

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2022/0262

BETWEEN:

MONDESIR ESTATES LIMITED

Claimant

And

THE DEVELOPMENT CONTROL AUTHORITY

THE ATTORNEY GENERAL

Defendants

Appearances:

Mr. Peter I Foster, KC with him Ms. Renee St. Rose of Counsel for the Claimant

Mr. Adrian Etienne of Counsel for the first-named Defendant

Mr. Renee Williams of Counsel for the second-named Defendant

2023: January 16;
: July 24

Constitutional law – Fundamental rights and freedoms – Protection of the law – Interference to right to use and enjoyment of property – Whether Development Control Authority's ('DCA') decision to refuse development approval on the basis of Limits of Acceptable Use Study not being a physical plan within the meaning of the Physical Planning and Development Act ('Act') unlawful ultra vires void and therefore amounting to a breach of the claimant's constitutional rights to the protection of the law and to observance of the due process of law – Whether breach of the claimant's constitutional right to the use and enjoyment of property guaranteed under the Constitution – Constitution of Saint Lucia, s.1, 6, 16

Constitutional law – Fundamental rights and freedoms – Breach – Remedies – Appropriate redress to secure enforcement of constitutional right – Whether declaration of breach of constitutional right sufficient remedy – Whether compensation appropriate – Constitution of Saint Lucia, s. 16

Planning law – Physical Planning and Development Act – Environmental Protected area – Cultural and heritage protected area – Piton Management Area – World Heritage Tourism

site – Whether failure to declare Piton Management Area a protected area within meaning of and in conformity with Physical Planning and Development Act coupled with absence of a physical plan for the Piton Management Area rendered the DCA's refusal of the claimant's application on the basis of LAC Study unlawful and amounting to an unlawful interference with private property rights of private land owners in the Piton Management Area

JUDGMENT

- [1] **INNOCENT, J:** The claimant is a limited liability company incorporated under the Companies Act.¹ The claimant is represented in these proceedings by its director and shareholder Mr. Geoffrey Robillard ('Mr. Robillard').
- [2] The first-named defendant, the Development Control Authority ('DCA') is a body corporate established under section 3 of the Land Development (Interim Control) Act 1971 and is preserved and continued in existence as a body corporate under section 61 of the Physical Planning and Development Act² (the 'Act') and is responsible for the carrying out of the statutory duties and exercising the statutory powers under section 5 of the Act.
- [3] Section 5 of the Act provides that the Head of the Physical Planning and Development Division shall be responsible for carrying out the statutory duties and exercising the statutory powers created by the Act and any statutory instrument made hereunder and shall be answerable therefor to the Minister. Section 61(2) of the Act provides that when the DCA is dissolved, the Head of the Physical Planning and Development Division shall undertake his or her functions under section 5 and as created by the Act.
- [4] The DCA's statutory remit, among other things, includes responsibility for regulating the development of land, the assessment of the environmental impacts of development, the granting of permission to develop land, and the regulation of the use of land in accordance with the Act. Adjunct to its main responsibilities, the DCA is mandated to observe and ensure observance of the main objectives and

¹ Cap. 13.01

² Cap. 5.12

purposes of the Act which includes the appropriate and sustainable use of public and privately owned land in the public interest and the maintenance and improvement of the quality of the natural environment and amenities.

- [5] According to the Executive Secretary of the DCA, the DCA is also mandated to protect and conserve Saint Lucia's natural and cultural heritage. This latter statement will become relevant in so far as it raises the question of whether it falls squarely within the statutory remit of the DCA.
- [6] The second-named defendant, the Attorney General is joined as a party to the present proceedings in the right of the Crown.
- [7] There appeared to be no actual or significant factual dispute between the parties to the present proceedings.
- [8] The claimant is the registered proprietor of the immoveable property situate at Anse L'Ivogne in the Registration Quarter of Soufriere and registered as Block 0025B Parcel 4 (the 'Land'). The claimant acquired title to the Land by deed on 16th day of February 2016 in the sum of EC\$22,849,700.00. The Land measures approximately 32 Hectares or 79 Acres and is located in or forms part of the southwestern section of the area known as Gros Piton which falls somewhere within an area designated as the Piton Management Area ('PMA').
- [9] On 10th April 2017, the claimant applied to the DCA for approval in principle for the construction of a single family dwelling unit, guard house, roads, and footpaths with a geographical footprint of 28,406 square feet on the Land. This application was given the reference number ARN 182/17.
- [10] The claimant received notice of the rejection of its application by the DCA by letter dated 26th April 2017.³ The letter read:

"The Board of the Development Control Authority (DCA) considered the above-referenced application for Approval in Principle for land use and

³ Exhibit GR3

concept for a Residential (Single Family) development on Block 0025B Parcel 4 at Anse L'Ivrogne, Choiseul at its meeting of 21st April, 2017.

Kindly be informed that the proposal was rejected on the basis of the following:

1. The proposed development site falls within Policy Area 1 of the Pitons Management Area which according to the provisions of the Limits of Acceptable Change Study, adopted by Cabinet Conclusion 242 of 2015, states the following:

No development is permitted in Policy Area 1 with the exception of works to improve existing trails on Gros Piton, including minor signage and interpretation".

[11] The claimant alleged that at a meeting held on 29th May 2018, between the Minister of Physical Planning (the 'Minister') the Chairman of the DCA, and its technical staff, the claimant was advised that the proposed building was too large. It was agreed that the proposed residential building would be split into 2 parts, the first comprising a 1 bedroom house as part of a single-family dwelling to be erected on the lower slope of Gros Piton, that is, in Zone 1, and the remainder of the residential dwelling to be erected within the valley floor, that is, north of Anse L'Ivrogne river and still within Zone 1 where construction was permissible within the recommended Limits of Acceptable Change Study ('LACS').⁴

[12] According to the claimant, the matters discussed and agreed to at the meeting of 29th May 2018 were confirmed by letter to the Minister dated 5th June 2018 and copied to the Chairman of the DCA. Annexed to this letter was a map that depicted the location of the proposed development.⁵

[13] The application ARN 182/17 submitted to the DCA for the single-family dwelling was approved by the DCA on 4th December 2018. This structure has since been constructed in the area designated as Zone 1.⁶

[14] The DCA alleged that by letter dated 26th January 2018, the DCA wrote to the claimant elaborating on the reasons for DCA's rejection of Application ARN 182/17 and made recommendations for the exploration of the option of presenting a

⁴ Exhibit GR4

⁵ Exhibit GR5

⁶ Exhibit GR6

proposal for the development of the part of the land which fits the description of the base of the valley provision in Policy Area 1 in conformity with the LAC Study and the mapping documents provided by DCA.

- [15] The claimant asserted that on 29th July 2019, the claimant, pursuant to the understanding arrived at in the meeting of 29th May 2018, and based on the previous assurances given, submitted an application to the DCA for the approval of the second phase of the claimant's project which was intended to be constructed north of the river and consisting of 5 ancillary buildings and a footbridge located south of the river and outside Policy Area 1.⁷
- [16] On 30th July 2019, the claimant submitted another application to the DCA for approval of a multi-family residential dwelling and ancillary buildings. This application was referenced as ARN 750/19. The DCA alleged, that in keeping with its established procedures the DCA wrote to the Department of Sustainable Development who had oversight of the PMA by letter dated 10th September 2019, requesting its review and comments on the application ARN 750/19.
- [17] By letter dated 4th October 2019, the Department of Sustainable Development wrote to the DCA outlining its recommendations regarding the claimant's application ARN 750/19.⁸ The letter addressed to the Executive Secretary of DCA captioned "Re: Request for Review and Comments on Proposed Residential Development and Ancillary Facilities Block 0025B Parcel 4, Anse L'Irvogne, Soufriere – Application Number: 750/19" read:
- "The Pitons Management Area Advisory Committee (PMAAC) met ... to review the above captioned. The proposed application for development was reviewed against the Limits of Acceptable Change for the Pitons Management Area (LAC) 2013 which was adopted by Cabinet in 2015. The LAC identifies parameters for development within the PMA. Its basic principle is that for any development to be considered within any of the Policy Areas (PA) of the PMA, it must satisfy completely the recommendations of the LAC for the specific PA.

⁷ Exhibit GR7

⁸ Exhibit KA1

The Committee deliberated on the proposed Application Registration Number 750/19 and determined the following:

1. The proposed application for Residential Development and Ancillary Facilities (Application Number: 750/19) is located on Block 0225B Parcel 4, Anse L'Irvogne, Soufriere which is located within Policy Area 1 (PA1) of the PMA.
2. Development Policy PA 1 Subsection (A) through (C) stipulates the following:
 - (a) Development Policy PA1 (A): No development is permitted in Policy Area 1 except for works to improve existing trails on Gros Piton, including minor signage and interpretation.
 - (b) Development Policy PA1 (B): Existing informal recreational Trails on Petit Piton will be extinguished avoid disturbance to the ecosystem; access permitted for scientific purposes only. Note that this sub-section refers specifically to Petit Piton.
 - (c) Development Policy PA1 (C): Small-scale development in the L'Irvogne River valley, set back from the beach, will be considered if it meets in full the Limits of Acceptable Change and Design Guide for the PMA World Heritage Site. Such development would be restricted to local needs and/or for conservation purposes. It could, for example, be a scheme that provides opportunities for local employment, for accommodation (but only for local people), and or for historic feature conservation. Such development would allow for the replacement of the existing ad hoc beach facilities with sustainably managed low-key beach facilities set back from the beach, all in accordance with the Design Guide. Unlike most of Policy Area 1 this site has potential because it is not easily visible.

Consequently, the PMAAC finds that the Development Application Registration Number 750/19 does not meet the requirements for Limits of Acceptable Change (LAC) within the Pitons Management Area and cannot be supported. This decision was based on the following:

1. The application for development is within an area where development of the nature and extent proposed is not permitted. See Development Policy PA1(A).
2. The proposed development does not represent a scheme that is restricted to local needs for sustainable use through heritage tourism. See Development Policy PA1(A)."

[18] The DCA alleged that by a second letter dated 11th October 2019 addressed to the Executive Secretary of DCA which was intended to supersede the letter of 4th October 2019 the Department of Sustainable Development provided input and

recommendations to the DCA on the proposal of ARN 750/19.⁹ This representation is false as this letter contained no recommendations. This latter correspondence was in precisely the same terms as the previous correspondence except that subparagraphs (b) and (c) of paragraph 2 were deleted along with the penultimate paragraphs 1 and 2.

[19] The DCA claimed that the Board by letter dated 23rd October 2019 informed the claimant that DCA was awaiting further clarification from the Department of Sustainable Development on their recommendations for the proposal ARN 750/19 since the land is located within the PMA.

[20] The DCA rejected the claimant's application for the second phase of its project. The DCA's rejection was communicated to the claimant by letter dated 22nd November 2019.¹⁰ The grounds for the rejection was that the proposed development fell within Policy Area 1.¹¹ The letter in part read:

"Kindly be informed that the Board at its meeting of November 20, 2019, rejected your application on the basis that the proposed development site falls within Policy Area 1 of the Pitons Management Area which states:

1. No development is permitted in Policy Area 1 with the exception of works to improve existing trails on Gros Piton, including minor signage and interpretation."

[21] It is worth noting that the Executive Secretary at paragraph 24 of her affidavit stated when referring to the letter dated 22nd November 2019, that the reasons for the rejection were based on the recommendations from the PMA Office of the Department of Sustainable Development which was guided by the LAC Study of 2013.

[22] On or about the month of December 2019, the claimant appealed the DCA's decision to the Physical Planning and Development Appeals Tribunal (the 'Tribunal'). By letters dated 6th January 2021 and 14th January 2021, the Tribunal advised the claimant of the date for submissions to be made and the date of

⁹ Exhibit KA2

¹⁰ Exhibit KA3

¹¹ Exhibit GR8

hearing of the appeal. The claimant's legal practitioners responded by letter dated 26th January 2021 requesting further documentation in order to proceed with the appeal. The Tribunal did not respond. To date, the appeal has not been heard by the Tribunal.

- [23] Subsequently, the claimant submitted for the DCA's approval an application for the construction of 5 ancillary buildings and a footbridge to be built on the Land.¹² This second application was referenced as ARN 497/20. The claimant was advised of DCA's approval of the application by letter dated 17th July 2020.¹³
- [24] With respect to this second application, DCA contended that this application was approved because the proposal was for ancillary facilities (buildings) and a footbridge which were ancillary to the previously approved single-family residential dwelling unit which had been approved on the original footprint of the existing building.
- [25] On 26th July 2021, the claimant submitted a further application to the DCA for the approval of a proposed single-family residential dwelling to be constructed. This application was given reference number 773/21.¹⁴
- [26] By letter dated 11th August 2021, the claimant was informed of DCA's disapproval of the application on the grounds that the proposed development fell within the area designated as Policy Area 1.¹⁵
- [27] DCA contended that the proposed single-family dwelling unit formed part of application reference number 750/19 which had already been forwarded to several referral agencies, namely, the Department of Sustainable Development, the Saint Lucia National Trust and the PMAAC for input and recommendations.

¹² Application No. 497/20 Exhibit GR12

¹³ Exhibit GR13

¹⁴ Exhibit GR14

¹⁵ Exhibit GR15

[28] The claimant, being dissatisfied with the DCA's decision to not approve the claimant's application for planning approval to construct the second phase of its project, namely Application No. 750/19 and Application No. 773/21 commenced these proceedings wherein it seeks the following orders, declarations and other relief, namely:

1. A Declaration that the First Defendant's decision to reject the Claimant's application for development approval is in breach of the claimant's right to protection of law under sections 1(a) and 8 of the Constitution of Saint Lucia Cap 1.01
2. A Declaration that the first defendant's decision to reject the claimant's application for development approval is illegal and in breach of Article 360 of the Civil Code of Saint Lucia.
3. A Declaration that the first defendant's decision to reject the claimant's application for development approval was devoid of any statutory, legal or regulatory basis and is therefore arbitrary, illegal, unreasonable and fundamentally unfair.
4. A Declaration that there are no legal or regulatory prohibitions on the claimant building on his property provided that he does so in accordance with established and lawful building guidelines.
5. An order setting aside the rejection of the first defendant and directing the first defendant to reconsider the application based on the applicable laws and regulations.
6. Damages for depriving the claimant of the use and enjoyment of his property.

[29] Before dealing with the claimant's challenge to the constitutional propriety of the DCA's decision, the court will first examine the preliminary technical points raised

by the DCA and the Attorney General with respect to the claimant's application for redress under the Constitution.

- [30] Although the Attorney General did not dispute that the claim ought to have been served on the Attorney General pursuant to CPR 56.9, however, it was argued that it did not automatically follow that the Attorney General should be named as a party to the proceedings. The fulcrum of the Attorney General's misjoinder argument was that the DCA was neither a servant nor agent of the Crown but was in fact a statutory corporation established under the Act. Therefore, the DCA was a public authority endowed with coercive powers.
- [31] On the authority of the decision in **Frederick Augustus v Mayor and Citizens of Castries**, the Attorney General argued that there was no act or omission on the part of the DCA that warranted the addition of the Attorney General as a party to the proceedings. In the premises, the claim ought to be struck out as against the Attorney General.
- [32] The Attorney General also expressed serious doubt in relation to the claimant's reliance on section 1(a) of the Constitution as providing any enforceable right the infringement or contravention of which entitled the claimant to seek redress under the Constitution. The Attorney General argued that section 1(a) of the Constitution does not confer any enforceable fundamental constitutional rights that the claimant can seek redress under section 16 of the Constitution for its enforcement.
- [33] In addition, the claimant has not identified with specificity which section of the Constitution or which right guaranteed to it under the Constitution has been infringed by the Crown in relation to any right guaranteed under the Constitution. The Attorney General also complained that the claimant has not demonstrated the manner in which the act or omission of any servant or agent of the Crown represented by the Attorney General has infringed any of his rights guaranteed by the Constitution. The Attorney General also took the view that there was no discernible act or omission on the part of any servant or agent of the Crown

- [34] In fine, the position adopted by the Attorney General was that in order for the claimant to mount a constitutional challenge, the claimant was required to show demonstrably that any one of his rights guaranteed to it under sections 2 to 15 of the Constitution had been or was likely to be infringed or contravened.
- [35] The court understood the underlying basis of the claimant's claim to redress under the Constitution as grounded in the provisions of section(s) 1(a) and 1(c) of the Constitution as securing the rights guaranteed to it under sections 6 and 8(8) of the Constitution. In this context, the provisions of section 1 of the Constitution are relied on as being an all-embracing provision that speaks to the manner in which the provisions of the proceeding sections of the Constitution are to be interpreted. It is within this context that the claimant appears to assert that the decisions of the DCA deprived it of the protection of the law in that the DCA had acted ultra vires the Act by its reliance on the LAC Study as the basis for refusing its application for development approval was also ultra vires the Act or otherwise unlawful (section 6); and that the nonexistence of a physical plan for the PMA coupled with the DCA's reliance on the LAC study as the physical plan for the area, which did not have the force of law the same not having come into operation in accordance with the provisions of the Act which required consultation with persons affected by the physical plan according to the provisions of the Act, meant that the claimant's right to a fair hearing and procedural due process guaranteed under section 8(8) of the Constitution had been infringed.
- [36] Additionally, the claimant appeared to have complained that it was deprived of its right to the due protection of the law to the extent that the right of appeal conferred under the Act to the Tribunal has been frustrated by the very inaction and non-operation of the Tribunal. It was on this footing that the court understood the claimant to have mounted its constitutional challenge and which would explain its reliance on the provisions of sections 1 and 8 of the Constitution.
- [37] In respect of the claimant's argument that the DCA's refusal to grant its application for development approval amounted to a breach of its rights guaranteed under

section 6 of the Constitution to the extent that it amounted to an unlawful interference or abrogation of its right to the use and enjoyment of its land or otherwise unlawfully prohibited it from the use and enjoyment of its land in a manner otherwise than that prescribed by law, or by regulations made in accordance with law, the Attorney General contended that Parliament acting in accordance with section 40¹⁶ of the Constitution may pass laws that are inconsistent with or abrogate private rights created by any other law, in this case, those established by the provisions of Articles 360-361 of the Civil Code. Therefore, the claimant had no entitlement to an unfettered right to the use and enjoyment of its land.

- [38] Accordingly, the Attorney General argued that therefore, it was not open to the claimant to object to any abrogation of its private right to the use and enjoyment of its land by the decision refusing its application to develop the same based on statute or laws passed by Parliament.
- [39] The DCA adopted a similar view as that of the Attorney General which was captured by its mantra that “the DCA is not concerned with the enforcement of private rights”. To that extent, the DCA argued that all development proposals submitted to the DCA for its consideration and approval are governed by planning laws, regulations, government policies, and local restrictions which are “material considerations” taken into account in considering applications for development approval.
- [40] The DCA relied on the authority of **Grenadines Services Limited v Physical Planning Development Board and the Attorney General of Saint Vincent and the Grenadines**¹⁷ in support of the proposition that planning authorities such as the DCA and by extension the Appeals Tribunal in considering applications for development approval are not concerned with the enforcement of private rights and also that the matters that the DCA takes into consideration cannot supersede

¹⁶ Subject to the provisions of this Constitution Parliament may make laws for the peace, order and good government of Saint Lucia.

¹⁷ Suit No. 516 of 2000 (SVG) 11th April 2001

private rights and therefore it was incumbent on the DCA as a planning authority to consider applications for development approval purely from a planning perspective.

[41] The court noted that the foregoing authority relied on by the DCA dealt with the question of restrictive covenants and that it was not the duty of the planning authorities to enforce restrictive covenants but rather that of the courts. Therefore, to that extent, the DCA's reliance on this case is unfortunate and does not avail the DCA in this instance. The court, therefore, assumed that it was cited merely for the purposes of illustrating the point that followed, namely that the DCA is guided purely by what are considered to be material considerations under the relevant statute; and that once the decision of the DCA is so guided it cannot amount to an abrogation of any private right.

[42] The court also understood the DCA's argument to be that the decisions of the DCA were not amenable to review by the court through the prism of the Constitution or even judicial review for that matter as the DCA was not an agent of the State. The court disagreed entirely with such a notion. The DCA is clearly an agent or organ of the State exercising coercive powers on behalf of the State. It appeared that the DCA was attempting to avoid the susceptibility of its decisions to review by the court under the shroud of its status as a statutory corporation. This notion can easily be dispelled by the decision of the Caribbean Court of Justice ('CCJ') in their decision in **Guyana Geology and Mines Commission v BK International Inc and another**¹⁸ where it held:

"Not every decision of a statutory corporation would be amenable to judicial review. Where the decision was commercial in nature, or was not subject to duties imposed by statute, or there was no allegation of fraud, judicial review would not normally be appropriate and a claimant would usually be left to the remedies in private law, if any. Where there was a sufficient public law element or flavour, judicial review would lie. Pursuant to the Judicial Review Act, in considering whether an act or omission had a public element the court was obliged to have regard to the source of the power or duty exercised; the nature of the power or duty exercised; the object or purpose of the act or omission; the consequences of the act or

¹⁸ [2022] 2 LRC 491

omission not being amenable to judicial review; any other matter the Court sees fit to consider. The present case was a particularly strong one for judicial review because of the significant statutory underpinning of the decision of the GGMC as a statutory body. The public law dimension was especially evident by virtue of the nature of the relationship between government and this statutory body. In circumstances where the statutory body, as an agent of government, was engaged in the carrying out of the public functions of a road rehabilitation project, and where the source of funding of the project was the government of Guyana, there was sufficient public law flavour to justify application of public law principles of judicial review.”

- [43] The court thinks that it would be helpful to set out the facts in **Guyana Geology and Mines Commission v BK International Inc and another** for the purpose of exposition and not simply on account of mere pedantry. The facts were that when concerns were raised about the poor state of a road and several bridges, a road rehabilitation project was recommended by a committee consisting of representatives from the Ministry of Local Government, the Ministry of Natural Resources and the Environment, Guyana Forestry Commission, Guyana Gold and Diamond Miners Association, and the Guyana Geology and Mines Commission ('the GGMC'), a state corporation established by statute. The GGMC invited bids for the rehabilitation project by way of public advertisement which specifically stated that 'Bidding will be conducted through the National Competitive Bidding procedures, specified in the Procurement Act 2003'. Three bidders, including CB&R and BK, responded to the Invitation For Bids ('IFB'). It was then discovered that CB&R had not submitted its insurance and tax compliance certificates or other information required by the Procurement Act (Cap 73:05). Notwithstanding those deficiencies, CB&R was awarded the tender, even though BK had submitted the lowest of the three bids and had submitted the required documentation. GGMC executed a contract with CB, the alleged owner of CB&R, and CB commenced rehabilitation for the road. BK applied to quash the decision of the GGMC to award the contract to CB&R and directed that the award be made to BK as the lowest bidder. The High Court judge held that the GGMC was a procuring entity for the purposes of the Procurement Act and that its failure to comply with the Act regarding the prequalification process and the award of the contract meant that it

had acted ultra vires. The decision of the GGMC to award the contract to CB&R was accordingly quashed. CB&R appealed to the Court of Appeal against the GGMC and BK in which CB&R sought to enforce the validity of its contract with the GGMC and to prevent GGMC from awarding the contract to another party. The GGMC also appealed to the Court of Appeal against BK in which it sought to establish that it was not a government agency but a private entity, and as such, its decisions were not amenable to judicial review. Those appeals were consolidated. The Court of Appeal agreed with the High Court but made the distinction that the GGMC was not a government agency under the Ministry of Natural Resources and Environment, but rather was an agency of the government falling under the purview of the Ministry. It was held that the advice to bidders that the Procurement Act would apply to the tendering process created a legitimate expectation that prevented the GGMC from subsequently claiming that it was not bound by the Act. Whilst acknowledging that BK should have invoked the prescribed administrative procedure set out in the Procurement Act, the court held that their failure to do so did not bar their claim for judicial review, as it was the court's duty to ensure procedural fairness and thereby the integrity of the tender process. Both the GGMC and CB&R appealed to the Caribbean Court of Justice which consolidated the appeals. A number of issues fell for consideration including: (i) whether the GGMC was subject to the Procurement Act in respect of its award of the contract for road rehabilitation, and therefore obliged to comply with the requirements of that Act. (ii) If so, whether the challenge to its decision to award the contract ought to have been made through the administrative review process provided for under the Procurement Act rather than by way of judicial review that was pursued in this case. (iii) If judicial review was appropriate, whether the decision to award the contract ought to be upheld or struck down.

- [44] The CCJ held, dismissing the appeal, that the two possible bases on which the GGMC might have been obliged to comply with the Procurement Act were (i) that it was a procuring entity within the meaning of the Procurement Act, or (ii) that it

created a legitimate expectation that bidding for the road rehabilitation project would be conducted in accordance with the Procurement Act.¹⁹

[45] The CCJ also held that as a matter of statutory interpretation, the GGMC was obliged to comply with the Procurement Act because it was a procuring entity. The deliberate establishment of the GGMC outside the strictures of the formal government apparatus meant that it could not be regarded as a department, unit, or sub-division of any ministry of government. However, the nature of the functions that it performed and the extensive ministerial control exercisable over it, strongly suggested that it was to be regarded as an agency of the government. As an agency of government, the GGMC was clearly a procuring entity that engaged in procurement and therefore came within the governance of the Procurement Act.²⁰ In addition, the CCJ held that even if the GGMC could not be considered a procuring entity within the meaning of the statute, it had created by its IFB a legitimate expectation that it would abide by the relevant provisions of the Act and the GGMC could not be permitted to resile from meeting that expectation.²¹

[46] In the present case, a similar reasoning could be applied to the DCA. This is particularly the case since the allegation is that the DCA in considering the claimant's application for development approval had failed to comply with the provisions of the Act. It can properly be said that in the present case the DCA as an agent of the government was engaged in carrying out the public function of superintending planning laws and regulations and was carrying out a public law function under the superintendence of the Minister which would justify the application of public law principles by way of judicial review and constitutional challenge. In the court's view, the same considerations and reasoning would apply to the present case notwithstanding that in **Guyana Genealogy** the court dealt with the issue within the context of the Judicial Review Act in force in that jurisdiction.

¹⁹ At paras [19], [53], [62]

²⁰ At paras [23], [27], [28], [52], [53], [62]

²¹ At paras [36], [37], [53], [62]

Constitutional Breach

- [47] Ultimately, the DCA submitted that restrictions that exist for the preservation and conservation of protected areas cannot amount to the unlawful abrogation of an individual's right to the use and enjoyment of their property. The court agrees wholeheartedly with this argument save that such restrictions must be embodied in some discernible law, statute or regulation ordained by such and applied in a manner that is consistent with the due process of law so as not to result in the abrogation of any private or public right guaranteed under the Constitution.
- [48] The Attorney General's objection to the constitutional point raised by the claimant was that it did not support the claimant's argument that there exists, for a landowner or developer, a constitutional right to a favourable outcome on an application for development approval under the Act. On the contrary, the position adopted by the Attorney General was that the operation of sections 1 and 6 of the Constitution does not exclude the right of the State to exercise lawful control over the use and development of property under domestic legislation by the making of decisions on applications for development permission and appeals against the refusal of permission. Indeed, such a concept is inimical to the terms in which the right itself is qualified. The provisions of section 6 of the Constitution do not in any way seek to impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest of the public.
- [49] The court agrees entirely with the foregoing submission. However, there appeared to be a critical matter that the DCA had either overlooked or otherwise failed to consider in advancing its argument. The DCA's argument was premised on the existence of procedures, regulations, and policies that have been sanctioned and given legally binding effect under the provisions of the Act itself. However, in advancing its argument on this point, the DCA did not advert the court's attention to any identifiable or discernible statutory order, regulation, or declaration made under the Act or any other enactment to support its contentions.

- [50] It is a well-established principle of public law that statutory powers entrusted to the executive branch of government must be exercised within the four corners of the relevant statutory powers, and when the executive acts outside these boundaries, its decision is ultra vires and unenforceable.²²
- [51] The foregoing argument advanced by the DCA provides a convenient transition to the court's analysis of the underlying basis of the claimant's case. However, before venturing into the very substance of the arguments advanced by the claimant in support of its right to redress under the Constitution, it would be useful, at least for the purpose of exposition, to examine critically the arguments relied on by the DCA in relation to the statutory remit of the DCA and how this is exercised within the contours of the Act.
- [50] The DCA at first relied on its corporate existence as the basis for challenging the susceptibility of any of its exercisable powers to review by the court. This assertion, and the arguments that followed have already been laid to rest earlier on in this judgment. However, the court reiterates that it accepts the proposition that the DCA must operate within the ambit of the law as set out within the Act, statutory regulations and orders made thereunder and what is essentially the governing laws regulating development planning within the state. However, the court is only prepared to accept that the DCA can only exercise a limited discretion within the four corners of the existing statutory regime. In this way, decisions of the DCA are therefore open to scrutiny by the court.
- [51] In support of the submission that the DCA had followed the provisions of the Act in arriving at its decision, reliance was placed on the provisions of section 23(2) of the Act which provides that:
- “The Head of the Physical Planning and Development Division shall not grant permission where an application for any development mentioned in Schedule 4 is made, unless the application has been submitted to the Advisory Committee for review and the Advisory Committee has submitted its advice to

²² Padfield [1968] AC 997 at p. 1060

the Head of the Physical Planning and Development Division in accordance with section 7(5)."

- [52] Section 7(5) of the Act provides that the Advisory Committee for any part of Saint Lucia shall advise the branch office in that area on any physical plan for that part of Saint Lucia; any application for permission to carry out development in that part of Saint Lucia that belongs to a class of applications prescribed by the Minister by order published in the Gazette as applications to be determined by a branch office on behalf of the Head of the Physical Planning and Development Division; and any application for development or other matter related to that part of Saint Lucia on which the Minister or the Head of the Physical Planning and Development Division or the branch office may seek its advice, whether under section 23(2) or not.
- [53] The court was also referred to the provisions of paragraphs 17 and 18 of Schedule 4 of the Act which deals with matters for which environmental impact assessment ('EIA') is ordinarily required. Paragraphs 17 and 18 of Schedule 4 refer specifically to coastal zone developments and development in wetlands, marine parks, national parks, conservation areas, environmental protection areas or other sensitive environmental areas respectively.
- [54] The DCA sought to develop this point by directing the court's attention to the establishment and functions of the Piton Area Advisory Committee ('PMAAC') of the Department of Sustainable Development ("DSD") which they described as an independent committee which gives guidance to the DCA and is responsible for the appraisal of all development applications within the PMA under the guidance of the LAC study in order to protect what was described as the Outstanding Universal Value of the PMA as a World Heritage Site.
- [55] Based on the foregoing, the DCA advanced its argument further to the extent that it had complied with its remit under the Act by having referred the claimant's application to a government agency notably the PMAAC for what was described as "independent feedback" for specific types of applications for development.

[56] To the extent of the foregoing submissions the DCA argued that this was a clear illustration that it had complied with its statutory remit when considering the claimant's application for development approval and its subsequent rejection of the same. However, it is unclear whether the claimant's application fell within the category of the kind of development envisaged by section 23 of the Act and Schedule 4 made thereunder. It was also not readily apparent whether the claimant was required to or had in fact submitted an EIA along with its application for development approval. The claimant argued that it was not required by the aforementioned provisions to submit an EIA.

Alternative remedy

[57] The linchpin of the DCA's disagreement with the constitutional relief sought by the claimant was premised on the interpretation of the provisions of section 16 of the Constitution. In a nutshell, the DCA argued that while the High Court possessed an original jurisdiction to hear and determine applications for redress under the Constitution, the High Court also retains a discretion to decline exercising its jurisdiction to hear and determine such claims for redress under the Constitution if satisfied that other adequate means of redress are available under any other law.

[58] It is upon reliance on the proviso to section 16 of the Constitution that the DCA implored the court to decline to exercise its power to grant redress to the claimant under the Constitution. The DCA took the view that there were other forms of redress available to the claimant that were more adequate, convenient, and better suited to the subject matter of the proceedings.

[59] To buttress its argument in relation to the existence of available alternative remedies, the DCA relied on the provisions of section 26 of the Act which provided a right of appeal to the Appeals Tribunal.

[60] In another argument against the grant of any relief to the claimant under the Constitution, the DCA referenced the provisions of section 34(5) of the Act. Interestingly, section 34 of the Act makes provision for where land within an area

declared as an environmentally protected area depreciates in value as a result of any restriction placed on its use or development by an order that adequate compensation shall be paid to the owner of the land.

[61] In the present case no order has been presented to the court where the claimant's property or any part thereof was declared an environmentally protected area or any of the classes of land mentioned in section 34 of the Act for which compensation was payable on account of its depreciation.

[62] The court will deal thoroughly with the foregoing argument later on in this judgment in so far as it relates to the claimant's arguments in relation to the question of the constitutional impropriety of the DCA's decision.

[63] Lastly, the DCA also took the view that the relief sought by the claimant by way of redress under the Constitution ought to have been addressed by a claim for judicial review.

[64] The claimant in response to the assertions made by the DCA with respect to the availability of an alternative remedy argued that there has been a jurisprudential shift away from the conventional wisdom that an applicant seeking redress under the Constitution must, as a condition precedent to seeking relief, first satisfy the court that no other means of redress is available to them.

[65] In addition, the claimant took the view that the issues raised in the present proceedings did not lend itself to the form of administrative review provided for under the Act. In fine, that the administrative tribunal set up under the Act in the form of the Appeals Tribunal did not have the power and authority to adjudicate on any matters related to the constitutional issues that arise in the circumstances of the present case. The court agreed with this submission.

[66] In **Guyana Genealogy** the CCJ in dealing with the question related to the availability of an alternative statutory remedy the CCJ reasoned that:

"The general principle was that the court was reluctant to permit judicial review in circumstances where the dissatisfied bidder could have invoked

administrative review process specifically ordained by statute. The special statutorily ordained procedure for redress had to, as a rule, be observed. In the instant case however, the nature of the complaints meant that they might not have been satisfactorily answered in the administrative review process. The issues raised were complex, they related not only to the adequacy of bids, but also the legality of the procurement process and specifically whether the GGMC was a procuring entity subject to the Act. Such a question of legality was not one contemplated by the administrative review process under the Act. Only a court of law could effectively determine that question. It followed that judicial review was available to challenge the decision of the GGMC.”²³

[67] In support of the foregoing argument, the claimant relied on the decision in **McEwan and others v The Attorney General of Guyana**²⁴ for the proposition that the court, when interpreting the Constitution ought to avoid a formalistic approach to the enforcement of fundamental rights which has a tendency to lead to grave injustice and defeat the spirit of the Constitution itself. In other words, the principle espoused in **Fisher v the Attorney General**, that the court should avoid “the austerity of tabulated legalism”. The claimant also relied on the decision in **Solomon Marin v The Queen** as embracing the idea that legalistic, mechanistic and strict constructionist approaches to constitutional interpretation are inappropriate.

[68] The posture adopted by the claimant was that the court ought to avoid sacrificing fundamental rights on the altar of a formalistic interpretation but should instead apply a liberal approach which opened the door to the principle of constitutional supremacy and the supremacy of the rule of law which are embodied in the Constitution.

Protection of the law

[69] In its written submissions before the court the claimant placed significant reliance on the decision of the CCJ in **Maya Leaders Alliance an others v The Attorney General of Belize**²⁵ to support the proposition that the DCA's refusal of the

²³ (see [36], [37], [53], [62])

²⁴ [2018] CCJ 30 (AJ)

²⁵ [2015] CCJ 15 (AJ); (2015) 87 WIR 178

claimant's application for development was in breach of the claimant's fundamental right to the protection of the law guaranteed to him by sections 1(a) 1(c) and 6 of the Constitution.

[70] In **Maya Leaders** the CCJ having found that the Government of Belize had contravened the constitutional guarantee of the appellants to the protection of the law, held:

“The right to protection of the law was a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. It prohibited acts by the government which arbitrarily or unfairly deprived individuals of their basic constitutional rights to life, liberty or property. Although it encompassed the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights, the concept went beyond such questions of access and included the right of the citizen to be afforded 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'.”

[71] The CCJ further reasoned that:

“The right to protection of the law might, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state might result in a breach of the right to protection of the law. Where the citizen had been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights had otherwise been frustrated because of government action or omission, there might be ample grounds for finding a breach of the protection of the law for which damages might be an appropriate remedy. Further, the mere possibility of relief under the common law was no answer to a claim for conventional constitutional redress.”

[72] In relation to the issue of the non-fulfillment of Saint Lucia's obligations under the Convention, which will be discussed later in this judgment, the reasoning of the CCJ in **Maya Leaders** is also instructive. The CCJ said:

“Moreover, the right to protection of the law encompassed the international obligations of the state to recognise and protect the rights of indigenous people. In all the circumstances of the instant case, the appellants' right to protection of the law, founded on the concept of the rule of law, which itself imported an obligation to adhere to international law commitments, had been breached and the failure of GOB to recognise and protect Maya customary land tenure rights had to be emphasised in

that respect. GOB had been under a duty to take positive steps to recognise Maya customary land tenure and the land rights flowing therefrom and, without detriment to other indigenous communities, to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect those rights in the general law of the country. The obligation on the state necessarily followed from the recognition that Maya customary land tenure, a species of property rights not provided for in the current legal system of Belize, was protected under ss 3(d) and 17 of the Constitution.”

[73] As in the case of **Maya Leaders**, the court in this instance adopts the view that the constitutional provisions which the claimant says have been contravened may be conveniently discussed under the rubrics of protection against arbitrary deprivation of property and the right to protection of the law. In order to establish any entitlement to constitutional relief the claimants must show that the factual evidence on which they rely establish are breaches of one or more of these categories.

[74] In order to establish the claimed violation, the claimants must prove that the DCA, by its actions or omissions, has deprived it of its property and that such deprivation was arbitrary. The notion of deprivation of property is often discussed in the context of the compulsory acquisition of property as under section 6 of the Constitution. It is evident that compulsory acquisition which does not meet the conditions specified in section 6 of the Constitution undoubtedly amounts to arbitrary deprivation of property. However, deprivation of property in the context of the constitution has been expanded from what was previously believed was limited to acquisition in the sense of compulsory acquisition. The case law has established that there may be an arbitrary deprivation of property even where there is no compulsory acquisition.²⁶

[75] This was the view expressed by the CCJ in the **Maya Leaders** case. In dealing with the Belize Constitution the court said:

“In other words, s 3 is not a mere preamble or introduction but rather is an enacting provision that recognises and declares rights in property outside the boundaries contemplated by s 17. As used in s 3, 'deprivation' of

²⁶ Maya Leaders at para [32]

property is akin to the concept of 'taking' of property rights which has received a broad interpretation has repeatedly held that in order to give practical effect to the right of peaceful enjoyment of property it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of."²⁷

[76] The CCJ also held relying on the Privy Council decision in **Societei United Docks v Government of Mauritius**³⁹ that against a background of constitutional provisions similar to sections 3(d) and 17 of the Constitution of Belize, that relief for arbitrary deprivation of property was not restricted to providing protection against loss caused by compulsory acquisition but extended to loss caused by damage and destruction. Loss caused by damage and destruction was, the same in quality and effect as loss caused by compulsory acquisition.²⁸

[77] Although the CCJ was prepared to accept readily that access to independent and impartial courts or other judicial bodies is perhaps the most visible aspect of the right to protection of the law, they were also of the opinion that this right goes well beyond the issue of access to judicial or quasi-judicial proceedings. Citing the decision in **Alleyne v A-G of Trinidad and Tobago** the CCJ observed that the High Court appeared to have accepted that the right to protection of the law could in principle encompass an obligation on the State to make subsidiary legislation and to institute administrative arrangements to promote the right of municipal police officers to receive similar benefits as regular police officers. The Court of Appeal affirmed this decision, holding that equal protection was not limited to the right of access as set out in the **McLeod** decision. The CCJ in **A-G v Joseph and Boyce**, said that the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed.²⁹

[78] The CCJ having accepted that the law is evidently in a state of evolution, made the following observations:

²⁷ Infra at para [32]

²⁸ At para [33]

²⁹ At para [44]

“The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.”

[79] The following observation made by the CCJ in **Maya Leaders** bears testimony to one of the issues arising in the present case in respect of Saint Lucia's obligations under the World Heritage Convention and its relevance to the question of protection of the law under the constitution which will be discussed later in this judgment. The CCJ adopted the view that:

“It also bears note that the right to protection of the law encompasses the international obligations of the State to recognise and protect the rights of indigenous people. A recognised sub-set of the rule of law is the obligation of the State to honour its international commitments. This ideal was expressed by the late Lord Bingham, delivering the Sixth Sir David Williams lecture in 2007. Recognising the inherent elusiveness that attends any definition of the rule of law, Lord Bingham proposed a list of eight sub-rules which can be derived from the rule of law, the last of which posits that: ... the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.”³⁰

The relevance of the foregoing observations made by the CCJ to the present case will become relevant later in this judgment.

³⁰ At para [52]

[80] In **Commissioner of Prisons and another v Seepersad and another**³¹ the Privy Council dealt with the question of the approach to the interpretation of the various constitutional provisions.

[81] The Board in delivering its judgment and relying on the dicta in **Reyes v The Queen** said:

“One of the main reasons for the generous and purposive approach advocated by Lord Bingham is readily ascertainable. The terms in which individual rights and guarantees are formulated in constitutional instruments are typically broad and open textured, unaccompanied by definition or particularity. Thus while the exercise of construing a statute has certain similarities, a court engaged in the construction of constitutional provisions must adopt a somewhat broader perspective. The analogy with construing a legal instrument such as a contract or a will is, as Lord Bingham makes clear, inappropriate. Furthermore, the Board considers that the court engaged in the interpretation exercise must be alert to the historical context of the constitutional instrument in question. It is trite to add that the constitutional provision under scrutiny must be construed by reference to the whole of the instrument in which it is contained.”³²

[82] In relation to the interpretation of the equivalent to section 1 of the Saint Lucia Constitution their Lordships held:

“The exercise of construing both section 4(a) and section 4(b) will also be informed by the immediate context of these provisions. They are contained in Chapter 1, the subject matter whereof is “The Recognition and Protection of Fundamental Human Rights and Freedoms”. Furthermore the Preamble, which overarches the entire instrument, must also be considered. In the context of these appeals the phrases which resonate in the Preamble are “faith in fundamental human rights and freedoms ... the dignity of the human person ... belief in a democratic society ... (and) respect for ...the rule of law”. The overarching purpose of the Constitution is to - “enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms.

In this way the Constitution proclaims and establishes a constitutional democracy.”³³

³¹ [2021] UKPC 13

³² At para [22]

³³ At para [24]

[83] Having examined the admonition in **Harrikissoon** and **McLeod** their Lordships said:

“Taking into account the guidance to be distilled from the decided cases considered above and later in this judgment, the assessment of the Board is as follows. The Board considers that section 4(a) and section 4(b), in common with many constitutional provisions, are protean in nature. Constitutions are living instruments. They are to be construed by reference to the situation of and conditions prevailing in the society which they serve as these evolve from time to time. It is for this reason that the approach of the interpreting court should ordinarily be more liberal than it would be in construing, for example, a measure of legislation or legal instruments such as deeds and contracts. In short, the court is enjoined to adopt a broader perspective.”³⁴

[84] It was argued before the Board that “due process rights must include the most basic of all requirements of the rule of law, namely, to be treated in accordance with the legislative framework in force. However, this was rendered impossible by the executive’s unexplained failure to do what it was statutorily required to do, which was to give effect to sections 54(1) and 60(1) of the Children Act” (Original emphasis.) and that this failure by the executive deprived the appellants of the benefits of the aforementioned two statutory provisions and diluted their right of access to the court.

[85] One of the main complaints of the claimant in the present case, as it relates to the question of the protection of the law argument, is appropriately illustrated by the decision in **Seepersad**. The issues raised in **Seepersad** are summarised in the judgment as follows:

“The question raised by this ground is whether there has been a violation of the appellants’ rights to the protection of the law guaranteed by section 4(b) of the Constitution. The appellants’ case on this issue is based on both act and omission on the part of the executive. In short, the executive brought into operation the legislative protections for children in sections 54(1) and 60(1) and (5) of the Children Act without having first made provision for community residences as required by these legislative provisions. It was contended that the executive had acted arbitrarily. The appellants’ submissions characterised the absolute prohibition on children being detained in an adult prison and the requirement for them to be detained in a community residence as foundational to the regime which applies to juveniles in the criminal justice system of Trinidad and Tobago.

³⁴ At para [26]

The other main ingredients in Mr. Clayton's argument were the breadth of the constitutional language, the impingement on the separation of powers, the "friction" between the Bail Act and the relevant Children Act provisions, the impact which the executive's actions had on the discharge of the judicial function in remanding the appellants and the shortcomings in the remedies available to them in their combined judicial review and constitutional claims."

[86] The court in **Seepersad** echoed the observations made by the CCJ in **Maya Leaders** and affirmed their treatment of the protection of the law provisions in the constitution.³⁵ The Board then went on to consider the approach that the court should adopt when there has been an allegation of the infringement of the constitutional right to the protection of the law; The Board held:

"The Board considers that in any case where the court is required to determine whether there has been a breach of the protection of the law clause in section 4(b) of the Constitution of Trinidad and Tobago, it is necessary first to identify, and then evaluate, all material facts and considerations. Material in this context denotes those matters which have a bearing on the question of whether the right protected has been breached. This will in every case be a fact sensitive and case specific question."³⁶

[87] The Privy Council set about applying the approach laid down in the following manner:

"The Board would draw together the material facts and considerations in the following way. First, sections 54(1) and 60(1) and (5) of the Children Act, couched in mandatory terms, were plainly designed to provide persons such as the appellants with substantive benefits and protections which the legislature had deemed necessary. These statutory provisions failed the appellants as they were impotent throughout the periods under scrutiny.

Second, this failing had a single cause, namely the failure of the executive to ensure that at the time of bringing these provisions into operation the requisite detention facilities were in place, a failure which continued thereafter.

Third, the executive's aforementioned failure was in clear defiance of what Parliament had laid down in the legislation. The purpose of the legislation was frustrated by the executive's failure to ensure that, once commenced,

³⁵ At paras [52] and [53]

³⁶ At para [62]

it would have immediate and practical effect. The conduct of the executive, consisting of both acts and omissions, obstructed the proper operation of the legislation. Their Lordships consider that the conduct of the executive was not harmonious with the separation of powers.

Next it is relevant to consider whether the executive offered any defence of or justification for its conduct. There was none. The short affidavit sworn by a government official in the judicial review proceedings outlines, via a brief timeline, what was done but not why. Notably the affidavit was not based on the personal knowledge of the deponent. Rather its contents were founded on her examination of the material records of the ministry concerned. The affidavit exhibited no documents. Fundamentally, it provided no explanation of the executive's selection of 18 May 2015 as the date for the Presidential Proclamation bringing the relevant statutory provisions into operation or its failure to have the necessary detention facilities in place.”³⁷

[88] Ultimately, the court in **Seepersad** found that the conduct of the executive was incompatible with a series of international law provisions and standards. Additionally, the Board considered that the exercise by the executive of its legal powers was arbitrary.

[89] The claimant also relied on the decision in **Guyana Geology and Mines Commission v BK International Inc and another and Baboolall v BK International Inc and another** to debunk the notion that the claimant was bound to seek redress under the statutory provisions or by way of judicial review. In the forgoing case the CCJ made the following observations in respect of the distinction between judicial review and constitutional challenges. The court finds the observations of Jamadar J to be immensely instructive to say the least and ought to be stated in full in this judgment. The learned Justice said:

“In Caribbean constitutionalism the rule of law is central to administrative law. It governs it. In jurisdictions where there is constitutional supremacy, courts must ensure that administrative decisions conform and comply with fundamental constitutional and human rights values and principles. These standards and values, therefore, apply to judicial review of administrative actions. This requires a re-orientation in how judicial review is approached by the public, lawyers, and the courts. This is so because of the conceptual and practical implications that distinguish states governed by Parliamentary supremacy from those governed by Constitutional

³⁷ At paras [65] – [69]

supremacy. The impact of Constitutional supremacy on judicial review of administrative actions can (a) broaden the scope of inquiry, bringing it squarely under the umbrella of constitutionalism and the rule of law, and as well (b) influence the nature of the inquiry, making it a more primary form of inquiry. The pivotal re-orientation is that judicial review of administrative actions is unavoidably anchored in Caribbean constitutionalism and human rights values and principles. This re-orientation is not an abandonment of the grounds that exist for judicial review. They are all encompassed and included under the umbrella of constitutionalism and the rule of law. It is not a matter of either/or, but rather of both/and, with the clear understanding that constitutional values, the rule of law, are the primary set and existing grounds a sub-set. This re-orientation can change in significant ways our approaches to judicial review of administrative actions. We need to reimagine judicial review through the lenses of constitutionalism. To see that as the primary lens, though not exclusively so. Traditional approaches are invaluable sub-sets of this, and not the other way around. Their value is not eroded, only enlarged and expanded. They remain critical and at times more useful for giving clarity and direction to administrators and for holding them accountable.”³⁸

[90] In fine, the claimant submitted that based on the foregoing authorities that it had genuine recourse to seek redress under the Constitution on account of the breach of its right to the protection of the law. In support of this contention, the claimant relied on the decision in **Maya Leaders Alliance and others v Attorney General of Belize**³⁹ as authority for the proposition that the evolving concept of the protection of the law encompassed the responsibility of the state to protect citizens from the arbitrary and irrational exercise of power.

[91] The claimant’s argument in relation to the protection of the law was formulated in the following manner. The claimant submitted that the DCA’s rejection of the claimant’s application for development approval purely on the basis of the LAC study, a guideline which lacked legal effect or the force of law, and in circumstances where the Act which contained the appropriate mechanism for restricting the use of privately owned land for public purposes, notably for the protection of land reserved for conservation, preservation, and the protection of natural, historical and environmental areas provided that compensation is paid for

³⁸ At paras [63] – [65]

³⁹ [2015] CCJ 15 (AJ); (2015) 87 WIR 178

any depreciation in value, was circumvented by and subordinated to an arbitrary and fundamentally unfair interference with the claimant's right to the use and enjoyment of its property.

[92] The court finds it fitting to deal with the preliminary points raised by the defendants at this juncture.

[93] In the case of **Hillaire Sears v Parole Board and others**⁴⁰ the appellant had brought a constitutional motion challenging the lawfulness of his detention and applied for certain declarations under the Constitution. The judge in the court below had found that the claimant had used the wrong procedure to bring the claim as it should have been brought by way of judicial review. The appellant appealed to the Court of Appeal who affirmed the decision of the court below. On his appeal to the CCJ on the question of whether the appellant had utilised the wrong procedure, the CCJ held, relying on the decision in **Marin v The Queen** and **Lucas v Chief Education Officer** that the appellant had alleged the arbitrary use of state power and these were genuine claims of infringement of his fundamental rights and they were not filed with the sole purpose of avoiding the usual judicial remedy for unlawful administrative action. The CCJ also held there was no merit in the argument that the Supreme Court was not empowered to quash the decision under a constitutional claim, given the discretion and wide powers provided under section 20 of the Belize Constitution.⁴¹

[94] Just like the defendants in the present case the respondents in **Hillarie Sears** argued that the warning enunciated by Lord Diplock in **Harrikissoon**, that not every failure by a public authority to comply with the law, entailed necessarily the contravention of some human right or fundamental freedom guaranteed by the Constitution, was still pertinent today. They further argued that the appellant's pursuit of constitutional relief notwithstanding the fact that there were available remedies both in public and private law was a clear abuse of process. They

⁴⁰ [2022] CCJ 13 (AJ) BZ

⁴¹ Equivalent to section 16 St. Lucia Constitution

therefore argued that the appellant's claim brought pursuant to section 20 of the Constitution was misconceived and the Supreme Court and the Court of Appeal were correct to have struck it out.

[95] The CCJ held:

"The Court adopts the effective and just approach of assessing the appellant's claim to satisfy itself that it is a genuine recourse to constitutional redress under s 20. The appellant's claim alleges credible, serious and multiple breaches of his fundamental rights. In summary, the appellant alleges the arbitrary use of state power; incarceration without legal authority and in breach of his fundamental rights to liberty and protection of the law; and the revocation of his parole without due process. These are genuine claims of infringements of the appellant's fundamental rights which require the Court to examine carefully those claims, and to determine whether the appellant is indeed entitled to constitutional redress. It follows that the appellant's fixed date claim was not filed with the sole purpose of avoiding the normal judicial remedy for unlawful administrative action."⁴²

[96] The sentiments expressed by the claimant in these proceedings echoed the resounding pronouncement made by the CCJ in **Sears** where the court held:

"The Court continues to caution against the unnecessary reliance on strict rules of procedure to shut out citizens from seeking constitutional relief, especially in the face of serious allegations of constitutional violations. The focus of this Court, as is the clear intention of the Constitution, is to provide flexible and effective access to justice for the peoples of Belize so that they can seek full vindication of their constitutional rights."⁴³

[97] In **Jamaicans for Justice v Police Service Commission and another**⁴⁴ a decision relied on by the claimant in its submissions before this court, and which the court finds apt to apply in the circumstances, where the claimant has argued that the DCA ought to have exercised its functions in a manner compatible to the claimant's fundamental rights and that the DCA failed in that obligation by arriving at a decision that abrogated the claimant's right to the enjoyment of his property arbitrarily and otherwise in accordance with law.

⁴² At para [32]

⁴³ At para [35]

⁴⁴ [2019] UKPC 12

- [98] The claimant relied on the above-cited case in support of the proposition that organs of the State, must exercise its functions in a manner which is compatible with the fundamental rights of all persons, including the right to life, the right to equality before the law, and the right to due process of law, guaranteed by the Constitution. That all organs of the State are specifically enjoined by the Constitution to take no action which abrogates, abridges, or infringes those rights, it must surely be equally uncontroversial to insist that all such organs are bound to respect and seek to protect the fundamental rights and freedoms guaranteed by the Constitution in all aspects of their activities.⁴⁵
- [99] The claimant also relied on the above-cited authority in support of their contention which the court has endorsed as correct that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These are, in any event, fundamental common law principles governing the exercise of public functions. As there is nothing in the statutory framework governing the DCA to contradict them, they are applicable in this case irrespective of whether or not they have the status of a constitutional right.⁴⁶
- [100] The principles of constitutional law discussed above can be easily transposed to the facts and circumstances of the present case.
- [101] The initial challenge mounted by the claimant to the DCA's disapproval of this application for permission to develop its land was on the ground that the DCA erroneously held that the site of the proposed development fell within the area designated as Policy Area 1 (A) ('PA 1(A)'). According to the claimant, the area in which the proposed development was to be undertaken was in fact in the area designated as PA (C) 3 where limited development was permissible according to the LAC study. The claimant contended that this area is not located on the slopes of Gros Piton.

⁴⁵ At para [23]

⁴⁶ At para [24]

- [102] The foundation of the claimant's assertions with respect to its entitlement to redress under the Constitution⁴⁷ is grounded on the footing that the DCA's decision to refuse the claimant's applications for planning permission to undertake the said development on its property contravened the fundamental rights guaranteed to it by virtue of the provisions of section 1(a), 1(c) and 6 of the Constitution.
- [103] The substratum of the claimant's claim for redress under the Constitution lies within the provisions of Articles 360 and 361 of the Civil Code⁴⁸ which provide that:
- “360. A person may have with respect to property, either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.
361. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations made in accordance with law.”
- [104] The claimant contends that DCA's decision to reject the claimant's application was based on grounds which were devoid of any statutory, legal or regulatory authority recognizable under the laws of Saint Lucia and amounted to a breach of the claimant's right to the use and enjoyment of its property under Articles 360 and 361 of the Civil Code of Saint Lucia. Accordingly, the claimant argued that DCA's decision was therefore unlawful and amounted to an irrational, unreasonable and arbitrary exercise of power that was fundamentally unfair and in breach of the claimant's right to the protection of law guaranteed to it under the Constitution.
- [105] The claimant also contended that in further breach of the law, DCA's decision to reject the claimant's application was based entirely on non-binding, unenforceable recommendations which, in any event, and notwithstanding their non-binding nature, were complied with by the claimant in its application. In so doing, the claimant alleged that DCA acted unlawfully by arriving at a decision that had no

⁴⁷ Constitution of Saint Lucia Cap. 1.01

⁴⁸ Cap. 4.01

basis in law and which in any event was in breach of the Act and for all intents and purposes was outside DCA's statutory remit.

- [106] The claimant characterized the broad issue arising for determination in the present case as to what extent and by what means can the State lawfully regulate a person's use of their private property which falls within environmentally or culturally and naturally protected or conservation areas. The determination of these issues they say, involved the balancing of competing private constitutional rights with the greater public good.
- [107] The claimant raised the specific question for the court's determination, namely, whether the DCA's decision to refuse the claimant's application for planning approval was unlawful and therefore in breach of the claimant's rights guaranteed by the Constitution. The fundamental basis of the claimant's challenge by way of constitutional redress was formulated in the following respects. The claimant contended that whereas the limitation of individual rights is recognised as part of the constitutional law arrangement, such limitations must exist in the form of recognisable laws, regulations, and statutes which provide for the manner and the extent to which a right guaranteed and protected by the Constitution can lawfully be derogated from or interfered with.
- [108] According to the claimant, rights entrenched by the Constitution cannot be derogated from or suffer interference from the State or organs of the State in a whimsical or cavalier manner. Any limitation must be introduced in the form of transparent, binding, and enforceable laws or regulations which are discernible and capable of being challenged if they are not adhered to or they do not follow constitutional prescriptions and operated disproportionately.
- [109] Therefore, it appears that at the heart of the claimant's case for redress under the Constitution is the notion that the claimant has been deprived of its right to the use and enjoyment of its privately owned property otherwise than under the authority of any law in force and without compensation. In support of the foregoing assertion, the claimant relies on the following arguments.

- [110] The claimant insisted that the Cabinet Conclusion approving the LAC study is not binding and has no effect in law. The basis for this submission was principally that the LAC study is not referred to in the Act. Therefore, the rejection of the claimant's application was not premised on any legally enforceable basis or law and therefore the DCA's reliance on it amounted to an unlawful and arbitrary interference with the claimant's right to the use and enjoyment of its property.
- [111] The claimant argued that in order to be binding and enforceable the LAC study ought not to have been merely adopted by Cabinet Conclusion but instead also incorporated into the physical plans for the PMA as provided for under Part 2 of the Act⁴⁹ or adopted by the Ministerial Order under section 34 of the Act.
- [112] According to the claimant, in conformity with the provisions of sections 10 to 11 of the Act, where physical plans are in existence, which have been approved by the House of Assembly, the DCA shall give principle consideration to the prescription of the physical plans in determining any application for permission to develop land in the area covered by the physical plan.⁵⁰ The claimant submitted that Part 2 of the Act envisioned the creation of a holistic physical plan to deal with nearly every aspect of development which once prepared must be approved by affirmative resolution of the House of Assembly and published in the Gazette. The claimant insisted that this was the only manner in which the physical plans could be given legal effect.⁵¹
- [113] The court understood the claimant's submission to be that the claimant's applications for development approval ought to be evaluated and considered in accordance with the physical plan approved in the manner as provided for under Part 2 of the Act. In other words, there was in existence no physical plan brought into being in accordance with the provisions of the Act. Therefore, if the DCA had relied on any other plan not being a physical plan envisaged by the Act in their

⁴⁹ Sections 10-15

⁵⁰ Section 15(1)(a)

⁵¹ Section 13(7)

consideration of the claimant's applications for planning approval, this would clearly have been contrary to the DCA's remit under the Act.

- [114] The claimant pointed out that the DCA's decision contained in its correspondence to the claimant signifying its disapproval of the claimant's proposed development made no reference to an actual physical plan for the PMA and the claimant's failure to adhere to same.
- [115] In the present case, the allegation is that the DCA referenced plans that were not "physical plans" within the meaning of the Act, specifically the plans derived from the LAC study in refusing permission to the claimant to develop its land. It was on this basis that the claimant maintained that the LAC study could not have been considered a legal basis upon which the claimant's application was considered by the DCA and subsequently refused. Therefore, the DCA's disapproval was the result of the consideration of what was in effect inappropriate, inadequate, and unlawful matters which were not sanctioned or enacted by legislation. In so doing the DCA arbitrarily and without lawful justification applied the LAC study as a factor in determining whether the claimant's applications for approval of its development ought to have been granted.
- [116] The DCA contended that in processing the claimant's application it utilised established procedures for the type of development envisaged by the claimant. In the fulfillment of its statutory duty, the DCA has set out clear planning guidelines and procedures that are applied to applications to develop land. Therefore, all applications are appraised by the DCA's technical team who review and oversee the process and make recommendations to the DCA for its determination.
- [117] The position adopted by the DCA was that in considering an application for development, it was required to pay regard to the physical plans for the area within which the land is situated and any other relevant material considerations in determining whether to grant permission to develop land and whether such approval shall be conditional or unconditional, or to refuse permission.

- [118] It appeared that quite separate from the literal terms of the Act, the DCA in considering applications for development approval applied “planning practices” which involved the consideration of land usage, government policy, regional policies and strategies, building regulations and building codes which they considered vital and material to acceptable planning practices.
- [119] The DCA maintained that it has always applied acceptable international standards followed by most planning authorities. These standards were said to include the consideration of existing laws, regulations, and government policies and standards. The DCA further maintained that the government policies and standards are considered vital material considerations approved by the Government of Saint Lucia (‘GOSL’) and sanctioned for use by the DCA in the determination of all relevant applications for development approval.
- [120] It was the DCA’s case that these government policies and standards form part of the GOSL’s national development strategy. According to the DCA, two such standards which were applied to the claimant’s application and formed part of the material considerations, taken into account by the DCA in determining the claimant’s application, were the OECS Building Code and the Limits of Acceptable Change (‘LAC’) Study. The DCA claimed that the OECS Building Code provided them with the proper and acceptable building standards and practices for the construction of buildings.
- [121] It was also the DCA’s case that the LAC provides a guide for development within the Piton Management Area (‘PMA’) in an effort to protect the outstanding universal value of the PMA with respect to its designation as a World Heritage Site. The PMA is managed by the Pitons Management Area Office which has an advisory committee called the Pitons Area Management Advisory Committee which is managed by the Department of Sustainable Development. The PMA Office is responsible for monitoring development activities and supporting conservation measures in accordance with the LAC Study. Any development to be considered within the PMA must first satisfy the recommendations of the LAC.

- [122] The DCA's position was that it is mandated to utilize requisite referral agencies in the determination of any development application. The PMA Office through the Department of Sustainable Development is the State's authorized referral agency that also monitors all developments within the PMA and as a consequence has been referred to for feedback and recommendations.
- [123] The DCA contended that it was obliged to follow these legally established procedures for the determination of development applications. Accordingly, the DCA took the view that any assurances that the claimant alleged were given to him by the DCA for the construction of the family homes would have been in direct contravention of the established procedures set out above. In the premises, these assurances could not have given rise to any legitimate expectation held by the claimant that it would have obtained development approval.
- [124] In any event, the DCA denied the existence of any formal correspondence or records from either the Executive Secretary of the DCA, or from the Board of the DCA confirming such allegations. Furthermore, DCA contended that any alleged assurances given by a former Minister of Physical Planning and/or a former Chairman of the DCA cannot and did not constitute a legally binding approval since approval of developments are only granted by the Board of the DCA through its established procedures.
- [125] The court finds merit in the foregoing submission. The Minister could not have been taken to have acted outside his purview under the Act. The Minister could not have acted otherwise than in the manner permitted under section 25 of the Act in respect of any application for development approval. Section 25 of the Act deals specifically to the referral of applications to Cabinet.
- [126] Section 25 of the Act gives discretionary power to the Minister to give directions in writing to the Head of the Physical Planning and Development Division requiring that a particular application or all applications of any particular class or in respect of any particular area specified in the direction shall be referred to the Cabinet for determination, provided that all documents required by the Physical Planning and

Development Division have been submitted. Where an application is referred to the Cabinet under the section, the Head of the Physical Planning and Development Division shall give notice to the applicant in writing that the application has been referred to the Cabinet pursuant to those directions. 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. On the determination of any application referred to the Cabinet under this section, 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 the Cabinet's decision and the reasons for that decision.

- [127] Therefore, no evidence was presented to the court that the Minister had followed the procedure under section 25 of the Act. In the circumstances, any undertaking given by the Minister would have been ultra vires the Act. For that reason any undertaking given, assuming there was one, could not have conceivably formed the basis of any legitimate expectation held by the claimant.
- [128] With respect to the claimant's application for the construction of a single-family residential unit which formed part of Application 750/19 the DCA contended that this application had been put through the process of being forwarded to the various referral agencies namely, the Department of Sustainable Development and the Environment, Saint Lucia National Trust and Pitons Management Area Advisory Committee (PMAAC) for input and recommendations. The input and recommendations were subsequently received by the DCA.
- [129] On the basis of the foregoing contentions the DCA denied that the disapproval of the claimant's applications was wrongful or illegal and prevented the claimant from its use and enjoyment of its property on the basis that DCA had followed the GOSL's approved planning policies and procedures that guide development within the PMA; and that any alleged breach of the claimant's rights under the Civil Code

and the Constitution by virtue the DCA's decision to consider the State's Planning Laws, Planning Policies and Guidelines, inclusive of the LAC Study which is managed by the Department of Sustainable Development is outside the ambit of the DCA's powers.

[130] In fact, it was the DCA's case that DCA's approval of the claimant's applications ARN 1026/18 and ARN 497/20 permitted the claimant enjoyment of the land but within the limits of the LAC Study which guides development within the PMA.

[131] In another forceful argument, the claimant submitted that there was no administrative scheme under the Act, approved by the Minister or by Cabinet and made pursuant to section 6 of the Act that governed the coordination between DCA, the PMAAC and any of the other referral agencies which the claimant alleged that it relied on for recommendations regarding the claimant's application for approval.

[132] In addition, the claimant contended that on the proper reading of section 23 of the Act, the requirement for review and advice of the Advisory Committee to the DCA is only triggered where the proposed development is of a kind mentioned in Schedule 4 of the Act and which requires an Environmental Impact Assessment ('EIA'); the proposed development is not of a kind found in Schedule 4 of the Act.

[133] The claimant argued that the Advisory Committee could not but had in fact considered material that was not sanctioned by statute. According to the claimant, the Act makes provision for the preparation of comprehensive physical plans approved by parliament or ministerial orders to create special environmentally protected areas on which people affected have been given an opportunity to comment and if needs be to be paid compensation where their land has been devalued. It was also on this basis that the claimant alleged that he was deprived of the right to the observance of principles of natural justice in relation to him which resulted in a breach of his constitutional right to the protection of the law.

- [134] In support of the foregoing argument, the claimant challenged the legal effect of the LAC study on the basis that notwithstanding Cabinet's adoption of the LAC study by Cabinet Conclusion, the LAC had no legal effect and therefore neither the PMAAC nor DCA were obliged to factor it into their consideration of the claimant's application. The claimant submitted that Cabinet Conclusions do not have the force of law unless they are implemented and formulated into regulations or statutes. This they argued was not done in the case of the LAC study. The claimant submitted that in the premises, there was no statutory basis for the introduction and reliance on the LAC study in considering the claimant's applications.
- [135] The claimant's challenge to the LAC study was also premised on its failure to comply with the procedural requirements of the Act which ought to have prefaced its coming into effect. The claimant argued that the statutory procedural requirements for adequate publicity, the opportunity for affected land owners to make representations as to whether the PMA shall be protected by ministerial order and the taking into account such representations before making an order were all absent from the LAC study relied on by the DCA and the PMAAC. Therefore, the claimant contended that the DCA's and the PMAAC's reliance on the LAC study was arbitrary, unlawful and therefore its application by the DCA and the PMAAC resulted in an infringement of the claimant's right to the due process of law and the protection of the law.
- [136] The claimant, with respect to the posture adopted by the DCA concerning the procedures which it claimed to have followed in considering the claimant's applications, contended that the PMAAC is not an agency recognised by any enactment or legislative authority. This was the underlying basis upon which the claimant sought to challenge the DCA's argument that they were obliged to consider the recommendations of the PMAAC in considering the claimant's application.

- [137] In addition, the claimant argued that the recommendations of the PMAAC having formed the underlying basis for the DCA's decision to reject the claimant's applications, failed to consider that the deliberations of the PMAAC and its resulting decision did not conform to the rules of natural justice in so far as the claimant was not given an opportunity to be heard.
- [138] Furthermore, the claimant complained that in any event, the PMAAC's recommendation was flawed to the extent that the same had been founded on the erroneous assumption that the proposed development fell within PA1 where no development was permitted when in fact the proposed development fell within the area designated as PA1(C) where limited development was permitted.
- [139] Ultimately, the claimant took issue with the DCA's assertion that it had relied on all "material considerations" within the meaning of the Act in arriving at its decision. The claimant contended that the phrase "any other material consideration" did not import the meaning that the DCA had ascribed to it. They submitted that in applying the ejusdem generis rule or the noscitur a sociis rule, the phrase "any other material consideration" cannot be interpreted to mean just any other material consideration and is therefore not at large. It could only be interpreted to mean any other material consideration flowing from the physical plan. Any other interpretation would be unlawful and inconsistent with the Act.
- [140] The claimant contended that Parliament could not have evinced any other or contrary intention than that the words "any other material consideration" were to be construed strictly in conformity with the Act. The claimant's argument was that Parliament, after having laid out careful and comprehensive provisions for the creation of physical plans to be presented to the House of Assembly and published in the Gazette in order to have binding effect, could not have intended the words "any other material consideration" to be used by the DCA to arbitrarily employ considerations not contemplated, introduced by or forming part of the Act.
- [141] It appeared from the DCA's submissions that the DCA had adopted the view that the provisions of section 19 of the Interpretation Act granted the DCA unlimited

license to formulate its own procedures to the extent that it can follow at its sole discretion depending on the circumstance of each application made, providing at all times that it acts within the boundaries of the governing statutes, regulations, established planning policies and the necessary duties of care.

[142] The court is inclined to reject the foregoing submission outright. Without belabouring the point, section 19 of the Interpretation Act merely sets out the rights, duties, liabilities, and obligations of the DCA as a corporation. Section 19 of the Interpretation Act does not grant unbridled or any authority, discretion, or unlimited license to the DCA to apply its own rules and procedures to the consideration of applications for development approval. The DCA is mandated to follow those rules, procedures, and regulations that are provided for in the Act.

[143] In other words, the DCA in carrying out its functions is constrained by the provisions the Act and any regulations made thereunder. The DCA has no free-standing right by virtue of its existence as a statutory corporation to make rules of its own volition by improvisation or otherwise. The only freestanding right that the DCA possesses is with respect to regulating matters related to its own internal governance. Any vested interest in land can only be regulated by Acts of Parliament and regulations made thereunder. To that extent the position adopted by the DCA is fallacious. The provisions of section 19 of the Interpretation Act have no relevance to the issues arising in the present proceedings.

The Statutory Framework

[144] In order to place the claimant's application for redress under the Constitution within its proper context it is necessary at first to examine the existing legislative framework.

[145] The Act has as its objects, among other things, ensuring that appropriate and sustainable use is made of publicly owned and privately owned land; maintaining and improving the quality of the physical environment including its amenity; and to

protecting and conserving the natural and cultural heritage of Saint Lucia.⁵² The Act mandates that it receives such purposive and liberal construction and interpretation as best ensures the attainment of its objects and purposes.⁵³

- [146] It was submitted on behalf of the DCA that the Act must be given a purposive and liberal construction and interpretation to ensure the attainment of the objectives and purposes of the Act. It was argued that the restrictive approach would stifle the DCA in realising its mandate under the Act. This argument was particularly in relation to the question of whether the DCA could have relied on the LAC study and the recommendations of the PMAAC as material considerations in arriving at their decision herein notwithstanding that the former are not endorsed by statute and the other not recognised as an administrative scheme approved by Cabinet in accordance with section 6(1) of the Act.

Duties of the Minister

- [147] Section 4 of the Act sets out the duties of the Minister having responsibility for planning and development (the 'Minister') and provides that the Minister shall secure consistency and continuity in the administration of this Act in accordance with the objects and purposes set out in section 3 of the Act.
- [148] It is therefore beyond doubt that the Act imposes duties on the Minister. However, section 9 of the Act seeks to limit the liability of the Minister and the DCA in the exercise of their duties under the Act. Section 9 provides:

"The Minister, the Head of the Physical Planning and Development Division or any person acting under the authority of the Minister or the Head of the Physical Planning and Development Division, and any person who is a member of an Advisory Committee or the Appeals Tribunal, shall not be liable in any court for or in respect of any act or matter done, or omitted to be done, in good faith in the exercise or purported exercise of any function or power conferred by this Act."

- [149] Section 9, in the court's view, does not create absolute immunity from liability in respect of the Minister or the DCA. The purpose of this provision in the Act is

⁵² Section 3(1)

⁵³ Section 3(2)

purely to ensure that the duties to be performed by the Minister and the DCA in furtherance of the purpose and objects of the Act are attained. All section 9 does is create a non-justiciable clause that protects the Minister and the DCA if they act within the powers and duties conferred on them by the Act. Therefore, neither the Minister nor the DCA is entirely free from liability for actions carried out in bad faith or otherwise not in conformity with the four corners of the Act. Therefore, the effect of section 9 is purely to exclude personal liability in the case of the Minister, the DCA, and other functionaries under the Act but does not exclude liability for actions carried out in bad faith or contrary to law.

Referral Agencies

- [150] Section 6 of the Act empowers DCA to co-ordinate with referral agencies. Referral agencies are defined under the Act as the governmental and non-governmental agencies to which applications for permission to develop land are routinely referred for technical advice.⁵⁴

Administrative Scheme

- [151] The DCA was mandated to, not later than 3 months after the Act came into force, after consultation with referral agencies, formulate and submit for the approval of Cabinet an administrative scheme for coordination between the Physical Planning and Development Division and the referral agencies in respect of the expeditious processing of applications.⁵⁵
- [152] An administrative scheme approved by Cabinet under subsection (1) may be revoked or altered by a revised scheme prepared by DCA, after consultation with the referral agencies, and submitted to and approved by Cabinet.⁵⁶ Unfortunately, the Act provides no definition of an “administrative scheme”. However, the meaning can be implied from the provisions of section 6(1).

⁵⁴ Section 2

⁵⁵ Section 6(1)

⁵⁶ Section 6(2)

[153] The claimant took the position that the provisions of sections 6(1) and 6(2) of the Act are not merely discretionary but are mandatory. The court agrees that these provisions of the Act are mandatory and they impose a duty on the Minister. It does not appear that Cabinet has approved any administrative scheme for coordination between the Physical Planning and Development Division and the referral agencies in respect of the expeditious processing of applications. In fact, no such Cabinet Conclusion relative to such an administrative scheme has been presented to the court.

[154] The question that arises is whether in the absence of such a Cabinet Conclusion as mandated under the Act for the formulation and submission for the approval of Cabinet an administrative scheme for coordination between the Physical Planning and Development Division and the referral agencies in respect of the expeditious processing of applications means that the referral of the claimant's application to the referral agencies described by the DCA and its reliance on their recommendations was unlawful the same not being sanctioned by the Act or carried out in compliance therewith.

Advisory Committees

[155] The Act also makes provision for the establishment of "Advisory Committees" to be appointed by the Minister. Section 7 of the Act provides that the Minister may establish in any part of Saint Lucia such branch offices of the Physical Planning and Development Division of the Ministry as the Minister considers necessary or convenient for the administration of this Act.⁵⁷ Where any of the functions of the DCA under the Act are delegated to a branch office of the Physical Planning and Development Division in any part of Saint Lucia, including a branch office situated in the City of Castries, the Minister shall appoint a Physical Planning and

⁵⁷ Section 7(1)

Development Advisory Committee for the area to be served by that branch office.⁵⁸

- [156] An Advisory Committee appointed under subsection (2) shall consist of such persons, who are involved in local government, community-based and other non-governmental organizations, and the business community in the part of Saint Lucia to which its advisory functions relate.⁵⁹
- [157] The Advisory Committee for any part of Saint Lucia shall advise the branch office in that area on any physical plan for that part of Saint Lucia; any application for permission to carry out development in that part of Saint Lucia that belongs to a class of applications prescribed by the Minister by order published in the Gazette as applications to be determined by a branch office on behalf of the DCA; and any application for development or other matter related to that part of Saint Lucia on which the Minister or the DCA or the branch office may seek its advice, whether under section 23(2) or not.⁶⁰
- [158] It was not made to appear to the court that the PMAAC was appointed as an Advisory Committee by the Minister under the Act. No evidence of any such appointment of the PMAAC as an Advisory Committee by the Minister was presented to the court. It is clear that although the decision to reject the claimant's application was that of the DCA, the DCA appeared to have delegated the oversight of the application to the PMAAC and acted on their recommendations. The question is therefore whether the reliance on the advice and recommendations of the PMAAC, a body not sanctioned under the Act was a lawful exercise of the powers conferred on the DCA by the Act.
- [159] Was there a need to submit the claimant's application to the PMAAC since it was not a development mentioned in Schedule 4 of the Act – section 23(2). Although not specifically raised by the claimant, the court considered the question whether

⁵⁸ Section 7(2)

⁵⁹ Section 7(3)

⁶⁰ Section 7(5)

the fact that the PMA had not been declared a zoned area, environmental protection area, conservation area, or cultural and heritage protected area meant that the requirement for an EIA was otiose. This begs the question of whether there was any requirement to submit the claimant's application to the PMAAC.

Absence of Physical Plans

[160] Section 10 of the Act deals with the duty to prepare physical plans. The dictionary to the Act defines a physical plan as 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. The section provides that the DCA may at any time; or if required to do so by the Minister shall, prepare a physical plan for Saint Lucia as a whole or for any specified part of Saint Lucia;⁶¹ and where a physical plan has been prepared for Saint Lucia as a whole, a physical plan prepared for any part of Saint Lucia shall conform to the prescriptions of that plan, as revised from time to time.⁶²

[161] Section 11 of the Act provides that a physical plan prepared under the Act shall include such maps and descriptive matter including written statements as may be necessary to illustrate the proposals made therein with such degree of detail as may be appropriate to Saint Lucia as a whole or the part of Saint Lucia to which the plan relates. A physical plan may allocate land for conservation and for use for agricultural, residential, industrial, commercial, touristic, institutional, recreational, or other purposes specified in the plan; make provision for the development of infrastructure, public buildings, open spaces, and other public sector investment works; provide for the layout and design of development schemes in whole or in part; state the policies, proposals and programmes contained in the development strategy; and prescribe for any of the matters set out in Schedule 2 of the Act.

⁶¹ Section 10(1)

⁶² Section 10(2)

[162] For the purpose of exposition, it will be necessary to set out in full the entire text of sections 12 and 13 of the Act. Section 12 of the Act under the chapeau ‘Preparation of physical plans’ reads:

- (1) In the course of preparation of a draft physical plan the Head of the Physical Planning and Development Division shall—
 - (a) take reasonable steps to consult with any person with an interest in the matters for which proposals may be made in the plan, including but not limited to the management of water and other natural resources, Crown lands, the natural and cultural heritage, environmental protection, agriculture, industry, tourism, commerce, urban development and transportation; and
 - (b) take into account the national development strategy in effect for Saint Lucia.
- (2) Before finalising the contents of a draft physical plan the Head of the Physical Planning and Development Division shall take reasonable steps to ensure that—
 - (a) adequate publicity is given in the area to which the plan relates to the matters concerning which proposals will be made in the plan; and
 - (b) persons who may wish to make representations with respect to those matters are invited and given an adequate opportunity to make representations on those matters.
- (3) In any case where a physical plan is concerned wholly or in part with an area governed by a local authority, the Head of the Physical Planning and Development Division shall, before submitting the draft plan to Cabinet for approval, furnish a copy of the draft plan to that local authority for their consideration; and, if the local authority wishes to make any objections or representations in respect of the draft plan, they shall submit the same to the Head of the Physical Planning and Development Division in the time and manner prescribed by the Head of the Physical Planning and Development Division.

[163] Section 13 of the Act provides under the chapeau “Approval of physical plans”:

- (1) When a draft physical plan has been prepared, the Head of the Physical Planning and Development Division shall submit a copy to the Minister and shall make copies available for public inspection at such places as the Minister considers appropriate for bringing it to the attention of persons who are likely to be affected, directly or indirectly, by the proposals in the plan.

- (2) The Head of the Physical Planning and Development Division shall give notice simultaneously in 2 successive issues of both the Gazette and one newspaper in wide circulation in Saint Lucia of the places where and times when the draft physical plan may be inspected and shall give such other publicity to the matter as is appropriate to inform the public in general, and particularly persons whose interests are likely to be affected, directly or indirectly, by the proposals in the plan, of their right to make representations to the Head of the Physical Planning and Development Division with regard to the proposals therein.
- (3) Any person may, within 8 weeks after the publication in the Gazette of the notice referred to in subsection (2), make representations in writing or in person on the draft physical plan to the Head of the Physical Planning and Development Division.
- (4) After the expiry of the period prescribed by subsection (3) for the making of representations on a draft physical plan, the Head of the Physical Planning and Development Division shall consider the representations made and forward a report on the same together with his or her own comments to the Minister.
- (5) After considering the draft physical plan submitted under subsection (1), and the Head of the Physical Planning and Development Division's report on the representations of the public and their comments thereon submitted under subsection (3), the Minister may accept the plan, with or without modifications, or may reject the plan.
- (6) Where a draft physical plan has been submitted to and accepted by the Minister, with or without modifications, the Minister shall submit it for the approval of the House of Assembly.
- (7) When a physical plan is approved by affirmative resolution of the House, the Head of the Physical Planning and Development Division shall cause notice of such approval to be published in the Gazette and the plan shall have full force and effect from the date of the last publication.
- (8) The Head of the Physical Planning and Development Division shall make copies of an approved plan available for inspection at the offices of the Ministry and for sale to the public at a reasonable price.

[164] Section 13 of the Act sets out the procedure for the approval of physical plans. Section 13(6) of the Act provides that where a draft physical plan has been

submitted to and accepted by the Minister, with or without modifications, the Minister shall submit it for the approval of the House of Assembly.

- [165] Section 13(7) further provides that when a physical plan is approved by affirmative resolution of the House, the Head of the Physical Planning and Development Division shall cause notice of such approval to be published in the Gazette and the plan shall have full force and effect from the date of the last publication.
- [166] Section 15 of the Act relates to the status ascribed to physical plans once approved. This section of the Act provides that when a physical plan, or any amendment to a physical plan, has been approved by the House of Assembly the DCA shall give principal consideration to the prescriptions of the plan in determining any application for permission to develop land in the area covered by the plan.
- [167] The claimant argued that the listing of the PMA as a protected area or environmentally protected area in the absence of a Physical Plan for the PMA was contrary to the dictates of the Act. According to the claimant, there was no physical plan that allocated land for conservation, preservation of natural areas and for use for or other purposes specified in the plan; which stated the policies, proposals and programmes contained in the development strategy; and prescribed any of the matters set out in Schedule 2 of the Act.
- [168] Sections 11 to 13 of the Act make comprehensive and elaborate provisions respecting Physical Plans. The question that arises is whether they impinge on the exercise of the DCA's discretion in considering applications for development approval.
- [169] It is arguable that Parliament considered Physical Plans to be of sufficient vital importance to the administration or the Act that they devoted a substantial portion of the Act to it. It is also arguable that Physical Plans are at the very foundation of proper planning and the exercise of discretion by the DCA.

[170] It may also be argued that whereas section 10(1) of the Act provides that DCA may at any time; or if required to do so by the Minister shall, prepare a physical plan for Saint Lucia as a whole or for any specified part of Saint Lucia, that the proposal for a Physical Plan comes into existence under a discretionary initiative by the DCA or under the express directive of the Minister to formulate such a Physical Plan. On the foregoing premise, it may also be argued that the DCA has discretion or power under section 10(1) of the Act with respect to the creation of a Physical Plan. However, the court has taken the view that although the aforementioned provisions of the Act are written in language that is directory and not mandatory, it is obvious that it imposes a duty on both the Minister and the DCA. Therefore, in the court's view, on a proper reading and interpretation of the Act, these statutory provisions are mandatory.

[171] In **Steadroy Benjamin v The Attorney General and others**⁶³ the court had to determine similar issues as arise in the present case, namely whether the failure to create, approve, and Gazette a development plan for the State of Antigua and Barbuda in accordance with the Physical Planning Act was unlawful and vitiated the grant of permission made; (2) whether the failure to comply with, properly administer and/or apply the provisions of the said Act in accordance with its objects and purposes and provisions before granting planning or development permission; (3) whether the relevant authority had failed to properly administer the provisions of the said Act in a fair, transparent and reasonable manner or at all having regard to the proper planning of development in the State of Antigua and Barbuda.

[172] In respect of the first question, the court in **Steadroy Benjamin v The Attorney General** held that all discretions are not equal for there exists in law a power coupled with a duty that applies in all circumstances where a refusal to exercise the discretion would render the legislation, to some extent, an exercise in futility.⁶⁴

⁶³ [2007] ECSCJ No. 346

⁶⁴ Per Thomas J. at para 149

After explaining this rule further by reference to De Smith's Treatise on Administrative Law, Thomas J. said:

"In the judgment of the court the discretion under section 9(1) falls within the rule. Additionally, outside of that rule, the very structure of Part III of the Act when tied to the objects and purposes of the Act and the responsibilities of the Minister thereto coupled with the purposive construction also lead to this result."⁶⁵

[173] In respect of section 16 of the Antigua legislation which is akin to the provisions of section 15 of the Act, the learned justice said:

"The short point concerning a development plan is that it is a mandatory guide for public officers in the circumstances prescribed by paragraphs (b) and (c) of section 16(1). And it must so be treated even when the plan is yet to be approved. So says Parliament."⁶⁶

[174] In **Steadroy Benjamin v The Attorney General**, just like in the present case, there was no evidence of a plan prepared pursuant to the relevant enactment, the court already having determined that the enactment created a duty. However, in the afore-cited case, there appeared to have been a proposed or operative plan which had been circulated but had not gone through the procedural rigours of the enactment for its legal viability. The court there relied on the fact that no evidence to the contrary had been presented and the fact that the statute did not specify a time within which a development plan was to be prepared. The court reasoned that a reasonable time had not elapsed within which the development plan could have been prepared as required by the Act.

[175] The present case is distinguishable from the case of **Steadroy Benjamin**; the court is mindful of the fact that the circumstances related to the existence and timing of the Physical Plans for the PMA differ significantly from the former. In the present case, there was no evidence presented of a draft Physical Plan except for the LAC Study. Indeed, section 10(1) of the Act does not specify a time within which a Physical Plan is to be prepared. Section 10(1) merely states that the DCA may at any time prepare a Physical Plan for any area in Saint Lucia. The court in

⁶⁵ At para 151

⁶⁶ Per Thomas J at para 153

this instance is compelled to come to a different conclusion to that of the court in **Steadroy Benjamin** for the reasons which follow.

- [176] The Act came into force on 1st July 2003. The PMA became a World Heritage Site in 2004. The Cabinet Conclusions giving effect to the government's policy regarding the PMA came into being between 2013 and 2016. The PMA has been listed as a protected area or environmental protection area. The claimant's applications were submitted in 2019. It appears that the PMAAC erroneously determined that the proposed development was located in a policy area where all development was prohibited. This is surprising given that the relevant authority had adequate and ample time to devise and formulate a physical plan for the PMA.
- [177] The Physical Plans were necessary for delineating the protected area particularly given its status as a World Heritage Site which was in keeping with Saint Lucia's obligation under the Convention. These, in the court's view are compelling reasons why the DCA and the Minister ought to have acted with alacrity in preparing the Physical Plans in accordance with the Act. Therefore, in the court's view, there was reasonable time within which the Physical Plans could have been prepared.
- [178] The claimant also complained that the Cabinet Conclusions did not have the force of law. Accordingly, the LAC Study did not have the force of law and ought not to have factored into the PMAAC's and the DCA's consideration of the claimant's application for development approval. This brings into sharp focus the exact legal status of a Cabinet Conclusion.
- [179] It is well settled that a Cabinet Conclusion does not have the force of law and neither can it have the effect of overriding, contravening or impliedly repealing the clear provisions of the Act. Having found that the Act imposed a duty on both the DCA and the Minister to prepare physical plans, it follows that the DCA could not rely on the Cabinet Conclusions as substitutes for what was mandated to be done under the Act. Therefore, in the court's considered view, the DCA's reliance on the LAC study as the substantial basis for refusal of the claimant's application for

development approval was misguided; and accordingly, it meant that any decision taken in reliance upon the LAC study was contrary to the Act.

[180] It appears from what has been canvassed by the DCA in these proceedings, that reliance has been placed on the LAC study as a matter of settled practice and not necessarily in accordance with any regulations or order made under the Act giving effect to the LAC Study as a physical plan brought forth in conformity with the Act. It was not permissible for the DCA to ignore the clear provisions of the Act and rely on settled practice in the exercise of the DCA's discretion in considering the claimant's application for development approval.

[181] The general principle is that where an enactment permits a party to take certain actions but only in accordance with a specified procedure and the party fails to act in accordance with that procedure the action may be rendered void or may become voidable.⁶⁷

Affirmative Resolution

[182] Section 13(6) of the Act specifically states that where a draft physical plan has been submitted to and accepted by the Minister, with or without modifications, the Minister shall submit it for the approval of the House of Assembly. Section 13(7) further provides that when a physical plan is approved by affirmative resolution of the House, the Head of the Physical Planning and Development Division shall cause notice of such approval to be published in the Gazette and the plan shall have full force and effect from the date of the last publication. It does not appear that this procedure was followed in relation to the LAC Study or in respect of any other physical plan for the PMA.

[183] The question that immediately arises is the exact legal status of a resolution. In terms of the enactment or making of legislation, resolutions are part of that process. It is therefore provided in section 38(5) of the Interpretation Act⁶⁸ that:

⁶⁷ *Gaston Browne v The Attorney General of Antigua and Barbuda and another* [2010] ECSCJ No. 218

⁶⁸ Cap. 1.06

“The expression “subject to affirmative resolution” when used in relation to any statutory instruments or statutory documents means that such instruments or documents shall not come into operation unless and until affirmed by a resolution of the House of Assembly.

[184] Section 38(6) of the Interpretation Act provides that: “The expression “subject to affirmative resolution of the House” when used in relation to any statutory instruments or statutory documents means that such instruments or documents shall not come into operation unless and until affirmed by a resolution of the House.

[185] The foregoing suggests that there is a clear distinction between a resolution which depends on whether or not legislation is involved. The chief distinction between a "resolution" and a "law" is that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing, while by a "law" it is intended to permanently direct and control matters applying to persons or things in general.

[186] In this comprehensive definition of “resolution”, the court considers that the critical point is the distinction between a resolution and a law – one being temporary and the other being intended to be permanent. This the court accepts but would add that when a resolution is used in the context of a law, as in the present case, it is also intended to be permanent. Therefore, a resolution without more, or without a primary or subordinate legislative context or foundation, is the least effective legislative measure. Therefore, anything done pursuant to a resolution of this nature is at best temporary as a subsequent Act of Parliament or subordinate legislation made thereunder will contradict or remove what that resolution sought to achieve.

[187] In any event, given the subject matter involved, it is the court's considered view, that notwithstanding whether or not physical plans were to be subject to review and therefore temporary in nature as opposed to being actual statutory documents

or subordinate legislation is irrelevant. The point remains that the LAC Study was not approved by affirmative resolution of the House and not published in the Gazette as mandated by the Act. In fact, there was no conformity with the provisions of section 13 of the Act which brought into being any physical plan for the PMA. Therefore, the court finds that there was no physical plan in existence for the PMA. The LAC Study clearly did not come into operation at all. Therefore, the DCA's and the PMAAC's reliance on it was indeed unfortunate as will be seen later in this judgment.

Material Considerations

- [188] Section 23 of the Act sets out the procedure by which the DCA must determine applications for approval of developments. Where an application is made for permission to develop land under section 19, the DCA shall have regard to the provisions of the physical plan for the area within which the land is situated, if any, and to any other material considerations. The DCA shall not grant permission where an application for any development mentioned in Schedule 4 is made unless the application has been submitted to the Advisory Committee for review and the Advisory Committee has submitted its advice to the Head of the Physical Planning and Development Division in accordance with section 7(5).
- [189] Section 23(1) of the Act is silent as to what amounts to "material considerations" for the purpose of the DCA determining applications for development approval. Unlike the provisions of section 25(1) of the Physical Planning Act of Antigua and Barbuda which provides that in considering an application for a development permit, the Authority shall give principal consideration to an approved development plan for the whole country, if any; and an approved development plan applicable to the land to which the application relates, if any. Section 25(2) of the Antigua and Barbuda enactment provides that in addition to the considerations referred to in subsection (1) the Authority shall take into account the following matters as appear to be relevant, or as the Town and Country Planner may advise, in order to make a proper decision on the application, namely as follows any representations made by a person with regard to the application or the probable effect of the proposed

development; an opinion expressed by an authority consulted under section 24; statement of policy issued by the Minister; information, study or report provided by the applicant in response to a notice served under section 20; the likely impact of the proposed development on the natural or built environment; the likely impact of the proposed development on public health and safety; the social and economic costs and benefits likely to accrue to the community as a result of the proposed development; and such other matters as the Town and Country Planner considers to be relevant to the determination of the particular application.

- [190] The issue that arose for consideration was whether the LAC Study was a material consideration to be taken into account by the DCA in determining the claimant's application for development approval. In the court's view, it was. The LAC dealt with the limitation of land usage in the PMA for the purpose of protecting the area for purposes of conservation, and the protection of the environmental, cultural and heritage of the PMA in order to maintain its standing as a World Heritage Site.
- [191] Given the purpose and objective of the Act which included, among other things, the protection and conservation of the natural and cultural heritage of Saint Lucia, ensuring that appropriate and sustainable use is made of all publicly-owned and privately-owned land in Saint Lucia in the public interest; and the maintenance and improvement of the quality of the physical environment in Saint Lucia, including its amenity, it was incumbent on the DCA to take all of these matters into account when determining applications for development approval. By implication this included an approved Physical Plan for the area if one existed; an approved Physical Plan for the area in respect of which development approval is sought; recommendations and opinions expressed by any authority consulted with including referral agencies under section 6 of the Act under any administrative scheme or Advisory Committees under section 7 of the Act; statements of government policy issued by the Minister; studies or reports compiled for the purpose of fulfilling any of the objects and purposes of the Act; the likely impact of the proposed development on the natural environment; the social and economic

impact of the development on the community; and the costs and benefits likely to accrue to the community as a result of the proposed development.

[192] In the court's view, the LAC study is a comprehensive report detailing all of the considerations mentioned above. It follows that the DCA and the PMAAC having considered the opinions and recommendations contained in the LAC Study would have given consideration to all of the matters mentioned in the preceding paragraph.

[193] The court has also concluded that having adverted its attention to the LAC Study, the DCA was purporting to act in conformity with the provisions of the Act when exercising its discretion not to grant development approval to the claimant. Therefore, the recommendations and opinions expressed in the LAC Study were in the DCA's view material considerations for the purposes of the Act as it contained material relevant to the fulfilment of the Minister's and DCA's mandate under section 3 of the Act. Additionally, the LAC Study formed the underlying basis of government policy in relation to the PMA and the fulfilment of Saint Lucia's obligations under the Convention.

[194] The Act also makes provision for the declaration of zoned areas. The court understands the concept of zoning to mean a system of delineated areas in which specific controlled and sustainable uses are permitted. The Act does not provide a definition of a zoned area but the same can be derived from the provisions of the Act itself.

[195] Section 32(1) of the Act provides that despite anything contained in the provisions of this Act, at any time before a physical plan for the area has been approved by the House of Assembly, the Minister may make an order to be published in the Gazette declaring any area to be a zoned area and reserving it for specific purposes. Where an area has been declared a zoned area under subsection (1), the Head of the Physical Planning and Development Division shall not approve

any application for the development of land in that area which is inconsistent with the purposes for which the area is reserved.⁶⁹

[196] The Act also makes provision for the protection of natural areas. Section 34(1) of the Act provides that the DCA shall compile lists of places of natural beauty or natural interest, including submarine and subterranean areas, and their flora and fauna, or may adopt, with or without modifications, any such lists compiled by the Saint Lucia National Trust under the Saint Lucia National Trust Act or the National Conservation Authority under the National Conservation Authority Act and may amend any such lists from time to time. Where the DCA is of the view that it is desirable to afford special protection to any area on a list compiled or adopted under subsection (1), the Minister may, by order published in the Gazette declare that area to be an environmental protection area.⁷⁰

[197] An order made by the Minister under subsection (2) may authorise the carrying out within the protected area of such works as may be expedient for the protection or rehabilitation of the environment in the area; require that an environmental impact assessment be carried out in respect of every application for development within the area; restrict or prohibit development, or development of any class, within the area; provide for the control over the use of land within the area for the purposes of agriculture, forestry or fisheries.⁷¹

[198] In light of the provisions of section 34(1) of the Act, brings into focus the provisions of Land Conservation and Improvement Act⁷² ('Conservation Act') and the National Conservation Authority Act⁷³ ('Conservation Authority Act').

[199] The dictionary to the Conservation Act defines a "conservation area" as an area defined and declared to be a conservation area in respect of which measures may

⁶⁹ Section 32(2)

⁷⁰ Section 34(2)

⁷¹ Section 34(4)

⁷² Cap. 5:10

⁷³ Cap. 6:01

be taken under section 12 of the Act.⁷⁴ Section 3 of the Conservation Act makes provision for the appointment of a Land Conservation Board ('Board'). The functions of the Board are set out at section 4 of the Conservation Act and they include among other things to coordinate efforts of other conservation boards including government agencies in relation to the conservation of land⁷⁵ and to advise the DCA and any other agency involved in land use on matters concerning land conservation and improvement of land.⁷⁶ The Chief Technical Officer, physical Planning is a member of the Board by virtue of section 3(2) Schedule 1 of the Conservation Act.

[200] It is noteworthy that there has not been any order made by the Minister and published in the Gazette declaring the PMA to be a zoned area or a protected area for any purpose mentioned in the Act. Additionally, the PMA does not appear on any lists compiled by the Saint Lucia National Trust under the Saint Lucia National Trust Act or the National Conservation Authority under the National Conservation Authority Act.

[201] In order to fully appreciated the dynamics at play in the present proceedings it will be necessary to discuss the historical evolution of the PMA and the underlying policies that underpin its existence as one of the matters to which the DCA takes into account when considering the grant of permission to develop land in the PMA and how it all fits into the existing statutory framework.

[202] The United Nations Educational, Scientific and Cultural Organisation ('UNESCO') Convention Concerning the Protection of the World Cultural and Natural Heritage (the 'Convention') was adopted by the General Conference at its Seventh Session Paris, 16th November 1972. Saint Lucia ratified the Convention by becoming a signatory thereto on 14th October 1991.

⁷⁴ Section 2

⁷⁵ Section 4(d)

⁷⁶ Section 4(f)

- [203] The ratification of the Convention by Saint Lucia was in recognition of its duty to ensure the identification, protection, conservation, preservation, and transmission to future generations of Saint Lucia's natural and cultural heritage; and also to ensure the effective and active measures were taken for the protection, conservation and preservation of the cultural and natural heritage.⁷⁷
- [204] By becoming a signatory to the Convention, Saint Lucia became a contracting state and was mandated to endeavour to take the appropriate legal, scientific, financial, and administrative measures necessary for the identification, protection, conservation, and preservation of its natural and cultural heritage.
- [205] The ratification of the Convention was without prejudice to property rights provided for by national legislation. Therefore, Saint Lucia's obligations under the Convention did not subvert the laws that governed ownership of private property. By becoming a signatory to the Convention, Saint Lucia assumed an obligation under the Convention and by extension under international law to enact such legislation or legislative measures and to streamline its planning laws as they related to protecting Saint Lucia's natural environment and cultural and historic heritage in a manner that protected both publicly and privately owned lands.
- [206] From all indications it does not appear that Saint Lucia has fulfilled its obligations under the Convention. This latter fact is quite evident from a reading of the LAC Study and an analysis of the existing laws and the various lacunas that exist therein.
- [207] The World Heritage Convention 1972 has been and continues to be used as the basis for inscribing the PMA as a World Heritage Site. However, while Saint Lucia is a party to the Convention, the Convention has not been incorporated into domestic law. Incorporation of the Convention into domestic law is necessary for the Convention to have the force of law in Saint Lucia.

⁷⁷ Article 5 of the Convention

- [208] In fulfillment of Saint Lucia's obligations under the Convention, the Pitons Management Area Management Plan ('PMAMP') was commissioned and obtained the approval of the Cabinet of Ministers by Cabinet Conclusion No. 387 of 2003 dated 16th June 2003.
- [209] The PMAMP had as its main objective, the establishment of the PMA as an Environmental Protection Area under the Act which came into force on 1st July 2003.⁷⁸ The legal framework set out under the PMAMP for the establishment and management of the PMA was the Act.
- [210] The World Heritage Committee established under the Convention inscribed the Piton Management Area ('PMA') on the World Heritage List on the basis of natural criteria in 2004. The ultimate authority over the PMA was intended to be the Minister pursuant to the powers conferred on the Minister by the Act. However, after the commissioning of the PMAMP, the Act was not yet in force. Accordingly, the PMA became formalised by Cabinet Conclusion. It was the intention that upon approval by Cabinet, the Minister would make an order declaring the PMA an Environmental Protection Area.
- [211] It was anticipated that when the Minister had declared the PMA as an Environmental Protection Area, the DCA would embark upon addressing the issues related to privately owned lands within the PMA.
- [212] The Piton Management Area Advisory Committee ('PMAAC') was conceptualised for the purpose of fostering a coordinated and integrated approach to the management of the PMA by creating a multi-agency coordinated body tasked with the oversight of the PMA.
- [213] By Cabinet Conclusion No. 1037 of 2008 and dated 2nd October 2008 entitled "Re-adoption of the Piton Management Area and Soufriere Region Integrated Development Plan" Cabinet approved the following namely: (1) the adoption of the recommendations of the Pitons Management Area (PMA) and Soufriere Region

⁷⁸ Act No. 29 of 2001

Integrated Development Plan submitted by Hyder Consulting (UK) Ltd.; and (2) the initiative by the Ministry of Physical Development and the Environment to define and realign the boundaries of the PMA using the system of roads, boundary lines, contour lines and specific geographic features on the ground, and submit same to Cabinet with the detailed development guidelines ...”

- [214] Cabinet Conclusion No. 242 of 2015 and dated 20th April 2015, entitled “Endorsement of Limits of Acceptable Change (LAC) Study” reads:

“Cabinet considered a Memorandum dated 24th March, 2015, submitted by the Ministry of Sustainable Development, Energy, Science and Technology and approved the Limits of Acceptable Change Study and its associated recommendations as the tool for appraising applications for development within the Piton Management Area (PMA).

Cabinet directed the Ministry of Sustainable Development, Energy, Science and Technology to collaborate with the Ministry of Physical Development, Housing and Urban Renewal to seek financial and technical support for the demarcation of the boundaries of the Piton Management Area (PMA).”

- [215] It was not made to appear to the court, and it is also doubtful whether the mandate given to the DCA by virtue of the two Cabinet Conclusions mentioned in the preceding paragraphs were ever carried into effect. It is certain however, that the LAC Study was not brought into effect as a physical plan within the meaning of the Act by affirmative resolution. The LAC Study was simply a physical plan in the making and has not yet been brought into operation by the observance of the legal formalities envisioned by the Act.

- [216] The Limits of Acceptable Change and Design Guide for the PMA World Heritage Site (‘LAC’) sets out limits to the amount of change that is permissible within the PMA without affecting the features of the PMA. The LAC also provided guidelines with respect to the manner in which development can be accommodated within the LAC. It also made provision for the kind of development that is permissible within the LAC by ascribing limitations in 5 distinct Policy Areas.

- [217] The LAC and the Design Guide applied to any development within the PMA designated as Map 1 in the LAC document. Applications to develop land within the

PMA must be submitted to DCA and applications will only be approved if they in the judgment of the DCA comply with the LAC and the Design Guide.

[218] Therefore, the underlying policy of the LAC is that change can occur within the PMA but it must not weaken or harm the attributes that give the PMA its World Heritage status. Changes should help the PMA attain and maintain this desired condition.

[219] By virtue of the LAC Study the PMA is divided into 5 Policy Areas. Only Policy Area 1 ('PA1') is relevant to the present case. PA1 comprises Gros Piton, Petit Piton and Ridge. In accordance with the terms of the LAC no development is permitted within the area designated as PA1 (A) with the exception of works to improve existing lands on Gros Piton including minor signage and interpretation. The LAC in relation to PA3 (C) also provides that small scale development in the L'lvrogne River valley will be considered if it meets in full the LAC and Design Guide for the PMA. Such development is restricted to local needs and/or for conservation purposes.

Reliance on LAC as a material consideration by the DCA

[220] In the absence of a Physical Plan, was the DCA entitled to rely on the LAC Study as a material consideration in considering the claimant's application for development approval?

[221] A reading of the Act makes it plain that the designation of "protected areas" and "environmental protected areas" is largely a matter for the Minister. The Act makes provision for the listing of areas as protected areas by the DCA and the Conservation Authority. However, in addition to listing areas, it is axiomatic that these areas are surveyed and demarcated. This is essential to facilitate the determination of the actual scope of any area and ensure accurate designation, administration, management, and use.

[222] The Act contains an elaborate procedure for the designation and declaration of areas as protected areas or environmental protected areas. However, the Act itself

contains no definition of the term “protected area”. Only the Conservation Act provides a definition of the term “protected area”, and this definition is limited within the specific ambit of that legislation. It is apparent that the existing laws which are relevant to the declaration of protected areas are the Act and the Conservation Act. It is also noteworthy that there are no regulations under the Act that deals with the development and operation of protected areas.

[223] Additionally, there appears to be no definitive list of protected areas in Saint Lucia; and it is unclear whether the PMA has been officially declared a protected area in accordance with the existing legislative scheme under the Act. In the event that the PMA has been declared a protected area by virtue of the provisions of the Act, no such evidence was presented to the court in this instance.

[224] With respect to the PMAAC, it is not readily apparent whether the PMAAC’s existence and the reliance upon it as a referral agency in respect of developments within the PMA has been rationalised or confirmed by Cabinet Conclusions, other legal instruments, or statutory documents. The current legislation makes no mention of the PMAAC.

[225] In the court’s considered view, the DCA’s reliance on the LAC study and the recommendations of the PMAAC as material considerations in arriving at its decision to refuse the claimant’s application for development approval at first instance leads to the ineluctable conclusion that the DCA acted in breach of the Act.

[226] It appeared that the relevant provisions of the Act were simply ignored. It follows that the LAC study not having the force of law, which primarily is attributable to the Minister’s failure to follow the provisions of the Act, the DCA’s decision cannot be said to have been one that was sanctioned by the existing legislative framework. Therefore, in the court’s opinion, the LAC does not have the force of law and could not form the statutory basis for denying the claimant’s application.

- [227] Under the Act, the Minister and the DCA have separate and distinct statutory functions and responsibilities. The Minister in exercising his functions under the Act, may properly take account of the expert advice of the DCA, but the exercise of power to enact legislation rests with the Minister.
- [228] In relation to the LAC and the PMA, there is no evidence of the Minister performing the statutory functions that the Act required of him in declaring the PMA a protected area or enacting legislation or regulations carrying the policy considerations contained in the LAC into effect. The LAC was accepted and adopted as the underlying basis of governmental policy at the level of Cabinet; it did not have the force of law. It appeared, in the court's view that both the DCA and the PMAAC treated the underlying policy embodied in the LAC study as settled and applicable law having the same effect as a legislative instrument or regulation. The simple point being that neither had the force of law. A Cabinet conclusion does not have the force of law until it is enacted into statute; until then it is simply the embodiment of governmental policy.
- [229] Therefore, in the court's view, if the DCA having arrived at their decision based on the recommendations of the PMAAC who had acted on the LAC study would have exceeded the ambit of the decision-making discretion conferred on the DCA by the Act.
- [230] It is a well-established principle of public law that statutory powers entrusted to the executive branch of government must be exercised within the four corners of the relevant statutory powers; and where the executive acts outside these boundaries, its decisions are ultra vires and unenforceable.
- [231] The question that the court considered relevant on the merits of the present case is whether the DCA in reliance on the recommendations and opinions of the PMAAC who in turn had relied on the LAC Study exceeded the ambit of their decisionmaking discretion under the Act. The other question with which the court is concerned is what ought to have been the correct approach of the DCA in considering the claimant's application in the absence of physical plans for the

area. Additionally, whether a general presumption in favour of sustainable development should be applied by the DCA.

[232] The modern system of planning is clearly a creature of statute. The Minister's power to formulate and adopt national planning policy derived expressly and by implication from the Act which gives the Minister overall responsibility for the planning system; and accordingly, any planning policy or policy guidelines had to be derived from the Act itself.

[233] In the determination of applications for development approval, a framework such as the LAC Study was no more than a guideline formulated into policy by Cabinet Conclusion, and therefore a material consideration in the process; but it did not provide the statutory test and could not displace or distort the primacy given by the Act to the physical plan. The provisions of the Act as they relate to applications for development approval are mandatory. The DCA must consider the physical plan and other material considerations. It could not have been the intention given the scheme and framework of the Act that the DCA could only have taken into account other material considerations and ignored entirely the physical plan. To do so would have been contrary to the Act.

[234] What was of significant interest in the present proceedings was the absence of any definitive physical plan demarcating the precise area designated as the PMA which came into being in conformity with the relevant provisions of the Act. It is beyond dispute that there is no physical plan for the area consistent with the provisions of section 13 of the Act. Additionally, the mandate given to the DCA by virtue of Cabinet Conclusion No. 242 of 2015 wherein Cabinet directed the Ministry of Sustainable Development, Energy, Science and Technology to collaborate with the Ministry of Physical Development, Housing and Urban Renewal to seek financial and technical support for the demarcation of the boundaries of the Piton Management Area (PMA) has not been complied with.

[235] The position adopted by the claimant was that the DCA's refusal of the claimant's application for development approval premised on the basis that the proposed

development was contained in policy area 1 (PA1) where development was prohibited was unreasonable, erroneous, and perverse; and in all the circumstances of the case, was incapable of being substantiated due to the absence of any formal survey or demarcation of the area which existed in the form of an actual physical plan.

[236] It was the claimant's case that no such technical exercise of demarcating the area by survey had been undertaken. The court was presented with no evidence to the contrary and did not have the benefit of any expert evidence in relation to the matter.

[237] The claimant presented an aerial map with what appeared to be boundary lines superimposed thereon which they contended was what was relied on by the DCA and formed part of the LAC Study, upon which the DCA claimed depicted the extent of the boundaries of the PMA. The defendants took no objection to this presentation and appeared to have conceded that this was in fact the map that sought to delimit the area of the PMA.

[238] Based on the foregoing, the court has concluded that it is beyond peradventure that there is no approved physical plan which contains a survey plan that demarcates the area known as the PMA. In the circumstances, it is impossible to define with any degree of precision or exactitude the true extent and limits of the PMA.

[239] The criticism levelled by the claimant at the existing 'plans' for the PMA brings into sharp focus the need for improving the clarity and consistency of the physical plans for the PMA in keeping with the dictates of the Act and the ministerial policy directive contained in the Cabinet Conclusions mentioned herein. It appeared that the image presented to the court was merely prescriptive and not indicative of the precise area of the PMA.

- [240] The difficulty that arises in the present case is that both the DCA and PMAAC held out the drawings contained in the LAC Study as capable of being utilised for the purpose of imposing restrictions on land use and development in the PMA.
- [241] It is difficult to reconcile this imprecision in the demarcation of the PMA with the relevant provisions of the Act that prescribe a physical plan the contents of which are required to be directed towards allocating or imposing restrictions on certain areas of land including privately owned land. The Act does not speak to “indicative” or “designated” plans. Any survey or map of the area must be in compliance with the Act.
- [242] The court takes the view that clearly, treating the map presented as merely indicative of the PMA would defeat the entire purpose of the Act. The map or any of the maps contained in the LAC Study as presented do not fall squarely or at all into what is contemplated by the Act. The court’s task in this instance is to interpret the Act and ultimately to determine whether what was relied on by the DCA fell in line with the language of the Act read in its proper context alongside the underpinning policy of the LAC Study. With the greatest of respect to the expertise of the specialist planning functionaries, that they may have misunderstood the underlying framework policy of the Act and the ministerial direction as it pertained to the PMA, the court cannot resist the temptation in finding that any decision arrived at on the basis of the map presented to the court and what is contained in the LAC Study was not in compliance with the Act and could not form the basis of a flawless decision when considering an application for development approval in the PMA.
- [243] The fact that the DCA and by implication the PMAAC deliberated on the claimant’s application for development approval and arrived at a decision in the absence of a physical plan is cause to doubt the viability of the decision arrived at and opens itself to serious criticism. As the court understood it from a reading of the Act, the purpose of physical plans is to promote a long term vision for an area and to set out the broad land use planning strategy guiding development and change in a

given area. The physical plan should include strategic planning policies; and should also set the context for local plans which translates the strategy into greater detail. Its preparation should include an account of national planning policy guidelines.

- [244] The DCA's decision was that the claimant's proposal for development within the PMA was not in accordance with the development plan for the area. This begs the question of what development plan the DCA was referring to. As it stood there was no physical plan for the area in existence. The only logical explanation is that the DCA was referring to the LAC Study. The difficulty which arises in the context of the DCA's decision is that the LAC Study has not crystallised into a physical plan as contemplated by the Act.
- [245] The troubling issue is whether, the DCA having proceeded to consider the claimant's application not on the basis of any physical plan, can it properly be argued that the DCA was entitled to have regard to the LAC and use it as a material consideration when considering the application? To answer this question in the affirmative would be inimical to the scheme of the Act. The question is answered in explicit terms by the Act. The DCA must consider the application in accordance with a physical plan for the area and then go on to consider other material considerations. It may very well be that some of those material considerations may have been embodied in the LAC; but that did not mean that the DCA could rely exclusively on its contents in arriving at its decision.
- [246] A planning authority was mandated to proceed on the basis and upon a proper understanding of the physical plan. The need for a proper understanding follows from the fact that the planning authority is required by statute to have regard to the provisions of the physical plan; it cannot have regard to the provisions of the physical plan if it fails to understand them or there is none in existence. Ordinarily, the DCA would have been required to consider whether the proposed development was in accordance with the physical plan and not whether material considerations justified departing from the physical plan or refusing an application.

- [247] If the DCA was permitted to act in this manner when making decisions, this would deprive the Act of much of its effect and would drain the need for proper interpretation of the physical plan of much of its meaning and purpose. The Act requires that the physical plan be a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by DCA as the planning authority in decision making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers while allowing a level of flexibility to be retained.
- [248] The foregoing considerations point away from the belief obviously held by the DCA that it could consider applications for development approval without the use of a physical plan within the meaning of the Act purely as a matter of discretion which it can utilise from time to time and from case to case. The physical plan is in principle one that is conceived with the Act as its progenitor which the DCA is entitled to determine from time to time within its discretion as provided for under the Act within the limits of rationality and reasonableness.
- [249] Assuming that the LAC was indeed accredited and incorporated into the Act and could have been considered as the physical plan for the area, it appears that the DCA misinterpreted or misconstrued the planning policy guidelines contained in the LAC having determined that the proposed development fell within PA1 where all development was prohibited.
- [250] It is accepted that it is for the planning authority to interpret the relevant policy by exercising its planning judgment. It is arguable that if there was a dispute about the meaning of words used in a policy document such as a physical plan or the interpretation of a policy document, it was for the court to determine as a matter of law what the words of the policy were capable of meaning. In the court's view, the planning authority would only fall into error if it attached a meaning to the words that they are not capable of bearing.

- [251] The court has strived to make the point that in principle, in this area of public administration as in others, policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
- [252] The LAC Study is clearly a policy statement regarding land use in the PMA. Such a policy statement should not be construed as if it were statutory or contractual provisions. Although a physical plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, physical plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of physical plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and the exercise of their judgment can only be challenged on the ground that it is irrational or perverse. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the physical plan mean whatever they would like it to mean.
- [253] In the court's considered view, the power to grant permission for developments within the PMA and generally, conferred on the DCA by the Act, is a clear example of a decision maker's statutory discretion in the area of land use and planning. However, such discretion is tightly constrained. The scope of the exercise of this discretion is limited by the general scheme of the Act. In other words, the paramount consideration for the DCA being that the proposed development was consistent with the DCA's mandate under the Act. How the discretion is applied within those constraints is clearly a matter for the DCA.
- [254] Therefore, the court feels bound to find that the exercise of the discretion must not be incompatible with the overriding objectives and purpose of keeping acceptable development within that which is consistent with the aims of socio-economic policy and the furtherance of the public interest in preserving Saint Lucia's environment, natural and cultural heritage the latter being the primary purpose behind the LAC

Study. To have exercised their discretion otherwise would have been ultra vires the Act and contrary to the spirit of the Act.

- [255] However, the matter does not stop there. The foregoing analysis only served to highlight the deficiencies in the planning law as it relates to the PMA and how it affects the DCA's consideration of applications for development approval in that area. To totally ignore what the court has already highlighted as material considerations that the Minister and the DCA ought to take into account when considering applications for development approval would render the mandate of the Act entirely superfluous and ineffective to manage and control the development of land in general and more specifically areas identified as deserving of protection for environmental, conservation, natural, historic and heritage purposes. Clearly, all of these matters import a public interest element.
- [256] Therefore, in the court's view, the DCA had to that extent purported to act within the scope and policy of the Act when it denied the claimant development approval. The DCA had proceeded in accordance with proper principles enshrined within the Act and as such to that extent only their decision cannot be regarded as being unreasonable. However, this did not make their decision lawful within the context of the Act.
- [257] It is a basic principle of administrative law that a person entrusted with discretion must, so to speak, direct himself properly in law. He must exclude from his consideration matters which are irrelevant to consider. If he does not obey those rules, he may truly be said, to be acting unreasonably. The matters contained in the Act were not matters that the DCA could ignore because it had a discretion. The very fact that a mandatory provision is coupled with a discretion on the same matter points to the importance of that matter in the eyes of Parliament.
- [258] In fulfilling its mandate under the Act the DCA is acting and carrying out its duties in the public interest. However, in fulfilling the public interest the DCA must observe the dictates of the rule of law and must strike a balance between those interests that affect the public as a whole and those interest that affect private and

individual rights. How then can the law reconcile the public interest with the interest preserved by the private ownership of land where they conflict as in the present case? This is where the question of constitutional propriety comes into play. To hold otherwise would defeat the entire purpose of the Act and would obviously run contrary to the intention of Parliament.

The Constitutional Point

[259] Section 1 of the Constitution is declaratory of the fundamental rights and freedoms to be enjoyed by individuals under the Constitution. It reads:

“Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person, equality before the law and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for his or her family life, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation”

[260] The preceding provision of the Constitution is subject to the proviso which reads:

“the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

[261] Therefore, it is a fundamental principle of our constitutional law that the enjoyment of rights guaranteed under the Constitution are not unlimited but are limited by respect for the rights and freedoms of others and for the public interest or without prejudice to the rights and freedoms of others or the public interest.

[262] Section 6 of the Constitution provides for protection from deprivation of property and reads:

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—

- (a) determining the nature and extent of that interest or right;
- (b) determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorising the taking of possession or acquisition;
- (c) determining what compensation he or she is entitled to under the law applicable to that taking of possession or acquisition;
- (d) obtaining that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) or (c) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(7) Nothing contained in or done under the authority of any law enacted by Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision for the compulsory taking of possession of any property, or the compulsory acquisition of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no monies have been invested other than monies provided by Parliament.

(8) In this section— “property” means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional; “acquisition”, in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right.

[263] Section 44 of the Act makes provision for claims for compensation and reads:

“(1) A claim for compensation alleged to be payable under this Act shall be made in writing to the Minister.

(2) The Minister may require a claimant to provide such further information in support of a claim for compensation as is necessary for its determination, and a determination of the claim may be deferred until after such further information has been received by the Minister.

(3) Where the claim for compensation arises from a decision of the Head of the Physical Planning and Development Division and it appears to the Minister that the decision which gave rise to the claim for compensation might properly be withdrawn or modified, the Minister may refer the matter to the Appeals Tribunal for its determination as if the claim for compensation had included an appeal against that decision.

(4) Compensation payable under this Act shall, in default of determination by agreement, be determined by the Appeals Tribunal.”

[264] Section 45 of the Act deals with the exclusion or limitation of compensation in certain cases and provides that:

“Compensation shall not be payable under this Act in respect of a decision by the Head of the Physical Planning and Development Division whereby permission is refused, modified or revoked for the development of land if, despite that refusal, modification or revocation, there is available with respect to that land, permission for a development of the land consisting of the construction of industrial, commercial or residential buildings or any combination of such buildings.

[265] The principles to be derived from the preceding provisions of the Constitution and the Act recited above, as it appears to the court, are as follows: (1) the right to use and enjoyment of private property is a right protected by the Constitution but is nevertheless subject to the qualifications and restrictions on the enjoyment of this right. Therefore, there is no reason why in principle public rights cannot supersede the right to enjoyment of private property or the extinguishing of such a right. Therefore, public rights should likewise be capable of protection; (2) the curtailment of the right to the use and enjoyment of private property may arise but cannot entitle a party to successfully challenge the exercise of the authority to curtail such a right when it is beyond the powers of the public body to offer protection of that right. However, a person aggrieved by a decision of the public body may be entitled to other relief which it is within the powers of the public body to afford, for example, the payment of compensation; (4) The fact that the

curtailment of the enjoyment of the right to private property was founded on an ultra vires act or that the public body had no power to curtail or abrogate such a private right and the reason why in law it had such power was the potential adverse effect on the public interest may be a reason, and indeed a strong reason, going to the justification for the interference with the private right.

[266] Applying these principles, the fact that it is arguable that the DCA's refusal of the claimant's application for development approval was ultra vires and resulted in the abrogation of the claimant's right to the use and enjoyment of its property does not exclude or diminish the claimant's entitlement to the protection of his right to the use and enjoyment of its property or the protection of that right declared by section 1 of the Constitution and guaranteed by section 6 of the Constitution, though the relief that may be available is restricted in the manner which the court has already indicated.

[267] In the defendants' view, the interference with the claimant's use and enjoyment of its property was plainly lawful and in accordance with domestic law and was in pursuance of a legitimate aim, namely the safeguarding the legal rights of the public over the PMA, the beneficiaries of the ultra vires rule; and achieved a proportionate or a fair balance between the interests of the community and the public and the interests of the Claimant.

[268] However, the defendants' view, regardless of how noble it may seem, has been defeated by the actions and omissions of the State which have resulted in the claimant being deprived of its right to the protection of the law guaranteed to it under the Constitution. The omission by the State to enact appropriate measures and to follow the procedures laid out in the Act meant that not only was the decision of the DCA ultra vires the Act and, as a consequence, unlawful, but also resulted in the abrogation of the claimant's rights otherwise than in keeping with the due process of law.

[269] Having made these declarations as to the constitutional impropriety of the inaction and omissions of the State, the question which now arises is the nature of the relief to which the claimant is entitled.

[270] Section 16 of the Constitution confers on the High Court a broad discretion in granting relief for the infringement of constitutional rights. Section 16 of the Constitution provides:

“(1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

[271] The court is clearly of the view that the State has failed in its duty to take positive steps to formalise its duties and obligations under the Convention as it relates to the PMA into domestic law. The State has failed to take active steps to delimit demarcate and declare the PMA a protected area or an area protected for environmental, cultural, and heritage conservation under the Act or in accordance with domestic law. The failure to take these necessary steps has resulted in the rights of owners of private property in the PMA not being recognised within an enacted legal framework necessary to clarify and protect these rights in the general law of the country.

- [272] It is undeniable that the State has failed to bring the recommendations of the LAC Study into conformity with the legal framework of the planning laws. It is within this context that the derogation from the rights to protection of the law guaranteed by the Constitution arose.
- [273] An award of compensation is not invariably the appropriate relief for the breach of a constitutional right. The court has wide powers and discretion under section 16 of the Constitution to fashion an appropriate remedy to vindicate the right which has been infringed. An order for the payment of compensation is only one of the forms of redress to which a claimant may be entitled, and they must convince the court that such an award is appropriate in the particular circumstances of the case. To hold otherwise would subvert the discretion vested in the court by section 16 of the Constitution.
- [274] In the present case, it has not been shown that the claimant has suffered any material disadvantage that is capable of empirical or forensic assessment and quantification, as a result of the breach of his rights guaranteed under the Constitution.
- [275] There appears to be the urgent need to rationalise the planning and development policy within the PMA which will necessitate its designation, delimitation, and demarcation in keeping with the policy objectives of the LAC Study commissioned by the State. In order to achieve this objective, it will also be necessary to incorporate the directives and policies contained in the LAC Study into the legislative scheme of the Act. Once this desired objective is achieved, it will serve to regulate development in the PMA and provide a level of certainty regarding development in the PMA. Such a comprehensive physical plan for the area embodied not just as part of government policy but existing within a detailed and comprehensive development plan consistent and in conformity with the existing legislative environment will provide certainty and generally guide the scope of development in the PMA while protecting the constitutional rights of private land owners to the protection of the law. However, the concomitant effect of such an

exercise in the inevitable interference and curtailment of the rights of owners of private property owners in the PMA. The court is of the view that once the planning authorities adhere to the dictates of the physical plan for the area, provided that one has been properly promulgated in conformity with the Act, then questions of procedural fairness, observance of the due process of law, accountability, transparency and constitutional propriety of decisions of that authority will be properly addressed.

[276] The award or payment of compensation for the curtailment or abrogation of property rights of land owners within the PMA can be dealt with competently within the statutory scheme once the necessary physical plan for the PMA is brought into conformity with the Act. Therefore, in light of the decision which the court has arrived at in this instance, the question of compensation to the claimant ought to be left for consideration under the statutory regime which for all intents and purposes is in conformity with the Constitution.

[277] In the circumstances, and based on the reasons provided by the court in this judgment, the court has formed the view that the decision of the DCA cannot stand. Therefore, the decision of the DCA to refuse development approval to the claimant is quashed. The applications ought to be remitted to the DCA for reconsideration in light of the observations and directions of the court made in these proceedings.

[278] It may very well be that once the appropriate measures contained in the LAC Study have coalesced into a comprehensive physical plan for the PMA in conformity with the Act the claimant's proposed development may not be approved. In such an eventuality the statutory arrangements for compensation will obviously have to be engaged. In this way the object of constitutional propriety will be achieved.

[279] The foregoing is hardly an attempt at directing the legislature to make laws for the good governance of the country. Instead, the court feels compelled to strike the cautionary note that in an age where environmentalist and conversationalist

concerns are resounding and resonating globally at a feverish and heightened pitch, that the domestic law has not evolved to the stage to resolve national concerns which are in large measure not only part of the wider global comity of international states in seeking to protect the natural environment but also as it affects the economy, natural and cultural heritage. As part of this cautionary note it may very well be that unless the State acts assiduously in taking the necessary legislative steps to protect the patrimony Saint Lucia may very well lose its standing as a World Heritage Site under the Convention.

[280] The court therefore makes the following orders and declarations:

1. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant was contrary to the Physical Planning and Development Act, unlawful and in breach of the claimant's constitutional right not to be deprived of its use and enjoyment of property otherwise than by the observance of the due process of law.
2. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant denied the claimant the right to the protection of the law guaranteed to it under the Constitution.
3. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant was unlawful to the extent that the LAC Study was devoid of any statutory, legal or regulatory basis and is therefore the reliance thereon as a basis for the DCA's decision was arbitrary, illegal, unreasonable and fundamentally unfair.
4. The decision of the DCA in refusing the claimant's application for development approval is quashed and the application is remitted to the DCA for reconsideration in light of the observations and directions given by the court in this judgment.

5. That upon the review of the claimant's application the DCA should consider the question of the payment of compensation to the claimant as one of the options available should the DCA find that upon review of the claimant's application in conformity with the Act development approval ought not to be granted.
6. Costs is awarded to the claimant to be assessed if not otherwise agreed between the parties within 21 days of the date of this judgment.

Shawn Innocent
High Court Judge

By the Court


Dp. Registrar