphs of the submissions appear to challenge the Environmental Impact Assessment ("EIA") process specifically; in particular whether there was a Terms of Reference ("TOR"), whether there was any, or any adequate opportunity for public participation in and scrutiny of the EIA and the contents of the register which they say was not in conformity with the Act, which matters were not specifically pleaded. As the Court understands the pleadings, The Landings' primary contention is that there was a duty on the DCA to have consulted The Landings in its decision making process, by virtue of section 23(1) of the Act, sections 4.8.1 and 4.8.3 of the Manual, and based on the principle of fairness. What was not foreshadowed by the pleadings was a challenge to the EIA process and to impugn the resulting Environmental Impact Study ("EIS"). The Court finds it wholly impermissible to seek to introduce these new matters via submissions and cannot now consider them.

[12] Counsel for the DCA in objecting, cited the case of Eastern Caribbean Flour Mills Limited v Ormiston Boyea et al.[12] In that case Barrow J.A. said:

> "The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleadings must contain the particulars necessary to serve that purpose."

[13] The Court finds support for its position in the case of Shankiel Myland v Commissioner of Police et al[13] where Ellis J said the following:

> "The Court cannot accept that in these circumstances it is appropriate for a claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings, thus taking the opposite party completely by surprise."[14]
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> …
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> "Litigation proceeds on the basis that the court is a court of pleadings. They are critical in that they give fair notice of the case that has to be met, so that

[12] SVGHCVAP2006/0012, delivered 16th July 2007.
[13] GDAHCV2012/0045, delivered 9th May 2014, (unreported).
[14] At paragraph 37.

the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations made by the litigants."[15]

B. Objections to Documents

[14] A third issue raised by both Mr. Theodore QC and Mr. Patterson QC related to the admission into evidence of what they termed hearsay documents. They both raised what I term a blanket objection without specifically identifying the documents or parts of same which were being objected to. Counsel for the claimant, Mr. Peter Foster QC ("Mr. Foster QC") submitted that there cannot be a carte blanche objection to the documents in a trial. I would agree with Mr. Foster QC that the Court must know what documents or parts thereof are being objected to. Otherwise, the Court will be left to assume which documents are being objected to. The defendant and interested party would have had disclosure served on them and it was therefore incumbent upon them to indicate the documents with which they were taking issue.

The PIeaded Case

[15] The crux of the Landings' case as pleaded is that there was a duty on the part of the DCA to consult them, considering the significant negative impact of the development on them, in accordance with the Act's requirement to have regard to 'material considerations' and its established practice of considering the guidelines in the Manual for Developers which requires an assessment of the socioeconomic implications of a development on other tourism resources. The decision was further illegal and irrational as it approved an illegal trespass on The Landings' property by Two Seas.

[16] The DCA's case is that it did consult with The Landings as part of the Environmental Impact Assessment process for the development, via Ms. Alison King ("Ms. King") in preparation of her ESIA ("Environmental and Social Impact Assessment") Addendum Update Report, dated 30th October 2017.[16] The DCA further says it did not act ultra vires as there are no height restrictions in law or in policy which would

[15] At paragraph 41.
[16] Affidavit in Answer of Werner Houson, filed 10th August 2018, at paragraph 14.

preclude it from approving the development or amount to a material consideration, and that the building setbacks of the development are in excess of the minimum requirements as per the policy of the DCA.[17] It says that the ESIA contains all the necessary measures to mitigate pollution and other nuisance.[18] The DCA also denies approving any trespass on The Landings' property.[19]

Issues

[17] The issues for determination are as follows:

i. Whether The Landings has standing to bring the claim?
ii. Whether the DCA had a duty to consult The Landings as part of its decision-making process? This entails an examination of whether any such duty arises pursuant to a legitimate expectation, a duty to take into account material considerations, a duty to conduct sufficient enquiry or the principle of fairness.
iii. Whether the DCA approved an illegal trespass on The Landings' property by Two Seas?
iv. Whether the Landings is entitled to the relief that it seeks?

Issue i

Whether The Landings has standing to bring the claim?

[18] This issue of The Landings' standing to bring this claim first arose on Two Seas' application of 22nd October 2018, seeking, among other orders, that leave which had been granted to The Landings ex parte to file this claim for judicial review be set aside. Two Seas' grounds were that The Landings has no standing to bring the claim for judicial review as it has no proprietary interest, legal or beneficial, in the adjoining property. The Landings is not authorized under the Condominium Act, the Declaration under which it is established, or its By-Laws to operate the business of a hotel and is therefore acting *ultra vires*; and The Landings has no sufficient interest in the matter. By order of the Court dated 12th December 2018, it was ordered that The Landings had sufficient interest in the subject of the application for

[17] Affidavit in Answer of Werner Houson, filed 10th August 2018, at paragraph 8.
[18] Affidavit in Answer of Werner Houson, filed 10th August 2018, at paragraph 13.
[19] Affidavit in Answer of Werner Houson, filed 10th August 2018, at paragraph 16.

judicial review pursuant to rule 56.2(2 (b) and (c) of the Civil Procedure Rules 2000 and therefore had standing to bring the claim. It was further ordered that the issue of standing may be further considered on the hearing of the substantive claim, should it arise. Both the DCA and Two Seas again raised the issue of The Landings' standing at trial.

[19] The DCA contends that by virtue of section 14 of the Condominium Act,[20] The Landings is required to operate for the benefit of the unit owners, as opposed to for its own benefit. It says The Landings asserts that it is the beneficial owner of the property and that it will sustain financial loss as a result of the approval granted. However, DCA submits, on the authority of Condominium Plan N 86-S-36901 v Remai Construction (1981) Inc. (Sask. C.A.), that The Landings is not the owner of any of the units and as such does not have the right to use or enjoy the common property as an owner would. Though section 13(2) of the Condominium Act gives the body corporate the capacity to sue and be sued, regard must have had to be to its functions under that Act, which generally relate to administration and maintenance of the common property. The DCA submits that the power to sue must be incidental to these functions.

[20] Similarly, Two Seas' position is that The Landings is not entitled to the use and enjoyment of the common property, which is an incident of ownership. The Landings is not the owner of the common property, rather it is the unit owners for the time being. Two Seas further submits that The Landings is not authorised under the Condominium Act, the Declaration, or By-Laws to operate the business of a hotel or any other business and is therefore acting ultra vires. The body corporate owes its existence to the Act and can only exercise the powers granted therein. Further, the Declaration does not authorize The Landings to operate the units as a hotel or rental pool. It places the responsibility for overseeing the rental pool on the manager. Two Seas submits that consequently, the assertions of The Landings that it operates the business of a hotel, hires staff, is a tourism resource of the State of

[20] Cap 5.05 of the Revised Laws of Saint Lucia.

Saint Lucia, and will sustain significant financial losses as a result of the approval having been granted, are false and misleading. Two Seas further submits that though section 13(2) of the Condominium Act gives the body corporate the capacity to sue and be sued, the issue of standing in any particular case must be based on the functions of the body corporate. It says that the Condominium Act does not authorise the body corporate to bring an action for judicial review that is premised upon alleged interference with rights enjoyed by individual unit owners such as light and views, as opposed to the common property. There is therefore no sufficient relationship between The Landings and the subject matter of the application.

[21] The Landings asserts that it has standing, as by virtue of section 14 of the Condominium Act it is the representative of the proprietors of all the units described in the Condominium Declaration; it is the only body authorised to operate, control, maintain, administer, repair, manage and improve the common property; is authorised to represent and carry out the directions of the unit owners; and that clause 11 of the Condominium Declaration charges it with the operation of the entire resort. It says clause 9.1 of the Declaration provides for the use of the units in a rental pool programme which is managed by a resort manager designated by it. The Landings further says it was duly authorised by the owners to bring this action.

[22] The Court determined that The Landings had sufficient interest in the subject of the application pursuant to CPR 56.2(2)(b) as a body acting at the request of persons who have been adversely affected by the decision which is the subject of the application; and (c) as a body that represents the views of its members who may have been adversely affected by the decision which is the subject of the application. The Court considered that the body corporate comprises all the unit owners whom it is undisputed have an interest in the subject matter. Further, that The Landings stated that it is charged with the responsibility of operating the property for the benefit of all unit owners, including the buildings, which the Act defines not to include

the units, but as forming part of the 'common property'. The Court continues to be of this view.

[23] However, as the DCA and Two Seas point out, much of The Landings' pleadings are to the effect that it operates the business of a hotel and that the business of the hotel stands to suffer significant loss as a result of the decision of the DCA. It is in fact on this basis that The Landings claims substantial damages, a significant part of the relief sought. However, the evidence of Ms. Anne Copeland ("Ms. Copeland") revealed quite clearly that The Landings does not in fact operate or manage the rental pool/hotel. Her evidence was that a Rock Resort used to manage the hotel in 2010 when she became a shareholder. After Rock Resort was removed, a company known as Landings Rental Pool Management Company ("LRPMC") was formed to take over management and continues to be the manager to today. She indicated that there are 85 units that are used in the rental pool which form the hotel; and there are a total of 145 units comprising The Landings. She was specifically asked whether there was a difference between the rental pool and the hotel. She replied that the rental pool provides the inventory for the hotel; the rental pool and hotel being one and the same. She said the revenues and expenditure of the hotel operation are segregated from the usual fees and expenses of the body corporate. Further Ms. Copeland's evidence was that there is a rental pool management agreement between the body corporate and LRPMC authorising LRPMC to manage the rental pool. The function of the hotel is carried out solely by LRPMC and individual owners sign contracts with LRPMC to manage their property as part of the rental pool. She indicated that LRPMC is owned by a company Landings Body Corporate Holdings Limited which was created for and is involved in the day to day running of the resort.

[24] As The Landings does not in fact manage or operate the rental pool/hotel, it is not in a position to maintain the claim for loss suffered in that regard[21] and could not

[21] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, at paragraph 17.

properly be awarded the damages it seeks for injury to the hotel business.[22] However, the decision of the DCA would not only affect the business of the hotel, but each unit owner whom the body corporate represents, and their use and enjoyment of the common property which it is charged to maintain. The pleadings, though focused heavily on the impact to the hotel, speak also to the impact on unit owners generally, for example "residential unit owners having paid an average of US$800,000.00 to US$900,000.00 per unit";[23] "the claimant also has several owners, both Saint Lucian nationals and non Saint Lucian nationals who reside on property";[24] "the property values will diminish";[25] "the respondent failed and refused to take into consideration...the full nature and impact of the said development on its business, commercial and residential effects...";[26] the height of the proposed buildings would cast shadows over the claimant's buildings and would interfere with the scenic view of Pigeon Point national landmark by residents;[27] dirt, noise and dust pollution during construction[28].

[25] To the extent that The Landings states that it is the beneficial owner of the common areas within the condominium and is entitled to the use and enjoyment of this property together with the common areas[29], it is clear based on the learning that this is not accurate. It is the unit owners that The Landings comprises and represents who own the property that are entitled to its use and enjoyment. It cannot be disputed that the individual unit owners could potentially be adversely affected by the decision of the DCA and on that basis would have a sufficient interest in the matter. The evidence of the claimant shows that the board of the body corporate has been duly authorised by the unit owners by resolution dated 13th April 2018 to 'initiate such court proceedings as necessary …for and on behalf of the Landings

[22] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 48(iv).
[23] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 9.
[24] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 10.
[25] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 17.
[26] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 31; see also paragraph 34.
[27] Affidavit in Support of Fixed Date Claim Form of Anne Copeland filed 13th July 2018, paragraph 16(a).
[28] Affidavit in Support of Fixed Date Claim Form of Anne Copeland filed 13th July 2018, paragraph 16(d)-(f).
[29] Affidavit in Support of Fixed Date Claim Form of Anne Copeland, filed 13th July 2018, paragraph 11.

Body Corporate and its Unit Owners …to preserve the Landings Body Corporate unit owners' property and other interests that will be adversely affected by the Sandals plan and construction…on the grounds that the said plan and construction is not in accordance with Saint Lucian law and is detrimental to the Landings Body Corporate and the Unit Owners and the Landings Resort.'

[26] The Court therefore confirms its position that The Landings Body Corporate has standing to bring this claim for judicial review.

Issue ii

Whether the DCA had a duty to consult The Landings as part of its decision-making process?

The Submissions

[27] Counsel for The Landings', in their written submissions, acknowledge that there is no express statutory provision requiring the DCA to consult The Landings before arriving at the decision. Counsel however maintains that by virtue of: (i) its obligation under the Act to have regard to 'material considerations'; (ii) the potential significant negative impact of the development on The Landings' property; (iii) the procedures established by the DCA in the Manual for Developers; and (iv) the principle of fairness because the development would have taken away some benefit previously enjoyed by The Landings', the DCA had a duty to consult them.

[28] Counsel for the DCA submitted that there was no duty on the DCA, statutory or otherwise, to consult The Landings before arriving at a decision. Notwithstanding, several representatives of The Landings were extensively consulted in relation to and as part of the EIA process by the EIA consultant, Ms. King. Counsel for the interested party assumes a similar position on the issue of the duty to consult and submitted that in any event, The Landings had not established that the DCA was under a duty to consult and further, public consultation is not part of the statutory process outlined in the Act.

The Evidence
Ms. Anne Copeland

[29] The evidence of Ms. Anne Copeland for The Landings' as contained in her affidavit dated 28th January 2019 is that Ms. King did not consult with The Landings or its board members in preparation of the EIS. Ms. Copeland stated that she and other board members found out about the development in an issue of the Business Focus and that it was representatives of The Landings that 'sought out' Sandals and requested details of the development to understand its impact on The Landings' property. Ms. Copeland says that they finally got a meeting with a Mr. Winston Anderson on 30th October 2017 at which Ms. King was in attendance. Ms. Copeland is adamant that this meeting was not a consultation as information requested was not provided, they were not shown the development plans, and could not in any way comment on the effect of the development on The Landings. Further they were not shown the EIA or given any information in relation to the EIA. Ms. Copeland, by way of comment on documents disclosed by the DCA on 3rd October 2018, stated that by virtue of certain findings and recommendations contained in the ESIA Addendum Update Report, dated 30th October 2017, prepared by Ms. King, the DCA ought to have consulted them. These include the finding of the high adverse impact of the increased height of the buildings by reference to the built and unbuilt apartments of The Landings; and the recommendation that the architectural design must consider the view from the neighbouring Landings' property. Nonetheless, The Landings was in no way contacted or consulted by the DCA as to the way to manage the potential adverse effects of the development, despite repeated requests for information, explanation and audience.

[30] In her affidavit of 19th March 2019, Ms. Copeland said that at the meeting of 30th October 2017, she requested copies of the plans multiple times which were not forthcoming. She denies seeing the concept plan alleged to have been shown to her on Ms. King's computer screen and says that in any event it would have been impossible to determine any impact on The Landings at such a cursory glance. She

says that Mr. Anderson promised to speak with his senior management to determine if the plans could be provided but never got back to them.

[31] She says that at the date of the meeting, The Landings' representatives were not aware that there would be a 9-storey building (11 stories in height) built near their wall. Incidentally, she also said The Landings' representatives brought up the height of the buildings closest to The Landings which impact Ms. King advised would be mitigated by landscaping, and Mr. Anderson indicated would face The Landings and there would be a road along the wall from the main entrance. Curiously, she says that they asked directly if the 9 storey (now 11 stories in height) building could be moved or reduced in size to lessen the impact on The Landings' property. She says they further discussed concerns about the impact to The Landings' light and views; the impact on their hotel business and compensation to their business. She says Mr. Anderson's response signified that he expected business at Sandals Grande to perform as usual financially, and The Landings was not entitled to compensation.

[32] Ms. Copeland stated that merely attending a meeting at which you are told there will be a development on the property next door is not participation in the approval process as alleged by the DCA. She says it was not possible to have participated in the process as they were not given information, nor an opportunity or time to take away, consider, review, or assess any information and the impact. She says that the questions asked and the agenda were driven by The Landings and not Ms. King or Mr. Anderson. She denies that plans were tabled or that Ms. King inquired of or considered the financial impact of the development on The Landings. She says there was no mention that the meeting was a consultation and there was no agenda. There was no follow up meeting to discuss the impact on The Landings. The Landings was neither consulted during the EIA process, nor by DCA after receiving the EIA or in consideration of the application by Two Seas.

[33] Ms. Copeland says that given the EIA consultant was hired by and acted on behalf of Two Seas, there is an obvious conflict of interest. In those circumstances, the

EIA should properly have been submitted to The Landings for consideration of the findings and recommendations. She says that there was also no mention of an earlier meeting with a Ms. Kathy Taylor and Mr. Wilbert Mason.

[34] In Ms. Copeland's affidavit of 19th March 2019, she details the attempts of The Landings to get information on the development subsequent to the meeting of 30th October 2017. She says that on 15th January 2018, The Landings' solicitors wrote to the DCA stating their concern about the development and requesting copies of the development plans and the Master Development Land Use Plan for the area. By letter dated 19th January 2018 delivered on 13th March 2018, Ms. Karen Augustin ("Ms. Augustin"), the Executive Secretary of the DCA informed that The Landings was entitled to access the information recorded in the Register. She says that she was informed and believes that The Landings' solicitors attended the office of the DCA and requested copies of the plans and information in relation to the development but were refused. Eventually, they were permitted sight only of the development plan. This information was confirmed by Ms. Augustin in cross examination who clarified that it was only the plan which had been approved up to that time, being the piling plan, which was permitted to be seen. Ms Copeland stated that by letter dated 17th April 2018, The Landings again requested copies of the application, plans and information in relation to the development for consideration. By letter dated 9th May 2018, The Landings was informed that the items requested could only be viewed at the DCA's office. At a meeting with the DCA held in May 2018, the DCA again refused copies and the voluminous documents were only available for viewing.

[35] Under cross examination, Ms Copeland insisted that she was not aware of the alleged meeting of 18th October 2017 between Ms. King and Mr. Wilbert Mason and Ms. Kathy Taylor, representatives of The Landings.

[36] Ms. Copeland maintained her position that the DCA did not consult with The Landings and that the meeting of the 30th October 2017 was not a consultation. She

was asked what the nature of the consultation she sought was, and the particular concerns The Landings would have raised. She agreed that light, views, noise, dust, and financial impact were all concerns she would have raised. It was then put to her that all these concerns were communicated to the DCA. She disagreed saying she had not seen any such communication and at the meeting with the DCA in May, which was after the development had been approved, the DCA would not hear their concerns.

[37] Counsel for the DCA suggested these concerns were in the EIA. To this, she responded no. She was shown the EIA where The Landings was specifically referenced and where the possible impacts to The Landings were mentioned. She answered that The Landings is in the best position to speak to the impacts on The Landings; she does not know the basis of the information shown to her, whether it was surmised or based on any feedback. Counsel suggested to her that the concerns mentioned in the EIA are the same concerns which she would have raised had there been proper consultation. She replied that had The Landings been consulted, it would have been; however, The Landings was not consulted, so the concerns were not raised. In relation to the impacts mentioned in the EIA, she said that those were from someone standing afar and stating what they think.

Mr. John Robertson

[38] On behalf of The Landings, an affidavit of Mr. John Robertson was filed on 29th January 2019, however, Mr. Robertson, who resides overseas, did not attend trial and was not cross examined. It would appear that counsel for the DCA forgot that he was to have advised The Landings' counsel whether he definitely wished to cross-examine Mr. Robertson so as to avoid the costs of having to bring Mr. Robertson from Macau. Notwithstanding, the Court was willing to see whether his cross-examination could be accommodated by electronic means. Counsel for the DCA however indicated that they would not pursue cross-examination of Mr. Robertson.

[39] Mr. Robertson like Ms. Copeland denies any consultation between himself and Ms. King. He says he attended the meeting on 30th October 2017, which he says lasted for little more than one hour. He says prior to this meeting, he did not attend any other meeting with Ms. King or anyone from the DCA. Ms King did not inform that the meeting would form the basis of any report to the DCA or anyone else, though she indicated that she was a consultant hired by Two Seas to provide mitigation plans in respect of the development. He too says the meeting was requested by The Landings based on information that was obtained from the Business Focus. The meeting was requested because The Landings needed information about the development in order to assess the possible impacts to it and to address concerns. He says that representatives of The Landings pressed Ms. King for information; however, they got little or no information.

[40] He does not recall Ms. King asking many questions, taking notes or filling out any forms. She declined to give any planning documents, architectural drawings or any document which would shed light on the development plan. In the circumstances, it was impossible for The Landings' representatives to raise specific concerns from an informed standpoint. Mr. Robertson says the meeting was merely perfunctory and not a consultation. He noted that Ms. King's report was concluded on the date of the meeting which bolsters the conclusion that there was no real and meaningful consultation process. He says in the circumstances, the DCA failed to consult The Landings.

Mr. Werner Houson

[41] The evidence for the DCA as contained in the affidavit of Mr. Werner Houson ("Mr. Houson"), Planning Officer of the DCA is that the DCA approved Two Seas' application for permission for the development on 11th April 2018, after the relevant planning requirements were duly met. Mr. Houson vehemently denied that the DCA did not consult with The Landings in relation to the development. He states the representatives of The Landings were part of the EIA process and that The Landings was consulted by virtue of the ESIA Addendum Update Report dated 30th October

2017, which enumerates the persons consulted. He states that the DCA, by letter dated 25th June 2018, informed The Landings that it could procure copies of the plans in relation to the development contained in the Register.

[42] Mr. Houson states that there are no height restrictions in law or policy which precludes the DCA from approving any development of a certain height so as to amount to a material consideration. Further he denies that the development included any 10-storey building and stated that there are already existing developments of similar height in the Gros Islet area. He stated that notwithstanding that The Landings development is 4 storeys, the height of The Landings' tallest building is 50 feet, while the height of Two Seas' tallest building is 53 feet. This was challenged in cross examination. The Plan was shown to Mr. Houson and it was pointed out to him that the Plan indicated in respect of at least one of the buildings, a minimum floor height of 10.6 feet and 10 storeys. The suggestion was that his statement of the tallest Two Seas' building being 53 feet was inaccurate and that the development included at least one building that was approximately twice the height of The Landings' buildings. It was suggested to him therefore that the development did not blend with the existing developments in the area with which he disagreed. He said he did not view height as a factor of blend. He said he thinks of architecture when he thinks of blend.

[43] Mr. Houson also denied that the development was proposed to be built in very close proximity to The Landings' boundary. He stated that the setbacks of the development are in excess of the minimum requirements of the DCA's policy. He also said that ESIA contains the necessary measures to mitigate pollution and other nuisance.

Ms. Karen Augustin

[44] Ms. Karen Augustin, the Executive Secretary of the DCA also gave evidence on behalf of the DCA. Her evidence was that Two Seas submitted an application for the first of three components of Phase 2 of the Sandals Grande development to the

DCA on 20th November 2017. She stated that in relation to applications for developments of a touristic nature, the provisions of the Act require that an EIA be carried out to determine among other things the likely significant impact of the development on the environment. She also stated that the established procedural process of the DCA required an EIA to be conducted to ascertain the physical, social, and environmental impacts of the proposed development. The process includes approval of the Terms of Reference and the professional EIA team by the Board of the DCA, and then submission of the EIA to the DCA for consideration.

[45] Ms. Augustin stated that The Landings was given the opportunity to contribute to the development approval process and to express its concerns and/or recommendations through the EIA process. She stated that it is the EIA team that is best placed within the EIA process to address all the concerns and recommendations of The Landings, as the EIA team is responsible for identifying the pros and concerns of the development with stakeholders and for making findings and recommendations in a final report which is submitted to the DCA for consideration. Ms. Augustin says that four representatives of The Landings were engaged as identified in the ESIA Update Addendum Report dated 30th October 2017 by Ms. King. She says therefore that The Landings was consulted and encouraged to participate with comments during the EIA process, which was sanctioned by the DCA. She maintained this in cross examination though she agreed that the DCA did not itself engage The Landings, invite them to participate in the process or seek any information from them, and that the DCA refused The Landings' requests to see and take copies of the development plans. In cross examination she stated that The Landings was only entitled to the information in the register and the approved components of the plan, which she explained were such plans as had been approved up to the time of the request, which was the piling plan and not the master plan which The Landings had requested. The piling plan was shown to them.

[46] She says that all this is notwithstanding that it is within the DCA's discretionary powers to determine which relevant third party should be part of an application process, if it is found to be expedient to do so. She indicated that the DCA's procedural policy did not provide for third parties to be consulted directly especially where the class and nature of the surrounding developments and land use are similar. She noted that the area is zoned for touristic/commercial development and the Two Seas development does not change the character of the area. Therefore, The Landings could have no expectation of being consulted. Further, the DCA had given Two Seas approval for a development in 2009, which though of a smaller scale, the nature and class were the same. As there was no change in the character of the neighbourhood or land use, there was no obligation on the DCA to consult The Landings. Nonetheless, she says The Landings was consulted.

[47] Ms. Augustin too denies that the development was approved in very close proximity to The Landings' property rather that it was approved within the established setbacks. She stated that there was no limitation on the height of developments and no legal right to light or views which would influence the decision of the DCA. The ESIA contained the necessary measures to mitigate pollution and other nuisance.

[48] In cross examination Ms. Augustin was asked a series of questions about the application approval process in particular concerning the EIA. Ms. Augustin confirmed that there is no requirement for an EIA at the time the application is submitted; that after the application is submitted, the DCA conducts an appraisal which involves the appraising officer visiting the site, consulting the legislation among other things, which will determine whether an EIA is required; the Board of the DCA, based on the appraisal, makes the decision as to whether the EIA is required; thereafter the referral agencies provide input to generate the terms of reference for the EIA; the Board approves the terms of reference and the proposed EIA team and the developer is informed of the decision of the Board; the developer then engages the EIA team approved by the Board; the EIA is conducted and

submitted to the DCA; the EIA is forwarded to the referral agencies for review and comment; the referral agencies conduct their own checks and provide feedback on the EIA; and having considered the feedback, the Board may then approve the EIA with or without conditions in respect of the application submitted. Ms. Augustin admitted that this process, as it relates to the development, was not detailed by her in her evidence.

[49] She agreed that the EIA is always prepared in accordance with the terms of reference. She disagreed with the suggestion that there were no terms of reference in respect of the application for the development, though she said she could not point to any document in the bundle entitled Terms of Reference. When pressed, she pointed to the Addendum Update to the ESIA and a list of issues identified by the DCA to be addressed by the EIA team and indicated that these were terms of reference. She stated that it was not part of the procedure to prepare the EIA before the application is submitted and without a terms of reference.

Ms. Alison King

[50] The evidence of Ms. King is that she was engaged by the Sandals Group in 2009 to undertake the EIA for the originally proposed Sandals Grande Saint Lucia Spa and Beach Resort expansion. She indicated that by letters dated 27th May 2009 and 24th August 2009, a request for the TOR for the EIA was made to the DCA. She then commenced work on the EIA in anticipation of receipt of the TOR. The TOR dated 16th October 2009 was the typical TOR of the DCA and the EIS was submitted in December 2009. Ms. King says that although the EIA considered and addressed potential impacts of relevance to The Landings, she did not deem it necessary to consult directly with them in the course of its preparation. Further the TOR for the EIA did not specifically require consultation with The Landings. She says that the potential impacts on The Landings could easily be mitigated by the implementation of good construction and operational practices recommended in the EIA.

[51] It is apparent from her evidence that thereafter, the DCA made several requests for further work to be undertaken in relation to the EIA submitted. These requests were made by letters dated 18th February 2010 and 18th January 2011. At a meeting between Sandals and the DCA on 24th January 2011, a revised concept was presented. There were several subsequent exchanges in 2011 with several referral agencies identifying issues and Ms. King provided responses as to how they had been addressed. Ms King says she had no further involvement until September 2017 when she was again retained by Sandals to prepare an update to the EIA for a revised concept. She says a meeting was held on 22nd September 2017 between Sandals and the DCA. Though the discussions were broad, action points for the latest EIA were raised. Ms. King says following the meeting, she wrote to the DCA on 13th October 2017 outlining her proposed approach for completing the EIA in the context of the earlier EIA work, changes in the development proposal and in the surrounding environment.

[52] Ms. King says that as part of the consultation process to inform the ESIA update, on 14th October 2017 she requested a meeting with The Landings management. There were email exchanges between herself and a Ms. Kamille Huggins who coordinated the meetings. She met with a Ms. Kathy Taylor, Director and Mr. Wilbert Mason, General Manager on 18th October 2017. She says she specifically requested the meeting because she thought it was necessary to hear from The Landings' management any possible concerns in relation to the development and their recommendations to address them. She says that at this meeting, the revised Sandals development concept plan was tabled for discussion. Concerns raised by The Landings included impact of noise from piling, and of the proposed buildings on views. She said she was taken on a tour of The Landings property by the General Manager, Mr. Mason. She took pictures and made notes. She says that via an email exchange, The Landings requested a follow-up meeting to seek further clarification. She recommended that they meet with Sandals management. The meeting was convened on 30th October 2017, which she attended. Representing The Landings were Mr. Mason, Mr. Robertson, Ms. Copeland and a Mr. Scourfield.

At the meeting the revised concept plan was tabled and the renderings viewed on her computer. The Landings' concerns included impact of construction noise and impact of height and proximity of buildings on views. She said she indicated that the scheduled test piling would give a good indication of likely noise impact and impact on views could be mitigated by vegetative screening. The Landings made a request for copies of the plans tabled to better understand the likely impact, which she advised she was not in a position to provide. The issue of setbacks was also discussed. The Landings enquired of timing of the work in order to inform their tour operators, as well as about access to the EIA report and the procedure for objection to the development. She says that blockage of light was never raised by The Landings.

[53] In her ESIA Addendum Update Report dated 30th October 2017, Ms. King said she noted changes in the proposed development, changes in environmental baseline conditions, alterations in significant potential impacts, potential significant impacts which remained unaltered, and mitigation measures from the previous EIA as well as additional measures. The DCA by letter dated 16th February 2018 raised some concerns and these concerns were addressed by a document dated 19th February 2018. Ms. King says that the EIA contained material considerations as identified by the DCA and its referral agencies and concluded that with the recommended measures implemented, impacts could be satisfactorily mitigated without adverse effect sufficient to warrant not proceeding with the development. The EIA Report, Addendum and Update sought to identify the potential negative impacts on others, including The Landings, in accordance with the DCA TOR and mitigation measures.

[54] In cross examination, Ms King confirmed that consultation with The Landings was not required by the DCA TOR of 2009, and while The Landings was within the sphere of impact, she did not see the need to engage them directly in 2009. She further confirmed that this was her own determination and not that of the DCA. She said that she decided to consult Landings in 2017 as the concept had changed. Again this was her own determination and not that of the DCA.

[55] Several potential impacts which could affect The Landings were put to her such as overwater suites being damaged by storm and waste water and sewage treatment plant construction, which she agreed were not discussed with The Landings. It was put to her that the impact on fishers was considered necessary and the minutes of her meetings with the fishers were appended to her report but no similar study was undertaken in relation to the socioeconomic impact on Landings. She agreed, however said that consultation with the fishers was specifically required by the TOR.

[56] Ms. King explained in cross examination that the she started work on the ESIA Addendum Update Report before the TOR was produced, as developers often do. When the TOR is received, one then ensures that the requirements are met she explained. She said she had already written to the DCA and indicated how she intended to proceed. She said she received the TOR after she produced the Update. She said she submitted the ESIA Addendum Update Report simultaneously with the application on 16th November 2017. The TOR is dated 16th February 2018. By her document dated 19th February 2018, she responded to the TOR indicating how the requirements had been addressed in ESIA Addendum Update Report which had been submitted.

[57] She was also asked if she did not see it fit to provide an agenda for her meeting, a copy of the plans in advance of the meeting, inform The Landings of the possible impacts or provide a draft of the EIA or her notes of the meeting. To all of these she responded no. She disagreed however, that The Landings was not part of the EIA process. She disagreed that the DCA did not have The Landings' concerns before it. She said the potential impacts are contained in the ESIA, even though it does not say "The Landings says…" She agrees that she did not prepare an economic impact assessment on The Landings.

Analysis

[58] Having considered all the evidence, this Court makes the following findings:

i. The DCA did not consult The Landings before arriving at its decision. The evidence of the DCA's witnesses was that there is no duty on the DCA to consult, but that in any event The Landings was consulted as part of the EIA process by virtue of the meetings held by Ms. King, the EIA consultant which the DCA sanctioned. However, this merits closer scrutiny. The 2009 Terms of Reference for the EIA, which Ms. King says she merely updated in respect of the application for permission for the development in 2017 did not require Ms. King to consult The Landings. In none of the subsequent communication between the DCA and Ms. King which informed the EIA Addendum Update Report was any request made for her to consult The Landings, as for example had been the case with the fishers. It was Ms. King's evidence that she was not required or asked by the DCA to meet with The Landings in October 2017 when she did; it was her own decision triggered by the fact she felt it important, since the concept had changed and The Landings was in the sphere of influence of the development. Whilst the DCA in its evidence says that it did consult with The Landings, what seems clear is that the DCA did not themselves consult or require consultation, but all the same did not object to the 'consultation' which Ms. King as part of the EIA process said she undertook. That would account for their evidence that the 'consultation' was sanctioned by the DCA. In other words, no objection was raised to the fact that Ms. King had had meetings with The Landings.

ii. Furthermore, at the time at which Ms. King held the meetings in October 2017, there was no application for permission in respect of the development before the DCA and therefore there could have been no duty on the DCA to consult with The Landings. Likewise no meeting with the Landings could have amounted to consultation by the DCA in consideration of any application for the development. Ms King's undisputed evidence is that the application and the

ESIA Addendum Update Report were submitted simultaneously on 16th November 2017. The meetings were held on 18th and 30th October 2017.

iii. The final observation is that Ms. King was at all times acting in her capacity as EIA consultant for Two Seas, hired and paid by Two Seas, and therefore as agent of Two Seas and not the DCA.

[59] The question therefore of whether these meetings rose to the threshold required for there to have been proper consultation need not be considered. The only question which remains is whether there was in fact a duty on the DCA to consult The Landings.

[60] The Physical Planning and Development Act which governs applications for permission to develop land in Saint Lucia does not contain any provision which expressly imposes a duty on the DCA to consult with any person or group or the public generally in considering applications for development. This is accepted by all the parties in this matter. This is in sharp contrast to sections 12-15 of the Act which specifically require consultation with specified persons in relation to preparation of physical plans.[30]

[61] However, a duty to consult may not only arise where there is an express statutory duty, but may arise where there is a legitimate expectation by a party that it will be consulted.[31] This comprises circumstances where there has been a promise to consult or where there has been an established practice of consultation.[32] The duty also arises where a failure to consult would lead to conspicuous unfairness such as where a decision directly affects a person's interests, or as part of a duty to take into account material considerations. However, where there is no legitimate expectation

[30] "physical plan" as defined in section 2 of the Act means a plan showing the manner in which land may be used whether by the carrying out of development or otherwise and the stages by which such development may be carried out.
[31] R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139.
[32] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.

of consultation, the courts have been reluctant to find an implied statutory duty to consult.[33] In R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department, Rimer L.J. agreeing with Maurice Kay L.J. stated:

> "…the real explanation as to why appellants are not entitled to succeed on the consultation issue is that it is simply no part of the scheme of section 3 that there should be any consultation; and if that is the legislature's scheme, it is not for the courts to re-write it. I regard that view as supported by the fact that, as was cogently illustrated to us, the legislature is well able when it chooses to do so to identify whether any and, if so, what consultation process should precede any legislative changes, yet in the case of section 3 it chose to remain silent on the topic."[34]

[62] In the case of R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others[35], Hallet L.J. reviewed thoroughly the common law principle of fairness, and the public law duties to consult, to carry out sufficient enquiry also called the Tameside duty, and to have regard to relevant considerations all of which are relevant to this case. As the principles are so concisely and clearly set out in the case, it is worth quoting extensively:

> **"**The English common law principle of 'fairness'
> [84] It is appropriate to start any legal analysis by examining the common law principle of fairness in this context. Where a statutory process is of itself insufficient to ensure the requirements of fairness are satisfied, the common law will generally intervene to ensure that the requirements of fairness are met. As Byles J observed in *Cooper v Board of Works for the Wandsworth District (1863) 14 CBNS 180 at 194, (1863) 143 ER 414 at 420*:
>
> > '[A] long course of decisions… establish, that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'
>
> [85] In *Lloyd v McMahon [1987] 1 All ER 1118 at 1161, [1987] 1 AC 625 at 702–703,* Lord Bridge of Harwich said:
>
> > '[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'

[33] Wood v Ealing London Borough Council [1966] 3 All ER 514.
[34] [2007] EWCA Civ 1139 at paragraph 65.
[35] [2015] 3 All ER 261.

…

[90] As a recently published textbook on judicial review has put it, the common law's intervention is usually justified on the basis that Parliament is taken to have legislated in the knowledge of the common law duty to act fairly and the requirement of fairness, and on the assumption that decision-makers will act in accordance with those requirements *(Auburn, Moffett and Sharland Judicial Review: Principles and Procedure (2013) para 5.16)*. Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice *(Bennion on Statutory Interpretation (2nd edn, 1992) p 737)*. Parliament is not to be presumed to act unfairly: the courts will imply into the statutory provision a rule that the principles of natural justice should be applied *(Wiseman v Borneman [1969] 3 All ER 275 at 279, [1971] AC 297 at 310 per Lord Guest).*

[91] Lord Browne-Wilkinson described this as a principle of construction requiring the courts to interpret even very wide words in a statute as implicitly limited by the presumption that Parliament intends the common law requirements of fairness to apply unless it has indicated to the contrary *(Pierson v Secretary of State for the Home Dept [1997] 3 All ER 577 at 590–591, [1998] AC 539 at 573–574).* Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions *([1997] 3 All ER 577 at 590–591, [1998] AC 539 at 573–574).* The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute *(Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700 at [35] per Lord Sumption).*

…

Intuitive judgment

[94] In *Doody v Secretary of State for the Home Dept [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560*, Lord Mustill emphasised that the exercise of determining the requirements of fairness was 'essentially an intuitive judgment' (emphasis added) and highly dependent on context. In a well-known and oft-cited passage, Lord Mustill summarised the principles to be derived from the authorities in six propositions:

> '(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to

decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

Public law duties

[95] The basic common law principle of fairness has found expression in public law in a number of ways, which limit or control the exercise of the power by government or public bodies by imposing certain duties on them before making administrative decisions, in particular, the duty to consult.

[96] There are three particular public law duties relied upon by the claimant in the present case:
(1) A duty to consult.
(2) A duty to carry out sufficient inquiry.
(3) A duty to have regard to relevant considerations.

Duty to consult

[97] A duty to consult may arise by statute or at common law. When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The common law recognises a duty to consult, but only in certain circumstances.

[98] The following general principles can be derived from the authorities:
(1) There is no general duty to consult at common law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision *(R (on the application of Harrow Community Support Unit) v Secretary of State for Defence [2012] EWHC 1921 (Admin), [2012] All ER (D) 96 (Jul), [2012] NLJR 962 at [29] per Haddon-Cave J).*

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult *(R (on the application of Cheshire East BC) v Secretary of State for Environment Food and Rural Affairs [2011] EWHC 1975 (Admin), [2011] All ER (D) 80 (Aug) at [68]–[82], especially at [72]).*

(3) The common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) *(R (on the application of Bhatt Murphy (a firm) v Independent Assessor R (on the application of Niazi) v Secretary of State for the Home Dept [2008] EWCA Civ 755, [2008] All ER (D) 127 (Jul), (2008) Times, 21 July at [41] and [48] per Laws LJ).*

(4) A duty to consult, i.e. in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures *(R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Dept [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov) at [43]–[44] per Sedley LJ).*

(5) The common law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator *(R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Dept at [47] per Sedley LJ).*

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose *(R (on the application of Hillingdon London BC) v Lord Chancellor (Law Society intervening) [2008] EWHC 2683 (Admin), [2009] LGR 554).*

(7) The common law will, however, supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation where it is necessary to do so, e.g. in sparse Victorian statutes *(Board of Education v Rice [1911] AC 179 at 182, [1911–13] All ER Rep 36 at 38 per Lord Loreburn LC) (see further at [87], above).*

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty *(A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 especially at 351, [1983] 2 AC 629 especially at 639).*

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was to be cast upon them *(Westminster City Council v Greater London Council [1986] 2 All ER 278 at 288, [1986] AC 668 at 692 per Lord Bridge).*

(10) A legitimate expectation may be created by an express representation that there will be consultation *(R (on the application of Nadarajah) v Secretary of State for the Home Dept, R (on the application of Amirthanathan) v Secretary of State for the Home Dept [2003] EWCA Civ 1768, [2003] All ER (D) 129 (Dec), 148 Sol Jo LB 24)*, or a practice of the requisite clarity, unequivocality and unconditionality *(R (on the application of Davies) v Revenue and Customs Comrs, R (on the application of Gaines-Cooper) v Revenue and Customs Comrs [2011] UKSC 47, [2012] 1 All ER 1048, [2011] 1 WLR 2625 at [49] and [58] per Lord Wilson).*

(11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise *(R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening) [2000] 3 All ER 850 at 883, [2001] QB 213 at 254 (para 89) per Lord Woolf MR).*

Duty to carry out sufficient inquiry/Tameside duty

[99] A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the Tameside duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065*, where he said: '[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'

[100] The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(2) Subject to a Wednesbury challenge *(see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223),* it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken *(R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party) [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37 at [35] per Laws LJ).*

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision *(R v Kensington and Chelsea Royal London BC, ex p Bayani (1990) 22 HLR 406 at 415 per Neill LJ).*

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient *(per Schiemann J in R v Nottingham City Council, ex p Costello (1989) 21 HLR 301; cited with approval by Laws LJ in (R (on the application of Khatun) v Newham London BC at [35]).*

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion *(R v Secretary of State for Education, ex p Southwark London BC [1995] ELR 308 at 323 per Laws J).*

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R v Secretary of State for the Home Dept, ex p Venables, R v Secretary of State for the Home Dept, ex p Thompson [1997] 1 All ER 327 at 378, [1998] AC 407 at 466).*

Duty to have regard to relevant considerations

[101] A public body also has a duty to have regard to relevant considerations when making its decision. The decision-maker's duty to have regard to relevant considerations may require him to 'hear the other side' and thereby take into account the affected

> person's views about the subject matter *(R (on the application of Khatun) v Newham London BC at [27] per Laws LJ*)."[36] (my emphasis)

Legitimate Expectation?

[63] Was there a legitimate expectation that the Landings would be consulted by the DCA? The Landings has not established that any promise was made by the DCA to it that it would be consulted. The Landings has also failed to identify any established practice which would give rise to an expectation that it would be consulted for example a practice of consultation of adjoining land owners or the like.

[64] Where established practice is said to be the basis of a legitimate expectation, the test is whether the practice of prior consultation was so well established at the relevant date that it would be unfair or inconsistent with good administration for the local authority to depart from the practice in this case.[37] While a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional voluntary act.[38]

[65] The Landings has relied on the Manual for Developers as establishing the practice and procedure for consideration of applications for permission to develop land, in particular sections 4.8.1 and 4.8.3. However, when these sections are carefully examined, they do not in any way establish, recommend, or suggest a practice of consultation. Interestingly, in cross-examination, Mr. Houson made clear that the Manual for Developers is used as a guide and has technical information which is used but that it is not the main source of information.

Material Considerations

[66] The Landings also relies on the legislative requirement for DCA to have regard to material considerations. It says that it is a material consideration because of the

[36] Pages 280-284.
[37] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at page 401.
[38] R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139 paragraph 39.

significant negative impact the development would have on it based on the guidelines contained in the Manual and therefore it ought to have been consulted. It is interesting to note that while section 23(1) of the Act provides that the DCA should have regard to 'material considerations' in its determination of an application to develop land, the Act does not define material considerations.

[67] The Manual sets out relevant considerations in respect of tourism development, which focus heavily on environmental impact but also mentions socio-economic impact. It further requires a technical study to be done. The Landings highlight some of the considerations in the Manual which it says warrant consultation:

i. In terms of consideration of appropriate location, "it is important that tourism establishments blend with surroundings by reason of sitting, design, scale and landscaping" and "have no adverse effect with regard to noise, traffic congestion, or destruction of features of interest in the area."
ii. The Manual calls for a technical study, one of the objectives of which is "to inform the DCA and other agencies of the government of the full environmental and socio-economic implication of the project."

[68] Respectfully, the Landings has not shown that these considerations were not taken into account by the DCA, which is the extent of the requirement imposed by the Manual. The Landings suggests that because the development is proposed to be twice the height of the existing neighbouring developments, it does not blend in sitting, scale and design. However this is a matter for DCA's determination. It is not appropriate for this Court or The Landings to seek to substitute its decision for that of the DCA.[39] The considerations imposed by the Manual are within the discretion that has been reposed in the DCA by statute, as the local authority with responsibility for granting planning permission in Saint Lucia. Furthermore, these are considerations among others which necessarily involve a weighing of negative effects with the advantages to be obtained. This is the effect of the provision in the

[39] R (on the application of White) v Secretary of State for the Home Department [2011] EWHC 897 at paragraph 12.

Manual, which after listing the relevant considerations concludes: "The DCA will not grant permission for any development which may negatively affect tourism resources of the Island or result in situations in which the positive socioeconomic effects derived from the project do not outweigh the potential negative effects of the project." This is the nature of a discretion.

[69] The Landings in its pleadings states that it "is an important tourism resource and performs a public purpose for the economic development of the State of Saint Lucia"[40]. It says that "the respondent is charged with the responsibility before making a decision... to take into account material considerations such as the socio-economic impact of a tourism resource, namely the claimant and its business operations as an ongoing hotel..."[41] When counsel for The Landings was asked what the term 'tourism resource' referred to in the Manual means, he said it would include things such as a hotel or scenic views. For the reasons stated above The Landings cannot properly maintain a claim on behalf of the hotel/rental pool which it does not own, manage, or operate.

Sufficient Enquiry-(The Tameside Duty)

[70] While the Tameside duty should not be used to introduce a consultation process through the back door, this does not mean that the information necessary to make an informed decision cannot itself be the product of consultation. It can, to the extent that the decision-maker's duty to call his own attention to considerations relevant to his decision, require him to consult outside bodies.[42] The test for the Tameside duty is one of rationality, not of process.

[71] The Landings claims that the DCA's decision was irrational. It claims that the development would have a significant negative impact on it in respect of light, views, noise and dust pollution, traffic congestion and financially.

[40] At paragraph 11.
[41] At paragraph 34.
[42] [2015] 3 All ER 261 at paragraph 137.

[72] On these assertions, the Tameside duty could come into play. The Tameside test is a two-stage enquiry: First, the court must establish what material was before the decision-maker and what he or she knew when he made the decision. Second, the court must decide whether no reasonable decision-maker, possessed of that material, could have proceeded to make a decision without making further inquiries.[43]

[73] The only evidence of what was before the DCA was what was contained in the EIA and ESIA Addendum Update Report. The fact is that at minimum, the ESIA Addendum Update Report addressed impacts which would have affected the surrounding areas, including The Landings. In fact it addressed all the impacts The Landings stated was of concern to it such as light, views, noise and dust pollution, and traffic congestion and recommendations were made for mitigation. The EIA was submitted to the DCA and the referral agencies for consideration. It has not been shown that in coming to its decision, the DCA did not consider the impacts and recommendations contained in the EIA of concern to The Landings. In fact there is a presumption that the DCA has acted lawfully unless the contrary is shown.[44] The fact the DCA did not see the need to consult with The Landings, in the absence of a statutory duty or a duty arising by legitimate expectation, does not mean that the impacts to The Landings were considerations to which the DCA did not have regard. The Landings has not shown that it had any concerns above and beyond those highlighted in the EIA report. The Landings have led no evidence to suggest that were there further consultation it would have shown impacts which were so adverse to it that it would have been impossible for DCA to make a decision without considering these.

[74] The answer to the question whether, knowing what the DCA did, its decision to grant approval was rational, without making further inquiries, must be yes. Many of the negative impacts raised by The Landing are predictable, such as noise and dust

[43] [2015] 3 All ER 261at paragraph 141.
[44] North Meath at paragraph 19.

pollution and traffic congestion. Further, these are temporary inconveniences for which there are well established mitigation measures. The potential for these impacts could not render the decision to grant approval for the development unreasonable. In the words of Ms. King the EIA consultant, they were expected construction impacts or by products on any construction.

[75] The Landings has not identified any law, rule or regulation establishing or protecting a right to light or views. On the other hand Two Seas has drawn the court's attention to the case of R (on the application of White v Secretary of State for the Home Department[45], in which the claimant, on an appeal of the decision of the Inspector to the High Court, contended that the neighbouring property would block the light to the window at the side of his house which lit his stairwell and hallway and an area which he used for reading. He submitted, inter alia, that he had been awarded registered title of the right to light, that guidelines in respect of the conservation area contained provisions regarding daylight, that the loss of light to his property would be unacceptable, that the area lit by the window was used as a habitable area, and that he was entitled to access to light for all the purposes for which the area would reasonably be used. Lindblom J held that:

> "[24] …[The Inspector] acknowledged, rightly in my judgment, that the question of any interference with that right to light was, as she put it, "a civil matter between the parties", which did not impinge upon her conclusion that the living conditions of neighbouring residents would not be harmed by the development.
>
> [25] I do not believe the Inspector went wrong in approaching the matter in that way. She had to consider the acceptability of the proposed development in planning terms. It was not her task to find whether the implementation of a planning permission granted on appeal would affect the property rights of third parties. In any event, the granting of planning permission in itself would not infringe any right to light. Such infringement could only arguably arise upon the commencement of the works to implement the permission.
>
> [26] Any infraction of a property right of this kind would be a matter for civil litigation. I note the observations of Ouseley J, obiter, in R(C, a child) v Camden London Borough Council [2001] EWHC Admin

[45] [2011] EWHC 897 (Admin).

> 1116, dealing with the contention that a grant of planning permission had infringed various property rights "If there is some specific right to light in some covenant or easement, the grant of planning permission would be a step on the way to a potential removal for breach of the covenant, but would not be directly decisive of it." (Paragraph 322)."[46]

[76] To the extent that it has not been challenged that there is no right to light or views and no regulations prohibiting developments of a certain height in Saint Lucia which is the DCA's stated position, the decision has not been shown to be irrational.

[77] Further when asked in cross examination, Ms. Copeland was unable to point to any new concern of which DCA would have been unaware. The only concern mentioned by her that may not have been considered by the DCA was the financial impact on the Landings, which is doubtful to be a material consideration for the purpose of granting planning permission. The area of the proposed development is zoned for touristic and commercial development. It was always likely that a hotel or other commercial facility would have been built on neighbouring property which would compete with The Landings. In any event, the financial impact on the hotel business, for the reasons already stated above, cannot be maintained by The Landings. Different considerations would I think apply had the development been of a nature totally inconsistent with tourism development. The fact that some sort of consultation, or further inquiries, might have been possible or desirable, does not mean that no reasonable or rational decision-maker could have made the decision on the basis of the information which had been before the DCA.[47]

Fairness

[78] The Landings also relies on the principle of fairness to establish that the DCA had a duty to consult it since it would be directly and adversely affected by the development. In this regard it relies on the Trinidadian case of Ulric Buggy Haynes Coaching School and ors v Minister of Planning and Sustainable

[46] White at paragraphs 24-26.
[47] Paragraph 145.

Development.[48] In that case, the Court was considering a claim to quash the decision granting planning permission to build a sporting complex on a savannah which had been utilized daily by a wide cross section of the public for several decades for a variety of sporting and other activities by the community. The first claimant conducted training in football, cricket and athletics for young persons and was one of the first coaching schools to have been established in the east of Trinidad, named after a sportsman of national repute who had played football for Trinidad and Tobago. The second claimant was a cricket club which had a clubhouse within the confines of the savannah and was used for training and local and inter-village cricket competitions. The court found that the claimants, as users of the savannah and persons adversely affected by the decision, were entitled to have been consulted arising out of a duty on the Minister to act fairly.

[79] In coming to this conclusion, the court held that the Town and Country Planning Act ("TCPA") gave the Minister the power to grant planning permission, without a statutory right to a hearing:

> "The TCPA provides for a process whereby the Minister, in the process of *altering a development plan* is bound to consult with the local authority within whose jurisdiction the land is situated. He may also consult with any other persons or bodies he thinks fit. He shall also before submitting the plan, give to the Council or persons or bodies an opportunity to make objections or representations. But the statute does not stop there. It provides for Notice in the Gazette which grants an opportunity for objection and representation in writing upon receipt of which the Minister is [to] hold an inquiry and a report on the inquiry submitted to the Minister. The Minister is then to consider the report along with the objections and representations before submission to the Parliament. Even before submission, the Minister may consult with others if he so desires. So that the statute clearly gives an opportunity to be heard to those who may be affected and to others who wish to be heard. There is however no such procedure provided in the statute in respect of *applications for planning permission*.
>
> For these reasons, this court agrees with the submissions of the Claimants that the fact that the TCPA does not contain a provision for objection or representation in respect of applications for permission to develop lands is of no relevance to the application of the principles of natural justice and fairness. It is to be noted that before a court imposes a duty to consult in

[48] Claim No. CV2013-05227 (Republic of Trinidad and Tobago High Court of Justice).

respect of planning permission where no such duty is prescribed by statute, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. In the court's view the present case falls squarely within the ambit of that principle. It is clear that the statutory framework does not provide for objections and representations in respect of *applications for planning permission* and so is insufficient to achieve justice in this case. It is equally clear that to require additional steps would not frustrate the purpose of the TCPA but will in fact fulfill its purpose, the Claimants having been deprived of the opportunity to object or make representations in respect of an *amendment to the National Plan* in relation to the proposed savannah development."[49]

[80] Having stated that, the court went on to highlight clearly the important distinguishing feature in this case:

> "Additionally, the distinction here is that in this case, the opportunity to be heard is set out in the provisions as they relate to the *amendment to the national Plan*. At that juncture, the policy decisions in relation to planning are subject to parliamentary oversight and national scrutiny but the Defendant has breached his statutory duty in that regard thereby depriving the Claimants of the opportunity to be heard. So that in the particular facts of this case, the breach of the duty to update the national plan is directly relevant to the application of the principles of natural justice in the *planning permission* process conducted by the Minister."[50]

[81] The court concluded:

> "Having therefore found that the statute does not provide adequately for a procedure to object and make representations and that there was a duty to act fairly on the part of the Minister, the court should therefore enquire as to the ambit of that duty in this case in these particular circumstances, and whether on the evidence that duty was in fact fulfilled. The court wishes in so doing to be pellucid in stating that the finding of the court is not that there exists a general duty to consult when the Minister is considering whether to grant permission to develop land but that in this case, in these circumstances, having regard to all the factors identified, including but not limited to the fact that it appears on the evidence that the Ministry was aware of the public objections and the fact that the Claimants were deprived of the opportunity granted to them by statute in relation to objections and representations permitted when updating the national plan and the extent of the effect that the sporting complex would have on the daily activities of these

[49] Para 67-69.
[50] Para 76.

> Claimants, there was a duty on the Minister to act fairly when considering the application for planning permission. In so saying it is the finding of the court that that duty encompassed the grant of an opportunity to the Claimants to engage in genuine consultation on at least on one occasion. It was not the duty of the Minister to consult with each and every user of the savannah but merely to provide a general opportunity to those users who wish to avail themselves of that opportunity."[51] (my emphasis)

[82] The Ulric Buggy Haynes case is in my view distinguishable from the present. In that case the savannah had been used by the public i.e. the community for public purposes. The Act had provided for public participation in relation to amendment to the national plan which had not been afforded to the claimants. It is this omission that therefore made it incumbent on the Minister when considering planning permission to have consulted the claimants, whom he was aware objected and in light of the importance to the public of the savannah and the adverse effect it would have on the public. In the present case, The Landings had not been deprived of any statutory duty of consultation which would have placed any duty on the DCA to consult with them prior to granting approval. While the DCA would have been aware of their request for information, the effect on The Landings cannot be said to be comparable to the effect of the planning permission in the Ulric Buggy Haynes case. The DCA would have had the EIA before it, in which impacts to the surrounding area including The Landings was considered and highlighted. The Ulric Buggy Haynes case emphasizes that there is no general duty to consult when considering whether to grant permission to develop land but that it was the circumstances of that particular case that called for consultation.

[83] Counsel for The Landings cited several other cases in which decisions were quashed on the basis that a duty to consult had not been complied with or that the consultation process had been flawed. However, these cases can also be distinguished from the present. In the case of R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry[52], the government

[51] Para 82.
[52] [2007] EWHC 311 (Admin).

was considering the option of nuclear power as an alternative energy source. The distinguishing feature in that case was that a 'full public consultation' had been promised by the government to explore the possibility of building nuclear power stations in the future. It was held that the claimant's legitimate expectation to a 'full public consultation' had been breached. Among the reasons for that finding was that no consultee could have reasonably foreseen that it was effectively their 'last chance' to air their views prior to the making of proposals for a nuclear generation.

[84] In R (on the application of Moseley) v Haringey London Borough Council[53], which concerned creation by local authorities of a new Council Tax Reduction Scheme ('CTRS'), the distinguishing feature was that before making a CTRS, authorities were obliged, pursuant to para 3(1)(c) of Sch 1A[a] to the Local Government Finance Act 1992, to consult 'such other persons as it consider[ed] [were] likely to have an interest in the operation of the scheme'.

[85] The other two cases cited by The Landings were R v The London Borough of Brent ex parte Gunning and others[54] which involved a decision by the local authority to make proposals which if approved by the Secretary of State would effectively result in the closure of two schools and R v Camden London Borough Council, Ex parte Cran and others[55] in which the court decided that the failure of the local authority to consult residents on the introduction in their area of a controlled parking zone rendered that decision invalid. As in the previous cases, the duty to consult was also tied to the fact that the impact of the decision was to be felt by a large group of persons and had far reaching consequences.

[53] [2014] UKSC 56.
[54] [1985] 84 LGR 168, The Times 30 April 1985.
[55] Times Law Reports, 25th January 1995.

Issue iii

Whether DCA approved an illegal trespass on The Landings' property by Two Seas?

[86] The Landings contends that the decision of the DCA is illegal and irrational as the DCA approved the development on The Landing's property.

The Evidence

[87] Both Ms. Augustin and Mr. Houson deny that the DCA approved plans which constituted a trespass on The Landings' property by Two Seas.

Ms. Karen Augustin

[88] In cross examination, Ms Augustin was shown a plan which she agreed was the approved master plan. She identified pathways and a roadway to the east of the plan. It was put to her and she agreed that the plan showed that the road/pathways touch the wall at two sections. She was asked if she was aware that Two Seas built structures along the wall to which she replied she knows that structures were removed but that she was not told why the structures were removed. She said that she was aware that the government had reserved a 10 foot reserve from Sandals' property and a 5 foot reserve from The Landings' property for a right of way to the beach. She said she is not aware whether the reserve strip is bounded by The Landings' wall. In re-examination she indicated that drainage was not reflected on the plan.

Mr. Werner Houson

[89] In cross examination, Mr Houson maintained that DCA did not approve any trespass. He said that he was aware that Sandals had removed structures but was not aware of a reserve strip. He was adamant that the development as approved did not extend to The Landings' wall. He was asked to identify the boundary on the site plan which he did indicating the line with the pegs. He however said he could not identify the wall as there were several lines on the plan and no annotations. He said that the boundary line and the setbacks are identified by the technical team, of

which he is part, on the survey plan and not on the site plan which was before him. It was put to him that the line on the plan that he identified as the boundary was in fact the wall, by virtue of the fact that the plan identified an area marked from the boundary line, as identified by him, to an inner line, which was annotated "15 feet minimum setback from the face of the wall." The suggestion was that this must therefore mean that the boundary line was the face of the wall from which the setback was measured. He said he could not agree to this.

Analysis

[90] It has not been established on a balance of probabilities that the DCA approved a trespass on the Landings' property by Two Seas. Neither Ms. Augustin nor Mr. Houson authored the master plan which was shown to them in cross examination from which The Landings sought to establish the approved trespass. Neither are Ms. Augustin and Mr. Houson experts in this area. Mr. Houson, who is part of the technical committee of the DCA indicated that he was not in a position to determine that the site plan before him depicted the development extending to the Landings' wall, as it is the survey plan that is used to identify the boundaries and measure setbacks.

[91] In order for The Landings to have proven this allegation, it would have been necessary to bring the appropriate expert, a surveyor, to give the relevant evidence, which they have not. Whilst several survey plans were introduced into evidence by way of exhibits to Ms. Copeland's affidavit dated 29th January 2019, this too is insufficient. The surveys plans were not accompanied by any surveyor's report offering any explanation of the plans or drawing any conclusions as to trespass. Ms. Copeland is not an expert in this area and therefore her evidence cannot be accepted as proof of a trespass itself, more so that such trespass was approved by the DCA. There is no indication that these surveys, if they depict a trespass were before the DCA for their consideration during the application approval process, or that any survey plan depicting a trespass was approved. The Court is not in a position to make any such finding as to the DCA's approval of the Two Seas

development on The Landings property by simply looking at a master plan or surveys without the necessary expert assistance.

Conclusion

Is The Landings entitled to the relief sought?

[92] On the nature of judicial review proceedings, both the DCA and Two Seas in their submissions cited the Irish case of North Meath Wind Farm Ltd. & anor v An Bord Pleanála[56] where it was explained:

> "This Court proposes to instead adopt the succinct analysis of the nature of judicial review in planning matters, as set out by Hedigan J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 at para 8.2:
>
> > "Judicial review is not available as a remedy to correct errors or to review decisions so as to render the High Court a Court of Appeal from the decisions complained of (see *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381). The system of judicial review is radically different from the system of appeals. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On an appeal, the question is "right or wrong?" On review, the question is "lawful or unlawful?" (See D*unne v. Minister for Fisheries and Forestry* [1984] 1 I. R. 230, at p. 237). The nature of judicial review of expert bodies was addressed in *Henry Denny & sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I. R. 34, where Hamilton C. J. stated at pp. 37 & 38 that:
> >
> > > 'It would be desirable to take this opportunity of expressing the view that the court should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by tribunals such conclusions must be corrected. Otherwise it should be recognised that tribunal's which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.'
> >
> > There is, moreover, a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown. One

[56] [2018] IEHC 107 at paragraph 19.

> must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner (see *Lancefort Ltd v. An Bord Pleanála* [1998] IEHC199). The burden of proof of establishing any error of law or fundamental question of fact leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on the applicant in proceedings such as these. Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere (see *Weston Ltd. v. An Bord Pleanála* [2010] IEHC 255). An applicant may only challenge the Board's decision on irrationality grounds if there was no material before it capable of supporting its view (see *Harrington v. An Bord Pleanála* [2010] IEHC 428). Thus, the nature and scope of judicial review is a limited one. The court should exercise considerable judicial restraint in the application of review principles. If judges overreach or overcontrol, they commit an error which review has been designed to prevent. They usurp the jurisdiction of those to whom the specific power has been granted."

[93] In judicial review matters, the court must exercise judicial restraint. Their function is not to sit as a court of appeal in relation to decisions of a local authority/statutory body such as the DCA. It is concerned with the legality of a decision and not the merits. The Court ought to interfere only where the local authority has committed some error of law or fundamental fact. Further there is a presumption that a local authority acts lawfully unless the contrary is shown. The Landings has not established before this Court any statutory duty on the part of the DCA to consult; duty arising out of any legitimate expectation whether by promise or established practice; or that the impacts to The Landings, other than those contained in the EIA which was before the DCA for consideration, were material considerations which had not been taken into account..

[94] Considering the foregoing, it has not been established on a balance of probabilities that the decision of the DCA to grant approval to Two Seas for the development was one that no reasonable authority could have come to on the material before it so as to have acted irrationally and unreasonably. In the circumstances, this is not an

appropriate case for the Court to interfere with the exercise of the DCA's authority and therefore the relief claimed by The Landings is denied.

Costs

[95] Rule 56.13(6) provides that the general rule is that no order for costs may be made against an applicant for judicial review unless the Court considers that the applicant acted unreasonably in making the application or in the conduct of the application. I can find no good reason to depart from the general rule in this case. I also note that neither the DCA nor the interested party made any submissions as to why the general rule should not be followed.

Order

[96] In light of the foregoing discussion, the Order is as follows:

(1) The fixed date claim for judicial review is dismissed.

(2) There shall be no order as to costs.

Kimberly Cenac-Phulgence
High Court Judge

By The Court

Registrar