

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2019/0019

BETWEEN:

THE LANDINGS PROPRIETORS UNIT PLAN NO. 2 OF 2007  
(also known as The Landings Body Corporate or The Landings BC)  
Appellant

and

THE DEVELOPMENT CONTROL AUTHORITY  
Respondent

and

TWO SEAS HOLDINGS LIMITED  
Interested Party

Before:

|                                  |                         |
|----------------------------------|-------------------------|
| The Hon. Mr. Mario Michel        | Justice of Appeal       |
| The Hon. Mr. Paul Webster        | Justice of Appeal [Ag.] |
| The Hon. Mr. Gerard St. C Farara | Justice of Appeal [Ag.] |

Appearances:

Mr. Richard Harwood KC with him Ms. Renee St. Rose and Ms. Marie-Ange Symmonds for the Appellant.  
Mr. Dexter Theodore KC with him Mr. Adrian Etienne for the Respondent.  
Mr. Garth Patterson KC with him Mr. Mark Maragh and Ms. Taylor Laurayne for the Interested Party.  
Mr. Rene Williams holding a watching brief for the Attorney General.

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2022: June 7;  
: November 7.

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*Civil appeal – Judicial review – DCA’s decision to approve development on land adjacent to Landings’ property – Duty to consult – Failure by DCA to consult The Landings as an adjacent landowner before approving development on Parcel 272 – Whether the DCA owed The Landings a duty to consult - Legitimate expectation -*

*Whether The Landings had a legitimate expectation that they would be consulted prior to the DCA's decision – Principle of fairness – Whether the DCA had a duty to consult The Landings arising out of the principle of fairness – Section 47 of the Physical Planning and Development Act – Register of planning applications – Right to access application documents - Whether the failure by the DCA to allow The Landings access to and copies of the application documents kept under section 47 rendered the decision unfair*

In 2007, Two Seas Holdings Limited ("Two Seas") made an application to the Development Control Authority (the "DCA"), for approval of a tourism development comprising a hotel and other facilities on land registered as Parcel 1257B 272 ("Parcel 272") at Pigeon Point, Gros Islet. Parcel 272 is bounded on the east by The Landings Hotel Resort & Spa (the "Landings Hotel") which is operated by the appellant (The "Landings"). Approval by the DCA was granted in 2008 for land use only on Parcel 272. The following year, Ms. Alison King-Joseph ("Ms. King"), engaged by Two Seas, submitted an environmental impact statement ("EIS") to the DCA. The EIS identified The Landings Hotel as being within the sphere of influence of the proposed development. By 2011, Cabinet approval for the development was received for the said development. However, Two Seas did not proceed with their plans.

After several years, the development was restarted in 2017 with a revised design and concept plan on a larger scale and with buildings up to 9 storeys in height. In October 2017, two meetings were held between Ms. King and representatives of The Landings to discuss the development. No officer of the DCA participated in these meetings. On 30<sup>th</sup> October 2017, an environmental and social impact assessment ("ESIA") and ESIA Addendum Update report (the "ESIA Addendum Update") were submitted to the DCA by Ms. King on behalf of Two Seas. Notably, the ESIA Addendum Update failed to include the views of The Landings' representatives on the proposed development scheme and its potential adverse impacts on The Landings' property. Furthermore, the ESIA Addendum Update recorded that certain adverse impacts of the development on The Landings' property, such as loss of views, had increased owing to the revised design.

In November 2017, Two Seas submitted an application for approval to proceed with this new development on Parcel 272. In January 2018, The Landings' lawyers wrote to the DCA stating that their client was concerned about the neighbouring development, and they requested a copy of the development plans under consideration by the DCA. The DCA responded pointing them to the register of planning applications established under section 47 of the Physical Planning and Development Act (the "PPDA"). In March 2018, The Landings' lawyers inspected the said register kept at the DCA, which provided few details regarding the proposed development on Parcel 272. The Landings' lawyers' request to see the application documents was denied. By letter dated 17<sup>th</sup> April 2018, The Landings' lawyers expressed their concern to the DCA that they had not been consulted in relation to the development on Parcel 272, and that the DCA failed to consider material considerations stipulated in their Manual for Developers (the "Manual") as

applicable to this type of development, prior to arriving at their decision. Despite the concerns expressed by The Landings and their lawyers, by letter dated 18<sup>th</sup> April 2018, the DCA communicated its approval of the development on Parcel 272 to Two Seas.

Being dissatisfied with the DCA's decision, The Landings commenced judicial review proceedings. They sought an order quashing the decision and damages owing to the impact of the development on their property. They claimed that the approval by the DCA was illegal, arbitrary and in breach of natural justice since the DCA failed to consult them before making its decision, when its property would have been adversely affected by the development on Parcel 272.

In giving judgment on The Landings' judicial review claim, the learned judge found that the DCA had not consulted with The Landings, and that the October 2007 meetings which Ms. King had with representatives of The Landings, was not consultation by the DCA. However, in dismissing The Landings judicial review claim, the learned judge found that it had failed to establish that the DCA had a duty under the PPDA to consult with them, or that a duty to consult arose out of a legitimate expectation, whether arising by promise or an established practice. The judge also found that section 23(1) of the PPDA and the Manual, whilst requiring the DCA to have regard to material considerations, did not lead to a duty to consult with The Landings, and that The Landings had failed to show that the impacts on its property had not been considered by the DCA in coming to its decision on the Two Seas application.

Being dissatisfied with the judge's ruling, The Landings appealed. On appeal the central issue for determination was whether the DCA had a duty to consult The Landings before granting approval of the Two Seas' application. The Landings argued that the DCA had a duty to consult them which arose by legitimate expectation, fairness, and by the duty to have regard to material considerations, including those stipulated at paragraphs 4.8.1 and 4.8.3 of the Manual. They contended that this duty to consult having arisen, it ought to have been exercised properly, and the DCA's refusal to permit The Landings access to (and copies of) the underlying application documents breached this duty.

**Held:** allowing the appeal and making the orders at paragraph [218] of this judgement, that:

1. A duty to consult principally arises by statute. However, this duty may arise at common law when (i) there is no statutory duty to consult, and (ii) there is a legitimate expectation of being consulted owing to a promise of consultation or an established practice of consultation, or (iii) where a failure to consult would amount to a breach of the rules of natural justice in the sense of conspicuous unfairness. This last category is exceptional, and the unfairness must be tantamount to an abuse of power. Absent these factors, there will be no obligation on a public body to consult.

**R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others** [2014] EWHC 1662 considered; **Binder and others v Secretary of State for Work and Pensions** [2022] EWHC 105 (Admin) considered.

2. The PPDA imposed no statutory duty on the DCA to consult The Landings, however, this duty could arise at common law. On the facts, there was neither a promise by the DCA to consult The Landings nor an established practice of consultation. The October 2017 meetings between Ms. King and The Landings' representatives was not consultation by the DCA. Furthermore, despite The Landings' contentions, the terms of the planning application certificate (which provides for notice to adjacent landowners) did not lead to a legitimate expectation that they would be consulted by the DCA. Additionally, neither section 23(1) of the PPDA and/or paragraphs 4.8.1 and 4.8.3 of the Manual explicitly nor impliedly conferred a right for the adjacent landowner to be consulted. As a result, no duty to consult The Landings arose by legitimate expectation, and the learned judge did not err in finding that the DCA had no obligation to consult The Landings on this basis.

**R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others** [2014] EWHC 1662 considered; **R v North and East Devon Health Authority Ex p Coughlan** [2001] QB 213 distinguished.

3. Where a statutory process is insufficient to ensure that the requirements of fairness are met, the common law will intervene and imply into the statute procedural safeguards to ensure that fairness is achieved. The principle of fairness may thus require that certain duties be imposed on public bodies when making their decisions. Such duties include a duty to consult, a duty to have regard to relevant considerations, and a duty to carry out sufficient inquiries. Any issue as to fairness is a fact sensitive one, and fairness will often require that a person adversely affected by a decision be given an opportunity to be heard and to be well-informed of the matters pertaining to the proposed development about which he or she wishes to make representations.

**R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others** [2014] EWHC 1662 considered; **Doody v Secretary of State for the Home Department; and other appeals** [1993] 3 All ER 92 considered.

4. On the facts, the process adopted by the DCA which led to the approval of Two Seas' application was in breach of the rules of natural justice. The DCA failed in its duty of fairness, which duty required them to consult The Landings. The EIS identified The Landings as within the sphere of influence

of the development at a fairly early stage. When the project was revised and greatly expanded, the assessment of the impact on The Landings was much greater. Owing to the proximity of The Landings' property to Parcel 272, fairness therefore demanded that they be given an opportunity to make representations to the DCA about the proposed development. The process adopted by the DCA was even more unfair having regard to the material considerations stipulated in paragraphs 4.8.1 and 4.8.3 of the Manual as applicable to the DCA's consideration of this type of touristic development, and to section 23(1) of the PPDA which required the DCA to have regard to all material considerations in coming to its decision.

5. Fairness further demanded that an adversely affected party be given sufficient pertinent information so as to make informed representations. On the facts, the DCA's failure to consult The Landings as a matter of fairness, was compounded by their failure to provide The Landings with copies of the application documents. A proper construction of section 47 of the PPDA meant that the public had a legitimate expectation and right of access (subject to the payment of the prescribed fee) not only to the information on the register, but also to the underlying application documents. As a result, it was a requirement of section 47 that the register contain sufficient information to inform a member of the public of the type of development applied for. The DCA was therefore required to provide The Landings with access to the underlying application documents. By not providing The Landings with this information, The Landings was denied the opportunity of being fully aware of the proposed development on Parcel 272, and this would have affected their ability to make informed representations to the DCA as regards the Two Seas' application. Therefore, the process adopted by the DCA was woefully inadequate and not a fair one, and the learned judge erred in dismissing The Landings' claim for judicial review on the ground of fairness.

**R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others** [2014] EWHC 1662 considered; **Director of Physical Planning v Anne Hendricks Bass** SKBHCVAP2017/0002 (delivered 15<sup>th</sup> June 2017, unreported) followed.

## JUDGMENT

### Introduction

- [1] **FARARA JA [AG.]**: This matter concerns a claim brought by the appellant (The "Landings"), a body corporate established under the **Condominium Act**,<sup>1</sup> for judicial

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<sup>1</sup> Chapter 5.05, Revised Laws of Saint Lucia 2019.

review of the decision dated 18<sup>th</sup> April 2018 (“the decision”) of the respondent, the Development Control Authority (the “DCA”), a statutory body created under the **Physical Planning and Development Act (“PPDA”)**.<sup>2</sup> By the decision, the DCA granted full development approval to the interested party, Two Seas Holdings Limited (“Two Seas”), to carry out a tourism development, comprising a hotel and other facilities, on land registered as Parcel 1257B 272 (“Parcel 272”) situate at Pigeon Point, Gros Islet, in Saint Lucia. The subject property, Parcel 272, known as Sandals La Source, comprises approximately 17.63 acres and is owned by Two Seas. The area of Parcel 272 to be developed by Two Seas is 1.41 acres.

[2] Parcel 272 is immediately adjacent to and bounded on the east by The Landings Hotel Resort & Spa (The “Landings Hotel”) registered as Block No. 1257 Parcel 182 (“Parcel 182”). The Landings Hotel is operated by The Landings under the authority of a Condominium Declaration registered on 2<sup>nd</sup> July 2007 as Instrument No. D2/2007, as amended subsequently by a Deed of Amendment of Condominium Declaration for The Landings Saint Lucia, registered on 10<sup>th</sup> January 2011 as instrument No. D1/2011. The condominium units at The Landings Hotel are four storeys in height. Parcel 272 is bounded on its western side by the Sandals Grande St. Lucian Spa and Beach Resort (the “Sandals Grande”), owned by Two Seas. The development on Parcel 272 would be Phase 2 of the Sandals Grande development. The Sandals Grande comprises buildings of two and three storeys in height. The area where the subject property is located is said to have been zoned for touristic development, although no documentary evidence of such zoning was produced at the trial.

[3] After a trial lasting 2 days in May 2019, the learned judge, delivered a detailed written judgment on 4<sup>th</sup> July 2019 dismissing The Landings’ claim for judicial review and made no order as to costs. The Landings appealed against the said judgment and order on several grounds. By its amended notice of appeal filed on 23<sup>rd</sup> June 2021, The Landings relies on six grounds of appeal, some with sub-grounds, and

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<sup>2</sup> Chapter 5.12, Revised Laws of Saint Lucia 2019.

seeks an order of this Court allowing the appeal, with costs to it in the court below and on the appeal. Curiously, in its amended notice of appeal, The Landings does not specify, as the reliefs which it seeks if its appeal is successful, that this Court give judgment in its favour on its claim for judicial review and make an order of certiorari quashing the DCA's decision. However, in its written submissions,<sup>3</sup> The Landings does seek orders that the appeal be allowed and that the DCA's decision be quashed.

### **Background**

- [4] Parcel 272 is flanked by the Sandals Grande to the west, The Landings Hotel to the east, the public roadway to Pigeon Point to the north, and the Reduit coastline to the south.<sup>4</sup> By application No. 1286/07, Two Seas sought the DCA's approval for the development of Parcel 272. Approval for land use only for touristic development was granted by the DCA on 31<sup>st</sup> January 2008.<sup>5</sup> At that time, consideration of the building concept, as put forward by Two Seas, was deferred by the DCA pending certain issues being addressed by them. This deferment was conveyed to Sandals Grande by the DCA's letter dated 31<sup>st</sup> January 2008. Another application was subsequently made by Two Seas on 27<sup>th</sup> May 2009 for approval of a concept plan.<sup>6</sup> This original concept plan dated 2008<sup>7</sup> showed a development consisting of 223 keys and ancillary facilities on 17.63 acres of land on Parcel 272. The proposed buildings ranged in height from one to four storeys and included 22 overwater suites. After receiving approval for land use only from the DCA on 31<sup>st</sup> January 2008, Two Seas submitted a revised concept plan, taking into account the requirements stipulated by the DCA in its approval.
- [5] On 16<sup>th</sup> October 2009, the DCA approved the terms of reference for an environmental impact assessment of the development as shown on the revised

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<sup>3</sup> See The Landings' submissions filed on 1<sup>st</sup> March 2022 at para. 101.

<sup>4</sup> Executive Summary Vol. 1 Environmental Impact Statement dated December 2009.

<sup>5</sup> Hearing Bundle Vol. 2 pp. 1066 -1067.

<sup>6</sup> See Appendix 1 to the Environmental Impact Statement, Hearing Bundle Vol. 2 p.1047.

<sup>7</sup> Hearing Bundle Vol. 1 p.1796.

concept plan. An Environmental Impact Statement (“EIS”) dated December 2009<sup>8</sup> prepared by Ms. Alison King-Joseph (“Ms. King”), engaged by the Sandals Resort Group (“Sandals”), was submitted to the DCA. The Landings Hotel on Parcel 182 was identified in the EIS as one of the adjacent properties within the sphere of influence of the development as then proposed and conceptualized on Parcel 272. The EIS noted that the DCA had granted approval in principle of the original concept plan subject to an addendum to the EIS being produced addressing the matters set out by the DCA in an attached document. These matters included presentation of a comprehensive description of the proposed development, including a description of the location and setting relative to other developments and environmental features, and to the receipt of reports and recommendations from various specified government agencies.

[6] In the executive summary to the EIS it was stated:

“Most negative impacts will occur during construction. Significant potentially adverse impacts are associated with piling for the jetty and for building foundations. Noise and vibration from piling may disturb immediate neighbours. These impacts may be largely mitigated by [the] selection of [a] percussion drilling method if this is available. By designing a piling schedule appropriately, impacts due to noise can be further mitigated. Noise and dust generated by construction activity and use of equipment will be mitigated by the erection of plywood boarding around the site early in the construction programme that will contain these within the site.”

[7] Some of the other specific adverse impacts identified in the EIS from building and construction were: (i) dramatic alteration of views/diminished aesthetics of the site from the sea, air and roadway, (ii) loss of public access to the beach for recreational purposes and (iii) dust, noise, vibration and air pollution from the operation of the concrete plant.

[8] The addendum to the EIS was submitted to the DCA in September 2010.<sup>9</sup> Section 10 headed ‘Comprehensive description of proposed development,’ contained a

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<sup>8</sup> Hearing Bundle Vol. 1 p. 1816.

<sup>9</sup> Hearing Bundle Vol. 2 p. 1121.

general description of the site, including it being bounded to the east by The Landings Hotel. On 18<sup>th</sup> January 2011, Two Seas' application No. 1041/10 'for the extension of Phase 1 – Venetian Village, Sandals Grande Saint Lucian Spa and Beach Resort,' was deferred by the DCA pending the submission of further information.<sup>10</sup> By letter dated 10<sup>th</sup> May 2011, Caribbean Consulting Engineers (St. Lucia) Ltd. responded on behalf of Two Seas to the issues listed in the DCA's letter.<sup>11</sup> On 9<sup>th</sup> June 2011 application No. 1041/10 was granted full approval by the Cabinet of the Government of Saint Lucia, subject to the implementation of all conditions and recommendations to be provided later by the DCA.<sup>12</sup> No conditions were subsequently provided by the DCA and this revised concept plan dated 2011,<sup>13</sup> for the development of Parcel 272, was not proceeded with by Two Seas.

[9] After a lapse of several years, Sandals decided, in 2017, to proceed with a newly designed scheme of development on Parcel 272. A drawing of the revised scheme appeared in Business Focus Magazine, where, apparently, it was seen by The Landings' representatives. Ms. King held two meetings with Landings' representatives on 18<sup>th</sup> and 30<sup>th</sup> October 2017 respectively (the "October 2017 meetings"). These meetings were not carried out at the DCA's request and the learned judge found, based on Ms. King's evidence, that 'it was her own decision [to hold the October 2017 meetings] triggered by the fact she felt it important since the concept had changed, and The Landings [Hotel] was within the sphere of influence of the development'.<sup>14</sup> No officer or representative of the DCA attended or participated in the October 2017 meetings.

[10] As the minutes of these meetings<sup>15</sup> records, the first meeting on 18<sup>th</sup> October 2017 was between Ms. King, Mr. Wilbert Mason and Ms. Kathy Taylor, the general manager and a director respectively, of The Landings. The purpose of this first

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<sup>10</sup> Hearing Bundle Vol. 2 pp. 1198 -1201.

<sup>11</sup> Hearing Bundle Vol. 2 pp.1208 -1210.

<sup>12</sup> Hearing Bundle Vol. 2 pp. 1204 -1205.

<sup>13</sup> Hearing Bundle Vol. 2 p. 1202.

<sup>14</sup> Judgment at para. [58](i).

<sup>15</sup> See exhibit "MH2" of Hearing Bundle Vol.1 pp. 1548 -1549.

meeting was two-fold: (i) to discuss any concerns which The Landings may have had with the current operation of the Sandals Grande and (ii) to discuss concerns which The Landings had with the Sandals-proposed construction and operations adjacent to The Landings property. The minutes record that at this meeting, Ms. King provided an overview of the planned development, using the conceptual layout as a guide. This was clearly a reference to the revised 'concept plan' for the development.<sup>16</sup>

- [11] The minutes also confirm that The Landings' representatives indicated that nine storeys was high and the setback of the development from the wall was also discussed. The minutes further noted that piling seven days a week from 7:30 am to 6:30 pm was discussed, as this would 'affect all rooms on that side of The Landings' property', and that 'nothing looks towards that site at present, with the exception of some of the patios [of The Landings Hotel]; the majority do not. Of a total of 125 apartments, approximately 15% of the patios look in that direction'. The minutes further recorded that:

"After the meeting, the [g]eneral [m]anager [Mr. Wilbert Mason] accompanied [Ms. King] to the area of The Landings property adjacent to the proposed Sandals development. Pictures were taken from the common areas (staircases) and patios looking towards the site. Landings back-of-house is also adjacent to the wall, on the roadside of the property."

- [12] The minutes of the meeting on 30<sup>th</sup> October 2017 recorded that in attendance, in addition to Ms. King, were Mr. Winston Anderson, the general manager of Sandals Grande, Mr. Mason and three directors/owners of The Landings, namely Mr. John Robertson, Ms. Anne Copeland and Mr. Phillips Scourfield. It was stated that the meeting had been convened 'on the request of The Landings management, made to [the] Sandals Grande management, to discuss concerns regarding the proposed Sandals development'. It was also recorded that at the said meeting, the 'concept plan was tabled'.

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<sup>16</sup> Annex 16 to the affidavit of Ms. King filed on 1<sup>st</sup> February 2019.

[13] These minutes also contained a summary of the discussions. Without reiterating verbatim each of the 10 matters listed as having been discussed, it was specifically recorded that, as regards the noise from piling, the ongoing operations at the Sandals Grande would also be subject to the same adverse impacts as The Landings Hotel. The impact on views from The Landings Hotel was raised, and the minutes noted that The Landings' representatives:

“...requested a copy of the concept plan, and to understand how close the proposed buildings are. They would also like to see the landscaping plan. They inquired regarding the status of [the] application/approval, and wondered whether the tall buildings could be placed on the [Sandals] Grande side rather than The Landings side of the property. Mr. Anderson undertook to ask the Sandals project team to share the plans. The use of landscaping to help with screening was discussed. Mr. Anderson noted that more than 300 palms were planted two years ago for this purpose.”

[14] These minutes further recorded that the other concerns of The Landings as regards the proposed development on Parcel 272, were (i) the construction noise, (ii) the need for them to be able to inform their owners and tour operators on likely impacts on a timely basis, (iii) the right of way between the two properties to the beach, (iv) the maintenance of a good relationship throughout the project being vital and (v) the agreement that the back of the 9 storey building facing The Landings Hotel [should] be aesthetically pleasing. It was also noted that The Landings had approved plans from 2004/5 for its development of ‘the open area facing Sandals’ and its representatives had –

“asked about the approval process and what the procedure for objection to a development was. [Ms. King] outlined the process. They also asked about access to the [environmental impact assessment (the “EIA”) report]. [Ms. King] responded that they would have to request it from Planning.”

[15] The Landings' evidence at trial was that at the October 2017 meetings, their representatives were allowed to view a plan for the proposed development on Parcel 272 on Ms. King's laptop, but they were not provided with copies of the said plans to take away. Ms. King, at Annex 18 to her affidavit filed on 1<sup>st</sup> February 2019, provided copies of 11 ‘renderings’ which she stated were presented at the 30<sup>th</sup>

October 2017 meeting. These are renderings depicting the proposed development on Parcel 272, including the 9 storey building.

- [16] On 30<sup>th</sup> October 2017, Ms. King sent to the DCA an Environmental and Social Impact Assessment (“ESIA”) and ESIA Addendum Update Report (the “ESIA Addendum Update”). The ESIA Addendum Update records that the persons engaged with for the preparation of the said report, included The Landings’ representatives who had attended one or both of the October 2017 meetings, that is, Mr. Mason, and the three owners/directors. The executive summary to the ESIA Addendum Update listed the changes to the scheme from the previous 2009 concept. These included an increase in the number of keys from 223 to 380, ‘with the increased numbers primarily accommodated within room blocks reaching up to 9 storeys’, increased offerings and facilities, reduced parking spaces, and ‘the conversion of 10’ public beach access on the southeast boundary to an internal site road along the length of the boundary, with existing public beach access on the eastern boundary of Landings to be improved in lieu’.
- [17] Regarding significant potential impacts on neighbouring properties, the ESIA Addendum Update identified ‘noise from piling for foundations and to support overwater suites’ located adjacent to The Landings Hotel, ‘alteration of views will be more dramatic with 9 storey buildings, where previously, the highest was 4 storeys’ and ‘reduced access to the beach by the public’. The proposed mitigation works identified included ‘inclusion of works on public access east of Landings [Hotel] in the development plans’, and ‘removal of fence on beach, between Sandals La Source and Landings [Hotel]’.
- [18] The ESIA Addendum Update included tables showing the changes to the original EIS. Importantly, the said report identified several adverse impacts on The Landings Hotel. These included: noise, vibration and other nuisance caused by pile driving for foundations and jetty construction, assessed as high impact, and dramatic alteration of views/diminished aesthetics of the site from the sea, air and roadway now

assessed as high impact. In relation to the latter, impact on views, the ESIA Addendum Update noted that:

“...there is no national or local area policy that limits building heights, and the Royalton Resort to the north of the site has completed buildings up to 7 storeys high. The Harbour Club to the south is of similar height. The greatest potential adverse impact on views will be from the adjacent resorts (Landings and Sandals Grande). Although most rooms at both resorts face away from this site, either towards The Landings marina or the sea, an estimated 15% of The Landings’ 125 apartments have balconies that face the new Sandals property, some across The Landings marina.”

- [19] It was recommended, inter alia, in the said report that ‘Architectural design must consider the view from the neighbouring Landing[s] property’, and ‘[l]andscaping along The Landings’ boundary should be designed to soften views from [the] Landings [Hotel] into the site’. In a section of the ESIA Addendum Update under the rubric ‘Key Potentially Adverse Impacts and How These May be Mitigated’, it was stated:

“Loss of Views

This was not previously considered to be a significant adverse impact, however, it is now considered to be so, particularly for the adjacent Landings property, due to the significantly increased building heights proposed. Although, for the majority of Landings’ apartments, the direction of views is typically not towards the [Sandals] La Source property, it will be a big impact on those properties on the common boundary near the waterfront.”

- [20] Other adverse impacts identified in the ESIA Addendum Update were competition for scarce potable water resources and increased volumes of brine discharge. The vulnerability to storm surge and interference with traditional fisher activities were identified as potential adverse impacts which remained high. As regards the potential adverse impact from increased vehicular traffic, it was noted that the capacity of the Castries to Gros Islet Highway had already been exceeded, and the proposed development scheme would increase the daily vehicular trips from the Sandals Grande from 710 (in the 2009 scheme) to 1200 from the current scheme.

- [21] While the ESIA Addendum Update identified four representatives of The Landings as ‘persons engaged,’ namely, Mr. Mason, Mr. Robertson, Ms. Copeland and Mr.

Scourfield, their views on the proposed development scheme and its potential adverse impacts on The Landings property were not identified or included in the said ESIA Addendum Update.

- [22] The planning application dated 16<sup>th</sup> November 2017 with the ESIA Addendum Update submitted by Two Seas, identified The Landings' property to its eastern boundary. The application was, on 6<sup>th</sup> December 2017, deferred pending the submission of further information and public body comments. An additional 'Component 2' was submitted by Two Seas for approval on 15<sup>th</sup> December 2017. This contained six linked two storey buildings providing for an additional 65 units.
- [23] On 15<sup>th</sup> January 2018, The Landings' lawyers wrote to the DCA<sup>17</sup> stating that their client was concerned about the proposed development on the neighbouring Parcel 272. They requested copies of the development plans being considered by the DCA with regard to the intended project on Parcel 272 and 'the Master Development Land Use plans for Gros Islet generally which shows the intended development parameters to guide the DCA's control of developments for the entire Gros Islet area, which ought to include Cap Estate and Rodney Bay.' This letter did not identify or set out any of The Landings' concerns with the proposed development. However, up to that point The Landings' representatives had only been permitted to view, on Ms. King's laptop, certain plans for the proposed development, and only for a short period.
- [24] In its reply letter dated 19<sup>th</sup> January 2018<sup>18</sup> the DCA, in response to The Landings' first request, pointed them to the register established in accordance with Part 6, section 47 of the **PPDA**, and stated that '... any person shall be entitled to access the information recorded therein and to take copies of such information on payment of the prescribed fee'. With regard to the second request, the DCA responded that it 'does not have any approved Master Development Land Use Plans for Gros Islet

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<sup>17</sup> Hearing Bundle Vol. 1 p. 1070.

<sup>18</sup> Hearing Bundle Vol. 1 pp.1071-1072.

generally. The DCA however has approved land use plans for Cap Estate and Rodney Bay which can be viewed at the office of the DCA’.

[25] On 13<sup>th</sup> March 2018, The Landings’ lawyers inspected the ‘register’ kept at the DCA. A copy of the register was not produced in evidence at the trial. However, The Landings’ evidence is that the register contained a one-line entry referencing the subject application by Two Seas to develop Parcel 272. It did not give any details with regard to the proposed new development and did not provide access to the relevant application documents and plans. Upon requesting to see the application documents, the lawyers were shown the ‘piling plan’ only, which, apparently, was the only approved plan at the time in relation to the proposed development on Parcel 272. Their request to be provided with a copy of the piling plan was denied.

[26] An Application Appraisal Report dated 3<sup>rd</sup> April 2018<sup>19</sup> (the “Appraisal Report”) as to the overall merits of the proposed development scheme, was prepared by the technical staff at the DCA and submitted to the DCA’s board for their consideration when determining whether to approve the subject application for the proposed development on Parcel 272. The proposed development was ascribed reference numbers 955/17, 955A/17 and 955B/17. The topographic map appended to the Appraisal Report identified the proposed development site and its proximity to the Sandals Grande and The Landings Hotel.

[27] The Appraisal Report described the proposed development on Parcel 272 as ‘Phase 2 of a touristic development which is an extension to the Sandals Grande at Pigeon Point, Gros Islet’. Phase 2 is stated as comprising three components:

“**Component 1** - ARN. 955/17 (consisting of a 5 storey and a 9 storey building, 8 Rondavel suites, 6 overwater suites, a restaurant, 5 swimming pools). This component had been previously considered by the board of the DCA on 6<sup>th</sup> December 2017 and further consideration deferred pending resolution of certain listed matters – four by the applicant, of which it had addressed three; and input from seven agencies and Ministries of

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<sup>19</sup> Hearing Bundle Vol. 2 p. 1914.

Government, responses having been received from each of them as noted in the Appraisal Report;

**Component 2** – ARN. 955A/17 (consisting of a 2 storey building consisting of 6 building blocks linked by a common corridor and ancillary buildings, 9 Rondavel suites, a central facility building and a river pool – a total of 65 units) previously considered by the DCA's board at its meeting of 16<sup>th</sup> February 2018; and

**Component 3** – ARN. 955B/17 (consisting of the construction of buildings for maintenance, a central plant, entertainment, a stage, a pub, a gym, Café de Paris, housekeeping, and a restaurant - Sandals La Source which is an extension to Sandals Grande at Pigeon Point, Gros Islet) - buildings to be determined by the board of the DCA along with Components 1 and 2.”

[28] The Appraisal Report noted that the DCA's board, at its meeting on 16<sup>th</sup> February 2018, considered Component 2 and a request for approval of piling of the nine and five storey buildings which form part of Component 1. The board approved the request for the piling of the five and nine storey buildings, and deferred further consideration of Phase 2 pending certain matters which Two Seas was required to submit to the DCA. The Appraisal Report also noted that, as part of the DCA's decisions at its 16<sup>th</sup> February 2018 meeting, Two Seas was 'to be guided by and adhere to' certain specific matters during the construction and operation of the development. The Appraisal Report records that on 27<sup>th</sup> February 2018, the DCA had received a response from Two Seas which included an Addendum to the EIA and volumes 1 and 2 of an ESIA dated December 2009 which had been conducted for a touristic development for the site. These were then forwarded to the referral agencies for review 'to ensure that issues articulated by the [b]oard of the DCA have been addressed.' The Appraisal Report also records that as of that date, only one response had been received from the referral agencies, that is, from the Department of Fisheries. Accordingly, as at that time, responses were outstanding from 7 referral agencies.

[29] The Appraisal Report contained no reference to The Landings having expressed concerns about the development project or that they had sought copies of and access to the application documents, but had been refused. A copy of a traffic

management approval dated 27<sup>th</sup> December 2017 was also appended thereto. This related to construction traffic and referred to an approved traffic management plan, a copy of which was not appended to the Appraisal Report. The Appraisal Report also referred to setbacks. However, with respect to Component 1, consisting of the 5 and 9 storey buildings, only the southern and western setbacks were given. No eastern setback with The Landings was stated. The Appraisal Report also dealt with public access to the beach. It indicated that the previously approved 10' public access to the beach had been moved from the southeastern boundary of the subject property Sandals La Source, to the southeastern boundary of The Landings' property, as indicated on the site management plan and must be developed in accordance with DCA standards. The density of the proposed development (380 units Component 1 and 65 units Component 2, totaling 445 units) with an allowance of 593 units, 'meets the allowable density in accordance with DCA standards'.

- [30] Four issues were identified in the Appraisal Report, two of which pertained to the proper certification of drawings by an engineer. The third sought clarification of the method of draining the concrete roof on the pub building and the fourth again noted that input had not been received on the Addendum to the ESIA from all but one of the referral agencies. However, in the 'comments' section of the Appraisal Report, it was stated:

"Notwithstanding the outstanding responses from the referral agencies, it must be noted that the issues highlighted in the Addendum of the [b]oard decision of [16<sup>th</sup>] February 2018 were largely articulated by the Ministry of Health and the Fisheries Department. Public Health approval dated [21<sup>st</sup>] March 2018 subject to conditions was obtained by the developer. A response was received by the DCA from the Department of Fisheries."

- [31] However, the Appraisal Report did not specifically identify any significant harm to views, including from The Landings' property, which had been identified in the ESIA Addendum Update, or any adverse impact on The Landings other than the relocation of the public access to the beach. The Appraisal Report recommended approval of all 3 Components of the proposed development, subject to: (i) 3 matters which Two Seas was required to do (two matters pertained to certification of

drawings by the appropriate engineer and one related to clarification of the concrete roof drainage for the pub building) and (ii) 7 recommendations to which Two Seas was to be guided.

- [32] The planning application for the Phase 2 development of Parcel 272 submitted by Two Seas, comprising Components 1, 2 and 3, was approved at a meeting of the DCA's board on 11<sup>th</sup> April 2018. The approval letter issued to Two Seas is dated 18<sup>th</sup> April 2018. Approval was given subject to the condition that 'the applicant is to be guided by certain recommendations'. These included consultation with fishers, and:

"d. The public access to the beach located on the south eastern boundary of The Landings property as indicated on the Site Management Plan must be developed including labelled in accordance with DCA standards;

.....

f. The most feasible option for the removal of the groyne located immediately west of The Landings' breakwater should be undertaken in a manner that will ensure that the impact to the coastal habitat is minimized as much as possible...."

- [33] By letter dated 17<sup>th</sup> April 2018, The Landings' lawyers wrote to the DCA<sup>20</sup> expressing their concerns as to the lack of consultation with The Landings given the potential impact on their property and its operations, and the proximity and size of the development. In the said letter it was observed that construction was ongoing on Parcel 272, and that it was their client's understanding that approval had been granted for the hotel development on Parcel 272. The letter noted that The Landings Hotel 'ha[d] been in operation since 1<sup>st</sup> December 2007 and was constructed at a cost of US\$150 million, with investments in the condominium units at an average cost of US\$800,000'. The letter went on to assert:

"Any development on lands adjacent to our client's property would be of serious urgent concern as construction of any nature would result in noise, dust, and general nuisance and environmental disturbance. It is also important to ensure that the nature and scope of any proposed development will be in keeping with the general nature and design, blend and scale with surrounding properties or developments and not negatively affect tourism resources or result in situations in which the positive socio-

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<sup>20</sup> Hearing Bundle Vol.1 pp.1074 - 1079.

economic effects to be derived from the project do not outweigh the potential negative effects of the project. Any activity carried out within proximity to our client's property which disturbs or threatens the hotel activity or residential nature of the development would lower the value of our client's properties and operations and cause irreparable harm."

The letter also expressed The Landings' concern that they 'had not been consulted, engaged or given an opportunity to be heard given the nature and effect of this development on its property and operations'. The letter further stated that:

"The development has commenced on [P]arcel 1257 272, a mere 42 inches from our client's boundary and in certain instances, on our client's property, [the development] will consist of 380 rooms and will be of a height of nine storeys. The main buildings will all be cited in close proximity to our client's boundary which will severely impact on the light our client's properties presently enjoy and will cast shadows over the property, severely impeding and impacting the use and enjoyment they have had in the past."

- [34] The letter also expressed The Landings' concern that the proposed development on Parcel 272 was 'not in keeping with the scale and blend of the surrounding properties'. In this vein, the letter also pointed out that there was no 9 storey building in the Pigeon Island area, and 'the proposed hotel does not conform to or blend with the height and scale of the surrounding properties'. It identified the material considerations with the proposed development, including impacts on neighbouring properties from noise from piling and compliance with certain provisions of the DCA's Manual for Developers (the "Manual") dated February 1988. By this letter, The Landings asserted that the DCA had failed to take certain material considerations into account in arriving at its decision to approve the development on Parcel 272. They pointed to what they saw as 'procedural irregularity' and abuse of process. The letter requested from the DCA within 12 days (i) all plans, drawings for the proposed development and (ii) all reports pertaining to the listed matters. These matters included the EIA and socio-economic assessment, sewage treatment and liquid waste management assessment, traffic management plans, public health reports on the operations during and post construction, any report from the Ministry of Tourism and other agencies concerning the impact this development project would have on the operations of The Landings Hotel and its bookings with their tour operators, and the results of the study of the proposed development as it

relates to the negative impact it will have on a tourism resource, and whether the positive socio-economic effects to be derived from the operation of the Sandals operation on Parcel 272 outweigh the negative effects of the project.

- [35] In its reply letter dated 9<sup>th</sup> May 2018<sup>21</sup> the DCA informed The Landings that the approved plans and reports were available for viewing at the office of the Physical Planning Section. As to the request for copies of the various reports, the DCA stated that following the DCA's Design Guidelines, the minimum standards at pages 15 to 19 of the Guide to Obtaining Planning Permission to Develop Land (the "Guide") 'indicate some of the considerations in assessing developments'. The DCA's letter also stated that, in addition, 'other material considerations were taken into account'. These 'additional considerations' include, but were not limited to, the following:

- "1. Compatibility of the proposed land use with the existing land use;
2. Availability of utilities;
3. Preparation of an Environmental and Social Impact Assessment (ESIA) for the proposed development;
4. All the submission requirements have been fulfilled by the applicant..."

- [36] This reply from the DCA was followed by a letter before action dated 14<sup>th</sup> May 2018 from counsel for The Landings, to the DCA.<sup>22</sup>

#### **Lower court claim for Judicial review**

- [37] Leave having been granted on 3<sup>rd</sup> July 2018, judicial review proceedings were commenced by The Landings by fixed date claim form ("FDCF") filed on 13<sup>th</sup> July 2018.<sup>23</sup> By its FDCF, The Landings sought a declaration that the decision of the DCA made 18<sup>th</sup> April 2018 approving the planning application by Two Seas for the development on Parcel 272 was illegal, arbitrary, irregular, irrational, unfair, unreasonable, made in breach of the rules of natural justice and an improper exercise of its discretion. The Landings also sought an order quashing the said decision of the DCA and an award of damages arising out of the damage caused

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<sup>21</sup> Hearing Bundle Vol.1 pp. 1080 – 1082.

<sup>22</sup> Hearing Bundle Vol. 1 pp.1157 - 1159.

<sup>23</sup> Hearing Bundle Vol. 1 p.1260.

by the development to them. The claim was supported by the affidavit of Ms. Copeland, chairman of the board of The Landings.<sup>24</sup> The DCA filed the affidavit of Mr. Werner Housen, planning officer at the DCA, in response.<sup>25</sup> Two Seas were added on 19<sup>th</sup> November 2018 as an interested party in the proceedings. The affidavit of Ms. King was filed on 1<sup>st</sup> February 2019.<sup>26</sup> Two Seas has taken an active part in the proceedings in the court below and in the appeal before this Court.

[38] On 12<sup>th</sup> December 2018, the learned judge dismissed an application by Two Seas dated 22<sup>nd</sup> October 2018 to set aside the leave granted to The Landings to commence judicial review proceedings in the matter. The grounds of Two Seas' application were that The Landings had no proprietary interest, legal or beneficial, in the said property adjacent to Parcel 272 and that The Landings was not authorised under the **Condominium Act**, the declaration under which it was established, or by its by-laws, to operate the business of a hotel and was therefore acting ultra vires and The Landings had no sufficient interest in the matter. In dismissing the application, the learned judge concluded that The Landings had a sufficient interest to bring judicial review proceedings pursuant to rule 56.2(2)(b) and (c) of the **Civil Procedure Rules 2000** (the "**CPR**"). The judge also ordered that the issue of standing may be further considered on the hearing of the substantive claim. The written judgment is dated 12<sup>th</sup> December 2018.

[39] At the trial, Ms. Copeland gave evidence on behalf of The Landings. She was cross-examined at some length by learned counsels for both the DCA and Two Seas.<sup>27</sup> Mr. Robertson, who resides in Macau and had provided an affidavit filed on 29<sup>th</sup> January 2019 in the proceedings below, did not attend the trial. When pressed by the learned judge, counsel for the DCA opted not to cross-examine, via electronic means, Mr. Robertson on his said affidavit, having apparently forgotten to previously notify counsel for The Landings as to whether he definitely wished to cross-examine

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<sup>24</sup> Hearing Bundle Vol. 1 p.1263.

<sup>25</sup> Hearing Bundle Vol. 1 pp. 1281 – 1284.

<sup>26</sup> Hearing Bundle Vol. 1 p. 1764.

<sup>27</sup> Judgment at paras. [29] to [37].

Mr. Robertson at the trial. Mr. Robertson's evidence was, accordingly, taken into consideration by the learned judge in giving her judgment. Mr. Housen, and Ms. Karen Augustin, the executive secretary of the DCA, gave evidence at the trial on behalf of the DCA. Ms. King, who had been engaged by Sandals in 2009 also gave evidence.<sup>28</sup>

- [40] At the trial, both the DCA and Two Seas again raised the issue of The Landings' standing to bring the claim for judicial review. In her written judgment delivered on 4<sup>th</sup> July 2019, the learned judge identified this as the first of four issues for determination.

#### **Judgment of the court below**

- [41] The four issues identified by the learned judge for determination in the proceedings below were:
- (i) Whether The Landings had standing to bring the claim ("issue 1");
  - (ii) Whether the DCA had a duty to consult The Landings as part of its decision-making process? This entailed an examination of whether any such duty arose pursuant to a legitimate expectation, a duty to take into account material considerations, a duty to conduct sufficient enquiry or the principle of fairness ("issue 2");
  - (iii) Whether the DCA approved an illegal trespass on The Landings' property by Two Seas ("issue 3"); and
  - (iv) Whether The Landings was entitled to the relief that it sought.
- [42] As to issue 1, the learned judge held that The Landings did have sufficient interest in the subject of the planning approval application to bring the claim for judicial review, and confirmed her ruling and order to that effect dated 12<sup>th</sup> December 2018 which included the qualification '[a]s The Landings does not in fact manage or operate the rental pool/hotel, it is not in a position to maintain the claim for loss suffered in that regard and could not properly be awarded the damages it seeks for

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<sup>28</sup> Judgment at paras. [50] to [57].

injury to the hotel business'.<sup>29</sup> The Landings has appealed in ground 6 of its amended notice of appeal against the judge's qualification as to the scope of The Landings' standing in these proceedings. The DCA has not cross-appealed against the lower court's decision on standing. Accordingly, the judge's ruling that The Landings has a sufficient interest in the subject matter of the claim to have standing to bring the claim for judicial review, stands, subject to the question as to whether that qualification is or ought to be set aside by this Court.

[43] As to issue 2, which is the core of this appeal, the learned judge, having examined the evidence of the various witnesses and the documentary evidence before the court, made three important findings at paragraph [58]. The first is that contrary to the DCA's assertion that it had consulted with The Landings, the DCA did not consult The Landings before arriving at its decision on Two Seas' application for planning approval in relation to Parcel 272. The judge found that there was no request from or requirement of the DCA for Ms. King, the consultant engaged by Sandals, to consult with The Landings, as had been the case with the fishers. Accordingly, Ms. King's decision to meet with the representatives of The Landings in October 2017 as part of her exercise to update the EIA, 'was her own decision triggered by the fact she felt it important, since the concept had changed, and The Landings was in the sphere of influence of the development'. Whilst the DCA's evidence was that it did consult with The Landings, it was clear that the DCA did not themselves consult or require consultation, 'but all the same did not object to the 'consultation' which Ms. King, as part of the EIA process, said she undertook'.

[44] The second finding by the learned judge at paragraph [58] is that, at the time of the October 2017 meetings which Ms. King had with representatives of The Landings, 'there was no application for permission in respect of the development [on Parcel 272] before the DCA and therefore, there could have been no duty on the part of the DCA to consult with The Landings' and, likewise, the said meetings with The Landings could not have amounted to consultation by the DCA. The judge further

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<sup>29</sup> Judgment at paras. [24] and [69].

noted that ‘Ms. King’s undisputed evidence is that the application and the ESIA Addendum Update Report were submitted simultaneously on 16<sup>th</sup> November 2017. The meetings were held on 18<sup>th</sup> and 30<sup>th</sup> October 2017’.

[45] The learned judge’s third finding at paragraph [58] is an even more emphatic one. It is that Ms. King, having been engaged and paid by Two Seas, was acting at all times ‘as a consultant for Two Seas, hired and paid by Two Seas, and therefore [acted] as agent of Two Seas and not the DCA’. Having made these three important observations and findings, the learned judge did not deem it necessary to consider the question whether Ms. King’s meetings with The Landings in October 2017 ‘rose to the threshold required for there to have been proper consultation’ (having found that they did not, and could not amount to consultation by the DCA), but whether ‘there was in fact a duty on the DCA to consult The Landings’.

[46] In addressing this singular and important question, the learned judge concluded that the **PPDA**, which governs applications for planning permission to develop land in Saint Lucia, does not impose a duty on the DCA to consult with any person or group or with the public generally, when considering applications for development approval. She opined that notwithstanding, a duty to consult may arise at common law where there is a legitimate expectation by a party that it will be consulted. This legitimate expectation to be consulted arises where there has been a promise to consult, or there has been an established practice of consultation, or where a failure to consult would lead to capricious unfairness such as where a decision directly affects a person’s interests or as part of a duty to take into account material considerations.<sup>30</sup> Where there is no legitimate expectation to consult which arises in the particular circumstances of a case, the courts will be reluctant to find an implied statutory duty to consult.<sup>31</sup>

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<sup>30</sup> See *R (on the application of BAPIO Action Ltd and another) v Secretary of State for the Home Department and another* [2007] EWCA Civ 1139 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>31</sup> See *Wood v Ealing London Borough Council* [1966] 3 All ER 514.

- [47] The learned judge cited an extract from the judgment of Rimer LJ in **R (on the application of BAPIO Action Ltd and another) v Secretary of State for the Home Department and another**<sup>32</sup> to the effect that, the real reason why applicants are not entitled to succeed on the consultation issue is because, where consultation is not part of the statutory regime, it is not for the courts to re-write the statute because the legislature has chosen to remain silent on the topic. She then set out in detail the statements of principles applicable to the common law duty to consult (these are traversed in some detail in the section of this judgment dealing with the applicable law). The learned judge then dealt first with whether a duty to consult arose here by legitimate expectation. She concluded that The Landings had not established any promise made to it by the DCA that it would be consulted, and had 'failed to identify any established practice which would give rise to an expectation that it would be consulted.'<sup>33</sup> With regard to The Landings' reliance on paragraphs 4.8.1 and 4.8.3 of the Manual as establishing the practice, policies and procedure for consideration of applications to develop land for touristic purposes, the learned judge reasoned that 'when these sections are carefully examined, they do not in any way establish, recommend, or suggest a practice of consultation'.<sup>34</sup>
- [48] Regarding the issue of whether the **PPDA** and the Manual required the DCA to have regard to 'material considerations' leading to a duty to consult The Landings, the learned judge observed that whilst section 23(1) of the **PPDA** does require the DCA to have regard to any other material considerations, the **PPDA** does not define the term 'material considerations'.<sup>35</sup> The judge also accepted that the Manual does 'set out relevant considerations in respect of tourism development, which focus heavily on environmental impact, but also mentions socio-economic impact' and requires a technical study to be produced by the applicant. These provisions require the DCA to consider whether the proposed development 'blend[s] with surroundings by reason of sitting, design, scale and landscaping' and 'ha[s] no adverse effect with

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<sup>32</sup> [2007] EWCA Civ 1139.

<sup>33</sup> Judgment at para. [63].

<sup>34</sup> Judgment at para. [65].

<sup>35</sup> Judgment at para. [66].

regard to noise, traffic congestion, or destruction of features of interest in the area'. It requires the applicant for planning approval to submit to the DCA a technical study undertaken 'to inform the DCA and other agencies of the government of the full environmental and socio-economic implications of the project'.

- [49] The judge concluded, on the issue of 'material considerations' leading to a duty to consult The Landings as a neighbouring tourism property likely to be adversely impacted by the development on Parcel 272, in these terms:

"[68] Respectfully, The Landings has not shown that these considerations were not taken into account by the DCA, which is the extent of the requirement imposed by the Manual. The Landings suggests that because the development is proposed to be twice the height of the existing neighbouring developments, it does not blend in sitting, scale and design. However, this is a matter for [the] DCA's determination. It is not appropriate for this [c]ourt or The Landings to seek to substitute its decision for that of the DCA. The considerations imposed by the Manual are within the discretion that has been reposed in the DCA by statute, as the local authority with responsibility for granting permission in Saint Lucia. Furthermore, these are considerations among others which necessarily involve a weighing of negative effects with the advantages to be obtained. This is the effect of the provision in the Manual, which after listing the relevant considerations concludes: "The DCA will not grant permission for any development which may negatively affect tourism resources of the Island or result in situations in which the positive socio-economic effects derived from the project do not outweigh the potential negative effects of the project." This is the nature of a discretion."

- [50] As to a claim by The Landings on the basis that its property is 'an important tourism resource' and that the Manual requires the DCA to take into account material considerations, including the impact on its on-going hotel business and scenic views, the learned judge concluded '[f]or the reasons stated above, The Landings cannot properly maintain a claim on behalf of the hotel/rental pool which it does not own, manage, or operate'.<sup>36</sup> This conclusion harkens back to the learned judge's ruling on the standing of The Landings in these proceedings and, specifically, limitations as to its scope. This issue is the subject of ground 6 of this appeal.

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<sup>36</sup> Judgment at para. [69].

[51] On the question of whether the DCA had conducted a sufficient inquiry, the judge opined that the test is one of rationality, not process.<sup>37</sup> She found at paragraph 73 that:

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

[52] The learned judge opined that:

“The answer to the question whether, knowing what the DCA did, its decision to grant approval was rational, without making further inquiries, must be yes. Many of the negative impacts raised by The Landings are predictable, such as noise and dust pollution and traffic congestion. Further, these are temporary inconveniences for which there are well established mitigation measures. The potential for these impacts could not render the decision to grant approval for the development unreasonable. In the words of Ms. King the EIA consultant, they were expected construction impacts or by products on any construction.”<sup>38</sup>

[53] The judge also concluded that The Landings had not established any law, rule or regulation establishing or protecting a right to light or views. She considered the decision in **R (on the application of White) v Secretary of State for the Home Department**<sup>39</sup> in which the claimant had appealed the decision of the inspector to

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<sup>37</sup> Judgment at para. [70].

<sup>38</sup> Judgment at para. [74].

<sup>39</sup> [2011] EWHC 897 (Admin).

grant planning permission to the high court contending that the neighbouring property would block the light to the window at the side of his house. In that case, Lindblom J held, inter alia, that the right to light was a civil matter and any infraction of a property right of this kind would be a matter for civil litigation, say, upon commencement of the works to implement the planning permission. The learned judge concluded that to the extent that 'there is no right to light or views and no regulations prohibiting developments of a certain height in Saint Lucia which is the DCA's stated position, the decision has not been shown to be irrational'.<sup>40</sup> She also posited at paragraph [77]:

"Different considerations would I think apply had the development been of a nature totally inconsistent with tourism development. The fact that some sort of consultation, or further inquiries, might have been possible or desirable, does not mean that no reasonable or rational decision-maker could have made the decision on the basis of the information which had been before the DCA."

[54] On the important question of fairness giving rise to a duty on the DCA to consult The Landings since it would be directly and adversely affected by the development, the learned judge considered, in some detail, the decision of the high court of Trinidad and Tobago in **Ulric 'Buggy' Haynes Coaching School and 18 Ors. v Minister of Planning and Sustainable Development**.<sup>41</sup> She concluded that this case was distinguishable from the instant case having been decided on its own peculiar facts and statutory provisions. The judge also opined that the said decision, in any event, confirms 'that there is no general duty to consult when considering whether to grant permission to develop land'.<sup>42</sup>

[55] On the third issue identified by the learned judge for determination, that is whether the DCA approved an illegal trespass on The Landings property by Two Seas, the learned judge concluded that it 'has not been established on a balance of

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<sup>40</sup> Judgment at para. [76].

<sup>41</sup> H.C. 5227/2013.

<sup>42</sup> Judgment at para. [82].

probabilities that the DCA approved a trespass on The Landings' property by Two Seas'.<sup>43</sup> I shall return to this when considering ground 5 of the appeal.

- [56] In concluding, the learned judge surmised that The Landings had not-  
"established before this [c]ourt any statutory duty on the part of the DCA to consult; duty arising out of any legitimate expectation whether by promise or established practice; or that the impacts to The Landings, other than those contained in the EIA which was before the DCA for consideration, were material considerations which had not been taken into account."<sup>44</sup>  
Accordingly, the judge concluded that The Landings had failed to establish that the decision to grant the planning approval to Two Seas for the development of Parcel 272 was one no reasonable authority could have come to on the material before it, so as to have acted irrationally and unreasonably.<sup>45</sup>

### **Grounds of appeal**

- [57] As mentioned above, The Landings relies on six grounds of appeal. Some grounds raise several issues or sub-grounds for consideration. The six grounds (including sub-grounds) of appeal are set out in the amended notice of appeal filed on 23<sup>rd</sup> June 2021.
- [58] These 6 grounds of appeal raise three broad issues. They are: (i) whether the DCA had a duty to consult The Landings arising by legitimate expectation, and/or fairness, and/or an obligation to take into account material considerations and existing policies, (ii) the alleged invalidity of the planning application and the lawfulness of the planning approval by the DCA and (iii) if, at paragraph [69] of the judgment, the learned judge is to be understood as saying that The Landings could not bring a claim for judicial review in respect of impacts on the hotel/rental pool, as distinct from seeking a damages remedy, as the judge correctly ruled at paragraph [24], the judge had thereby erred.

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<sup>43</sup> Judgment at para. [90].

<sup>44</sup> Judgment at para. [93].

<sup>45</sup> Judgment at para. [94].

- [59] In relation to the first of these broad issues, the duty to consult, several bases are relied on by The Landings. These include fairness, legitimate expectation, failure to permit The Landings to have sight of and to be provided with copies of the underlying application documents, the non-compliance with the provisions of section 47 of the **PPDA** relating to keeping a register of applications for planning permission and permitting a member of the public to search the register and the underlying documents and failure to take account of material considerations and declared policies in the Manual at paragraphs 4.8.1 and 4.8.3.
- [60] In relation to the second broad issue, the lawfulness of the planning process and approval, The Landings contends, in addition to the matters raised under the first broad issue, that the Two Seas' planning application was invalid as it did not comply with section 19(b) of the **PPDA** and, consequently, the approval of the said application by the DCA was itself unlawful. This legal issue is rooted on the factual issue that the application site, as shown on the plans submitted, included, incorrectly, a small strip of The Landings' property. It is contended that the planning permission granted to Two Seas approved a trespass to that area of The Landings' property, rendering it unlawful and invalid.
- [61] The third broad issue concerns the correctness of the judge's statement at paragraph [69], which reads '[f]or the reasons stated above The Landings cannot properly maintain a claim on behalf of the hotel/rental pool which it does not own, manage, or operate'. This ground of appeal is based on a strained understanding or possible interpretation of that ruling by The Landings which, if accurate, would exclude The Landings from making a claim for judicial review based on the impacts of the approved development on the hotel/rental pool, as distinct from a claim for damages, which was clearly the judge's ruling at paragraph [24]. However, as matters unfolded this ground of appeal turned out to be a 'non-point,' since neither counsel for the DCA nor counsel for Two Seas understood the learned judge at paragraph [69] to be saying anything different from what she had ruled at paragraph [24].

[62] The first broad issue, the duty to consult, is at the core of this appeal. It was determinative of the claim for judicial review in the court below. It encompasses the issues raised by grounds 1 - 4 of the appeal. These all go to the principal issue of whether there was, in law, a duty on the part of the DCA to consult with The Landings, and if so, whether what took place amounted to proper consultation. Having considered these grounds of appeal and the various issues raised, and the way in which counsel for the parties dealt with them in their written submissions, I have distilled the 6 grounds of appeal into the following heads for consideration in this judgment:

**A. Duty to Consult:**

**(1) Legitimate Expectation** arising by -

- (i) the Manual prescribing application forms requiring certification that notice of an application had been given by an applicant to adjacent property owners thus enabling The Landings, as an immediately adjacent property owner, to comment on it (**Ground 1(b)**);
- (ii) paragraphs 4.8.1 and 4.8.3 of the Manual concerning touristic developments having identified certain impacts on adjacent properties to be addressed in a technical study to be submitted by an applicant for assessment by the DCA, would necessarily involve the DCA having to obtain adequate information on those impacts and how they should each be weighed in the planning balance, leading to a requirement or legitimate expectation of consultation with The Landings (**Ground 1(c)**); and
- (iii) the DCA's evidence at trial being that it did consult with The Landings thus evincing a decision to consult, failed to

properly consult with The Landings, as the judge found (**Ground 2**).

(2) **Fairness** arising by -

- (i) the proximity to the development site and potential impact of the scheme on The Landings' property acknowledged in the EIS and the ESIA Addendum Update (**Ground 1(a)**);
- (ii) the DCA refusing to allow The Landings to see and take copies of the application documents, thereby depriving The Landings of the ability to make representations on the application, including the adverse impacts of the scheme on The Landings (**Ground 3(a)**);
- (iii) refusing to allow The Landings to see and take copies of the application documents contrary to section 47 of the **PPDA**, which makes provision for the DCA to keep and allow public access to a register of particulars of applications for planning approval, and to make its contents and documents available to the public (**Ground 3(b)**);
- (iv) implication from the provision of the DCA's 'Guide' (revised January 2018) on searching the application register to be kept pursuant to section 47 of the **PPDA** (**Ground 3(c)**); and
- (v) the failure by the DCA to have regard to material or relevant considerations regarding, specifically, the effect of the construction, operation and existence of the scheme on the surroundings, including The Landings and its failure to consider relevant policies in the DCA's Manual (Vol.1 dated February 1988), the impacts which the scheme would have on The Landings' property, that The Landings were concerned about those impacts, or the planning balance

between benefits and harms, which matters were not addressed in the ESIA Addendum Update (**Ground 4**).

**B. Whether the DCA acted unlawfully:**

- (i) the planning application, and hence its approval, was invalid pursuant to section 19(b) of the **PPDA** as the application site did not relate exclusively to Two Seas' land, Parcel 272, but included a part of The Landings' property, Parcel 182, with the result that the decision and approval thereon by the DCA relating to that part of The Landings' property effectively approved a trespass, which trespass has now been conceded by Two Seas (**Ground 5**).

**C. Lower court's ruling at paragraph [69] on standing:**

- (i) whether the ruling at paragraph [69] incorrectly prevented The Landings from raising the impact of the development on the hotel/rental pool (**Ground 6**).

**The Landings' fresh evidence application**

- [63] On 20<sup>th</sup> May 2022, The Landings filed an application for an order to admit, as fresh or new evidence in the appeal, five documents in civil case SLUHCV2021/0288 (formerly SLUHCV2018/0263) The Landings Proprietors Unit Plan No. 2 of 2007 v Two Seas Holdings Limited. These documents are (i) a fixed date claim form filed 5<sup>th</sup> June 2018, (ii) a statement of claim filed 5<sup>th</sup> June 2018, (iii) a defence filed 17<sup>th</sup> July 2018, (iv) a reply filed 2<sup>nd</sup> August 2018 and (v) a consent order dated 15<sup>th</sup> December 2021 (filed 22<sup>nd</sup> December 2021). For these documents to be admitted as evidence in this appeal, The Landings must satisfy each of the three limbs of the well-established **Ladd v Marshall**<sup>46</sup> test. It is to be observed that while the first four of the five documents sought to be admitted are dated and filed in June, July and August 2018, before the trial dates of 15<sup>th</sup> and 17<sup>th</sup> May 2019, the fifth, and perhaps

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<sup>46</sup> [1954] 3 All ER 745.

the most relevant of the documents, the consent order dated 15<sup>th</sup> December 2021, came into existence after the trial had been concluded and judgment rendered. The consent order essentially resolved, in favour of The Landings as claimant in the lower court, the dispute and claim in trespass in the said action relating to the construction undertaken by Two Seas on a small portion (5ft strip) of The Landings' property, Parcel 182. As such, The Landings satisfied the first limb of the **Ladd v Marshall** test as the consent order could not have been obtained with reasonable diligence for use at the trial.

[64] As to the second limb of the test, the issue which has now been settled by the consent order, as to whether the small piece of land in dispute in those proceedings formed part of The Landings' property, is clearly relevant to the determination and could probably have an important influence on the outcome of the legal issue raised by Ground 5, and potentially, the determination of the appeal itself. The third limb of the test is also satisfied as there is no question (and none can be raised) as to the credibility of the said five documents, but more importantly, the consent order is to be believed as being apparently credible. Thus, all three limbs of the **Ladd v Marshall** test have been satisfied by The Landings and the consent order dated 15<sup>th</sup> December 2021 in claim SLUHCV2021/0288 (formerly SLUHCV2018/0263) is admitted as fresh evidence in this appeal.

[65] However, the application to admit the said five documents as fresh evidence in the appeal has, to a large extent, become otiose since both the DCA and Two Seas have conceded that the consent order has settled the factual issue as to whether that small portion of land was part of Parcel 182 and not Parcel 272. Accordingly, the conclusion by the learned judge at paragraph [91] of the judgment below that, in the absence of relevant expert evidence 'the court was not in a position to make a finding as to the DCA's approval of the Two Seas development on The Landings' property by simply looking at a master plan or surveys without the necessary expert assistance', would have to be revisited in light of the consent order and its legal effect. That said, the matter does not end there as, even if that strip of Parcel 182

was included in the application site for the development of Parcel 272, the question remains whether the effect of that is to render the Two Seas' application for permission to develop Parcel 272 invalid or unlawful under section 19(b) of the **PPDA**, and the planning decision made thereon unlawful and liable to be set aside.

### **Duty to consult – The Law**

- [66] It is well-established that a duty to consult may arise by statute or at common law. Where the duty to consult arises by statute, a court must look to and be guided by the statutory provisions which imposes such a duty, the precise circumstances or subject matter of the consultation prescribed thereby, the persons or group of persons who are to be consulted, and the way in which that duty is to be discharged by the public authority. A failure by a public authority to carry out its statutory duty of consultation may render its decision, or the exercise of its decision-making power conferred by the statute, unlawful, invalid and liable to be quashed by the court. However, the common law duty to consult arises in only four main circumstances. These are (i) where there is no statutory duty to consult, (ii) where there has been a promise to consult, either made generally or directly to the claimant, giving rise thereby to a legitimate expectation of consultation, (iii) where there has been an established practice of consultation, which has not been withdrawn or disbanded, again giving rise to a legitimate expectation of consultation and (iv) where, in exceptional circumstances, a failure to consult would lead to conspicuous unfairness. This fourth category, which it must be underscored is exceptional,<sup>47</sup> has been further elucidated in the case law as meaning 'unfairness amounting to an abuse of power... [it being] illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse of power'.<sup>48</sup>
- [67] The principle of fairness giving rise to a duty to consult has found expression in public law where the courts have seen it fit to impose on public bodies or on governments certain duties when making administrative decisions. Three such

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<sup>47</sup> See *Binder and others v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin).

<sup>48</sup> See *R v IRC, ex p Unilever plc* [1996] STC 681 per Simon Brown LJ at 695.

duties are (i) a duty to consult, (ii) a duty to carry out sufficient inquiry and (iii) a duty to have regard to relevant considerations.

[68] In the instant matter, The Landings sought to rely on both the common law and public law duties, more specifically, legitimate expectation, fairness, a duty to carry out sufficient inquiries and to have regard to relevant considerations as required by statute and by paragraphs 4.8.1 and 4.8.3 of the Manual dealing specifically with applications for tourism developments.

[69] At paragraph [62], the learned judge set out in full the comprehensive restatement by Hallet LJ in **R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others**<sup>49</sup> of the English common law duty to consult and the public law principles of 'fairness.' No issue has been taken by counsel for the parties in this appeal with any of these hallowed principles. Accordingly, I do not consider it necessary to regurgitate them in full here. Suffice it to be said that I fully adopt and inform myself of these important principles from the decided cases as I consider in detail the various grounds of appeal and the legal and factual issues raised by them for consideration and determination.

[70] A convenient starting point on the applicable law and principles is in what context or set of circumstances can resort be had by a court to these common law principles of fairness and duty to consult. The answer to this question is made clear by Hallet LJ at paragraphs [84] and [85] in **Plantagenet**:

"84. It is appropriate to start any legal analysis by examining the common law principle of fairness in this context. Where a statutory process is of itself insufficient to ensure the requirements of fairness are satisfied, the common law will generally intervene to ensure that the requirements of fairness are met. As Byles J observed in **Cooper v Board of Works for the Wandsworth District** (1863) 14 CB(NS) 190, 194:

'[A] long course of decisions ... establish, that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'

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<sup>49</sup> [2014] EWHC 1662 at paras. [84] to [101].

85. In **Lloyd v McMahon** [1987] 1 AC 625, 702-3, Lord Bridge of Harwich said:

'[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'" (Emphasis added)

[71] The juridical justification and rationale for the courts 'intervening,' where a statute confers wide powers of decision-making on a public body or functionary, to imply common law principles of fairness, were explained and chronicled by Hallet LJ in **Plantagenet** at paragraphs [90] and [91] (recounted here in part only):

"90. ...Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice.... Parliament is not to be presumed to act unfairly: the courts will imply into the statutory provision a rule that the principles of natural justice should be applied (**Wiseman v Borneman** [1971] AC 297, at p.310 per Lord Guest).

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

[72] Where a court intervenes by implying into a statute principles of natural justice and fairness in the execution of the decision-making powers, the exercise of determining the requirements of fairness is said to be 'essentially an intuitive judgment,' which is 'highly dependent on context.'<sup>50</sup> In **Doody v Secretary of State for the Home**

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<sup>50</sup> Supra n. 48 at para. [94].

**Department; and other appeals**,<sup>51</sup> Lord Mustill distilled six propositions or guiding principles to be applied when a court is exercising its 'intuitive judgment'. These principles, which drill-down, define and circumscribe the parameters of a court's exercise of such judgment within the particular context of the legislation and the scope and effect of the conferred decision-making power, are important to any assessment by this Court of the exercise which the learned judge conducted, and the conclusions which she reached on the issues of fairness and a duty to consult. Accordingly, I set them out here in full:

"(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer."

[73] At paragraph [96] of the decision in **Plantagenet**, Hallet LJ, addressed the ways in which the common law principle of fairness, in particular the duty to consult, finds expression in public law. As mentioned above, the Lord Justice identified three public law duties relied on by the claimant in that case. As to the first, a duty to consult, the Lord Justice distilled from the authorities eleven guiding principles. The first is that there is no general duty to consult at common law. The second is that there are four main circumstances where a duty to consult may arise. These circumstances are (i) where there is a statutory duty to consult, (ii) where there has been a promise to consult, (iii) where there has been an established practice of

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<sup>51</sup> [1993] 3 All ER 92 at 106.

consultation and (iv) where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult. The third principle is that the common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or to the continuance of a policy to consult (substantive expectation).<sup>52</sup> The fourth is that a duty to consult is not open-ended. The duty must have defined limits.

[74] The fifth principle identified by Hallet LJ is that the common law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator.<sup>53</sup> The sixth principle is that the courts should not add a burden of consultation which the democratically elected body decided not to impose. The seventh is that the common law will, however, supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation where it is necessary to do so, e.g. in sparse Victorian statutes. The eighth principle is that where a public authority, charged with a duty of making a decision, promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty.<sup>54</sup>

[75] Specifically, in relation to a duty to consult arising from a legitimate expectation, the ninth and tenth principles are, respectively, that this doctrine does not embrace expectations arising merely from the scale or context of particular decisions, since otherwise, the duty of consultation would be entirely open-ended, and no public authority could tell with any confidence in which circumstances a duty of consultation was to be cast upon them. However, a legitimate expectation may be created by an

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<sup>52</sup> See *R (on the application of Bhatt Murphy (a firm) v Independent Assessor; R (on the application of Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 per Laws LJ at paras. [41] and [48].

<sup>53</sup> See *R (on the application of BAPIO Action Ltd and another) v Secretary of State for the Home Department and another* [2007] EWCA Civ 1139 at para. [47] per Sedley LJ.

<sup>54</sup> See *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 at 351.

express representation that there will be consultation. The scope of the doctrine of legitimate expectation is further circumscribed by the eleventh principle, which is that even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise to consult.

[76] In relation to the second public law duty imposed by the common law on the decision-making power of administrative bodies, the duty to carry out a sufficient inquiry prior to making a decision (the “Tameside duty”) as per Lord Diplock in **Secretary of State for Education and Science v Metropolitan Borough of Tameside**,<sup>55</sup> Hallet LJ distilled, at paragraph [100] of **Plantagenet**, 6 principles from the authorities. Importantly, a decision-maker ‘is only to take such steps to inform himself as are reasonable’ and, subject to Wednesbury unreasonableness,<sup>56</sup> ‘it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken’. The courts should not intervene merely because it considers that further inquiries would have been sensible or desirable, but ‘only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision’.

[77] As to the third public law duty, to have regard to relevant considerations when making decisions, Hallet LJ opined that this duty ‘may require [the decision-maker] ‘to hear the other side’ and thereby take into account the affected person’s views about the subject matter’.

#### **A. Duty to Consult**

[78] The Landings contends that the learned judge erred when she found that the DCA did not have a duty to consult them before approving the planning application of Two Seas. The Landings argues that a duty to consult arose in the instant matter (i) as a matter of fairness, (ii) as a matter of legitimate expectation and (iii) because of

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<sup>55</sup> [1976] 3 All ER 665 at 696.

<sup>56</sup> See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

the requirement for the DCA to take into account certain material considerations and relevant policies as set out in the Manual, in particular paragraphs 4.8.1 and 4.8.3, requiring the DCA to obtain relevant information on such impacts and how they should be weighed in the planning balance. They also contend that the duty to consult which arose had to have been exercised properly by the DCA, and the refusal to permit The Landings access to and to take copies of the application documents was both contrary to law and legitimate expectation, thereby rendering the DCA in breach of its duty to consult with The Landings.

#### **A.1 Duty to Consult - Legitimate Expectation - Grounds 1(b), (c) and 2 Ground 1(b): The Manual**

- [79] The Landings accepts, on the authority of **R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government**<sup>57</sup> that for a legitimate expectation by promise to arise there must be a clear and unequivocal promise. However, it submits that an inconsistent practice cannot disapply a promise contained in a public statement. In this regard, they rely more generally on the provisions of the Manual and submit that, in principle, as a publication of the DCA of policies and standards which seeks to improve guidance, control and administration, it is capable of giving rise to a legitimate expectation to consult. The Landings attempts to sustain this characterisation of the Manual, first by reference to the certificate section of each of the 3 application forms. These require an applicant for planning approval to certify that he/she has given notice to the owners and occupiers of adjacent land. The certificate(s) in these terms state(s):

“I/WE certify that notice has been given to the owners and occupiers of all land adjacent to the site which is the subject of this application and a newspaper notice duly inserted in accordance with Schedule 2 of the Procedure Regulations and I/WE produce true copies of the newspaper notice.”

- [80] The Landings argues that this certificate requires that adjacent property owners and occupiers be notified prior to the application being made, ‘so that they may comment on it, and to do so requires access to the details of the scheme’.

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<sup>57</sup> [2018] EWCA Civ 2137 per Coulson LJ at para. 39.

[81] In response to this issue, Two Seas makes the point that an alleged right to be notified of a proposed development does not translate into a right to be consulted, and that The Landings has not pointed to any provision in the Manual which requires consultation with an adjacent property owner. The scheme of the **PPDA** contemplates that a register of applications be kept and be made available to the public for inspection upon request and the taking of copies upon payment of a prescribed fee (section 47). In this regard, section 47 makes no provision for consultation or for the application documents to be supplied to any person. I shall address what is the proper interpretation, meaning and effect of section 47 when considering grounds 3(b) and 3(c).

#### **Conclusion on Ground 1(b)**

[82] In my considered view, it is difficult, if not impossible, to see any sound basis upon which this conclusion, leading to a finding of legitimate expectation to be provided with the relevant application documents and to be consulted on the application, can be drawn or sustained simply from the terms of the certificate in the planning application forms. The terms of the application certificate are set out above. They only go so far as certifying that an applicant has given notice of an application to adjacent owners and occupiers. Notice to adjacent property owners or occupiers of the fact of an application being made for planning approval, does not, without more, lead to a requirement or a legitimate expectation at common law that adjacent property owners and occupiers will be entitled to copies of the application documents, and will be consulted by the DCA before approving the application. If that were so, then all adjacent landowners or occupiers would be entitled to be consulted by the DCA on each and every application for planning approval with respect to land adjacent to their property, as would all members of the public, since the requirement is also for notice of an application to be given via a local newspaper. This is clearly not the law in Saint Lucia and, as far as can be discerned, it is not and has never been the practice.

- [83] Absent a statutory requirement for consultation or an existing practice or policy of consultation, there is no general duty to consult. Moreover, the question of whether a duty to consult arises at common law is a fact sensitive one. Even if established, while consultation must be 'proper', the degree or extent of the consultation will necessarily vary from application to application and may be satisfied in different ways depending on the particular circumstances of the application for development before the DCA. The character and extent of consultation will also vary based upon the DCA's own judgment as to the extent of the consultation necessary in relation to a particular application, and the method or means of effecting such consultation in order to properly discharge its statutory duty and power to determine applications for planning approval fairly.
- [84] In short, an alleged entitlement to be notified that an application has been made to the DCA for planning approval, is not the same as a right or entitlement to be consulted or a legitimate expectation that the adjacent owner will be consulted by the DCA. I say this mindful of the provisions of paragraphs 4.8.1 and 4.8.3 of the Manual upon which The Landings seeks also to hinge a legitimate expectation that they would be consulted by the DCA, which I will consider next in ground 1(c). I am likewise mindful of the provisions of section 47 of the **PPDA** which requires the DCA to maintain a register containing particulars of any application for permission to develop land. This latter provision, which is to be considered under ground 3(b) dealing with the lawfulness of the refusal to give The Landings sight and copies of the application documents, does not go so far as to stipulate a right for adjacent owners to be consulted by the DCA with respect to planning applications. Properly construed, any person, any member of the public, and not just adjacent landowners or occupiers, have an entitlement under section 47 to access the information recorded or which ought to have been recorded in the register, and to take of copies of the information on payment of a prescribed fee. The issue of whether this right extends to being provided with copies of the application documents are all matters to be dealt with when I come to consider ground 3(b).

### Ground 1(c): Paragraphs 4.8.1 and 4.8.3 of the Manual

[85] Paragraphs 4.8.1 and 4.8.3 of the Manual Vol.1 states (in material parts):

#### “4.8.1 LOCATIONAL CONSIDERATIONS

There are two levels of touristic development. One includes hotel construction within an area already including other hotels or establishments related to tourism. The other is the creation of a touristic development with extensive grounds offering a variety of recreation (passive or active) and where the activities of the visitors of the development entail direct contact with adjacent tourism attractions and/or existing communities. Both levels of tourism require consideration in terms of appropriate location, and it is important that tourism establishments:

- blend with surroundings by reason of siting, design, scale and landscaping;
- have no adverse effect upon the environment with regard to noise, traffic, congestion, or destruction of features or interest in the areas;
- do not involve the depletion of the housing stock especially in areas of housing shortage.

.....

#### 4.8.3 DEVELOPMENT IN TOURISM ATTRACTION AREAS

.....

Tourism development proposals which are comprehensive in nature, i.e. include a large number of rooms, utilize directly or non-directly adjacent communities, and result in direct interaction with adjacent communities formally or informally, must undertake and submit a technical study outlining various details of the proposed development.

The Development Control Authority will not grant permission for any development which may negatively affect tourism resources of the island and/or result in situations in which the positive socio-economic effects derived from the project do not outweigh the potential negative effects of the project. No development will be permitted in Special Conservation Areas under any circumstances.

The Technical Study to be submitted for tourism development at the comprehensive level must be a written report prepared by a competent professional/s and this individual or firm must be approved by the Development Control Authority.

The study must contain information on investigations of prevailing environmental conditions, ecology, hydrology, landscaping quality, and water mass movements in relation to the site applied for, the properties adjacent to the site, and the areas near the site. (Emphasis added)

The Technical Study must provide a complete description of the proposed development and define precisely the modifications, alterations and construction methods to be employed. It shall provide details of the procedures proposed for supervision and control of the proposed development.

Objectives of the Study should be:

- to ensure full consideration of environmental priorities during project planning;

- to inform the Development Control Authority and other agencies of Government of the full environmental and socio-economic implication of the project;

- to study the consequences of the project on the landscape, sensitive areas, atmosphere, soil, water, fauna and flora, existing human populations and activity;

- to outline the mitigation measures to be taken to avoid, reduce or compensate the possible negative consequences of the development on the environment.

Overall, the content of the report should present a clear picture of the balance between the socio-economic importance of the project on the one hand, and the fragility or sensitivity of the area to be affected by the project, on the other.

The study should present the following:

- An analysis of the existing state of the site and its environment, considering especially the natural resources including landscape quality and marina resources, and the area's marine activities or recreation that are to be affected by the project.

- An analysis of the effects of the project on the environment, in particular on sites and landscapes.....

- An outline of alternative development possibilities for the site, including passive recreation....

- A clear description of the measures to suppress, reduce and, if necessary, compensate for the negative or damaging consequences of the project on the environment. The developer must clearly show the compatibility of his project with the preservation of the natural milieu and other site and landscape values. He must also submit an estimate of the cost of compensatory measures."

- [86] The Landings contends that paragraphs 4.8.1 and 4.8.3 of the Manual setting out certain policies and requirements relating to tourism applications and providing for the submission by an applicant of a technical study, give rise to a legitimate expectation that they would be consulted by the DCA on the application by Two Seas for a tourism development on Parcel 272. The stipulated requirements are for the technical study which is to be produced by the applicant to address, among other things, information on 'the properties adjacent to the site', on the socio-economic implications of the project, the consequences for existing human populations, and 'on the freedom of enjoyment of the local population of the unique qualities of the area'. As the argument goes, these were all material considerations which the DCA was obligated to consider and, in doing so, it must ensure that it had received sufficient information to make such assessments. Accordingly, in the circumstances of the instant case, The Landings argues that they were well placed to inform the DCA on all such matters or requirements, and to correct, supplement and help weigh in the balance the matters contained in the EIA and the ESIA Addendum Update. This gave rise to a legitimate expectation, created by these provisions of the Manual, that The Landings would be consulted and to a corresponding duty on the part of the DCA to consult The Landings before approving the application for development of Parcel 272 by Two Seas.
- [87] The DCA, on the other hand, argues that this position does not accord with the applicable law and is unsustainable. The manner, scope and intensity of any inquiry were matters for the DCA as the public authority charged under the **PPDA** with considering and determining applications for planning approvals. Absent *Wednesbury* unreasonableness, it is not for The Landings or the court to say to the DCA that it was not enough to rely, in the instant matter, on the EIA, the ESIA Addendum Update, the recommendations from the referral agencies, and the in-house Appraisal Report. In support of this submission, they cite this passage from

the judgment in **R (on the application of Khatun and others) v Newham London Borough Council (Office of Fair Trading, interested party)**:<sup>58</sup>

“...where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.” (Emphasis added)

[88] In addition, the DCA contends that The Landings has not shown that it had any issues with the proposed development or was possessed of any relevant information, other than what was contained in the EIA and the ESIA Addendum Update, which the DCA ought to have considered before approving the application by Two Seas for planning approval to develop Parcel 272, as the learned judge correctly found.

[89] The DCA also submits that even if it can be said that the Manual gave rise to a secondary case of legitimate expectation of consultation, ‘there would be no unfairness amounting to abuse of power once the DCA made a rational decision for a proper planning purpose reached by lawful process’. In support of this argument, they rely on this extract from the judgment in **R (on the application of Bhatt Murphy (a firm) and others) v Independent Assessor; R (on the application of Niazi and others) v Secretary of State**<sup>59</sup> at paragraph 49, as indicative of precisely what has happened in the instant matter:

“I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in **[R v North and East Devon Health Authority] ex parte Coughlan** [[2001] QB 213] (para. 66): “In the ordinary case there is no space for

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<sup>58</sup> [2004] LGC 696 at para. 35.

<sup>59</sup> [2008] EWCA Civ 755.

intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.” (Emphasis added)

- [90] Two Seas contends, among other points, that there is no requirement in paragraphs 4.8.1 or 4.8.3 of the Manual that the technical study in relation to tourism developments must contain information on the properties adjacent to the site. Accordingly, they submit that this is ‘simply another narrative being pushed [by The Landings] to bolster a hopeless case’.

#### **Conclusion on Ground 1(c)**

- [91] Paragraphs 4.8.1 and 4.8.3 of the Manual must be read alongside section 23(1) of the **PPDA** which requires the DCA to have regard, in addition to the provisions of any physical plan of the area established and approved under Part 2 of the **PPDA**, ‘to any other material considerations’. Accordingly, there is a clear requirement for the DCA to consider ‘material considerations’ when deciding whether to grant or refuse planning permission. This statutory requirement is not limited in its application to any particular type of development or planning approval. It applies to all applications for planning approval.
- [92] The effect of section 23(1) of the **PPDA** is that the DCA had a duty to have regard to any material consideration in relation to the application by Two Seas for planning approval to develop Parcel 272. While it is correct that the **PPDA** does not define or identify what are the material considerations to be taken into account, this does not render impotent the requirement for such considerations to be taken into account by the DCA. The more correct approach is that it is for the DCA to determine, in its own judgment in relation to a particular application, what are the ‘other material considerations’. Materiality will necessarily vary depending on the nature of the application and the type of development for which planning approval is being sought. What is also clear is that such considerations must be ‘material’ to the proper and full consideration of an application and to the sound decision-making and lawful exercise of that statutory power. These considerations should not be trifling, purely

tangential, or irrelevant considerations. They must be the type and scope of considerations which are relevant to the particular application and to the DCA's determination whether to approve it unconditionally or with certain conditions, or to refuse the application.

[93] Where the DCA has published, for the benefit of applicants for planning permission generally, or in relation to specific types or classes of developments, written requirements or considerations applicable or to be taken into account when considering such applications or developments, and these published guidelines remain in place without being significantly revamped or withdrawn by the DCA, then those stated considerations remain applicable both to the applicant for planning approval and to the DCA itself. Accordingly, they are 'material considerations' for the purpose of section 23(1) of the **PPDA**. In my judgment, the specific requirements of paragraphs 4.8.1 and 4.8.3 of the DCA's Manual applicable to tourism developments, in particular, large tourism developments, are for the purpose of section 23(1), material considerations to be satisfied or addressed by applicants for planning approval of such developments and they are 'material considerations' to be taken into account and weighed in the planning balance by the DCA when deciding whether to approve such an application or not.

[94] In this regard, it is simply not satisfactory to say, as the learned judge recorded at paragraph [65], that 'Mr. Hous[e]n made clear that the Manual is used as a guide and has technical information which is used but that it is not the main source of information'. The gist of this evidence by Mr. Housen seems to be that the Manual is still being utilised by the DCA for certain purposes as a guide but not for other purposes. If this is indeed the current practice of the DCA, then it ought to make the necessary changes to bring the Manual into conformity with what is the declared current practice. This may require amending certain parts of the Manual or completely revoking it and replacing it with new guidelines applicable to tourism developments. Until this has been done, applicants for development are entitled to rely on the provisions in the Manual, including those at paragraphs 4.8.1 and 4.8.3

dealing specifically with touristic developments, and to expect that the DCA will have regard to these considerations when deciding upon an application for tourism development in Saint Lucia.

- [95] The next question to be addressed is whether paragraphs 4.8.1 and 4.8.3 of the Manual gives rise to a legitimate expectation that an owner or occupier of land adjacent to the proposed development will be consulted with regard to the material considerations set out in those provisions and, if so, whether this would include a right to be provided by the DCA with copies of the relevant application documents.
- [96] Paragraph 4.8.1, locational considerations, expressly states that both levels of tourism developments, 'require consideration in terms of appropriate location and it is important that tourism establishments blend with their surroundings by reason of sitting, design, scale, and landscaping; have no adverse effect upon the environment with regard to noise, traffic congestion, or deconstruction of features of interest in the area; and do not involve the depletion of the housing stock'.
- [97] Paragraph 4.8.3, development in tourism attraction areas, provides for comprehensive tourism projects (large number of rooms) to undertake and submit a technical study outlining various details of the proposed development. It speaks, inter alia, to the DCA not granting permission for any development which may negatively affect tourism resources on the island or where the positive socio-economic effects to be derived from the project do not outweigh the potential negative effects of the project. Paragraph 4.8.3 also goes into some detail as to the matters which are to be addressed in the technical study, which 'shall contain information on investigations of prevailing environmental conditions, ecology, hydrology, landscaping quality, and water mass movements in relation to the site, and the areas near the site'.
- [98] The objectives and requirements of the technical study are heavily weighted towards environmental considerations and socio-economic importance, and the

potential impact of the proposed project on the site and the surrounding area. In the context of the instant matter, this would clearly include any adverse impacts on The Landings' property, its hotel and operation.

[99] Paragraphs 4.8.1 and 4.8.3 of the Manual do not explicitly or impliedly speak to or confer a right or entitlement for adjacent landowners or occupiers to be consulted by the DCA, or to be provided with copies of the application documents with regard to tourism developments. In my view, the learned judge was correct to so find at paragraph [65]. Similarly, there is no right in these provisions, either expressly or by implication, for an adjacent landowner to be provided with the application documents. This right or entitlement would have to arise by virtue of some other provision such as section 47 of the **PPDA** or necessarily as part of 'proper' consultation where a duty to consult arises or fairness demands that an adjacent landowner ought to be consulted by the DCA before making its decision on a particular application.

[100] The starting point is that there is no general duty to consult. In the absence of a statutory duty to consult, a duty to be consulted must arise in one or more of the circumstances identified at common law, that is, by a promise to consult leading to a legitimate expectation to be consulted where there is an established practice of consultation and, in exceptional cases, where a failure to consult would lead to conspicuous unfairness such that it would be an abuse of power. Additionally, such a duty may arise as a matter of fairness. In my view, the learned judge was correct to find that paragraphs 4.8.1 and 4.8.3 of the Manual does not give rise to any promise to consult with owners of land adjacent to the site for which application for planning permission to carry out a tourism development, even one with a high number of rooms or buildings of a height over that which is currently the norm in the immediate or general area of the proposed development, has been made. In my view, the material considerations set out at paragraphs 4.8.1 and 4.8.3 of the Manual, while not leading to a legitimate expectation that The Landings would be consulted and be provided with the application documents, are of relevance to the

issue to be considered at ground 4 and, to some extent, the issues of fairness canvassed by ground 1(a).

### **Ground 2 – Whether the DCA evidenced a decision to consult**

[101] The Landings argues that the DCA's case and evidence at trial was that it had a discretion under the **PPDA** to determine which relevant third party to consult with regarding an application for planning approval and, further, that it had consulted with The Landings during the ESIA process. Accordingly, the DCA accepted that it ought to consult or that it had a duty to consult with The Landings with regard to the application by Two Seas to develop Parcel 272 as a tourism development. They argue that in such circumstances, it was not open to the DCA to contend that there was no legitimate expectation of consultation with The Landings whose property was, as Ms. King stated in the ESIA Addendum Update, 'within the sphere of influence of the development'.

[102] Moreover, where a public authority has decided to consult or that consultation is required, the DCA was required, as a matter of law, to carry out the consultation properly. In support of this submission, The Landings relies on two cases. The first is **Save Guana Cay Reef Association Ltd and others v The Queen and others**<sup>60</sup> in which Lord Walker, in delivering the decision of the Board, endorsed and approved at paragraph [33] this poignant statement of principle by Lord Woolf MR in the second reference authority, **R v North and East Devon Health Authority Ex p Coughlan**:<sup>61</sup>

"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent considerations and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: **R v Brent London Borough Council Ex p Gunning** (1985) 84 LGR 168."

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<sup>60</sup> [2009] UKPC 44.

<sup>61</sup> [2001] QB 213.

[103] The Landings relies on the finding by the judge that there was no consultation by the DCA prior to approving the planning application by Two Seas, as being conclusive that there was no 'proper' consultation with The Landings as required and explained in the passage above. The effect of this, The Landings says, is that the DCA, having decided in its discretion to consult The Landings (as was its case at trial), failed to carry out and to discharge its duty at common law to consult or to properly consult with The Landings.

[104] It is also the case for The Landings that the October 2017 meetings between Ms. King and representatives of The Landings, during the ESIA and ESIA Addendum Update exercise, was not proper or lawful consultation with The Landings. This was certainly not consultation by the DCA since, as found by the judge, the DCA never consulted with The Landings at all. This finding, as well as the finding that the consultation by Ms. King was not consultation by the DCA, have not been appealed by the DCA. Moreover, these meetings with Ms. King were not, in any event, proper consultation with The Landings by Two Seas or Ms. King. The Landings says that what transpired at the October 2017 meetings (which is not substantially in dispute), did not and could not amount to proper or lawful consultation as not rising to the meaning and standard of 'proper' consultation set out in **Coughlan**.

[105] The Landings submits that they were not given, by Ms. King or anyone else on behalf of Two Seas, sufficient information about the proposed development of Parcel 272. Also, they were never provided with any of the application documents. In short, The Landings was not given sufficient information about the proposed development so as enable it to properly understand and intelligently consider and respond to the application and the proposed development itself, including the negative impacts on The Landings' property and resort. Also, The Landings, having not been given prior access to the application documents, was not afforded any adequate opportunity to comment or to make informed responses about the proposed development. Moreover, there is no evidence, says The Landings that the

product of the October 2017 meetings with Ms. King had been taken into account by the DCA, much less conscientiously taken into account, when reaching its decision on the planning application by Two Seas. They say this since the DCA was wholly unaware of what The Landings had said at the October 2017 meetings about what its representatives had been told by Ms. King about the proposed development.

[106] The Landings also submits that the actual interaction by the DCA with The Landings, which took the form of an exchange of letters between the lawyers for The Landings and the DCA, was even more legally inadequate, as the DCA refused to show the application documents to The Landings and their concerns and requests for the application documents were not acceded to and were never reported to the board of the DCA.

[107] In the premises, The Landings argues that having decided that they should be consulted, the DCA did not consult with them. Instead, it embarked and relied upon an unlawful and inadequate process in which the views and informed opinions of the development's immediately adjacent neighbour were not solicited or considered. In those circumstances, there was a failure to satisfy the legal requirement for consultation with The Landings. The result is that The Landings was not properly informed about the development by being given, at an early stage in the process or at all, the application documents and information. It was therefore not in a position to provide its intelligent considerations and responses to the proposed development, and to have its views and responses conscientiously considered and taken into account by the board of the DCA when coming to its decision on the application by Two Seas.

[108] In response, the DCA argues that the judge below did not make a finding that the DCA had decided to consult with The Landings. No such decision had been communicated to anyone let alone The Landings. Accordingly, this could not have given rise to a legitimate expectation that the DCA would consult with The Landings.

They point out that the dicta of Lord Woolf MR in **Coughlan** as to the meaning of 'proper' consultation, is premised on the decision to consult being 'embarked upon' by the public authority. However, in the instant matter, there is no evidence that the DCA had either made a decision to consult The Landings, and if so, had embarked upon such consultation. They submit further that, in any event, the decision in **Coughlan** is distinguishable from the instant matter. Here the learned judge expressly found that there had been no consultation by the DCA with The Landings, and the consultation by Ms. King on behalf of Two Seas could not have been consultation by the DCA. As such, no consultation with The Landings had actually been embarked upon by the DCA.

[109] In relation to this ground of appeal, Two Seas contends that the argument being advanced by The Landings is 'disingenuous at best and nonsensical at worst.' They say so because it was The Landings' case that the DCA had not consulted with it. Further, it was never the case for The Landings that the DCA had consulted with it, but that such consultation was inadequate. The learned judge found as a fact that there had been no such consultation with The Landings, which finding has not been appealed by them. Two Seas also contended that this line of argument is being raised by The Landings for the first time on appeal. It is, as they say, untenable, 'circuitous and absurd' as there is no evidence that the DCA decided to or required consultation with The Landings and no such consultation occurred, as the learned judge found. Furthermore, the learned judge found that at the time of the October 2017 meetings with Ms. King and the representatives for The Landings, there was no application for planning permission by Two Seas before the DCA and, therefore, there could have been no duty on the DCA to consult with The Landings, and no meeting with The Landings could have amounted to consultation by the DCA in consideration of any application for the development on Parcel 272.

[110] In summary, Two Seas asserts that 'there is no factual or evidential basis on which the assertion that the DCA had decided to consult could be based'. Absent such a factual basis, the argument based on the principle that when a public authority

decides to consult it must be carried out properly, must fail and any argument based on the legal inadequacy of the consultation is irrelevant and does not arise. In these circumstances, 'actionable legitimate expectation could not spring from a decision to consult that was never made'.

## **Conclusion on Ground 2**

[111] The learned judge's important findings at paragraph [58] regarding no consultation by the DCA with The Landings are clear. They are summarised at paragraphs [43] to [45] above. They remain unchallenged in this appeal and therefore stand.

[112] The evidential basis upon which to successfully mount this submission and ground of appeal is very scant to non-existent. At paragraph 14 of the affidavit of Mr. Housen, filed on 10<sup>th</sup> August 2018 on behalf of the DCA, he averred that the DCA  
"vehemently denies that it did not consult [The Landings] in relation to the [Two Seas] development. By virtue of the ESIA Addendum Update Report dated [30<sup>th</sup>] October 2017 by Ms. King, there is an enumeration of the persons who were consulted and there were three (3) representatives of [The Landings] namely...."

At paragraph 18, Mr. Housen averred 'I verily believe that the DCA has not acted ultra vires and in excess of its powers because [The Landings] and its representatives were part of the EIA process for the development'.

[113] This was a clear reference not to any decision having been taken by the DCA to consult with The Landings or any actual consultation embarked upon by the DCA with The Landings or their representatives. The averment is rooted solely on the ESIA exercise in preparation for the ESIA Addendum Update which had been conducted by Ms. King on behalf of Two Seas, being considered consultation with The Landings. This assertion of consultation by the DCA through the ESIA exercise, was roundly refuted by Mr. Robertson at paragraphs 4 to 24 of his affidavit sworn and filed on 29<sup>th</sup> January 2019 on behalf of The Landings in the proceedings below. At paragraph 24, Mr. Robertson avers: '24. It is therefore impossible for the meeting

[30<sup>th</sup> October 2017] to have been consultation with the [DCA] and any suggestion of 'engagement' between ourselves and [Ms. King] are patently false'.

[114] As mentioned above, the learned judge rejected any notion that participation in the ESIA exercise by representatives of The Landings during the October 2017 meetings with Ms. King, was consultation by the DCA with The Landings. It follows that there was no evidence before the court of any decision by the DCA to consult The Landings or of any such consultation in fact taking place. In such circumstances, while I am fully mindful of the principles elucidated by the English Court of Appeal in **Coughlan** (endorsed by Lord Walker in **Save Guana Cay Reef**) as to the requirement for, meaning of, scope and extent of 'proper' consultation where a public body has embarked upon consultation with a third party or with the public, in my judgment the evidential basis in the instant appeal and the unchallenged findings by the learned judge at paragraph [58] do not give rise to the application of these principles. Accordingly, there is no merit in this ground of appeal and no legitimate expectation of or a duty to consult with The Landings can sensibly be said to have arisen premised on the assertion of consultation at paragraphs 14 and 18 of the Housen affidavit.

#### **Conclusion on Legitimate Expectation – Grounds 1(b), (c) and 2**

[115] In the premises, in my judgment The Landings has not made out any of these grounds of appeal upon which it relies to mount its case that a duty to consult with them arose by virtue of a promise to consult or that a legitimate expectation arose that they would be consulted with regard to the proposed development on Parcel 272. I reach this preliminary conclusion, subject to a final determination of grounds 3(a), (b) and (c) which I will consider alongside ground 1(a) in the next section of this judgment.

**A.2 Duty to Consult - Fairness - Grounds 1(a), 3(a), (b) and (c), and 4**  
**Ground 1(a) - The impact of the scheme on The Landings' adjacent property**

[116] The Landings contends that given the impact of the proposed development of Parcel 272 on its adjacent property, Parcel 182, as acknowledged in Two Seas' own ESIA Addendum Update, fairness required that they be consulted by the DCA and provided with the application documents prior to the DCA's decision. They submit that while any issue as to fairness is a fact sensitive one, and the degree of consultation would vary depending on the specific circumstances of an application for planning approval, in the instant matter, there was clearly a duty at common law on the part of the DCA to consult them.

[117] The Landings identified at paragraph 65 of their written submissions, 14 circumstances or factors which they contend made it 'pressing' for them to be consulted by the DCA and allowed to see and take copies of the relevant application documents. These circumstances, which point to proximity and likely adverse impacts, (with my brief comments in italics on each of them) are as follows:

"(i) The Landings and the interest which they represent are immediately adjacent to the application property Parcel 272."

*This fact is not in dispute.*

"(ii) The scheme (the development) will self-evidently have the potential for a significant adverse effect on The Landings with a nine-storey building being erected immediately next to it."

*There can be no doubt that the proposed nine storey building on Parcel 272 would represent a significant increase over the height of buildings currently erected within the immediate environs of the Pigeon Point touristic locale. The other buildings in that immediate area are of 3 or 4 storeys. This would be the first 9 storey building in the immediate area of Parcel 272. However, as the ESIA Addendum Update shows, the Royalton Resort to the north of the application site has completed buildings up to 7 storeys, as does the Harbour Club to the south.*

"(iii) As holiday properties, The Landings site will be highly sensitive to the construction, operation and existence of the proposed development."

*As acknowledged in the ESIA Addendum Update, The Landings' property was 'within the sphere of influence' of the proposed development on Parcel 272.*

*"(iv) The applicant's ESIA Addendum Update Report identifies high potential adverse impacts on The Landings from construction noise and impacts on views and aesthetics. Various mitigation measures are referred to, but these are left uncertain. It is said that 'architectural design must consider the view from the neighbouring Landing property'. Whilst different to the effects on users of the savannah in *Ulric Buggy* Haynes they were significant adverse impacts."*

*The impacts to The Landings and surrounding properties identified in the ESIA Addendum Update, including construction noise and dust, adverse impacts on light, views, and traffic congestion, were addressed by the learned judge at paragraph [73] of her judgment. There the judge observed that the ESIA addressed 'all the impacts which The Landings stated were of concern to it', recommendations were made for mitigation and The Landings had not shown that it had any concerns 'above and beyond those highlighted in the EIA report'. The learned judge also observed that it had not been shown that in coming to its decision on the planning application, the DCA had not considered these impacts and recommendations on The Landings and it must be presumed to have acted lawfully unless the contrary is shown. I shall return later in this judgment to these findings and observations.*

*"(v) The applicant (Two Seas) through Ms. King had initiated meetings with The Landings (in October 2017) to discuss the proposals."*

*As I understand it, this is being relied on by The Landings to show that as they were 'within the sphere of influence' of the development, Two Seas and Ms. King saw it as important to discuss the proposed development of Parcel 272 with them. This, they contend, gives credence to the existence of a duty at common law and on the principle of fairness for the DCA to consult them before making its decision on the said application.*

*"(vi) The Landings had, at the October 2017 meetings, asked the applicant (Two Seas) via Ms. King for a copy of the EIA and its request was refused."*

*The evidence discloses that at the October 2017 meetings, Ms. King did show to The Landings' representatives, on her laptop, a plan for the proposed development on Parcel 272. It is not seriously disputed that this was a brief showing of a plan and that this did not afford the representatives much opportunity to properly view and consider such a plan. While there is some uncertainty as to what plan or plans had been shown at that time, it seems to be that the only available plan was the 'piling plan'. However, it is*

*Ms. King's evidence, as borne out by the minutes of the October 2017 meetings, that at the first meeting on 18<sup>th</sup> October 2017 she provided an overview of the planned development using 'the conceptual layout guide', and at the second meeting on 30<sup>th</sup> October 2017 'the concept plan' was tabled. The 'concept plan' was identified in the ESIA Addendum Update and the renderings of the development were said to have been presented at the second meeting.*

*"(vii) The Landings expressed their concern about the scheme and asked to see the application documents."*

*This is an obvious reference to the October 2017 meetings. In this regard reliance is presumably also being placed by The Landings on the letter dated 15<sup>th</sup> January 2018 from their lawyers to the DCA and on their visit to the DCA to inspect the register of applications. The letter, visit and inspection all failed to result in The Landings being provided with access to and copies of the application documents.*

*"(viii) The DCA had a discretion to show The Landings the application documents and provide them with copies."*

*Here reliance is placed on the evidence at trial of Ms. Augustin recounted, in part, at paragraph [46] of the judgment. There, the learned judge also recounted her evidence that 'the DCA's procedural policy did not provide for third parties to be consulted directly especially where the class and nature of the surrounding developments and land use are similar'. Ms. Augustin also stated 'that the area is zoned for touristic/commercial development and the Two Seas development does not change the character of the area. Therefore, The Landings could have no expectation of being consulted'. This issue clearly hinges on the applicable principles relating to a common law duty of consultation and a consideration of the provisions of the **PPDA**, including section 47 and the Manual, in particular paragraphs 4.8.1 and 4.8.3.*

*"(ix) Ms. Augustin (of the DCA) relies on the area being zoned for touristic/commercial development, but cites no policy for this."*

*Before this Court, no issue was taken with regard to the area being designated for tourism development. However, no actual decision of the DCA or document evidencing the said area being zoned as such, was produced at trial to support that statement in evidence by Ms. Augustin. This notwithstanding, The Landings is relying on the provisions of the Manual which specifically address the requirements and material considerations applicable to touristic developments.*

“(x) The DCA’s claim that there was no change in the character of the area because of the 2009 approval was wrong. The 2009 decision for a smaller tourist scheme was simply an approval in principle. It did not grant any right to develop.”

*The simple point here is that there was no approval of permission to develop Parcel 272 for a tourist development until the approval by the DCA dated 18<sup>th</sup> April 2018, the legality of which was the subject of the judicial review proceedings brought on 13<sup>th</sup> July 2018 by The Landings before the High Court.*

“(xi) Ms. Augustin relied on the 2009 decision to suggest that there was ‘no change to the character of the neighbourhood or to land use which would have necessitated an obligation to consult [The Landings]’. Since the land was in fact ‘vacant/unused’, there is an implication that had the land condition been properly understood, the DCA would have consulted.”

*In my view, this is, at best, a weak point in support of a duty to consult.*

“(xii) There was no good reason not to provide the application documents - particularly when The Landings’ lawyers were at the DCA asking for them. The refusal to do so frustrated The Landings’ ability to make representations.”

*This point speaks to the duty to consult whether arising as a result of fairness, legitimate expectation, the operation of section 47 of the **PPDA** and paragraphs 4.8.1 and 4.8.3 of the Manual or the application forms stipulated thereunder, and to the legal concept of ‘proper’ consultation, all of which will be addressed when considering various grounds of appeal.*

“(xiii) Had The Landings been permitted to have sight of and to be provided with copies of the applications documents, they would have been able to comment on the impacts of the scheme, including on or to their site; what mitigation could be brought forward to address potential harmful impacts on their site and the likely effectiveness of those measures; and the overall planning balance – whether the scheme should proceed.”

*These are all matters which go to fairness, the duty to consult and the nature and extent of such a duty, if established, and to the applicable principles of law relative to the exclusive purview of the DCA as the public authority to determine what information was necessary to make an informed decision on this application.*

“(xiv) The legislation (the Physical Planning and Development Act) allows for regulations to be made to require publicity and consultation generally, for EIA cases in particular and for the register to contain a considerable amount of information, but it appears that no regulations have been made

at all. This creates a gap which the Court has to consider on a case-by-case basis.”

*These are some of the matters to be dealt with when considering ground 3 of the appeal where the following issues would be dealt with: (i) the legal effect and requirement for a register of applications to be maintained as prescribed by section 47 of the **PPDA**, (ii) the fullness or lack thereof of the actual register, (iii) whether the register complied with the requirements of section 47(1)(a) for it to contain ‘particulars’ of any application for permission to develop land and (iv) whether this provision of the legislation gave rise to a right to members of the public to inspect and take copies of the application documents themselves.”*

[118] In support of its submissions on fairness giving rise to a duty to consult, The Landings relies both on the common law and public law principles. They also rely on the decision of **Ulric ‘Buggy’ Haynes**. In so doing, they take issue with the basis upon which the learned judge below sought to distinguish that case from the instant matter. They argue that the learned judge erred in relying on the EIA to conclude that they did not need to be consulted by the DCA. To be accurate, what the learned judge found was that

“[t]he DCA would have had the EIA before it, in which impacts to the surrounding area including The Landings was considered and highlighted. The **Ulric ‘Buggy’ Haynes** case emphasizes that there is no general duty to consult when considering whether to grant permission to develop land but that it was the circumstances of that particular case that called for consultation.”<sup>62</sup>

[119] In response to ground 1(a), the DCA, relied on six general principles, none of which are controversial. These are:

- (1) the exercise of planning judgment is not the business of the court, it is entirely a matter for the decision-maker.<sup>63</sup>
- (2) there is no common law duty to consult persons who may be affected before making decisions.<sup>64</sup>

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<sup>62</sup> Judgment at para. [82].

<sup>63</sup> Supra n. 39.

<sup>64</sup> Supra n. 47.

- (3) a duty to consult in relation to measures which may adversely affect an identified group or sector is not open-ended. The duty must have defined limits which hold good for all such measures.<sup>65</sup>
- (4) the common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation or as to the continuance of a policy to consult.<sup>66</sup>
- (5) the common law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator.<sup>67</sup>
- (6) the doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended, and no public authority could tell with any confidence in which circumstances a duty of consultation was cast upon them.<sup>68</sup>

[120] The DCA also referred to the four main circumstances or factors identified in **Plantagenet** in which a duty to consult may arise at common law. These are:

“First, where there is a statutory duty to consult, Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult.”

[121] It is the DCA’s case that none of these factors arise nor have they been established in the instant matter. They submit that there is no statutory duty to consult, and no

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<sup>65</sup> Supra n. 32 at paras. [43] - [44] per Sedley LJ.

<sup>66</sup> Supra n. 62.

<sup>67</sup> Supra n. 63.

<sup>68</sup> In re Westminster City Council and others [1986] 2 WLR 807 at 822, per Lord Bridge of Harwich.

such duty was pleaded or relied on by The Landings in the court below. The Landings has not alleged that there was a promise made by the DCA that they would be consulted concerning the application for planning approval to develop Parcel 272 and similarly, there is no allegation of the existence of an established practice or policy of consultation. As to the fourth of these main circumstances, the DCA submits that it was not pleaded nor was it The Landings' case at trial that the failure to consult was 'capriciously unfair'. Accordingly, they failed to establish that the DCA was under a duty to consult or that a duty to consult them arose at common law and so this first ground of appeal must fail.

[122] Specifically, regarding the fourth factor, which arises only in exceptional cases, the DCA argues that The Landings would have to show unfairness amounting to an abuse of power in order to succeed. This means that it was 'illogical or immoral or both for a public authority [the DCA] to act with conspicuous unfairness and in that sense abuse of power'. In support of this principle the DCA cites the decision of the English Court of Appeal in **R v IRC, ex p Unilever plc**.<sup>69</sup>

[123] The DCA also stressed that, absent a promise to consult, a court should be slow to require consultation. In **Bhatt Murphy** at paragraph 41, Laws LJ gave the underlying rationale for this principle:

"There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often, they must balance different, indeed opposing interests across a wide spectrum. Generally, they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."

[124] The DCA contends that The Landings' case was premised not on there being a statutory duty, promise or legitimate expectation that it would be consulted, or that it was, in the circumstances an abuse of power such as to be conspicuously unfair for it not to have been consulted, but on the notion that the DCA had a duty to consult

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<sup>69</sup> [1996] STC 681 per Simon Brown LJ at 695.

'given the large scale (9-storey buildings etc.) of the proposed development and the context of this particular planning approval'. As to the 14 factors identified at paragraph 65 of The Landings' written submissions, the DCA points out that they are arguing that 'the factual matrix was so compelling by virtue of the potentially negative impacts that they could suffer as a result of the development that they ought to have been consulted'. However, that is precisely the kind of argument frowned upon at paragraph [98](9) of **Plantagenet**, the effect of which would be to make the duty to consult too open-ended such that it would be impossible for the DCA to determine, with any confidence, in which circumstances a duty of consultation was cast upon or imposed on them. The DCA argues that such a duty to consult would not simply arise because (as here), the owner of the adjacent land to the proposed development operates a resort therefrom, or requests to see the EIA and is refused, or where the land to be developed is characterised by the DCA as vacant/unused.

[125] In support of these submissions, the DCA relies on the dicta in **Binder and others v Secretary of State for Work and Pensions**<sup>70</sup> which further explained and applied the reasons given at paragraph [98](3),(6), (9) and (11) in **Plantagenet**. At paragraph [98](11) in **Plantagenet**, it was underscored that even where a claimant has established a duty to consult, that is not the end of the matter. He must also show that, in the case at bar, a failure to consult constituted unfairness rising to the level of an abuse of power. This, the DCA submits, The Landings has not done.

[126] The DCA also considered the decision of **Ulric 'Buggy' Haynes**. They submit that the facts of that case are distinguishable from the instant matter, as reasoned correctly by the learned judge. Furthermore, in this matter, The Landings has accepted, at paragraph 65(viii) of their written submissions, that the DCA had a discretion whether or not to show the application documents and provide copies of them to The Landings and that the absence of regulations created a 'gap' for the court to consider on a case-by-case basis whether a duty to consult has arisen.

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<sup>70</sup> Supra n. 47.

Implicit in these 'concessions' is that there could be no requirement to supply The Landings with the application documents, and no duty to consult on the basis of fairness could arise.

- [127] On the question of a duty to consult arising on the basis of fairness (ground 1(a)), Two Seas contends that The Landings has not identified any, or any sufficient factual bases for interposing a duty to consult with it during the decision-making process and none of the factors which it has identified at paragraph 65 of its written submissions, taken singularly or collectively, are sufficient to displace the ordinary rule that, where there is no statutory duty to consult, no duty to consult arises. Two Seas contends further that there is nothing so exceptional about the circumstances identified by The Landings at paragraph 65 that would imply or give rise to a duty to consult or implicate a duty of fairness. There was nothing unfair about the process adopted by the DCA that warranted consultation with The Landings. Furthermore, they argue, the hurdle is substantially higher where, as here, the **PPDA** specifically imposes a duty to consult with regard to some planning matters, while remaining silent on others. In such circumstances, the rule of statutory interpretation, *expressio unius est exclusio alterius*, would operate to exclude any duty to consult in any circumstances other than those identified in sections 12 to 15 of the **PPDA**, which specifically requires consultation with specified persons in relation to the preparation of physical plans.

#### **Analysis and conclusion – Ground 1(a)**

- [128] The Landings relies on the decision of **Ulric 'Buggy' Haynes** as an application of the principle of 'fairness' giving rise to a duty to consult. This case concerned a claim to quash the decision of the Minister under the Town and Country Planning Act to grant planning permission to build a sporting complex on a savannah, which had been used daily by a wide cross section of the public for decades for a variety of sporting and other activities. The statute provided for a process whereby the Minister, in carrying out the legal process of altering a development plan, is bound to consult with the local authority in the jurisdiction where the land is situated and to

give to the council or persons or bodies an opportunity to make objections and representations. The statute provided for the publication of a notice in the Gazette granting an opportunity for objections and representations in writing, upon receipt of which the Minister was to hold an inquiry. It also provided for a report on the inquiry to be submitted to the Minister for his consideration along with the objections and representations before he made a submission to the Parliament for its approval.

[129] In **Ulric ‘Buggy’ Haynes**, the judge found that while the statute gave the Minister the power to grant planning permission without a right to a hearing or provisions for objections and representations being made, the statutory procedure ‘is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation’. To the contrary, these additional steps ‘will in fact fulfill its purpose, the claimants having been deprived of the opportunity to object or make representations in respect of an amendment to the National Plan in relation to the proposed savannah development’. In these circumstances, having found that there was a duty on the Minister to act fairly, ‘the court could then enquire as to the ambit of that duty in this case in these particular circumstances, and whether the duty was in fact fulfilled’. The judge was careful to state that his decision did not extend to any general duty to consult when the Minister is considering whether to grant permission to develop land, but that in the particular circumstances of that case there was a duty on the Minister to act fairly when considering the application for planning permission.

[130] In the judgment below in this matter, the learned judge distinguished the **Ulric ‘Buggy’ Haynes** decision on the basis that the relevant statute had provided for public participation in relation to amendments to the National Plan, which participation had not been afforded to the claimants. Whereas, in this case ‘[t]he Landings had not been deprived of any statutory duty of consultation which would have placed any duty on the DCA to consult with them prior to granting approval’.<sup>71</sup> The learned judge also reasoned that:

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<sup>71</sup> Judgment at para. [82].

“while the DCA would have been aware of [The Landings’] request for information, the effect on The Landings cannot be said to be comparable to the effect of the planning permission in [the] **Ulric ‘Buggy’ Haynes** case. The DCA would have had the EIA before it, in which, impacts to the surrounding area including The Landings [were] considered and highlighted. The **Ulric ‘Buggy’ Haynes** case emphasizes that there is no general duty to consult when considering whether to grant permission to develop land but that it was the circumstances of that particular case that called for consultation.”<sup>72</sup>

[131] In my judgment, the first instance decision in **Ulric ‘Buggy’ Haynes**, which is not binding or persuasive authority in this Court, was decided upon the particular legislative provisions under consideration in that case. These provisions find some parallel in section 12 of the **PPDA** which provides for consultation with any person with an interest in matters for which proposals may be made in a physical plan. Section 12(2) expressly requires that before finalising a draft physical plan, reasonable steps must be taken 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. This is all to take place before the draft physical plan is sent to Cabinet for its approval.

[132] In the instant matter, there is no statutory duty to consult with respect to the applications for planning approval, including for touristic developments. I have already decided that the learned judge was correct in concluding that no legitimate expectation of consultation arose either expressly or by implication in relation to The Landings. The simple issue therefore is whether fairness required that The Landings be consulted by the DCA. The Landings says it did because of the proximity of Parcel 282 to the application site on Parcel 272 and the likely impacts of the proposed development on its property and business. In my view, this submission is not rooted on sound principle. There is no general common law duty to consult, and the court will be slow to imply such a duty where none is provided for in the statute

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<sup>72</sup> Supra n. 71.

or arising by virtue of a promise to consult or a practice of consultation. Moreover, it is not the size, scale or context of a particular planning decision which leads to a duty to consult arising on the basis of legitimate expectation. Absent the first three main circumstances where a duty to consult may arise, a claimant must rely on a failure to consult leading to conspicuous unfairness. This fourth circumstance, as the authorities clearly state, arises in exceptional cases. Furthermore, a court should not add a burden of consultation which Parliament decided not to impose.

- [133] The question therefore is whether the provisions of the **PPDA** are insufficient to achieve justice, such that it is necessary for the court to 'supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation'. This must be balanced with the principle that where a public authority, as in the case of the DCA, has promised or held out that in making a particular type of planning decision it will either follow certain procedures or take into account certain material considerations, good administration requires that it should be bound by its undertaking provided this does not conflict with its statutory duty. This duty to have regard to material considerations may require the DCA to 'hear the other side' and to consult with the owners of adjacent properties which would be impacted by the proposed development, such as The Landings. It means that, the DCA, having expressly represented and undertaken to consider the factors and matters set out at paragraphs 4.8.1 and 4.8.3 of the Manual, a legitimate expectation arose that those prescribed factors would be considered by them in determining planning applications. The weight to be given to each of these considerations would be a matter for the DCA, unless by its Manual, the DCA has placed a particular importance or significance to certain considerations or factors. This matter must also be considered in light of the duty to carry out sufficient inquiry, the Tameside duty. It is a duty to take reasonable steps to acquaint itself with the relevant information to enable it to properly and fairly assess the merits of the proposed development and to reach a rational decision. These two public law duties fall to be considered at ground 4. Accordingly, I will reserve my analysis and conclusions on this ground 1(a) on the issue of fairness, until I have considered both grounds 3 and 4 below.

**Ground 3 – Fairness**

**Ground 3(a) - Refusing to allow The Landings access to the application documents and depriving it of the opportunity to make informed representations to the DCA**

**Ground 3(b) - Refusing The Landings access to the application documents (section 47 of the PPDA); and**

**Ground 3(c) - Refusing The Landings access to the application documents (page 25 of the DCA's Guide)**

[134] These three grounds may conveniently be dealt with together. Ground 3(a) concerns whether the DCA acted wrongfully and/or unlawfully when it denied The Landings access to the application documents effectively depriving it of the ability to make informed representations on the planning application, including on the impacts of the scheme on The Landings. Similarly, Grounds 3(b) and 3(c) are concerned with the right of access by members of the public, including The Landings, to the application documents pursuant to an official search under section 47(4) of the **PPDA** and/or the implied intention and purpose of the DCA's Guide regarding searching the application register.

[135] As to ground 3(a), The Landings submits that it was unfair for the DCA to refuse their requests for the application documents. They argue that as an 'adversely affected immediate neighbour' of Parcel 272, it was unfair for it to be deprived, effectively, of the opportunity to make representations to the DCA by not being allowed to see and take copies of all the application documents.

[136] As to ground 3(b), the section 47 point, The Landings' submissions are more expansive. They rely heavily on the decision of this Court in **Director of Physical Planning v Anne Hendricks Bass**<sup>73</sup> where the equivalent provision of the **Nevis Physical Planning and Development Ordinance**<sup>74</sup> (the "**Nevis Ordinance**") was considered, interpreted and applied. Section 47, of the **Nevis Ordinance** is very

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<sup>73</sup> SKBHCVAP2017/0002 (delivered 15<sup>th</sup> June 2017, unreported).

<sup>74</sup> CAP. 6:09 (N), Revised Laws of Saint Christopher and Nevis 2009.

similar (almost identical in every material particular) to section 47 of the **PPDA**. On this basis The Landings argues that, for the purpose of interpreting and construing the provisions of section 47 of the **PPDA**, there are no material differences which, when properly construed, would lead to a different construction.

- [137] The dicta of Webster JA [Ag.] at paragraphs [16] and [17] of his oral judgment in **Anne Hendricks Bass** is most instructive as to the interpretation and effect, in practical terms, of the equivalent section 47 of the **Nevis Ordinance**:

“[16] In relation to the content of registers, we accept Mr. Wilkin’s submission that the register must be in a form that allows the public to have access to sufficient information to allow them to be able to make a proper assessment of the development that is contemplated. How else would the public be able to determine what impact, if any, the development will have on neighbouring properties, the environment and on ‘... the preservation of the natural and cultural heritage’ of the island of Nevis. To achieve this objective, the information in the register cannot be limited to what the Director sees fit to note in the register. A brief perusal of the register for the Development shows how unhelpful the notations in the register can be. The only real information that can be gleamed from this document is that the proposed development is for 17 condominium style buildings, six of the buildings are under construction and there is an outstanding application for fencing. There is no mention of the ongoing dispute which is before the High Court regarding environmental issues and no real details of the scope of the development. (Emphasis added)

[17] We do not think that this was the intention of the legislation. The use of the word “information” in subsection 5 and the requirement for an index are clear indications, in the context of the general intention of the Ordinance, that the register means the information actually recorded on the register itself and the supporting documents which must be listed in the index and which form a part of the register.” (Emphasis added)

- [138] The Landings also places much emphasis on this Court’s utilisation of the preamble and the objects and purposes section to the **Nevis Ordinance**, as an aid to arriving at a ‘liberal and purposive interpretation’ of section 47 in compliance with the mandate of section 3(2) of the said legislation. In **Anne Hendricks Bass** at paragraph [13], Webster JA [Ag.] opined:

“[13] The combined effect of the preamble and section 3 makes it abundantly clear that the development of land in Nevis is not entirely a private matter even when it is taking place on land that is privately owned.

The public has an interest in how land is developed on the island and the draftsman has made provision in the Ordinance for a fair, open and accessible system of approving projects for the development of land and has gone as far as to direct in subsection 2 of section 3 that the Ordinance must receive ‘...such purposive and liberal construction and interpretation as best ensures the attainment of its objects.’ This is very powerful language and this Court would be remiss if it did not honour the draftsman’s intention of not just looking at the words used in the Ordinance and interpreting them literally, but reading and interpreting them in the context of land development in Nevis as is clearly set out in the preamble and section 3. There is nothing in the remainder of the Ordinance that contradicts the clear intention in the preamble and section 3.”

- [139] The preamble to the **PPDA** is not identical with the preamble to the **Nevis Ordinance**. However, it is, subject to one notable exception, in *pari materia* with the terms of the preamble to the **Nevis Ordinance**. To the extent that these similar provisions use slightly different language, these differences are inconsequential. The one exception is that the Nevis preamble includes this contextual statement: ‘for the preservation of the natural and cultural heritage’ which, though not in the preamble to the **PPDA**, is included as one of its objects and purposes at section 3(1)(e). The preamble to the **PPDA** states:

“AN ACT to make provision for the development of land, the assessment of the environmental impacts of development, the grant of permission to develop land and for other powers to regulate the use of land, and for related matters.”

- [140] Section 3 of the **Nevis Ordinance** and the **PPDA** are almost identical in their statement of the objects and purposes. Sub-paragraphs (a) to (d) in both statutes are identical, with the inconsequential exception that at sub-paragraph (d) of the **Nevis Ordinance**, the word ‘enhance’ is used instead of ‘secure’ as used in the **PPDA**. Also, sub-paragraph (e) of section 3 of the **PPDA** (to ‘protect and conserve the natural and cultural heritage of Saint Lucia’) is almost identical with sub-paragraph (f) in the **Nevis Ordinance** (to ‘protect and conserve the natural and built heritage of Nevis’). The only significant point of departure in section 3(1) of both statutes, is that the **Nevis Ordinance’s** statement of objects and purposes includes the added object at (e) ‘[to] provide for physical planning and development control processes that are fair, open, assessable, timely and efficient’. This additional object

in the **Nevis Ordinance** differentiates it, to some extent, from the position and context applicable in the **PPDA**. It expressly gives statutory recognition to these important principles of natural justice by requiring that applications for planning approval, whether in relation to public or private land, are to be dealt with, inter alia, in a fair, open and assessable way. In this respect, the **Nevis Ordinance** has expressly incorporated into the planning approval process the common law and public law (natural justice and the principles of fairness, including a duty to consult), access to sufficient relevant information to enable or to facilitate informed representations, and where applicable, proper consultation. In my view, this object in the **Nevis Ordinance** would also extend to and incorporate a duty to carry out sufficient inquiry and to have regard to relevant considerations, as developed by the courts over time in the public law sphere and which are to be deployed by the courts in circumstances where there is no statutory duty to consult. That said, an important point of similarity between section 3(2) in both pieces of legislation, which was accorded much significance by this Court in **Anne Hendricks Bass**, is that the legislation ‘shall receive such purposive and liberal construction and interpretation as best ensures the attainment of its objects and purposes’.

- [141] The decision in **Anne Hendricks Bass** also dealt with another important point raised by The Landings in this appeal, that is, whether the scope and extent of the public access to the application register kept pursuant to section 47 of the **PPDA** extends to include or to give rise to a right by the general public to search the register and take copies of documents noted in the register and the application documents, upon payment of the prescribed fee. This question was answered in the affirmative in **Anne Hendricks Bass**. It is The Landings’ contention that, upon a proper construction of section 47(4) of the **PPDA** (in particular the use there of the word ‘information’) and the wording and depiction at page 25 of the DCA’s Guide concerning searching the application register, this question must also be answered in the affirmative in relation to the **PPDA**. At paragraph [19] in **Anne Hendricks Bass** Webster JA [Ag.] dealt with this issue as follows:

“[19] The other issue regarding the interpretation of section 47 is the extent of the public’s access to the information on the register and their right to

take copies of all the documents that comprise the register. It was suggested by Mrs. Nisbett-Brown that even if the public has the right or has been given the right to inspect the documents on the Director's file, this right does not extend to taking copies of those documents. We can find no justification for making this distinction. From a proper reading of section 47(5), once it is established, as the lower court and this Court have found, that the register includes the documents mentioned in paragraphs 4 and 17 above, the right to take copies of those documents, upon paying the prescribed fee, follows." (Emphasis added)

[142] The documents referred to at paragraphs 4 and 17 of the judgment in **Anne Hendricks Bass**, is a reference to the terms of the declaration made by the judge below at sub-paragraph (d) of the order (as approved and endorsed by this Court), as to what documents constitute the register to be kept by the equivalent section 47. These documents are:

- (i) the actual application made for planning permission;
- (ii) the plans of the project;
- (iii) any amendments or revisions to the application;
- (iv) related applications;
- (v) environmental impact assessments amended thereto or supplemental environmental impact assessments; and
- (vi) any notices issued and all related documents in relation to that particular application for development.

[143] As to the existence of a general right for the public to inspect and take copies of the register and underlying documents under the **Nevis Ordinance**, the judgment of this Court in **Anne Hendricks Bass** was that the respondent and other members of the public had a right to inspect and take copies of the register of the development kept by the Director under section 47 of the **Nevis Ordinance** which register included the supporting documents. The attempts to restrict that right to information entered in the register by the Director was a breach of the **Nevis Ordinance** and accordingly unlawful.

[144] The Landings argues that any difference in the language of the objects and purposes between the Saint Lucian and Nevis statutes should not alter or lead to a different meaning, interpretation and effect of section 47 of the **PPDA**. Accordingly, in the instant appeal, this Court ought to accord to section 47 the same meaning and right of access to the underlying or supporting documents to be kept on the register, and not just to what is entered on the register itself by the head of the Physical Planning and Development Division. This is so, says The Landings, notwithstanding that no regulations contemplated by section 47(h) have been promulgated. It is for the courts to fill this gap in the interim, until regulations are made pursuant to section 56 of the **PPDA** as to the form of the application to inspect, and prescribing 'all things required or authorized by this Act to be prescribed'.<sup>75</sup> In concluding this point, The Landings argues that the right to view the register and to obtain copies of the information recorded therein, must be for a purpose and must assist the objects of regulation in the public interest. This object or purpose is not achieved by providing minimal information.

[145] With respect to ground 3(c), the instructions, requirements, and depiction at page 25 of the DCA's Guide, provides guidance to persons (members of the public) who wish to request, in writing, a search of the register of planning applications to be kept pursuant to section 47 of the **PPDA**. Section (b) on page 25, 'Information relevant to the application to be indicated', requires the name of the applicant, reference number, date of submission and location of development to be given by an applicant for a search. The Landings argues that as drafted, the document indicates that the person requesting the search has to provide these details, and this (a) begs the question as to where that person will have found out that information and (b) means that what is provided in the search must be more substantial than the information provided by the person making the request. They also point out that page 25 has a drawing of a man searching a filing cabinet for documents, showing the expected scale or scope of the 'search' exercise, which is not to be limited to merely flicking through an index folder or book.

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<sup>75</sup> Section 56(1)(a) and (d) of the PPDA.

- [146] The DCA's primary position on grounds 3(a), (b) and (c) is that The Landings should not be permitted to argue or rely on this ground of appeal as a basis for asserting that a duty to consult arose by virtue of fairness or legitimate expectation, or that the refusal to provide them with the application documents and other documents pertaining to the development was unfair and unlawful. The DCA asserts that the decision granting leave to commence a claim for judicial review was specifically to challenge the decision by the DCA to grant planning approval of the development. It was not to challenge any decision to restrict or to prohibit access to the application documents or development plans. They contend that The Landings have not sought any relief in these proceedings in respect of any decision to restrict or prohibit access to the application documents.
- [147] The DCA refers to paragraph 10 of the judgment below regarding the preliminary objection taken to certain matters in The Landings' submissions, the effect of which would have been to expand the scope of the claim for judicial review beyond that set out in its FDCF and to the affidavit of Ms. Copeland filed in support thereof. One such matter, at paragraph 5 of The Landings' further submissions filed on 14<sup>th</sup> May 2019, in reliance on the case of **Anne Hendricks Bass**, was the submission that 'the attempt to restrict the right to information entered in the 'register' is a breach of the Act and is unlawful'. At paragraph [11] of the judgment below, the learned judge ruled that this issue (and the other matters which were listed at paragraph 10) were not specifically pleaded and, accordingly, it was impermissible for these matters to be introduced as new matters via submissions and they could not be considered. From this ruling The Landings has not appealed.
- [148] Two Seas relies on similar submissions to those of the DCA in response to grounds 3(a), (b) and (c). They maintain the same technical objection as does the DCA to this issue being raised at this stage for the first time and in this way. They make the additional point that The Landings has not pointed to any statutory provision entitling it to the extensive information and documents that it requested, nor has it cited any

authority that supports the argument that it was so entitled. Learned counsel for Two Seas, in his oral submissions, argued that section 47, when properly construed, deals with the requirements of the contents of the register and the entitlement of a member of the public, upon payment of the prescribed fee, to access to the contents of the register itself. There is no requirement to permit access to the documents, including the application documents. In the instant matter, there was no evidence as to what information or particulars of the Two Seas application the register actually contained, and a copy of the register was not produced and put into evidence at the trial. Accordingly, there was no evidence that the register did not conform with the requirements of section 47 as to what should be contained therein.

- [149] In the alternative, learned counsel submitted that even if the register was in some respect inadequate, this should not lead to the planning approval obtained by Two Seas being quashed. This would adversely affect Two Seas' interests since the extant planning approval was given several years ago in April 2018. Two Seas also contends that upon a thorough assessment of the documentary and other evidence, The Landings were not treated unfairly by the DCA. All the concerns which they expressed about the proposed development were addressed in the EIA and ESIA Addendum Update, as the learned judge correctly found.

### **Conclusion on Grounds 3(a), (b) and (c)**

- [150] I will first deal with the technical objection made by the DCA and Two Seas to the submissions made by The Landings before this Court that the DCA acted unlawfully and improperly when it refused, or did not permit The Landings access to the application documents. It cannot be denied that the claim for judicial review brought by The Landings was a challenge specifically to the decision made by the DCA's board on 18<sup>th</sup> April 2018 granting the application by Two Seas for planning approval to develop Parcel 272. This is the decision, and the sole decision, being challenged by these proceedings on the grounds that it was arrived at illegally, arbitrarily, irregularly, irrationally, unfairly, unreasonably, made in breach of the rules of natural justice and an improper exercise of discretion.

[151] In the judgment below, the learned judge ruled in favour of the DCA and Two Seas on their objection to The Landings, in written submissions filed in the court below, seeking to expand the scope of the challenge in the judicial review claim. In particular, the judge ruled against the claim for judicial review being expanded in that way in reliance on the authority of **Anne Hendricks Bass**, by challenging the application register as not being in conformity with the requirements of section 47 of the **PPDA**. The terms of The Landings' submission was that the register must be in a form that allows the public to have access to sufficient information to allow them to be able to make a proper assessment of the development that is contemplated. The judge found that a challenge to the EIA process, including 'whether there was any, or any adequate opportunity for public participation in and scrutiny of the EIA and the contents of the register which they say was not in conformity with the Act' (emphasis added), were not matters specifically pleaded by The Landings. She concluded that '[w]hat was not foreshadowed by the pleadings was a challenge to the EIA process and to impugn the resulting EIS. The court finds it wholly impermissible to seek to introduce these new matters via submissions and cannot now consider them'. From this decision, The Landings have not appealed. This is not one of the findings (fact or law) challenged by The Landings in its amended notice of appeal filed on 23<sup>rd</sup> June 2021, nor is it one of its grounds of appeal. This ruling, accordingly, stands.

[152] In its reply submissions, at paragraph 9, The Landings asserts that the failure by the DCA to provide the application documents and the inadequacy of the register of applications kept under section 47, were matters covered by Ms. Copeland in her witness statement filed in the proceedings below. At paragraph 48(ii) Ms. Copeland states that the DCA 'failed or refused to provide the claimant with the plans and reports'. The Landings submits that the issues before the court below concerned the lawfulness of the DCA's actions and processes and its consequential effect on the lawfulness of the planning approval and therefore, no separate claim was needed against the individual acts in that process.

[153] In support of this submission, The Landings cites the decision of Dove J in the English high court in **R (on the application of Holborn Studios Ltd) v Hackney London Borough Council**<sup>76</sup> at paragraphs 46, 61, 71 and 72. This case concerned a challenge by way of application for judicial review, to the grant of planning permission for a development. The challenge was made on three grounds, ‘the first consisting of a sequence of legal contentions relating to the information provided in respect of the viability assessment of the proposed development which informed the contributions which were sought from the interested party, in particular, in relation to affordable housing’.<sup>77</sup> Dove J found, in relation to the first point raised by the council in response to ground 1, that it had not complied with its obligations under the relevant section of the 1972 Act ‘not simply in relation to listing background papers but also in failing to provide them for inspection’.<sup>78</sup> Dove J went on to hold that the claimant must succeed on ground 1 and the decision taken by the council in relation to the interested party’s planning application must be quashed. At paragraph [71], the judge stated:

“71. ....In my view the principles identified in the case of **[R (Joicey) v Northumberland County Council]** [2014] EWHC 3657] by Cranston J at paragraph 47 are clearly on point, since the purpose of having a legal obligation to confer a right to know in relation to material underpinning a democratic decision-taking process is to enable members of the public to make well informed observations on the substance of the decision. The failure to provide the background material underpinning the viability assessment in the present case, in circumstances where such material as was in the public domain was opaque and incoherent, was a clear and material legal error in the decision-taking process.” (Emphasis added)

[154] In **Hackney London Borough Council** while the challenge in the judicial review proceedings was to the planning decision, this involved a direct challenge to the information or lack of information provided to an interested party and the lawfulness of this alleged failure. In the instant matter, this is equally so as The Landings challenged the planning approval granted by the DCA on various grounds including

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<sup>76</sup> [2020] EWHC 1509 (Admin).

<sup>77</sup> Supra n. 76 at para. [3].

<sup>78</sup> Supra n. 76 at para. [61].

illegality and breach of the rules of natural justice. One of the bases upon which The Landings, as the claimant below, sought to have the planning decision quashed, was the DCA's alleged failure to provide it with the plans and reports with the underlying application documents. By contrast, the case of **Anne Hendricks Bass** concerned not a claim for judicial review of a planning approval, but a claim against the refusal of the claimant's request to take copies of the documents and plans on the Director's file kept pursuant to section 47 of the **Nevis Ordinance**.

[155] At first blush, it may be somewhat unclear, from the way in which the learned judge gave her ruling at paragraph [11] of the judgment, whether the said ruling incorporated all seven (a to g) of the listed points of objection at paragraph 10, including the lawfulness of the denial by the DCA of an entitlement to be permitted access to and to take copies of the application documents pursuant to section 47. I say this because the judge first refers to these matters as having not been 'specifically pleaded'. She then goes on to refer to the challenge to the EIA process and to the resulting EIS as being 'not foreshadowed by the pleadings'. The specific ruling of the court below is that 'it is wholly impermissible to seek to introduce these new matters via submissions' and the court cannot now consider them. This is seemingly a reference to all seven new matters. What is clear is that having made her ruling, the learned judge did not go on to consider the lawfulness of the information kept on the register and whether the denial of access to the underlying application documents was a breach of section 47 of the **PPDA**; its impact on The Landings' ability to make informed representations to the DCA concerning the impact of the proposed development of Parcel 272 on Parcel 182 and the business being conducted therefrom, and whether such a failure rendered the planning approval unlawful.

[156] In my judgement, considering the judge's ruling on the 'new matters,' it is not permissible for The Landings to seek, in these proceedings, to have any 'decision' taken by the DCA not to permit it access to the application documents in the register kept under section 47, set aside or quashed on the ground that the said decision

was unlawful, as was the case in **Anne Hendricks Bass**. No such relief was sought by The Landings either in the court below or before this Court. However, that does not prevent The Landings, in these proceedings, seeking to have the planning approval quashed on the basis of a duty to consult having arisen at common law and on the ground of the fairness (or the lack thereof) of the decision-making process adopted by the DCA. The essence of this basis is the DCA's failure to engage in proper consultation with The Landings by, among other bases, not providing them with the underlying application documents which ought to have been available to them under or pursuant to section 47 of the **PPDA**. This is so whether The Landings were entitled to be shown and to have copies of the application documents as of right like a member of the public searching the register, or as a requirement of meaningful and proper consultation.

[157] Section 47 of the **PPDA** states:

“47. (1) The Head of the Physical Planning and Development Division shall maintain a register containing particulars of –

- (a) any application for permission to develop land, including the name and address of the applicant, the date of the application and the development forming the subject of the application;
- (b) the date and effect of any decision made in respect of any such application;
- (c) any appeal in respect of such a decision and the decision made on the appeal;
- (d) any modification or revocation of any permission granted in respect of any such application;
- (e) any enforcement notice or stop notice issued in respect of any development of land;
- (f) any permission granted for the display of an advertisement;
- (g) any commencement notice received and any completion certificate issued under this Act; and
- (h) any other matter which may be prescribed by regulations made under this Act.

(2) The register kept by the Head of the Physical Planning and Development Division under subsection (1) shall include an index, which shall be in the form of a map, and both the register and the index may be kept in an electronic data storage and retrieval system.

(3) Every entry in the register shall be made within 7 days of the date on which the decision, notice or event to which it relates was made, filed, issued or done.

(4) The register shall be kept at the office of the Ministry and any person shall be entitled to access to the information recorded therein and to take copies of such information on payment of the prescribed fee.”

[158] The courts must apply to section 47 ‘such purposive and liberal construction and interpretation as best ensures the attainment of its objects and purposes’ most notably, in the context of this case, the object at subparagraphs (a), (b) and (e) of sub-section (1) of section 47, as set out above.

[159] Applying this purposive approach to the interpretation of section 47, the register is to contain particulars of the matters listed at sub-paragraphs (a) to (h) of subsection (1). These include at (a) that ‘any application for permission to develop land’ is to include, but is not limited to, the name and address of the applicant, the date of the application and ‘the development forming the subject of the application’. Accordingly, it is a requirement of section 47 that the register must contain sufficient particulars of the development being applied for so as to inform the public searching the register of what type of development is applied for, its scope, size and any other information necessary to provide an accurate and full description of the development being proposed and the location and area of land upon which it is to be built. The register is to also contain, *inter alia*, particulars of any other matter which may be prescribed by regulations made under the **PPDA**. However, this requirement has been somewhat handicapped by no regulations having been made under section 56.

[160] Importantly, section 47(2) provides for the register to include an index, which index shall be in the form of a map. Both the register and the index (the map) may be kept ‘in an electronic and data storage retrieval system’. While this is not an absolute requirement, it is indicative of the intention of the legislature that the means by which the right to search the register and the index is to be realised by a member of the public, should be a modern and convenient one, that is, by electronic means,

thereby providing quick, easy and accurate access to the information kept or required to be kept therein as shown in the index. This quick and accurate access to the register (and its contents) is for the benefit and convenience of both those responsible for maintaining and updating the information noted in the register and the end users, the members of the public searching the register and the index. There is also provision made for the timely updating of the entries in the register with any current decision, notice or event to which it relates. This again goes to the importance of properly and accurately keeping and maintaining the register up to date in the interest of providing the searching public with access to all information pertinent to an application for planning approval.

[161] Section 47(4) expressly provides that any person shall be entitled to access the 'information recorded [in the register]', and to take copies of such information on payment of the prescribed fee. In my view, properly construed, this provision gives to the public a right of access not just to the entries or notations in the register itself, but to the information and underlying documents pertaining to the planning application being searched. This must include a right to request and obtain copies of the underlying application documents as the searching members of the public elect to request and pay for. Such a right, in its fullness, has been declared and pronounced upon by this Court in **Anne Hendricks Bass** in relation to the very similar section 47(5) of the **Nevis Ordinance**. In my view, there is no material difference in the wording of these provisions in both statutes which would or ought to lead to a different interpretation or construction to that which was ascribed by this Court in **Anne Hendricks Bass**.

[162] In the premises, I hold that, properly construed, section 47 of the **PPDA** requires the head of the Physical Planning and Development Division to maintain a register which contains more than simply the name of the applicant, his or her address and the date the application for planning approval was submitted to the DCA. This officer is also charged with ensuring that the register comprises an index (in the form of a map) of the pertinent information, documents and events applicable to the

registered planning application. This must include sufficient particulars and an accurate and full description of the proposed development, so as to inform any member of the public conducting a search of the register of the type, location, scope, size, density, and any other important, unique or critical particulars of the proposed development; the important documents submitted such as the maps, plans and renderings for the project; any environmental impact assessments; any technical reports; and any socio-economic assessments of the impact of the proposed development on the surrounding area and neighbouring properties or existing developments. In this respect, I fully adopt the approach taken by this Court in interpreting section 47 of the **Nevis Ordinance** at paragraphs [13], [14], [16], [17], [18] and [19] of the judgment in **Anne Hendricks Bass**, as being applicable with equal force to the proper construction of the provisions of section 47 of the **PPDA**, both statutory provisions being *in pari materia*.

- [163] The effect of this is that the DCA ought to have made available to The Landings, upon the request by its lawyers to search the application register relating to the proposed development on Parcel 272, access to and copies of the underlying application documents, plans, maps, renderings and reports relating to that application for planning permission. As a member of the public exercising its right to search the application register, including the index, The Landings was entitled to such access, information and documents upon payment of the prescribed fee. This, the DCA did not do. While not pronouncing on the legality or lawfulness of the DCA's decision to deny The Landings its rights under section 47, by it not being provided with such information and documents, The Landings were deprived of the opportunity of being properly or fully informed members of the public of the details of the proposed development of Parcel 272. This would have affected, in a significant way, their ability, should they have elected to so do, to make representations to the DCA about the proposed development, including its impact on The Landings' property and hotel business.

[164] The DCA's Guide is, as its title states, a guide. It is not a document with any statutory force or effect, nor is it a regulation made pursuant to section 56 of the **PPDA**. It follows that what is stated and depicted at page 25 of the Guide, falls to be considered in the context and parameters of the rights of members of the public searching the register to be kept under section 47, as per the purposive construction above. Whilst page 25 does not, by itself, lead to a legitimate expectation that access to the application documents would be made available to a person searching the register, section 47, as construed above, gives rise to such a legitimate expectation. This legitimate expectation is further buttressed by the contents and depiction at page 25 of the Guide.

[165] In light of the interpretations and pronouncements above regarding section 47 and the Guide leading to a legitimate expectation that the public would be permitted such access to the underlying application documents, the questions which follow are (i) whether a failure by the DCA to provide The Landings with access to the application documents pursuant to section 47(4) rendered the planning process adopted by the DCA unfair; (ii) whether, as a neighbouring property within the sphere of influence of the proposed development, The Landings ought to have been consulted by the DCA; and (iii) whether, absent any consultation or any proper consultation, the planning approval granted to Two Seas ought to be quashed as unlawful, unfair, irrational, arbitrary, in breach of the rules of natural justice, or on the ground of *Wednesbury* unreasonableness. The answer to these questions will hinge on the final determination and outcome of grounds 1(a) and 4 of the appeal.

#### **Ground 4 – The DCA's failure to have regard to material considerations and relevant policies**

[166] At ground 4 of its appeal, The Landings contends that the learned judge erred in law and fact when she found that the DCA had regard to material considerations, specifically (i) the effect of the construction, operation and existence of the scheme on its surroundings, including The Landings and (ii) the DCA failed to consider the relevant policies in the Manual, the impacts which the scheme would have, that The

Landings were concerned about those impacts and the planning balance between benefits and harms. It also contends that apart from some references to harm, the application documents, including the ESIA Addendum Update, also failed to address these matters.

[167] Section 23(1) of the **PPDA** expressly requires the DCA to have regard to any other material considerations. The **PPDA** does not define or address what is meant by, or which factors would constitute material considerations. This is unsurprising and is not unusual in planning legislation. Section 23(1) leaves the determination of what is 'material' in relation to a proposed development, to the assessment and judgment of the DCA. However, material considerations in the planning context would vary depending upon a range of factors including the type of development, its location, size, and any likely adverse impacts on the surrounding area, properties and businesses. Such considerations must serve a planning purpose, must fairly and reasonably relate to the development applied for, and must not be so unreasonable that no reasonable planning authority could have imposed them.<sup>79</sup> The Landings also submits on the law that material considerations are divided between those which are 'expressly or impliedly identified in the Act or the policy as considerations required to be taken into account' or 'on the facts of the case they were so obviously material as to require consideration'.<sup>80</sup>

[168] This jurisprudence accords with the statutory regime and approach to planning decision-making, where some factors which the DCA is to have regard to, for example, the provisions of any physical plan of the area within which the land is situated, are required to be taken into account and other material considerations are not identified in the **PPDA** nor in any regulations made thereunder. Accordingly, decisions as to materiality are quintessentially matters to be assessed and weighed by the DCA, as the statutory authority empowered to make such assessments when

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<sup>79</sup> See *R (on the application of Wright) v Resilient Energy Severndale Ltd and another* [2019] UKSC 53 at paras. [31]-[37] per Lord Sales.

<sup>80</sup> See *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council* [2020] UKSC 3 at para. [32] per Lord Carnwath.

arriving at a decision on a particular application. These are not matters for the courts to interject its own judgment as to materiality (absent *Wednesbury* unreasonableness or *Tameside* irrationality). Likewise, it is not the duty of a court to interpose its own assessment or to carry out its own balancing exercise of conflicting or opposite impact factors. The function of the courts is to determine whether the statutory body did take into account the considerations and policies expressly or impliedly identified in the legislation as matters to which the DCA must have regard and, in addition, to assess whether a non-specified consideration was, on the facts of that application, so obviously material as to require its consideration so as to render the failure to do so *Wednesbury* unreasonable or the decision taken irrational.

[169] In addition to the statutory requirement that the DCA must take into account other material considerations (section 23(1)), the applicable principles of natural justice impose, on the exercise of the decision-making power by public bodies, a duty to carry out sufficient inquiries and to have regard to relevant considerations. The latter duty may require the public body to hear the other side, and to thereby take into account the affected person's views about the subject matter of the application. In the instant matter, it cannot be denied that the DCA did not consult with The Landings; it did not itself hear the other side or any other point of view from The Landings as to the impact of the proposed development on Parcel 272 on Parcel 182. It confined itself to what was in the EIA and ESIA Addendum Update as to the likely adverse impacts on The Landings and the recommended mitigating steps and to what was in the Appraisal Report and internal reports from various agencies.

[170] The Landings submits that the DCA failed to have regard to all material considerations in making its decision. In this context, it refers to governmental planning policies (without identifying any specific planning policy). It challenges the thoroughness of the EIA as failing to address certain relevant environmental impacts and submits that these matters ought to have been addressed in the DCA's decision, otherwise the statutory purpose of the EIA would be frustrated. The

Landings took aim at the application appraisals provided to the DCA's board, for their 'failure to identify the relevant policies to be applied in determining the application, the issues which go to the merits of the application, any issues on detailed controls or mitigation for the [b]oard to consider or make any assessment of whether the proposal complies with policy or is acceptable'.

[171] Specifically, as to the requirements in the Manual for tourism developments to blend into their surroundings, The Landings argues that there was no assessment as to whether the Two Seas development satisfied this policy requirement, or the consequences of its failure to do so, and there was no evidence that the DCA had considered and made any determination on this factor or taken it into account. The judge did not point to any appraisal or other DCA documents identifying or weighing up positive and negative factors. Accordingly, it must be presumed that the said exercise was not carried out or properly carried out by the DCA as required by the Manual.

[172] The Landings contends that the EIA material ought not to rescue the DCA's position on its failure to take into account material considerations and policies. It is submitted that the EIA materials do not identify the material considerations or policies required by the Manual to be taken into account with regard to tourism developments, and they do not evaluate the merits of the scheme against such considerations and policies before making a recommendation. In support of this point, it relies on this passage from the judgment of Pill LJ in **R (on the application of Lowther) v Durham County Council and another**:<sup>81</sup>

“... the duty of a planning officer in reporting to a committee. That duty is broader than a duty not actively to mislead. It includes a positive duty to provide sufficient information and guidance to enable the members to reach a decision applying the relevant statutory criteria. In the end, it is a matter of fact and degree for the members. However where, as in the present case, the decision-making body is required to apply a legal test to the facts as the members find them, it includes a duty to provide guidance as to what legal test is appropriate.”

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<sup>81</sup> [2001] EWCA Civ 781.

[173] The Landings also contends that the appraisal reports obtained by the DCA do not inform the board that The Landings were concerned about the development. Furthermore, the DCA was under a duty pursuant to section 23(3) of the **PPDA** to give reasons for granting permission subject to conditions, which it did not. I observe that this was not a ground of appeal upon which The Landings has sought to have the planning decision quashed.

[174] In response to ground 4, the DCA submits that the UK Supreme Court made it clear in **R (on the application of Wright) v Resilient Energy Severndale Ltd and another**<sup>82</sup> that the question of whether something was a material consideration was a question of law. There are three categories of considerations (i) those clearly identified by statute as considerations to which regard must be had, (ii) those clearly identified by statute as considerations to which regard must not be had and (iii) those to which regard may be had in the discretion of the decision-maker. This third category can be divided into two sub-categories: (1) considerations to which the decision-maker makes no reference and (2) considerations which are adverted to by the decision-maker but given no weight.<sup>83</sup> Where the decision-maker makes no reference to a consideration which falls into the third category his decision is not unlawful unless the consideration is obviously material in accordance with the Wednesbury test of irrationality. Likewise, where such a consideration is referred to by the decision-maker but he accords no weight to it, his decision is not unlawful unless no reasonable decision-maker could have done so.

[175] The DCA also pointed to this cautionary statement from the New Zealand case of **CREEDNZ Inc v Governor General**,<sup>84</sup> which was approved by the UK Supreme

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<sup>82</sup> [2019] UKSC 53.

<sup>83</sup> See **R (on the application of Friends of the Earth Ltd and another) v Secretary of State for Transport (Heathrow Airport Ltd, interested party)** [2021] 2 All ER 967 at paras. [116], [120] and [121].

<sup>84</sup> [1981] 1 NZLR 172.

Court in **R (on the application of Friends of the Earth Ltd and another) v Secretary of State for Transport (Heathrow Airport Ltd, interested party)**.<sup>85</sup>

“What has to be emphasized is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

[176] The test of what is a material consideration in the context of a development is whether the consideration serves a planning purpose, i.e. a purpose which relates to the character of the use of land.<sup>86</sup>

[177] The DCA disagrees with The Landings’ characterisation of the inadequacy of the appraisal reports; that they did not address the relevant or material considerations applicable to the proposed development. The DCA submits that these reports addressed issues that went to the merits of the application and issues on detailed controls or mitigation for the board to consider. The DCA points, in its written submissions, to certain parts/pages of the appraisals requiring input from the Department of Sustainable Development regarding impacts from water pollution, noise pollution and other environmental issues. It was noted that feedback had been obtained from the Ministry of Sustainable Development; it referenced adjacent land uses as touristic and the proposed use of Parcel 272 being touristic; it also anticipated the development of social friction between the developer’s workforce and the neighbouring communities and recommending mitigation measures and the likely impact of dust nuisance, noise nuisance, air pollution, vibration and other nuisance caused by the construction activity, pile driving, haulage vehicles and machinery operation.

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<sup>85</sup> [2021] 2 All ER 967.

<sup>86</sup> Supra n. 85 at para. [119].

[178] The DCA in its written submissions also stated that special mention was made by the Department of Sustainable Development of the likely impact on The Landings assessed as dramatic alteration of views/diminished aesthetics from the sea, air and road and recommended certain mitigation measures during the construction phase of a mesh screen on the boundary between Sandals La Source and The Landings, along with a green screen mesh to reduce noise pollution and maintain the visual greenery on the site.

[179] The DCA submits that the court must have regard to the legal presumption that 'statutory bodies.... exercise their powers and discharge their functions in a lawful and proper manner'.<sup>87</sup> They submit that it cannot be assumed that the DCA's board did not consider the individual policies to be applied as there is a presumption of regularity. The onus was on The Landings to prove this, which it has failed to do, as the learned judge held. In **North Meath Wind Farm Ltd. and another v An Bord Pleanála**<sup>88</sup> the burden on proof was formulated in this way:

"The burden of proof of establishing any error of law or fundamental question of fact leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on the applicant in proceedings such as these."

[180] The DCA also submits that the in-house appraisals by their technical staff addressed the merits of the application and it was not the function of the EIA or the ESIA Addendum Update to do so. In the absence of the actual minutes of the meeting of the board at which the decision to approve was made, the presumption of regularity applies. With regard to this point, I would merely interject that in judicial review proceedings it is a well-established fundamental principle of 'cards on the table' litigation. This imposes on the statutory body or functionary whose decision is sought to be impugned, a duty to disclose and to produce in those proceedings all relevant information and documents pertaining to the process by which that decision was arrived at. It was therefore incumbent upon the DCA to produce the minutes of

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<sup>87</sup> See *North Meath Wind Farm Ltd. and another v An Bord Pleanála* [2018] IEHC 107.

<sup>88</sup> *Ibid.*

the meeting of its board at which the decision to approve Two Seas' application for planning permission was made and the minutes of any other meetings of the board at which the said application was considered. This they clearly failed to do. It therefore does not lie in the mouth of the DCA to assert that the non-production and admission of the minutes of the meeting of the board at which the decision approving the application was made leads to a lack of proof and a failure on the part of The Landings to discharge its burden of proof in this matter.

[181] As to an assessment of whether the proposed development would blend into or with its surroundings, the DCA submitted that this is a planning function and not a matter for the court to delve into. Further, there is no principle of law which requires the decision-maker to be notified of the concerns expressed by a neighbour or requiring mandatory consultation with a neighbour simply because he or she is concerned about an application.

[182] As to the effect of the scheme on the surrounding area including The Landings, the DCA relies on the principle that 'planning control should restrict the rights of landowners only so far as may be necessary to prevent harm to community interests'.<sup>89</sup> In **R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council**<sup>90</sup> Lord Carnwath stated:

"It is trite and long-established law that the range of potentially relevant planning issues is very wide (**Stringer v Minister of Housing and Local Government** [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker..."

[183] The DCA also submits that neither the **PPDA**, the Manual or the Guide provides a specific policy guidance imposing a positive obligation to consider matters listed in ground 4 of the appeal. In such circumstances, the issue is left to be considered, or not, by the authority as a matter of planning judgment.<sup>91</sup>

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<sup>89</sup> Supra n. 82 at para. [38].

<sup>90</sup> [2020] UKSC 3.

<sup>91</sup> *Derbyshire Dales District Council and another v Secretary of State for Communities and Local Government and another* [2009] EWHC 1729 (Admin) at paras. [28] and [36] per Carnwath LJ.

[184] Two Seas objects to The Landings raising a challenge to the adequacy of the internal appraisal reports. They argue that this was not part of The Landings' case in the court below and this issue is being raised for the first time on appeal, which must not be allowed. In addition, they rely on much of the points and submissions by the DCA in opposing ground 4 of the appeal. With regard to the appraisal reports, Two Seas argues that these are not a requirement of the **PPDA**; they do not represent the views or findings of the DCA's board and there is no evidence or suggestion that in making its decision, the DCA confined itself to the information summarised in the appraisals. In relation to the process, they point to the evidence of Ms. Augustin summarised by the judge at paragraph [48] of the judgment below. This evidence shows clearly that the appraisals are done at a preliminary stage in order to determine whether an EIA is required, they precede the EIA and any decision of the board on the application. Accordingly, The Landings' challenge to the appraisals reflects a mischaracterisation of the nature and purpose of the application appraisal, and misleadingly implies or suggests that it is the document that informs the final decision of the board; which it clearly does not.

[185] As to the provisions in the Manual requiring touristic developments to blend into their surroundings, Two Seas submits that there is no requirement that the DCA should itemise every matter that it took into consideration. It is enough that the materials were placed before it on which the assessment could be made, the presumption being that the DCA understands its own policies and makes decisions with those policies in mind. The Manual is a guide and not a legal or legislative prescription. The phrase 'blend into their surroundings' is not defined. It is a subjective assessment to be made by the DCA whether the proposed development does so.

[186] As to The Landings' main objection or concern, the height of the buildings, the DCA must be presumed to have known the character of the neighbourhood, the height of other touristic buildings in the area. In any event, these concerns were specifically recorded in the EIA produced by Ms. King. This document was before the DCA and

it must be presumed that the DCA took this concern into account when the board made its decision. Further, the issue concerning impacts on light and views were not legitimate planning considerations, but alleged infringements by the developer of private rights. Moreover, the decision by the judge at paragraph [76] of the judgment that, it having not been shown that there is a right to light or views under the laws of Saint Lucia, The Landings has not shown that the decision of the board was irrational, has not been challenged in this appeal. The logical conclusion is that if the board requested an EIA, it must have read it and taken it into account. They also submit that it is clear from the decision itself, which mentions The Landings by name, that the board had The Landings in mind when it made the decision. Finally, it is submitted that the argument raised regarding non-compliance with section 23(4) of the **PPDA**, is a fresh one raised for the first time on appeal. In any event, the reasons for imposing the conditions are clearly stated in the approval decision itself.

#### **Conclusion on Ground 4**

- [187] The learned judge, having observed that the Manual (paragraphs 4.8.1 and 4.8.3) sets out relevant considerations in respect of tourism development and requires a technical study to be carried out and submitted to the DCA,<sup>92</sup> concluded that The Landings had not shown that these considerations were not taken into account by the DCA which was the extent of the requirement imposed by the Manual.<sup>93</sup> She posited that The Landings' concern regarding the height of the buildings was a matter for the DCA's determination and it would be inappropriate for the court or The Landings to seek to substitute its decision for that of the DCA. Importantly, the judge also opined that the relevant considerations imposed by the Manual were within the discretion that has been reposed in the DCA by statute and were considerations which, among others, necessarily involved a weighing of negative effects with the advantages to be obtained. This is the nature of the discretion granted to the DCA in paragraph 3 of paragraph 4.8.3 of the Manual.

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<sup>92</sup> Judgment at para. [67].

<sup>93</sup> Judgment at para. [68].

[188] At paragraph [69] of the judgment the learned judge seems to brush aside The Landings' pleaded case that since its adjacent property was a tourism resource, the DCA was obligated to take into account, among other factors, the socio-economic impact on it of the proposed development on Parcel 272, including the impact on its hotel operation and scenic views. In doing so, the judge mused that The Landings could not properly maintain a claim on behalf of the hotel/rental pool which it did not own, manage, or operate. The judge also opined that there was a legal presumption that the DCA had acted lawfully unless the contrary was shown<sup>94</sup> and that there was no evidence that the DCA did not consider, when reaching its decision, the impacts on The Landings. She concluded that the only evidence of what was before the DCA was what was contained in the EIA and ESIA Addendum Update, which addressed impacts to surrounding areas, including The Landings. She posited that The Landings had not shown that it had any concerns above and beyond those highlighted in the EIA, and many of the impacts raised by them were predictable, such as noise, dust pollution and traffic congestion and all of which were temporary inconveniences for which there were well established mitigation measures. Accordingly, applying the Tameside test, the learned judge concluded that it could not be said that the decision of the Board was unreasonable or one which no reasonable decision-maker, possessed of that material, could have proceeded to make without making further inquiries. The judge also concluded that there was no right to light or views and there were no regulations prohibiting developments of a certain height in Saint Lucia which was the DCA's stated position and accordingly the decision had not been shown to be irrational.

[189] Section 23(1) of the **PPDA** imposes on the DCA a requirement to have regard to any other material considerations. This provision does not go so far as to specify or to mandate the DCA to consider any specific listed considerations or category of considerations. The statute also does not provide any guidance as to what considerations or types of considerations are to be considered as material or how the DCA was to go about assessing the materiality or lack thereof of any

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<sup>94</sup> Supra n. 88 at para. [19].

consideration or factor. What is clear from the case law is that the question of whether something is a material consideration is a question of law and the test is whether that consideration is one which serves a planning purpose in relation to the character and proposed use of the land with respect to which the application relates.<sup>95</sup>

[190] The first question to be considered is into which of the three categories of considerations identified in **Resilient Energy Severndale** does the requirement at section 23(1) fall? The first category relates to matters which are 'clearly identified' by the applicable statute. Section 23(1) does not identify any specific matter or consideration, other than the provisions of the physical plan for the area where the land is situated. The latter is clearly a material consideration mandated by section 23(1). As regards the requirement to have regard to any other material considerations, no specific considerations are identified. As stated above, while the DCA cannot ignore or fail to have regard to other material considerations, it is for it to assess and determine the materiality of other considerations and the extent to which regard must be had to them when weighing the considerations, (positive and negative) applicable to the development applied for in coming to its decision thereon. In my judgment, this places the issue of what considerations are material to a proper, lawful and rational assessment and decision on a pending application for planning approval, squarely within the ambit of category three identified in **Resilient Energy Severndale**. These are the considerations to which regard may be had in the discretion of the decision-maker, unless there is an existing obligation to consider or to have regard to certain material considerations or policies of or applicable to the DCA. In this respect, if no consideration falls within this third category, the decision of the DCA on Two Seas' application is not unlawful unless a particular consideration or considerations is or are so obviously material in accordance with the *Wednesbury* or *Tameside* test of irrationality.

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<sup>95</sup> *Supra* n. 82.

- [191] In the instant matter, as already stated above, the DCA was obligated to have regard, when assessing Two Seas' application for Parcel 272, to the matters and considerations set out at paragraphs 4.8.1 and 4.8.3 of its Manual relating to touristic developments. The preparation of this Manual by the DCA was intended to inform applicants for planning approval, not just of the procedures to be followed when making an application for approval of such developments, but also as to the requirements necessary or applicable when applying for certain specified types or categories of development approvals under section 19 of the **PPDA**.
- [192] Importantly, the requirements at paragraphs 4.8.1 and 4.8.3 applicable to touristic developments and especially, those which are comprehensive in nature (that is, having a large number of rooms) are for the benefit of applicants, as well as being clear statements of the considerations and matters to be taken into account by the DCA when assessing an application for approval. This is a clear statement of principle and policy as to the considerations and matters which the DCA has decided are material to a consideration of touristic development applications. However, the amount of weight or significance to be accorded by the DCA to any of these considerations at paragraphs 4.8.1 and 4.8.3 are not definitively stated therein, except to the extent that certain matters are stated as important. These matters include that tourism developments must blend with surroundings by reason of siting, design, scale, and landscaping, have no adverse effect upon the environment with regard to noise, traffic congestion, or destruction of features of interests in the area; and do not involve the depletion of the housing stock especially in areas of housing shortage. In considering these important matters, the Manual does not prevent the DCA from approving an application which would or may have any of these adverse impacts, subject to appropriate mitigation measures being put forward by the applicant to address them.
- [193] I am constrained to agree with the learned judge that many, if not all, of these considerations were identified in the EIS and ESIA Addendum Update and certain mitigation measures were recommended to be taken and implemented by Two

Seas. It was also noted, as early as the EIS, that The Landings were within the sphere of influence of the proposed development on Parcel 272. The potential impact on The Landings' property by the 2017 revised development plan, being a significantly more expansive development, was recognised, and this impact was upgraded to 'more significant' in the ESIA Addendum Update. Both the EIS and ESIA Addendum Update clearly identified certain issues concerning the impact of the proposed development on Parcel 272 on the surrounding area, especially on Parcel 182 and particularly, the impact on views from the balconies of 15% of the condominiums at The Landings by the planned 9 storey building. It was also noted that in the general area there were buildings of 7 storeys in height at two other existing touristic developments. In any event, there is no existing physical plan or zoning decision which limits the height of buildings in the Pigeon Point or Gros Islet areas which would prevent consideration being given by the DCA to approving a new development consisting of a building or buildings of 9 storeys in height.

[194] Likewise, these documents submitted to the DCA in support of the application by Two Seas, identified impacts on the environmental such as noise, dust, and traffic congestion particularly during the construction phase and from piling. Certain mitigation measures were also recommended to help address these issues, particularly their effect on The Landings.

[195] The Landings has not identified any applicable government planning policy which the DCA had failed to consider, other than the provisions of the Manual relating to large touristic developments. It is not sufficient, in my view, to assert that the EIS or ESIA or Appraisal Report were inadequate in their treatment of these various issues which, as the learned judge found, were largely predictable impacts on The Landings' property. These include the issues of the heights of the buildings, the impact on views and the impacts due to noise, dust, and traffic congestion, particularly during the construction phase. The fact is that these various reports which were before the DCA's board, did identify all these issues or adverse impacts on The Landings' property and surrounding area and certain mitigation measures

were recommended. In my judgment, these documents contained some information and guidance to the DCA to enable the members of its board to consider and make an informed decision with regard to Two Seas' application and the proposed development on Parcel 272. It is not for the courts to interpose its own judgement as to their technical inadequacy, unless it is manifestly obvious, such as to be considered *Wednesbury* unreasonable or irrational, that the absence of certain information renders its decision an irrational one, or in exceptional cases, the failure to consult leads to conspicuous unfairness.

[196] It cannot be presumed that the DCA's board in arriving at its decision, had not read the EIA or ESIA or ESIA Addendum Update or any of the internal reports received. Absent any evidence to the contrary, it must be presumed that the DCA's board, as a statutory body imbued with decision-making power relating to planning applications, did act properly and lawfully when considering and deciding upon Two Seas' application. The burden of proof lies squarely on the shoulders of The Landings to show the contrary. I agree with the learned judge that The Landings produced no such evidence. The Landings' contention is to the effect that it must not be presumed that the board did not act properly and rationally because it has not put forward any evidence at the trial that it did take these material considerations into account and that they were assessed and weighed in reaching its decision. While I have some sympathy for this point based on the failure by the DCA to produce and put into evidence the minutes of the meeting of the board when its decision was made, a court cannot act on a presumption or on the assumption that no proper consideration was given by the board to any of these material consideration or policies in the Manual.

[197] The short fall in the process adopted by the DCA was, in my view, its failure to provide The Landings with the application documents as they were required to do pursuant to section 47(4) of the **PPDA** which gave rise to a legitimate expectation that The Landings would be provided with the said documents, thus enabling them to have the necessary information about the application and the development

project so as to make, should they elect to do so, informed representations and views thereon to the DCA. The other issue (which will be determined below) is whether, absent any statutory duty to consult or any duty arising from legitimate expectation or from a course of conduct, a duty to consult The Landings arose as a matter of fairness (ground 1(a)) and whether any failure to discharge that duty rendered the decision Wednesbury irrational.

### **Conclusion on fairness and the duty to consult**

[198] In my considered judgment, fairness dictated that the DCA ought to have consulted with The Landings on Two Seas' application for planning approval to develop Parcel 272. I have reached this conclusion not lightly. The EIS clearly identified The Landings as within the sphere of influence of the proposed development on Parcel 272. This was at a fairly early stage when the planned development was of a smaller scale and likely to have less impact on The Landings. When the project was revised and greatly expanded, both in density and, in particular, the height of buildings, this assessment of impact on The Landings was upgraded by Ms. King to being much greater. This assessment was clearly a correct one and further pointed to the need, in the interest of fairness, for the DCA to consult with The Landings. In short, apart from some impact with respect to views on its Sandals Grande resort, the anticipated impact on The Landings was greatest because of its proximity to the application site. Indeed, several adverse impacts on The Landings were identified by Ms. King in the ESIA and ESIA Addendum Update and mitigation measures recommended.

[199] The judge has found that there was no consultation by the DCA with The Landings and that the October 2017 meetings with Ms. King and The Landings' representatives did not amount to consultation by the DCA. Indeed, it may be concluded from the fact of these meetings, albeit on the very day when the ESIA Addendum Update was dated and submitted, there was a need for the DCA itself to have consulted with or to have heard The Landings' point of view, bearing in mind that Ms. King had correctly assessed that The Landings was within the sphere of

influence of the proposed development. Such consultation may take different forms. It may be in person between representatives of both the DCA and The Landings, or by written invitation from the DCA soliciting responses from The Landings. Whatever format it takes, however, it must be proper consultation, that is, it must be carried out properly within the meaning of that expression in **Save Guana Cay Reef**.

[200] An essential component of proper consultation is access to sufficient pertinent information and documents so that the third party, in this case The Landings, can make informed responses and provide information, which is relevant to the planning process, including the impacts on its adjacent property. However, no consultation (and not proper consultation) took place by the DCA with The Landings. The DCA made no attempts to even contact representatives of The Landings about this proposed large-scale development immediately adjacent to their property. As the evidence discloses, it is The Landings, through their lawyers, who first made contact with the DCA to search the register of applications and to request the application documents. There was a letter from the said lawyers, the response to which was to point them to their right to search the application register, which they were subsequently permitted to do. However, the DCA withheld access to the underlying application documents, which refusal also prompted a letter from the said lawyers. The upshot of all this was that there was no consultation and no application documents, except one plan, had been shown to The Landings. The question therefore is whether, in the absence of such consultation and the denial, wrongfully, of the application documents to The Landings as part of its official search of the application register and for any other reasons, the decision by the DCA on Two Seas' application is rendered Wednesbury irrational, such that it ought to be quashed as being capriciously unfair.

[201] The judge had correctly set out the applicable common law and public law principles, including the principle that the common law will supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation where it is necessary to do so. In considering the issue of fairness, the

judge went on at paragraph [82] of her judgment to distinguish the decision in **Ulric 'Buggy' Haynes** from the decision in the instant matter on the basis that here The Landings were not deprived of any statutory duty of consultation which would have placed any duty on the DCA to consult with them prior to granting approval. She also opined that while the DCA would have been aware of The Landings' request for information, the effect on The Landings could not be said to be comparable to the effect of the planning permission in the **Ulric 'Buggy' Haynes** case. The DCA would have had the EIA before it, in which impacts to the surrounding area including The Landings was considered and highlighted.

[202] There is no apparent definite ruling by the learned judge on the issue of fairness. With due respect, the judge seems not to have conducted an analysis of the applicable principles of fairness and to state a definitive conclusion thereon. The difficulty with this approach to the issue of fairness is that, as the case law shows, this is a public law issue which may be imported into the statutory decision-making regime by the courts in the absence of a statutory duty to consult, express or implied. It follows that the absence, as in the instant matter, of such a statutory duty of consultation, does not preclude, in an appropriate case, the courts filling the perceived gap in the legislation by Parliament, with a public law duty to consult based on fairness or a failure to carry out sufficient inquiries or a failure to have regard to material or relevant considerations leading to a conclusion of Wednesbury unreasonableness and irrationality.

[203] Having considered the applicable legal principles, I have come to the conclusion that the process embarked upon by the DCA leading to the approval of Two Seas' application for planning approval of its development of Parcel 272, was in breach of the rules of natural justice in that, the DCA failed in their duty of fairness, which duty required it to consult with The Landings and enable them to make informed representations with regard to the proposed development on Parcel 272. This duty arose as a matter of fairness as The Landings' property was admittedly within the sphere of influence of the proposed development and the EIS and ESIA Addendum

Update identified certain adverse impacts of the development on the said property. Consequently, The Landings ought, at minimum, to have had an opportunity to make its own representations about the proposed development.

[204] The failure to consult The Landings was made even more unfair having regard to the planning and other relevant policy considerations which the DCA represented, at paragraphs 4.8.1 and 4.8.3 of the Manual, were certainly important issues or considerations of sufficient materiality in relation to touristic developments in Saint Lucia. Furthermore, they were considerations which the DCA represented that would be taken into account by it and weighed in the planning approval process. The DCA was required by section 23(1) to have regard to all such considerations when discharging its statutory decision-making powers.

[205] This failure to consult with The Landings as a matter of fairness and natural justice, is further compounded by the DCA's refusal or failure to discharge its obligations under section 47(4) of the **PPDA**, by failing to permit The Landings access to and to receive copies of the underlying application documents in the register of applications kept pursuant to that section. The effect of section 47, properly construed, is to create a legitimate expectation that The Landings, as a member of the public searching the application register, would have access to and be permitted to take copies of all such relevant documents and reports, thereby placing it in the position to elect to make informed and relevant representations to the DCA about the proposed development for consideration by the board.

[206] In addition, a duty to consult having arisen at common law on the facts and circumstances of this case, there was an abject failure by the DCA to consult. It did not embark upon any consultation with The Landings at all. It seemed content to rely on what was identified in the EIS and ESIA Addendum Update as the impacts on The Landings and the surrounding area and the proposed mitigation measures set out therein. While these were important planning considerations and factors for consideration by the DCA, the approach and process adopted by the DCA was, in

this important respect, woefully inadequate and not a fair one upon which to properly assess the merits and demerits of the proposed development. It was tantamount to only hearing from one side, Two Seas, and not hearing from the affected third party, The Landings, whose property the DCA was well aware was within the sphere of influence of the development on Parcel 272. In my considered judgment, the DCA, by not hearing from The Landings acted unfairly or with capricious unfairness such as to amount to an abuse of its decision-making power. Put simply, there was absolutely no consultation by the DCA, as the decision-making body, with The Landings as the learned judge correctly found. This continued even after the DCA must have been aware that The Landings were searching the application register and seeking to be provided with access to and copies of the applications documents. There being no consultation, it becomes wholly unnecessary to go on to consider whether there was a proper consultation with The Landings within the meaning of that term in **Coughlan**.

- [207] In the premises, I hold that the decision by the DCA on the application for touristic development of Parcel 272 was arrived at through a process which was patently unfair and is accordingly irrational within the meaning of the Wednesbury test. It follows that the learned judge erred in dismissing The Landings' claim for judicial review on the ground of fairness and breach of the rules of natural justice.

#### **Ground 5 - Section 19(b) – Planning application invalid**

- [208] This is a short point. As stated above, the judge's finding as to insufficient proof of a potential trespass, is unsustainable in light of the concession by learned counsel for Two Seas during oral submissions before us. It is now accepted that Two Seas' application for planning approval to develop Parcel 272 incorrectly included within the application site a small (5 ft) strip of land on The Landings' property. Learned counsel for The Landings pointed out that this strip of land is in an area where the approved plans for the Two Seas' development provided for the construction of a drain. It is not an integral part of the overall development on the site. Essentially this was a boundary dispute which has now been resolved by the two parties as the

consent order dated 15<sup>th</sup> December 2021 evinces and as confirmed by counsel for the parties before this Court.

[209] The Landings argues that since section 19(b) of the **PPDA** requires an application for planning approval to be accompanied by a 'notice in writing by the owner of the land to which the application relates acknowledging that the owner has knowledge of and does not object to the making of the application', absent such a notice, the Two Seas' application was invalid and unlawful as it was not accompanied by a notice from The Landings consenting to the use of that small portion of Parcel 182 for the proposed development. As part of the proposed development was on Parcel 182, the DCA could not proceed with the application without The Landings' consent. Accordingly, the DCA effectively approved a trespass to Parcel 182. In short, The Landings contends that the application was unlawful, and it must follow that the approval was equally unlawful. However, counsel for The Landings accepted that the grant of approval did not authorise an encroachment on Parcel 182.

[210] Learned counsel for the DCA submitted that the fact that there was an error in the development plan that resulted in a small part of The Landings' land being inadvertently included, did not invalidate the application under section 19(b). More fundamentally, judicial review proceedings are concerned with public law issues as to whether a decision by a public body was unlawful. That class of proceedings is not concerned with private law issues, such as boundary disputes or alleged trespass to land. Moreover, public bodies 'are entitled to make errors without [them] necessarily impacting upon the decision reached'.<sup>96</sup>

[211] While maintaining its objection to the admission of the new evidence, Two Seas contended that an encroachment is not a planning consideration, but simply a private law issue to be determined in civil proceedings as and when an alleged trespass has taken place. Any potential encroachment could not invalidate the application for planning approval by reason of non-compliance with section 19(b) of

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<sup>96</sup> Supra n. 87.

the **PPDA**. Also, at the trial there was no evidence that the DCA was privy to any such potential encroachment at the time of its decision granting planning approval to Two Seas. Its decision could not therefore be impugned on this basis.

#### **Conclusion on Ground 5**

- [212] In my considered judgment there is no merit in this ground of appeal, save as to the factual issue relating to the ownership of the strip of land now having been settled and accepted by the parties in favour of The Landings. This was evinced by the consent order and confirmed by the concession by counsel for Two Seas before this Court. The judge found that, on a balance of probabilities, The Landings had not established that the DCA had approved a trespass on their property. In so finding, the learned judge lamented the absence of any expert evidence capable of establishing a trespass or that any survey plan depicting a trespass was approved. However, in light of the concession by Two Seas, it is now accepted that the narrow strip of land which was the subject matter of the dispute between The Landings and Two Seas, is part of The Landings' property.
- [213] The legal basis of this ground is hopelessly flawed. Section 19(b) does not render an application which is not accompanied by a written consent of the landowner to which the development relates, invalid or unlawful. Such an application is merely flawed, which flaw is capable of being remedied by the applicant obtaining and producing such a consent. Furthermore, section 19(b) applies where a development is to be carried out by an applicant either wholly or partially on the land of another and is shown as such in the application and any supporting plan. The consent of a third party to the development on their land does not apply as a requirement in circumstances where there is a boundary dispute, unless and until that dispute has been resolved or determined in favour of the third party, in which instance, the applicant for planning permission would have to either amend their application to remove that area of land from the application site, or obtain the consent of its rightful owner to the development being proceeded with on their property.

[214] In the instant matter, the proposed development by Two Seas was on Parcel 272, as shown on the development plan. However, in error, the development plan incorporated within the area of the development site a small part of Parcel 182, The Landings' property. This error did not render the application invalid or unlawful. There is no evidence that the DCA was aware of this error when making its decision to approve the development. Accordingly, if inadvertently the approved development plans incorporated a small part of Parcel 182, this could not render the planning approval unlawful or irrational. In this sense, it is wholly inappropriate and incorrect to contend that the DCA by its approval had approved a trespass by Two Seas on to The Landings' property.

[215] Moreover, any issue relating to trespass is a matter for the civil law and not an issue which finds any place in judicial review proceedings which are concerned with the lawfulness of decisions by public bodies and not with civil law issues of trespass to land and boundary disputes. For these reasons ground 5 is without merit and is accordingly dismissed.

#### **Ground 6 – Standing**

[216] This ground relates to paragraph [69] of the lower court's judgment. There the learned judge stated '[f]or the reasons stated above The Landings cannot properly maintain a claim on behalf of the hotel/rental pool which it does not own, manage, or operate'. At paragraph [24], the judge had accepted that The Landings had standing to bring judicial review proceedings, but that it could not maintain a claim for loss or damages for the hotel/rental pool which it did not own or manage. The Landings' concern was that in paragraph [69] the judge may have been saying that The Landings could not bring a judicial review claim in respect of the impacts of the development on the hotel/rental pool, as distinct from seeking damages as a remedy. This concern has evaporated since both the DCA and Two Seas understood and accepted that the learned judge could not be saying at paragraph [69] that The Landings was not, as a party with standing to bring judicial review

proceedings, entitled to raise any public law issues regardless of whether that error affected it or its interests in the property directly.

### **Conclusion**

- [217] For the reasons traversed above, particularly in relation to ground 1(a) of the appeal, the decision of the learned judge is set aside. On the issue of costs, I am mindful of the provisions of **CPR 56.13(6)** which, as a general rule, provides for no costs order to be made against an unsuccessful applicant for an administrative order, unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. This provision led the learned judge, in dismissing the FDCF, to not order The Landings to pay the DCA's and Two Seas' costs. However, this provision has no application to where, as here, the effect of allowing the appeal is to enter judgment for The Landings on the FDCF and to quash the decision of the DCA. I am also mindful that The Landings have succeeded in their appeal on certain grounds and not in relation to others. In the circumstances, not having heard counsel for the parties on the issue of costs during the hearing of the appeal, I would make an order for the filing, by each party, of short written submissions on this issue within a specified time frame after delivery of this judgment.

### **Order**

- [218] Accordingly, I would make the following orders:
- (i) the decision and order of the court below dismissing The Landings' FDCF is set aside;
  - (ii) judgment is entered for The Landings on its FDCF filed on 13<sup>th</sup> July 2018;
  - (iii) it is declared that the decision of the DCA made on 11<sup>th</sup> April 2018 as set out in the letter dated 18<sup>th</sup> April 2018 from the DCA to Two Seas Holdings Ltd is unfair, unreasonable and in breach of the rules of natural justice; and

- (iv) the said decision of the DCA is accordingly quashed;
- (v) the parties shall each file written submissions, not to exceed 3 typed pages, on the incidents of costs flowing from the decision and judgment of this Court, within 14 days of delivery of this judgment.

[219] I wish to express our appreciation to counsel for the parties for their very helpful written and oral submissions.

I concur.  
**Mario Michel**  
Justice of Appeal

I concur.  
**Paul Webster**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**