

THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: SLUHCV2024/0412

BETWEEN:

DEVELOPMENT CONTROL AUTHORITY

Appellant

and

MONDESIR ESTATES LIMITED

Respondent

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Anand Ramlogan SC with Mr. Jared Jagroo instructed by Mr. Kurt Satney
for the Claimant

Mr. Peter Foster KC with Ms. Rene St. Rose, Ms. Marie-Ange Symmonds and
Ms. Tianah Foster for the Defendant

Mrs. Rochelle John-Charles holding a watching brief on behalf of the Attorney
General

Present:

Ms. Karen Augustin, Executive Secretary of the Appellant

Mr. Ian Harrison, representing the Respondent

Mr. Geoffrey Robillard and Ms. Carole Robillard, Owners of the Respondent

2025: January 16; (Hearing)

January 28 (Submissions in Reply)

March 25,31 (Further submissions)

May 27. (Decision)

Corrected pursuant to CPR 42.10 and re-issued: May 28, 2025

JUDGMENT

[1] **CENAC-PHULGENCE J:** On 24th October 2024, the appellant, the Development Control Authority (“the DCA”) filed a fixed date claim appealing the decision of the Physical Planning and Development Appeals Tribunal (“the Appeals Tribunal”) dated 24th September 2024 (“the Decision”).

- [2] This decision concerns three interlocutory applications listed in chronological order: (i) an application for a stay of the decision of the Appeals Tribunal filed by the DCA on 5th December 2024; (ii) an application to strike out the fixed date claim filed by the respondent, Mondesir Estates Limited (“Mondesir Estates”) on 12th December 2024 and (iii) an application for extension of time filed by the DCA on 16th December 2024. For the reasons which follow, I have determined that the application to strike out should be dismissed, the application for extension of time be granted and the application for a stay of execution be dismissed.

Background

- [2] The DCA on 22nd May 2024 rejected application no. ARN 773/21 for permission by Mondesir Estates Limited (“Mondesir Estates”) to develop land registered as Block and Parcel 0025 4 situate in Anse L’Ivrongne, Soufriere which land was purchased in January 2016. This particular development comprised the construction of a single-family dwelling unit referred to as “The Great House”.
- [3] The DCA’s consideration of ARN 773/21 came after the decision of Innocent J delivered on 24th July 2023 in which the learned judge quashed the decision of the DCA in relation to the submitted ARN 773/21 and remitted the application to the DCA for reconsideration in light of the observations and directions given by the court. The 22nd May 2024 rejection was said to be the DCA’s reconsideration of the application.
- [3] The 22nd May 2024 rejection of ARN773/21 was appealed to the Appeals Tribunal. On 24th September 2024, the Appeal Tribunal allowed the appeal. It is this decision which is now the subject of appeal in these proceedings.

The Applications

- [4] Having considered the nature of the applications, I decided that the three applications would be dealt with in the following manner; the application to strike out the claim, the application for extension of time and lastly the application for a stay of execution.

The Application to strike out

- [5] By this application Mondesir Estates seeks an order that the fixed date claim filed on 24th October 2024 be struck out as being a nullity having been filed and served out of time or in the alternative that the Grounds of Appeal stated at Nos. 1-8, 9(a)-(h), 9(j) and 10 be struck out.
- [6] The grounds of the application in summary are that:
- (i) In accordance with CPR 60.5, the claim form must be served within 28 days of the date the decision was given to the claimant;
 - (ii) The Appeals Tribunal delivered the Decision on 24th September 2024. The fixed date claim form and Authorisation Code were required to be filed and served on Mondesir Estates on or before 23rd October 2024. The claim and supporting affidavit and exhibits were filed on 24th October 2024. It was served on the respondent on 25th October 2024 and the Authorisation Code was served on the Mondesir Estates on 20th November 2024. CPR 5A.12(4) provides that service is deemed not to have been effected until the authorisation code generated by the Portal has been served on the party and the time of service shall be deemed to be the time when service of the authorization code has been effected in accordance with this rule unless service is effected in accordance with directions given by the court. The appeal is therefore a nullity and ought to be struck out.
- [7] The application is accompanied by an affidavit in support. The DCA filed an affidavit in reply and asks that the application be dismissed.

A. Is the claim form out of time?

- [8] Section 28 of the **Physical Planning and Development Act**¹ (“the Act”) provides for appeals from decisions of the Appeals Tribunal to be made to the High Court. However, it does not prescribe a time for doing so. Therefore, we look to the **Civil Procedure Rules** (“CPR”), Part 60 which deals with appeals to the High Court. CPR 60.2(1) states that an appeal to the court is made by issuing

¹ Cap 12.06 of the Revised Laws of Saint Lucia.

a fixed date claim form in Form 2. It is agreed by the parties that the rule does not prescribe a time for filing of the claim.

- [9] CPR 60.5 states that the claim form must be served within 28 days of the date on which notice of the decision was given to the claimant. Mondesir Estates argues that CPR 60.5 does not provide a sanction for failure to serve the claim form within 28 days and no such sanction is implied. They also argue that it must follow that the claim must be served at least within 28 days of the decision date if it is to be served within that same period.
- [10] The evidence is that the decision of the Appeals Tribunal was given on 24th September 2024. Therefore, the claim ought to have been filed on 23rd October 2024. The claim was filed on 24th October 2024, one day out of time. Service should have been effected on that day as well. However, the claim and accompanying documents including the authorisation code was served on Mondesir Estates on 25th October 2024. This was two days out of time.
- [11] The DCA urges that the period between 24th September 2024 and 23rd October 2024 contained two public holidays which shortened the 28-day period by two days. They say that when calculating time for filing and service of the claim, it is only just and fair that an additional two days be allowed having regard to the intervening public holidays. Accordingly, the claim was duly filed on 24th October 2024 and served on 25th October 2024, within 28 clear days from the decision of the Appeals Tribunal having regard to the intervening public holidays.
- [12] That argument from the DCA is quite interesting and cannot stand up to CPR 3.2(3) which clearly defines clear days. Any period beyond seven days is calculated as clear days. CPR 3.2(3) states that clear days means that in computing the number of days the day on which the period begins and the day on which it ends are not included.
- [13] The undisputed evidence is that when the claim form was served on 25th October 2024, the authorisation code was served as well. It turned out that the authorisation code was incorrect and that was only remedied after the lawyer

for the DCA received an email from Mondesir Estates' lawyer informing him of the issue with the authorisation code. The correct authorisation was served on 20th November 2024.

[14] CPR 5A.12(4) states that:

“Where the correct authorization code generated by the Electronic Litigation Portal is not served on a party in accordance with paragraph 3(b) or is not served at all, service is deemed not to have been effected until the authorisation code generated by the E-Litigation Portal in the form set out in Schedule 2 has been served on the party and the time of service shall be deemed to be the time when service of the authorization code has been effected in accordance with this rule unless service is effected in accordance with directions given by the court.”

[15] This rule makes it very clear that where, as in this case the incorrect authorisation code is not served with the claim, the claim would only be considered served on the date when the proper authorisation code is served. In this case the authorisation code whilst served on 25th October 2024, was only properly served on 20th November 2024 which means that the claim was served 28 days out of time. By the hearing date on 16th January 2025, Mr. Anand Ramlogan SC (“Mr. Ramlogan SC”), Counsel for the DCA conceded that the claim was considered served on 20th November 2024

[16] I therefore find that the claim was filed and served out of time.

B. Should the claim be struck out? or Should the DCA's application for an extension of time be considered?

[17] After the filing of the application to strike out the appeal on 12th December 2024, the DCA filed an application for extension of time to file and serve the fixed date claim form four days later on 16th December 2024. Mondesir Estates says that the claim having been filed and served out of time it is a nullity and must be struck out. Mr. Peter Foster KC (“Mr. Foster KC”), Counsel for Mondesir Estates argued that the application for extension of time cannot save the DCA's claim as they filed that application after the application to strike had been filed and it was therefore too late. Mr. Foster KC urged that the Court should not entertain any such application for extension of time at this late stage.

- [18] Mr. Foster KC referred to the case of **Crooke v Secretary of State for Communities and Local Government and anor**² which I do not find assists Mondesir Estates' arguments.
- [19] In **Crooke**, the claimant's six-week time limit under section 288(4B) of the Town and Country Planning Act for bringing a challenge against the decision of an inspector appointed by the Secretary of State ended on 23rd March 2016. The claimant had intended to file his claim on the due date but missed the train and sent it to a friend to file for him. By the time the friend got to the court office, the counters were closed. The claim form was only filed on 29th March 2016. The Secretary of State as in this case applied to strike out the claim on the ground that the court had no jurisdiction to hear it. The High Court granted the application to strike out the claim. The Court of Appeal dismissed the appeal and held that there was no room for the exercise of judicial discretion as Parliament had provided a strict time limit of six weeks for the making of an application under section 288. Subsection 4B the court said did not admit any exception to the absolute, mandatory time limit it laid down, which was precise, unambiguous and unqualified. The court went further to say that there had been no violation of the claimant's right to access the court which would justify the exercise of the court's judicial discretion to extend the time limit, in exceptional cases, on human rights grounds.
- [20] **Crooke** is clearly distinguishable from this case. Unlike **Crooke**, there is no time limit stipulated in the Act for filing an appeal. The claimant in **Crooke** did not file an application seeking to extend time to appeal but was seeking to invoke the court's judicial discretion to extend the time since by the time his friend got to the court office it was closed. In this case, the DCA filed an application for extension of time four days after the application to strike out was filed.
- [21] Even if the Act had stipulated a time limit, **Crooke** would still not be applicable. In the Court of Appeal decision of **Patrick Morille v Hermina Roseline Morille**,³ the question was whether the judge erred in holding that the High Court had no

² [2019] EWCA Civ 54.

³ SLUHCVP2010/0035, (delivered 26th February 2016, unreported).

jurisdiction to entertain an application for extension of time to appeal and dismissed the application. The relevant section was section 23(1) of the **Domestic Violence (Summary Proceedings) Act** (“Domestic Violence Act”) which provided for appeals to the High Court to be made within 28 days of the date of the order. An application for extension of time was filed over a year after the order was made.

[22] As was said in **Morille**, as part of the Court’s general case management powers under CPR, and more particularly, CPR 26.1(k), the court has a discretion to ‘extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension of time is made after the time for compliance has passed’. The court however held that because section 23 (1) of the **Domestic Violence Act** provided the time limit for appealing, CPR 26.1(k) could not apply and the court could not extend time pursuant to that rule.⁴

[23] Baptiste JA went on to consider the purpose for imposing a time limit for appealing and referenced the case of **Perez de Rada Cavanilles v Spain**⁵ where the court said:

“the rules on the time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy.”⁶

In **Perez de Rada**, the time limit had been exceeded by two days. The Court considered that “the particularly strict application of a procedural rule by the domestic courts deprived the applicant of the right of access to a court”.

[24] In **Morille**, Baptiste JA concluded that even in the absence of the ability to exercise the case management powers under CPR 26.1(k) or the absence of a specific provision in the **Domestic Violence Act** to extend time, this would engage the court’s inherent jurisdiction and the exercise of its discretion. The

⁴ See **Morille** at para [7]-[8].

⁵ [1998] ECHR 28090/95, at para 45.

⁶ *Ibid* at para 49.

learned Justice of Appeal made the point that if this were not the case, potential injustice could result from what would be an absolute and inflexible time limit for appealing.

[25] Having considered the case of **Morille**, it is clear that in this case, the Act has no time limit within which to file an appeal against the Appeal Tribunal's decision. The time limit for appealing is found in CPR 60. Therefore, applying **Morille**, it would mean that CPR 26.1(k) would apply and that the time period could be extended where there is a failure to appeal in time.

[26] My conclusion on this issue is further supported by the Court of Appeal judgment of **Heritage Plantation Condominiums Ltd. et al v Doche and Doche**.⁷ The preliminary point was taken by the respondent at the hearing that the notice of appeal was filed out of time and was therefore a nullity, no application for an extension of time having been filed by the appellants. The Court dismissed the notice of appeal as having been filed out of time, with no application for an extension of time having been made.

[27] Price-Findlay JA said:

"[17] ...The appellants, having been placed on notice that the respondent was taking the point that the notice of appeal was filed out of time, chose not to make an application in writing for an extension of time".

[28] Her Ladyship went on to make the point that:

"[21] ... A notice of appeal filed outside the time stipulated by the CPR is not validly filed. **Such a notice can only be clothed with validity after an application is made to the court and the court exercises its discretion to grant an extension of time, and time is thereby extended, and the notice of appeal is deemed validly filed.**"

[29] The DCA has sought to cloth its fixed date claim form with validity by filing the application for an extension of time. It follows that before I can consider whether it is appropriate to strike out the claim, the application filed by the DCA to extend time must be considered first.

⁷ SLUHC VAP2022/0006, (delivered 25th November 2022, unreported).

The DCA's application for extension of time

[30] In its application for extension of time, the DCA seeks the following orders: extending the time for filing of the claim to 24th October 2025, extending the time for service of the claim to 25th October 2025 and extending time for service of the claim to 20th November 2024 and deeming service to be proper as at 20th November 2024.

[31] The factors to which the Court must regard when considering an extension of time application are well-known. The Court must look at (i) the extent of the delay in filing; (ii) the reasons for the delay; (iii) chances of the claim/appeal succeeding if the extension of time is granted; and (iv) the degree of prejudice to the respondent if the extension is granted.⁸ In **Carleen Pemberton v Mark Brantley**,⁹ the learned Chief Justice endorsing the factors above, made the point that this is by no means an exhaustive list of all the factors to be considered. One other important factor is whether there is a realistic, not fanciful prospect of success.

Good explanation/Reasons for the delay

[32] In their affidavit evidence the DCA acknowledges that the twenty-eight day period for filing the claim would have expired on 23rd October 2024 but they say that the twenty-eight day period comprised of two public holidays, 27th September 2024 (Julien Alfred Day) and 7th October 2024 (Thanksgiving) which must be taken into account. The DCA is a public authority, staffed by public servants and by law, its offices are closed on public holidays. As such staff, including members of the legal department, are unable to access documents and electronic files which are maintained on the DCA's servers which are only accessible on site at the DCA office.

[32] The DCA's reasons for the delay in filing are quite bizarre and these submissions were made without providing any authority. The DCA does not

⁸ John Cecil Rose v Anne Marie Uralis Rose SLUHCVP2003/0019, (delivered 22nd December 2003, unreported).

⁹ SKBHCVP2011/0009, (delivered 14th October 2011, unreported).

account for the remaining twenty-six days which were available to it to file the appeal. I have to agree with Mondesir Estates that the reasons provided for the delay are not good reasons and I believe Mr. Ramlogan accepts this.

Length of the delay

- [33] The delay in filing the claim form as has been established is one day and in service of the claim is twenty-eight (28) days. Mr. Ramlogan SC accepted that the claim was filed one day out of time. In relation to service, the DCA says that the contention that the authorisation code was served on 20th November 2024 is factually incorrect. The code was served on 25th October 2024 together with the fixed date claim.
- [34] Thereafter, the DCA says they heard nothing from Mondesir Estates except on 20th November 2024 when Mondesir Estates' lawyers emailed and indicated that the authorization code provided to them was not working and that they were seeking a response to an email which had been sent on 4th November 2024 to the DCA's lawyer.
- [35] The DCA's lawyer immediately responded and clarified that he had never received any correspondence on 4th November 2024. However, he promptly responded and clarified the error in the code. It was discovered that the code served on 25th October 2024 was "nyjCKH" however, the correct code was "nyjCHK". The error was corrected and the respondent was served with the correct authorization code on 20th November 2024.
- [36] It is a fact that in accordance with CPR 5A.12(4) that the proper authorisation code was only served on 20th November 2024. However, I agree with the DCA that it cannot be ignored that Mondesir Estates lawyers were served with an authorisation code on 25th October 2025, one day late. They did not until 4th November 2024 (10 days later) attempt to email the lawyer for the DCA and it was only on 20th November 2024 (almost a month later) that they followed up with the DCA's lawyer.

[37] Mr. Foster KC argued that it was not the respondent's responsibility to bring to the attention of the DCA that the authorisation code was incorrect. However, I cannot accept this as the only way the DCA would know that there was a typographical error in the code was if the respondent had reached out and said so. It is very obvious that the DCA's lawyer promptly dealt with the matter which would have been the case had the respondent's lawyers simply followed up their initial 4th November 2024 email with a call. Mondesir Estates has not provided any evidence as to why it took almost three weeks after the 4th November 2024 to contact the DCA's lawyer.

[38] I therefore find in the circumstances of this case that the length of the delay in filing and serving the fixed date claim was not inordinate.

Degree of Prejudice to Mondesir Estates if the application is granted

[39] The DCA argues that there is no prejudice or hardship or detriment to Mondesir Estates or any other party if time is extended for the filing and service of the fixed date claim form. The DCA argues that if the application for extension of time is not granted, its appeal against the decision of the Appeals Tribunal would be shut out and the effect would be that the DCA would be prevented from being heard on an issue of great national and public importance, i.e. the development and construction of structures in the Pitons, an established World Heritage Site and environmentally protected area.

[40] The DCA says conversely Mondesir Estates would not be prejudiced if the application for extension of time is granted as it will be afforded the opportunity to defend against the appeal and be heard. Any prejudice to Mondesir Estates can be cured by a consequential extension for the respondent's defence/response affidavit.

[41] Mondesir Estates' position is that they will be prejudiced as further to the decision of the Appeals Tribunal allowing the appeal, it has begun construction and ought not to be subjected to an appeal out of time. They then speak about the fact that they have workmen on the site engaged in construction and that they would be significantly prejudiced if they were made to stop construction at

this stage. They also say that if an extension of time and stay is granted and Mondesir Estates is forced to stop construction, it will suffer grave losses of XCD\$20,782.08 per day. These losses flow from the costs of the contractor, project manager, on site security while the site is suspended, extension of insurances and the forecasted variation of the price of materials among other things. The suspension will also put over 20 workmen out of a job without notice. Mondesir Estates has expended a total of XCD \$1,113,758.79 as of 31st December 2024 and they exhibit copies of the Summary Suspension Costs, supporting invoices, signed construction contract, bank statements evidencing payments made to date and all supporting documentation.

[42] The appeal is a challenge to the decision of the Appeals Tribunal and is not an application for a stay. Allowing the claim to proceed is in no way prejudicial to Mondesir Estates. The evidence contained in the affidavit in opposition filed by Mondesir Estates on the issue of prejudice is more relevant to the application for the stay which will be addressed below.

[43] I do not find that there would be any prejudice to Mondesir Estates if an extension of time is granted as they have filed an affidavit in response to the claim on 19th December 2024, and that is the filing of the application to strike out the claim and after the DCA's application for extension of time had been filed. They will therefore have an opportunity to ventilate the issues raised on the appeal. The greater prejudice would be to the DCA whose appeal would not be heard and who would be shut out from the Court.

Realistic prospect of success

[44] The DCA did not address the prospect of success. Mondesir Estates argues that the DCA's appeal had no realistic prospect of success. The Act only allows for appeals on points of law and all the grounds of appeal go beyond points of law and are purported errors of fact which the Court is not permitted to review, thus disclosing no reasonable grounds.

[45] Mondesir Estates looks at the grounds and suggests that they are not points of law. They say for example that the Building Application plans submitted to the

DCA for approval fall squarely within the definition of a single-family dwelling as provided by section 2 of the Act. The Tribunal considered the evidence before it and properly determined that “*there is no basis in law that the Application is for anything but a single-family dwelling unit.*” (para 42 of Decision). This they say is not a point of law.

[46] This very matter was raised in the contempt application before Paragsingh J filed by Mondesir Estates in SLUHCV2022/0262 and the judge made the point that what is a single dwelling house or the interpretation of section 24 was a matter for the Appeals Tribunal. Mondesir Estates has challenged this finding in its appeal of Pariagsingh J’s judgment. An interpretation of section 24 of the Act must have regard to the facts to see whether the proposed structure can be considered a single dwelling unit. This would be a question of mixed law and fact. This suggests that this is a question of law as it involves the interpretation of the relevant section of the Act which defines ‘single-family dwelling unit’.

[47] I rely on the dicta in the decision of the Court of Appeal on the application to strike out the appeal and for extension of time in SLUHCVAP2023/0020-**Development Control Authority v Mondesir Estates Limited**¹⁰. In this case, Michel CJ [Ag.] pointed out that:

“It is not the role of the Court to embark upon a mini trial of the issues on appeal when determining an application to strike out the appeal. However, an evaluation of the merits is necessary to determine whether the Court ought to exercise its discretion to strike out the appeal.”

[48] Mr. Ramlogan SC argued at the hearing, that the grounds of appeal are best considered at the substantive hearing of the appeal. He submitted that it would be a disproportionate exercise of the Court’s discretion to deal with them at this stage on an application to strike out and extension of time.

[49] I am of the view that engagement on the merits of the grounds of appeal, whether they are points of law or otherwise should really be done at the substantive hearing and is premature at this stage of the proceedings because

¹⁰ Delivered 27th November 2024.

whilst some of the grounds appear to be factual, they could be considered mixed law and fact upon a proper assessment and properly a question of law. Moise J in **TEI Anguilla Villa Equities LLC v Caribbean Alliance Insurance Company Ltd.**¹¹ had extensive discussions on assessment of questions of fact and law, and mixed law and fact. Referring to the cases of **The Nema** and **Syvia Shipping Co. Ltd. v Progress Bulk Carriers Ltd.** (“The Sylvia”) Moise J concluded that ‘at times the decision of the arbitrator can appear initially to be a matter purely of fact. However, when one examines the legal principles under consideration in light of these facts, the court may grant leave if no reasonable person could have arrived at the decision. That would be a matter of law.’

- [49] There is at least one ground of appeal which the parties agree is a ground of law and that is whether the Tribunal erred when it found that the application concerned a single-family dwelling unit.

Conclusion:

- [50] I am of the view that the extension of time application filed by the DCA on 16th December 2024 should be granted. The Order is as follows:

- (a) The DCA is granted an extension of time to 24th October 2024 to file the fixed date claim and the fixed date claim filed on 24th October 2024 is deemed properly filed.
- (b) The DCA is granted an extension of time to 20th November 2024 for the service of the fixed date claim and the service of the claim is deemed to have been effected on 20th November 2024.

- [51] Consequent upon granting the extension of time, the application of Mondesir Estates to strike out the claim as being a nullity is refused.

The Alternative Relief Sought

- [52] In relation to the alternative order sought on the notice of application to strike out, the ground is that section 26(6) of the Physical Planning and Development Act¹² (“the Act”) provides for an appeal to the High Court on a point of law, but

¹¹ AXAHCV2024//0038, (delivered 10th February 2025, unreported) at para. 21.

¹² Cap 12.06 of the Revised Laws of Saint Lucia

not on any matter of fact or on the merits of the decision. Further, the claim filed by the DCA conflates errors of fact as points of law and errors of fact cannot be the subject of an appeal. The grounds identified in the application are not points of law and ought to be struck out as they disclose no reasonable grounds for bringing the claim.

[53] In light of the discussion above, the Court is of the view that it would be in the best interests of the parties that the matters raised in relation to the grounds of appeal be dealt with at the substantive hearing of the appeal. To engage on a determination as to whether each ground identified is a ground of law or fact or otherwise would be tantamount to conducting a full-fledged trial.

[54] Given the history of litigation between these parties, and the number of appeals currently before the Court, I am of the view that the parties should seek to expedite the hearing of their appeals currently before the Court of Appeal. The initial appeal before the Court of Appeal if successful could have serious implications for all the other matters and events between the DCA and Mondesir Estates.

Historical Background-Engagement between by Mondesir Estates and the DCA

[55] I think it advisable at this stage to set out the chronology of the DCA's and Mondesir Estates' engagement with each other in the various planning applications made over the years.

- On 26th April 2017, ARN182/17 was rejected on the basis of the Limits of Acceptable Change Study (LAC Study).
- On 23rd November 2018, the DCA approved ARN1028/18 giving permission for the construction of a single-family dwelling unit referred to as "Family Cottage". The approval was granted because the proposed structure sought to replace an existing residential structure on the site which was undeveloped at the time.
- On 30th July 2019, the respondent submitted ARN750/19 seeking permission to develop land for the construction of a multi-family residential development. The master plan for that development

comprised of The Great House, together with ancillary buildings which included laundry facilities, staff house, manager's house, night watchman's hut and a car port.

- On 20th November 2019, ARN750/19 was rejected on the basis that no development was permitted in Policy Area 1 which was designated as such by the LAC study and Design Guide for the Piton Management Area ("PMA"), with the exception of works to improve existing trails on Gros Piton, including minor signage and interpretation.
- On 13th July 2020, ARN 487/20 was submitted for approval of ancillary buildings which originally formed part of ARN 750/19.
- On 17th July 2020, ARN 487/20 was approved by the DCA on the basis that the intended development was situated on a portion of Parcel 4 located in the Green Buffer Zone of the PMA where construction is permissible according to the LAC study.
- On 21st July 2021, Mondesir Estates submitted ARN 773/21 for a single-family dwelling house referred to as "The Great House" along with the previously approved single-family residential unit (ARN 1026/18), night watchman hut, ancillary buildings, foot bridge and trails.
- On 6th August 2021 the DCA rejected ARN 773/21 on the basis that "no development is permitted in Policy Area 1 (according to the LAC Study) with the exception of works to improve existing trails on Gros Pitons, including minor signage and interpretation.
- On 9th June 2022, the DCA filed a High Court claim challenging the rejection of ANR 773/21.
- On 24th July 2023, the High Court quashed the DCA decision rejecting ARN 773/21 and the application was remitted to DCA for reconsideration.
- On 30th August 2023, the DCA appealed the High Court decision.
- On 11th September 2023, the DCA applied to the Court of Appeal for stay of execution of the judgment of the High Court.
- On 28th November 2023, the Court of Appeal refused the stay on the basis that the DCA failed to provide evidence that irremediable harm would be occasioned and that the appeal would be rendered nugatory if the stay is not granted.

- On 30th November 2023, Mondesir Estates wrote to the DCA and indicated that it was planning to begin construction of the development on 1st December 2023 based on ARN 773/21 receiving unconditional approval pursuant to section 24 of the Act.
- In December 2023 the DCA issued stop and enforcement notices to Mondesir Estates.
- On 8th December 2023 Mondesir Estates filed a contempt application in the High Court seeking the committal of the DCA's Executive Secretary for failure to comply with the High Court Order to reconsider the ARN 773/21 application.
- On 25th March 2024 the contempt application was dismissed.
- On 4th January 2024 Mondesir Estate appealed to the Appeals Tribunal in relation to the stop and enforcement notices issued in December 2023.
- By letter dated 2nd February 2024 the DCA advised Mondesir Estates that ARN 773/21 was still under consideration and indicated that the application was deferred pending resolution of some matters.
- On 3rd May 2024 the Appeals Tribunal dismissed the appeal against the stop notices and found that the notices were both lawfully served as Mondesir Estates commenced development without prior permission from the DCA.
- On 21st May 2024 Mondesir Estates resubmitted ANR 773/21 with the requested documents and clarifying the issues raised.
- On 22nd May 2024 the DCA reconsidered ANR 773/21 and the application was rejected on the basis 'that the proposal, in the context of the site plan and existing sight situation is not consistent with the definition of single-family dwelling unit as defined in the Act.
- On 31st May 2024 Mondesir Estates filed an appeal against the decision of the Appeals Tribunal on enforcement and stop notices to the High Court - SLUHCV2024/0217.
- On 27th June 2024 Mondesir Estates appealed to the Appeals Tribunal against the rejection of ANR 773/21.

- On 24th September 2024 the Appeals Tribunal allowed the appeal stating that they could not find any justification to uphold the decision of the DCA.
- On 26th September 2024 Mondesir Estates gave notice to the DCA that it would begin construction by 27th September 2024 as the decision of the Tribunal is deemed approval.
- On 24th October 2024 the DCA filed an appeal to the High Court against the Appeal Tribunal's decision to allow appeal in relation to rejection of ANR 773/21 – SLUHCV2024/0412.

The application for a stay of execution

[56] The DCA filed its application for stay of execution of the Decision of the Appeals Tribunal on 5th December 2024, two months and eleven days after the Decision was given. The application is strenuously opposed by Mondesir Estates.¹³

[56] The factors to be taken into account on an application for a stay were set out in the case of **C-Mobile Services Limited v Huawei Technologies Co. Ltd.**¹⁴ The starting position is that a stay is the exception rather than the general rule; there is no automatic right to a stay. A successful litigant should not be deprived of the fruit of its judgment pending further proceedings such as an appeal save in exceptional circumstances.

[57] The court, on an application for a stay, is essentially engaged in performing a balancing exercise which requires it to consider a number of factors: (i) the court must take into account all the circumstances of the case; (ii) a party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; (iii) in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and (iv) the court should take into account the prospects of the appeal succeeding but only

¹³ Notice of Opposition filed 9th December 2024.

¹⁴ BVIHCMAP2014/0017, (delivered 2nd October 2014, unreported).

where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[58] It is important to keep in focus the various decisions.

The DCA's decision

By its letter dated 23rd May 2024 the DCA advised on its rejection of ARN773/21 on the following basis:

"The proposal, in the context of the site plan and existing site situation is not consistent with the definition of "single-family dwelling" as per the Physical Planning and Development Act Cap 5.12 which defines "single-family dwelling house" as "a building used or intended to be used solely as a separate dwelling unit without any essential facility shared with another dwelling unit because:

- a) A single-family residential unit had already been approved by the DCA and built on the parcel (ARN 1028/18) and the application presents an additional dwelling unit which therefore results in multiple dwelling units or a multifamily development on the parcel.
- b) Several other supporting amenity structures were also approved by the DCA (ARN 479/20) and built on the parcel including but not limited to laundry facilities structure, watchman hut, car port, manager's house, staff house all of which are inconsistent with a single-family dwelling unit, but suggest a commercial development, or one which supports touristic/hotel amenities, residential complex, multifamily development."

The salient parts of the Tribunal's Decision:

Para 27. The question which the Tribunal is called to answer is, with the greatest respect to the extensive submissions made by appellant and the DCA, a narrow one. It is "was the denial of approval to develop by the DCA done in accordance with law".

Para 30. The Tribunal would be hard pressed to find upon a literal interpretation of the definition of Single-Family Dwelling House, that the Application does not relate to one.

Para 31. For the "Great House" (as it is styled in the Application) to be a Single-Family Dwelling House would need to (1) be a building (2) not share any essential facility with any other dwelling unit and (3) be intended for use by one household.

Para 36. While it can, and likely will, share other amenities with other dwelling units, none of these amenities are "essential" within the definition of the word in the Act.

Para 42. That said, we can find no basis in law to find that the Application is for anything but a single-family dwelling house.

Para 43. The DCA however submits that the Application is for a multi-family development on the basis that there are already dwelling units on Block 0025B Parcel 4.

Para 44. This argument can be disposed of summarily as there is no legal definition in the Act, or provided by the DCA, of a multifamily dwelling unit or a multifamily developmental parcel.

Para 45. The Tribunal would be creating law to find that such a concept exists in the Act as there are no restrictions which we can find, or which have been provided to us which prohibit more than one single-family dwelling unit being developed on one parcel of land.

Para 52. Even if the Tribunal was wrong in its determination of whether or not the Application pertains to a Single Family Dwelling House, the tribunal cannot find that in these particular circumstances and unique to this particular application, the failure to simply change classification of the Application, by itself; is a material consideration which warrants the denial of the Application in accordance with Section 23 (1) of the Act.

Para 53. This is especially so where the Appellant has (1) otherwise complied with all requested amendments to its development plans and (2) addressed the technical concerns the DCA posited as bases for the deferral of the application and (3) is not seeking to rely on automatic approval of its Application in accordance with Section 24 (I) of the Act.

Para 55. Perhaps if the DCA were faced with a fresh application which it had not yet reviewed and which was not revised on multiple occasions, our position would be different. However in these unique circumstance, we cannot find that at this point, the Appellant's classification of its Application, alone, is a material consideration warranting its denial.

Para 56. The Tribunal accordingly cannot find any basis in law to uphold the decision of the DCA and would recommend that the Appeal be allowed.

The Stay Application

- [59] The grounds of the application are (i) the DCA has filed an appeal against the Tribunal's decision which they say effectively grants approval to Mondesir Estates; (ii) DCA has a good arguable case and there is a strong likelihood of success on the appeal; (iii) there is a grave danger that a judgment in DCA's favour on the appeal would be rendered nugatory unless the status quo is maintained; (iv) the appeal raises matters of considerable public importance which gives rise to special circumstances for the grant of a stay and (v) the

balance of justice lies with the DCA taking into consideration the detriment each party is likely to suffer and any prejudice to Mondesir Estates can be compensated in damages.

[60] DCA's position is that a stay is necessary to prevent a further downward spiral like what occurred following the High Court's order for a reconsideration of ARN 773/21. The DCA provided a background to its application. Subsequent to the Tribunal's decision on 24th September 2024, Mondesir Estates gave notice to the DCA that they would commence construction on or about Friday, 27th September 2024 as the Tribunal's decision is deemed approval pursuant to section 26(5) of the Act.

[61] The DCA says its appeal has a good prospect of success and there is a serious risk if a stay is not granted. In addition, they say this is an exceptional case with special circumstances that plainly justify the grant of a stay.

[62] The DCA's Building Officers conducted a site visit on 5th November 2024 which they say revealed that Mondesir Estates had begun construction as they had indicated, had completely cleared the site of all vegetation, have laid and spread site preparation material on the surface of the site and have placed heavy earth moving equipment and a container which could be the construction site's office on site.

Factors to be considered Prospects of success

[63] The DCA identified ten (10) grounds of appeal in its fixed date claim filed on 24th October 2024. The grounds challenge the constitution of the Tribunal and its jurisdiction to hear the appeal, and mainly the Tribunal's determination that the proposed building in ARN 773/21 fell within the definition of single-family dwelling unit.

[64] The Act allows an appeal against the Tribunal's decision but only on a question of law. There is no right of appeal against factual findings made by the Tribunal. In **Nam Tai Property Inc. v Iszo Capital LP**, the Court was clear that in an

application for a stay of execution the Court must consider, in a preliminary way, the merits of the appeal.¹⁵

[65] The DCA contends that it has a strong appeal with a realistic prospect of success. Mondesir Estates says this appeal has no prospects of success. Having looked at the grounds of appeal, there are some which may not be questions of law but of fact and if so found, would have no likelihood of success. However, in relation to the main ground of appeal, that is that the Tribunal erred in its determination that ARN 773/21 referred to a single-family dwelling unit and allowing the appeal, this ground may be arguable. The ground is stated as follows:

“The Tribunal erred in law by considering matters that fell outside the scope and remit of the instant appeal that was before it for consideration. The Tribunal had to consider an appeal against the decision of the Applicant/Appellant which was considered on 22 May 2024 refusing an application (ARN 773/21) for planning permission by Mondesir Estates Limited for permission to construct a single-family dwelling unit. That application was rightly refused in the exercise of the Applicant/Appellant’s judgement and discretion and the Tribunal was wrong to overturn it.”

[66] By way of another example, the DCA says the Tribunal erred in not considering the **Physical Planning and Development (Environmental Protection Area) (Piton Management Area) Order** (“2024 Order”).¹⁶ Mondesir Estates points out in their reply submissions that the 2024 Order was not part of the documentation which was before the Appeals Tribunal and therefore its reference to it in these proceedings is irregular. They say it was not part of the application process at the DCA level and was never raised during the appeal before the Tribunal.

[67] In response, the DCA in its submissions quote from the Court of Appeal judgment on an application to strike out the appeal and for extension of time to file submissions in SLUHCVP2023/0020 where the Court made the statement that ‘The respondent is purporting to build what the DCA deems to be more in line with a commercial tourist attraction than a private dwelling...which could

¹⁵ Nam Tai Property Inc. v Iszo Capital LP, BVIHCP2021/0010 at para 18.

¹⁶ SI 107 of 2024 dated 16th July 2024 but which was deemed to have come into force under section 4 of the Order on 8th March 2004.

compromise the status of the Pitons as a World Heritage Site and the consequences could be dire for Saint Lucia.’¹⁷

[68] I think it important to note that since that judgment, there is a finding by the Appeals Tribunal that ARN773/21 was in respect of a single-family dwelling unit. The Court of Appeal was simply stating what the respondent’s position was but did not make a finding. It considered that this was important enough that the notice of appeal should not be struck out. The comments of the Court of Appeal must be understood in the context of what was before the Court. They cannot be evidence used by the DCA to address the prospects of success of this appeal. The appeal in SLUHCVP2023/0020 is the appeal against the decision of Innocent J in SLUHCVP2022/0262 where he determined that the DCA could not have considered the LAC Study in its consideration of the application which was before it at the time.

[69] These current proceedings concern the findings of the Appeals Tribunal in relation to their review of the DCA’s decision rejecting ARN773/21 and their decision to allow the appeal. It is doubtful that an extraneous matter such as the 2024 Order never raised before the Tribunal can now be a ground of appeal against the Tribunal’s decision.

[70] Although it can be said that the DCA has raised a few grounds which may be arguable, I would not go so far as to say that they are strong grounds of appeal. This appeal requires a careful assessment of whether the grounds raised concern factual findings made by the Tribunal or whether they are indeed questions of law.

Appeal will be stifled or rendered nugatory

[71] In its grounds of the application, the DCA says that “there is a grave danger that a judgment in DCA’s favour on the appeal would be rendered nugatory unless the status quo is maintained”.

¹⁷ SLUHCVP2023/0020 at para 62-63

[72] In response, Mondesir Estates says that the DCA has not provided any cogent evidence that the appeal will be stifled or rendered nugatory if the stay is not granted. An appeal is nugatory when success will have little or no value for an appellant because of changed circumstances.¹⁸

[73] The affidavit in support of the application for the stay is substantially in like terms as the application. There is no evidence to show how the appeal would be rendered nugatory or stifled if a stay is not granted. Ms. Augustin says in her affidavit that if the stay is not granted, Mondesir Estates will be permitted to continue works that will have the effect of substantially altering an area considered to be a “World Heritage Site”. She contends that allowing the works to continue and then attempting to rehabilitate the land in the event the appeal is successful is impractical as it will only cause further harm and damage to the environment and scenic natural beauty of this protected area. Ms. Augustin in her evidence says that there is no point in allowing the works to continue pending the appeal as it would be an exercise in futility that will lead to a waste of scarce resources and if this appeal succeeds and the works continue, it would have all been in vain.

[74] This evidence does not assist the DCA as it does not show how the appeal would be rendered nugatory. Even if the stay is not granted and Mondesir Estates continues its construction, this does not impact the appeal being heard and determined, the outcome of the appeal may have implications for Mondesir Estates but certainly not for the DCA as its appeal would have been heard and determined.

[75] I find that the DCA has failed to show that the appeal would be rendered nugatory or stifled.

Balance of Harm

[76] The evidence required to satisfy a court on a stay application must show that the appellant will be ruined, that there are some special circumstances which

¹⁸ Nam Tai at para 24.

take the case out of the ordinary so that the ordinary rule should not apply and a stay be granted. If showing that such circumstances exist involves making good factual submissions, the facts have to be made on good evidence.¹⁹

[77] In Ms. Augustin's affidavit,²⁰ she avers that the Tribunal's decision to allow the appeal means that permission is granted to Mondesir Estates and they would be allowed to develop and execute its construction and developmental works within a specially protected area in breach of the 2024 Order.²¹ This DCA says could have detrimental and irreversible consequences for an internationally recognised protected area that is an integral part of Saint Lucia's identity, environment and cultural heritage.

[78] The DCA in its submissions filed on 16th December 2024, at paragraph 59 states that "there is no apprehension of potential breaches of planning control by the Respondent. There is in fact, a clear, unequivocal and express intention evidenced by the Respondent not only to clear some 79 acres of land in the Pitons, but to also begin construction of several buildings which are interconnected and are touristic or commercial in nature. It is the Respondent's intention not to simply use it for a single-family dwelling, but to let it out to expended family and friends."

[79] I note that this is not evidence contained in any of the affidavits filed in relation to the stay application. It is stated in the affidavit in reply to the respondent's affidavit in response to the fixed date claim at paragraph 10(d) but the affidavit referred to of Mr. Ian Harrison²² is not exhibited by any party. Mondesir Estates in their submissions in reply have indicated that this statement by Ms. Augustin without the supporting document is a blatant and complete misinterpretation of the statement made by Mr. Harrison, to try to establish that ARN773/21 is not a single-family dwelling but rather a commercial/touristic development. I note too

¹⁹ Winchester Cigarette Machinery Ltd. v Michael Payne and anor., (Unreported Judgment) (QBD) No. FC 393/6788/C Royal Court of Justice, 10th December 1993 at pages 6-11 applied in Dawn Simon and Peggy Huggins and Others v Jozeyl Morris SVGHCVAP2008/0009, delivered 24th February 2009.

²⁰ See para 30, 38-40 and 52-57.

²¹ SI 107 of 2024 dated 16th July 2024 but which was deemed to have come into force under section 4 of the Order on 8th March 2004.

²² An affidavit of Ian Harrison filed on 10th January 2024.

that the issue of whether ARN773/21 related to a single-family dwelling unit was the subject of letters written to the DCA after 10th January 2024 in which Mondesir Estates set out its position clearly.

- [80] The DCA contends that the construction and development works would cause irreparable harm and the prejudice and detriment cannot be compensated by an award of damages. It will impact the public at large and this area is a national treasure in an island whose economy is heavily dependent on tourism that is marketed and linked to the Piton Management Area (PMA).
- [81] On the other hand, the DCA says that there is little or no prejudice to Mondesir Estates as any delay caused by this appeal can easily be compensated by an award of damages. They again rely on the decision of the High Court now on appeal where the learned judge ordered that the DCA should consider payment of compensation as part of its reconsideration of Mondesir Estates' application.
- [82] Mondesir Estates, on the other hand, says there is no risk of prejudice to the DCA and that all prejudice lies with it as it would have been deprived of the fruits of its judgment after a period of almost eight years in its fight with the DCA, of the use and enjoyment of its property and delays and losses in construction if the stay were to be granted.
- [83] Mondesir Estates says that the DCA's contention in the stay application that they would suffer prejudice as the development would substantially alter the area considered to be a World Heritage Site is false and made up to mislead the Court into thinking that the reasons for refusal was to protect the World Heritage Site or the scenic beauty of the area. They say no such evidence was raised before the Tribunal by the DCA.
- [84] Mondesir Estates contends that nowhere in the application or affidavit in support or the exhibits is there any evidence that the development has the effect of affecting the World Heritage Site. They insist that the evidence shows that the development is not within the PMA and is outside its boundaries.

- [85] Since the letter of 27th September 2024 to which they got no response, Mondesir Estates' evidence is that to date, it has cleared the working area, levelled and compacted the formation and constructed temporary covered areas for bending of reinforcement and fabrication of formwork. The application for stay was filed two and a half months later, with knowledge of the extent of the construction so far. They say they have 20 workmen who have been working and engaged in construction, a site manager, project manager and contractor. They say they will be significantly prejudiced if they are made to stop construction at this stage.
- [86] Mondesir Estates says that more than 8 years have elapsed from the date it purchased the property, and it has been deprived of the use and enjoyment of its property to build a family home. Mondesir Estates says it is not seeking to build on the slopes of the Piton, but in an area known as **PA3(C)**, which even under the LAC Study permits development. Its development does not fall within PMA1 which is the area in which development is restricted, and the parcel of land in question was not within an Environmental Protected Area at the time of any of its applications, rejections or appeals to the Court or Appeals Tribunal because the Environmental Protected Area designated as the PMA was only declared on 16th July 2024 by the passage of the 2024 Order. This Order was not before the Tribunal and was not raised even remotely by the DCA.
- [87] Mondesir Estates' position is that it has already been deprived of the enjoyment of its property for 6 years. The grant of a stay would mean that it could be kept out of its property for some additional time and in the meantime costs of construction continue to rise. On the other hand, if the stay is not granted and the DCA is successful on the appeal, it will suffer no harm whatsoever and neither would Saint Lucia. The statements made about the loss of the heritage status present as pure speculation as the DCA has provided no cogent evidence suggesting that the proposed development is a threat to this status.
- [88] Mondesir Estates submits that it is simply seeking to enjoy its property and to develop their property in a responsible, environmentally conscious manner, within the limits of the permits of the law. Mondesir Estates says it has begun construction of its development, if a stay is granted it would be forced to stop

construction, it will suffer losses of EC\$20,782.08 per day and provide supporting documents to evidence the losses.

[89] The DCA however says Mondesir Estates has attached undated, unsigned spreadsheets of costs and an unsigned contract dated 20th November 2023 in support of the losses they say they will suffer. There is no indication that any third-party rights under a contract will be affected if a stay is granted, no indication of monies being paid, lost or forfeited and the respondent cannot be allowed to rely on unsubstantiated self-serving documents. They further submit that the documents exhibited to the affidavit in opposition to the extension of time do not assist Mondesir Estates. The documents are highlighted by the DCA in its submissions: (a) Undated unsigned documents entitled summary of suspension works authored by someone unknown; (b) A signed copy of an agreement dated 30 November 2023 (long before there was any appeal to the Tribunal); (c) Unsigned undated bills of quantities authored by someone unknown; (d) An invoice dated August 2023 for survey works - a year before this case; (e) An invoice for survey works done 19 December 2024 - after the application was filed when an undertaking to refrain from works was in effect; (f) More unsigned undated summaries the author of which is unknown; (g) An invoice dated December 2023 - over a year before this matter arose; (h) A Bank account which was redacted- showing a transfer to Buildtec in May 2024 (before approval was even granted) and 3 transfer of sums (the purpose of which is unknown) long after the appeal had been filed and served.

[90] It is clear that the evidence produced by Mondesir Estates does not show that these expenses were incurred post the decision of the Appeals Tribunal and therefore cannot be used by them to show the risk to them. Prior to September 2024, ARN773/21 had been refused by the DCA and there ought to have been no construction on the Property.

[91] For its part, Mondesir Estates submits that the affidavit in support of the application for the stay is void of any factual circumstances or evidence which demonstrates the standard of ruination if a stay is not granted and that burden rests on the DCA to demonstrate that "irremediable harm" that would be

occasioned if there is no stay. They further submit that the DCA is the expert in receiving and processing these applications and they never raised any issue in the process regarding any risk the development would pose to the World Heritage Site or the scenic and natural beauty of the area.

- [92] It is clear that there would be some measure of harm to Mondesir Estates if a stay is granted, it having at least commenced clearing of the land with a view to commencing construction since both parties at least at the time the application for stay was filed, agreed that the Tribunal's decision is an automatic approval of ARN773/21. It is also clear that the DCA would have been aware of these steps being taken, they having conducted a site visit to the property in early November 2024. The DCA on the other hand has not provided any evidence of what harm it would suffer and as the applicant it is required to provide cogent evidence of this, evidence that is full, frank and clear. Bald statements have been made with no supporting evidence as to the impact should the stay not be granted. It must be remembered that cogent evidence is required. The DCA has not shown that irremediable harm would be occasioned should the stay not be granted.

Other considerations

(a) Special circumstances

- [93] The DCA says that it is important that the State be allowed to carefully regulate construction and development works in the PMA in the public interest. The issues in this case do not simply affect the parties to this appeal but impact the right of the public to enjoy the natural beauty of the PMA. As a protected world heritage site, the State has obligations under the international law to protect and preserve the natural beauty and status of this area. The destruction that will be caused by any construction will be irreversible and irreparable.
- [94] The DCA contends that it is in the interest of justice for a stay to be granted pending the hearing and determination of this appeal. This they say would be consistent with the overriding objective by enabling the Court to deal with this case justly.

- [95] In response, Mondesir Estates says the DCA has not provided any evidence whatsoever of UNESCO stating or warning that Mondesir Estates' development of its land, in the manner desired would threaten the World Heritage Status. There is no evidence of this bare and unsubstantiated allegation. Mondesir Estates says that the UNESCO reports of the World Heritage Committee from 2016 to 2023 presented by the DCA does not assist them. These reports contain issues presented to the World Heritage Committee from 2016 to 2023 and they do not indicate that Mondesir Estates' proposed building is of any concern to the Committee or in any way will alter the World Heritage Status of the Pitons. Other matters are listed as threats to the PMA but no mention is made of Mondesir Estates' development which the DCA was always aware of.
- [96] Mondesir Estates avers in its affidavit in opposition that the approved construction which has been completed to date has been done in a manner to protect the World Heritage Status and in line with the LAC Study despite the fact that it is not law. They say the planned building will blend in with its surroundings and will not disrupt or interfere with the natural beauty of the area's aesthetics. Mondesir Estates intends to conduct all construction in a manner that respects and protects the UNESCO status and the rights of the public. They continue to say that in any event their site falls outside of the PMA so the continuation of the development does not substantially alter an area considered to be a World Heritage Site as asserted by the DCA.
- [97] Mondesir Estates details in its affidavit the steps taken to consult with various stakeholders including the Saint Lucia National Trust, the PMA, and have made several attempts to address the concerns of the planning authority. They have also written to the Prime Minister and the Manager of the PMA detailing their intentions and undertakings with respect to preserving the UNESCO World Heritage Status.
- [98] The Court notes that the DCA has not provided any evidence to support its statements that the proposed development will threaten the World Heritage Status. Whilst it cannot be disputed that the Pitons are an iconic part of Saint Lucia's heritage, it must be noted that ARN773/21 was rejected not because it

was part of the World Heritage Site but because the 'proposal in the context of the site plan and existing site situation is not consistent with the definition of "single-family dwelling" '.

- [97] In the context of this case, there are no special circumstances which have been identified by the DCA to warrant the grant of stay.

(b) Delay

- [98] Mondesir Estates in its affidavit in response says that the DCA has not acted with promptitude and had full knowledge that Mondesir Estates had commenced construction since 27th September 2024. Mondesir Estates says that the DCA waited 43 days from the filing of its fixed date claim and 73 days from the date of delivery of the Tribunal's decision before it filed this application for a stay.
- [99] By letter dated 26th September 2024, Mondesir Estates informed DCA of its intention to commence construction on 27th September 2024. The DCA visited the site on 5th November 2024 and the stay application was filed on 5th December 2024 illustrating the lack of urgency.
- [100] Mondesir Estates argues that the delay in filing the application effectively serves as an acknowledgment by the DCA that there is no pressing or irreparable harm that warrants the drastic measure of a stay of execution, and the extreme disruption and inconvenience that would be caused by one. They say the DCA has demonstrated neither urgency nor compelling reasons to justify why it took over two months to seek judicial intervention after the Tribunal's decision was delivered. This lack of urgency they say undermines the DCA's contention that a stay is necessary to prevent harm.
- [101] Mondesir Estates therefore asks the Court to take this delay into account and find that the DCA has failed to meet the threshold required for the grant of a stay of execution. As such, the Court should refuse the DCA's application and allow the Tribunal's decision to stand.

[102] The DCA in answer to the issue of delay raised says after it received the letter from Mondesir Estates it presented it to its Board on 2nd October 2024 and the Board then decided to appeal the decision and requested legal advice with a view to retaining Counsel. That process took some time, and the appeal was filed on 24th October 2024.

[103] I am of the view that this delay must be considered as part of the overall circumstances of the case. The DCA's response does not address or explain why the application for stay was only filed on 5th December 2024, a month after it had visited the site. It is difficult to understand how this accords with the DCA's indication of such irreparable harm that would be occasioned if the stay is not granted. The DCA was fully aware of the intention of Mondesir Estates to commence construction in September 2024 yet this application for stay was not filed at the time the fixed date claim was filed in October 2024,

[104] In *Nam Tai*, Webster JA[Ag] referred to **Novel Blaze Ltd (in Liquidation) v Chance Talent Management Ltd**,²³ to illustrate how the principles in *C-Mobile* are to be applied. It was made clear that even where the Court of appeal found that the appellant did not have strong grounds of appeal or a strong likelihood of success, it nonetheless went on to consider the other principles in *C-Mobile*. The Court of Appeal gave guidance as to how the principles in *C-Mobile* were to be applied and said:

“These elements are self-explanatory and apply in virtually all applications in varying degrees. **The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case.**” (my emphasis)

[105] Having carried out the balancing exercise, I conclude that the application for a stay of execution of the decision of the Appeals Tribunal dated 24th September 2024 should be refused.

²³ BVIHMCAP 2020/0006 (delivered 16th April 2021, unreported).

Appeal allowed-an automatic stay?

- [106] Even after considering the application as filed with both parties holding the view that there was an automatic approval of ARN773/21, I had a serious doubt as to whether the decision of the Appeals Tribunal allowing the appeal translates to such an automatic approval. I therefore invited the parties to file further submissions addressing the question whether the Tribunal's decision allowing the appeal means that Mondesir Estates is automatically granted planning permission and is now free to continue its construction.

The parties' further submissions

- [107] Section 8(3) of the Act provides that the Appeals Tribunal shall, in addition to any powers conferred upon it under this Act, have the power to determine compensation in accordance with section 44(4).
- [108] Section 26(4) speaks to what transpires post the decision of the Appeals Tribunal. It provides that 'The decision of the Appeals Tribunal on any appeal referred to it shall be conveyed to the Minister in writing, and the Minister shall by notice in writing under the hand of the Permanent Secretary inform the applicant and the Head of the Physical Planning and Development Division of that decision.
- [109] Section 26(5) states that the decision of the Appeals Tribunal on any appeal is final.
- [110] The DCA accepts that the legal framework governing appeals against the refusal of planning permission is outlined in the Act. They note that the Act does not expressly allow the Appeals Tribunal to grant permission as part of the appeals process. This power is reserved to the DCA as per section 23 of the Act.
- [111] The DCA submits that given that the decision of the Appeals Tribunal is that the refusal of ARN773/21 by the DCA was a decision that could not be upheld, it means that its decision to allow the appeal is binding on the DCA. They say it is for Mondesir Estates to take the decision to the DCA, who will then consider

it and take steps to implement the Tribunal's decision provided there is not a successful appeal to the High Court.

[112] The DCA resiles from its position taken on the application for a stay and now submits that the decision to allow the appeal does not translate to an automatic grant of approval to Mondesir Estates. They say it is only the DCA who can grant approval, with or without conditions as per sections 20 and 23 of the Act.

[113] The DCA relying on dicta in **R v. Cardiff County Council exp. Sears Group Properties Ltd**²⁴ that where a formal decision has been made on a particular subject-matter or issue affecting private rights by a competent authority that decision will be regarded as binding on other authorities directly involved, submits that notwithstanding that there is no automatic approval, the DCA will be bound to implement and act in accordance with the decision of the Appeals Tribunal. In the absence of a stay, the DCA will have to give effect to the decision of the Tribunal by revisiting their previous refusal.

[114] Mondesir Estates in their submissions refers to section 25 which enables the Minister to direct that a particular application or applications of a certain class go to Cabinet for determination. Notice of Cabinet's decision along with the reasons therefor is given by the Minister through the Permanent Secretary. Mondesir Estates says that section 25 makes no reference to the imposition of conditions on any approval but it is implicit that it can do so, and that Cabinet does not make a recommendation to the DCA or a direction to issue a permission or refusal. The planning consent is the Cabinet's decision, as notified in writing.

[115] They submit that just as a Cabinet decision takes effect when issued by the Permanent Secretary under section 25 and does not require action by the DCA, the same point holds in relation to decisions of the Appeals Tribunal.

²⁴ [1998] 3 PLR 55 at p. 6460.

- [116] Mondesir Estates submits that by section 26(5), the decision of the Appeals Tribunal on any appeal is final. This they say reinforces that the DCA cannot undo the decision by asserting that it still has to make a final determination.
- [117] They further submit that the Appeals Tribunal is constituted as a body to determine planning merits: it includes members with professional expertise, not just lawyers. There is no purpose in having those members if the Tribunal is not deciding whether the development should be approved. A body with a purely legal membership might be said to be suited to a legal or procedural review and then reference back to the DCA. However, the statutory Appeals Tribunal can have no realistic purpose other than to decide whether to grant permission.
- [118] Mondesir Estates draws a comparison with the Environment and Land Use Appeal Tribunal in Mauritius which is empowered to 'hear and determine appeals' on various environmental and planning matters: Environment and Land Use Appeal Tribunal Act 2012, s 4. They argue that neither the 2012 Act nor the underlying environmental or planning regimes state explicitly how the appeal is to be determined nor its effect. They cite **Eco-Sud v Minister of Environment, Solid Waste and Climate Change** [2024] UKPC 19, and state that the Privy Council held that 'The determination of an appeal to the Tribunal is by way of rehearing on the merits' (see para 51).
- [119] I must confess I am not persuaded by the arguments of Mondesir Estates. Firstly, a rehearing on the merits suggests that the Tribunal would have to give a substantive decision and not just simply say the appeal is allowed. Section 25 clearly puts Cabinet in the shoes of the DCA when it says that applications can be referred to Cabinet by the Minister provided that all documents required by the Physical Planning and Development Division have been submitted. In this scenario, the DCA makes no prior decision on the application. Section 25(3) specifically provides:
- "The provisions of section 23(1) shall apply, with any necessary modifications, in relation to the determination of an application by the Cabinet as they apply in relation to the determination of an application by the Head of the Physical Planning and Development Division."

- [120] Contrary to Mondesir Estates' submission, Cabinet is endowed with the powers of the DCA under section 23(1) and can grant permission either unconditionally or subject to such conditions that appear to be fit or may refuse permission.
- [121] This to my mind is different to the position of the Appeals Tribunal. They are sitting in review of the DCA's decision. The decision maker is the DCA and the Appeals Tribunal having allowed the appeal, the application is taken back to the stage where it is now before the DCA again, but this time as submitted by the DCA, the DCA is constrained by the findings of the Appeals Tribunal. It does not get to re-consider the application but simply to approve the application given that the appeal against its refusal on the basis that it gave, has not been upheld by the Appeals Tribunal.
- [122] This is unlike the provisions of section 25. The Appeals Tribunal does not stand in the DCA's shoes to determine applications as is expressly stated in section 25 as relates to Cabinet. When Cabinet determines an application, there is a notice in writing indicating whether the application is refused or approved with or without conditions.
- [123] Whilst the Decision of the Appeals Tribunal speaks to a recommendation that the appeal be allowed, it is understood that this is not a recommendation but the actual decision. There is no issue here. The decision of the Appeals Tribunal allowing the appeal does not grant approval as submitted by Mondesir Estates. That is the purview of the DCA in this instance. The ambit of their power is less but they are the body which is required to grant the approval of Mondesir Estates' application. Their reasons for rejecting the application have been rejected by the Appeals Tribunal and subject to a successful appeal, the application must be formally approved by the DCA. The DCA cannot question the decision of the Appeals Tribunal. It is not an appeal body. This is about procedure and whether Mondesir Estates can just simply commence or continue construction without formally going to the DCA with its decision of the Appeals Tribunal in hand to get its formal approval of ARN773/21. Simply put, there is a process to get to an approval of ARN773/21.

[124] I liken this to an appeal against a decision of a High Court Judge refusing an application to extend time. If the Court of Appeal allows the appeal, it may remit the application for consideration or it may decide the application itself depending on the circumstances. If the appeal court simply says appeal allowed, all this means is that the decision of the High Court Judge cannot stand and the application returns to its state prior to being heard.

[125] Having concluded that the decision of the Appeals Tribunal to allow the appeal does not automatically equate to approval of ARN773/21, it simply means that Mondesir Estates must follow through with the next step in the process. It may be wise to consider the impact of proceeding at this time with the several appeals filed so far with overlapping issues.

[126] I wish to indicate that my conclusion on this further question does not impact the decision and reasons articulated above in relation to the stay application.

Conclusion on the applications:

[127] In light of all the forgoing discussion, I make the following orders:

1. The application for an extension of time to 24th October 2024 to file the fixed date claim filed by the DCA is granted and the fixed date claim filed on 24th October 2024 is deemed properly filed.
2. The application for an extension of time to 20th November 2024 for the service of the fixed date claim filed by the DCA is granted and the service of the claim is deemed to have been effected on 20th November 2024.
3. The DCA shall pay costs on the application for extension of time to Mondesir Estates in the sum of \$1,500.00.
4. The application to strike out the appeal filed by Mondesir Estates is refused with costs to the DCA in the sum of \$1,500.00.
5. The application for a stay of execution of the decision of the Appeals Tribunal dated 24th September 2024 filed by the DCA is refused with costs to Mondesir Estates in the sum of \$1,500.00.

[128] As I conclude this decision I wish to thank Counsel for their helpful submissions and to make some brief observations:

There is a need for balance between the interests of the private property owner, Mondesir Estates and the DCA in a matter like this. This is a private property owner who has a constitutional right to the enjoyment of his property and not to be arbitrarily deprived of its enjoyment. The DCA also has a vested interest in ensuring that development in an area such as the property's location is not used in a manner which would be detrimental to the World Heritage Status and to the Piton Management Area as a whole. This is a matter which requires some level of discussion and reasonableness. This is not a matter which will be resolved in a contentious manner. As we have seen, we now have four appeals before the Court in relation to various decisions given by the High Court and the Appeals Tribunal and no doubt there may be others. The matter is being tied up in Court but to what end? I wish to urge the parties to consider the options which may be available to them to assist in adopting a more conciliatory approach with a view to ultimately resolving this matter.

**Kimberly Cenac-Phulgence
High Court Judge**



By The Court

Registrar