

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2014/0132**

Between **Pinneys Hotel Development Limited**

Claimant

-and-

**The Minister of Communications and Works et al
The Department of Physical Planning
Rene Walters in her capacity as Acting Director of Physical Planning
The Physical Planning Appeals Tribunal
The Nevis Island Administration**

Defendants

Before: His Lordship Justice Ermin Moise

Appearances:

Mrs. Angela Cozier of counsel for the claimant

Ms. Rhonda Nisbett-Browne with Mrs. Kimberly Hanley-Bello of counsel for the 2nd, 4th and 5th Defendants

Ms. Farida Hobson of counsel for the 1st and 3rd Defendants

2020: March, 5th
March, 28th Written Submissions
September, 30th

JUDGMENT

- [1] **Moise, J:** This is a claim for judicial review. The claimant seeks a total of 13 declarations and orders, including orders of certiorari and mandamus, as well as special and general damages for breach of statutory duty. The case concerns an application by the claimant for planning permission of its condominium development plans, which were initially lodged with the Department of Physical Planning on 13th December, 2013. Of the relief sought, I have determined that the decision of the Cabinet dated 25th June, 2015 should be quashed and the matter remitted for further consideration. The remaining requests for orders and declarations are denied. In addition, I have determined that the claim in damages must also fail. These are the reasons for my decision.

The Facts

- [2] The claimant is a limited liability company and the owner of a parcel of land located at Pinneys Estate measuring 1.7547 acres. It was represented in these proceedings by its director Mr. Elson Williams. According to Mr. Williams, in 2011 the claimant engaged the services of architectural firm Brisbane, O'Garro and Alvaranga to prepare the design and presentation for approval of development plans for a number of condominium units on the claimant's property, as well as on a parcel of land owned by the Nevis Club Company Limited. The project was to take place in two phases. The claimant asserts that Phase 1 had been approved in October, 2011 subject to certain conditions; one of which was the claimant's acquisition of ownership of the property owned by the Nevis Club Company Limited. I understand the claimant to assert that this acquisition was the only condition which remained outstanding at the time of the commencement of these current proceedings.
- [3] Phase 2 of the project involved the presentation of plans for buildings which were identical in size and design as those approved for Phase 1. According to Mr. Williams, these plans involved the construction of 2 buildings, each containing three floors with two condominiums on each floor. Mr. Williams asserts that the project would entail the construction of 8 one bedroom and 4 double bedroom condominiums. The construction costs of the single bedroom unit was said to be \$150,000.00US each and the double bedroom was estimated to cost \$180,000.00US each. Mr. Williams states that the expected selling price of the single and double units were \$400,000.00US and \$495,000.00US respectively. A total of \$139,785.75EC was paid for the preparation of the architectural plans. The claimant asserts that this project was also approved by the Federal Government of Saint Christopher and Nevis as part of its Citizenship by Investment Program.
- [4] On 13th December, 2013, the claimant submitted the architectural plans for Phase 2 of the project for approval. Mr. Williams asserts that the claimant had already pre-sold one of the units in this phase of the project to an investor. He also states that the claimant was in negotiations with other investors for the purchase of condominiums. He goes on in his affidavit to state that, because of what he considers to be substantial delays and the refusal or the failure of the defendants to communicate with the claimant in a timely manner, the claimant was unable to commence construction of the project on time.

[5] However, the evidence suggests that on 13th January and 18th February, 2014 the Development Advisory Committee (DAC) considered the claimant's plans. Those deliberations would have therefore commenced approximately one month from the date of the submission of the plans for approval. On 20th February, 2014, the Permanent Secretary in the Ministry of Physical Planning wrote to counsel for the claimant and informed her that the application for approval was still being processed. The letter stated that the application was also referred to the Minister of Planning which was standard practice for tourism related projects. In that letter, counsel for the claimant was also informed of concerns raised by the Development Advisory Committee and that these concerns should be taken into consideration in formulating the terms of reference for an Environmental Impact Assessment (EIA) which needed to be done. The concerns raised by the DAC are as follows:

- (i) *Drainage and Pollution – Impacts on the adjacent pond and marine area during site preparation, construction and operation of the proposed development;*
- (ii) *Liquid and Solid Waste – Relevant data on the proposed wastewater treatment plant including specifications on equipment (exact type of plant, effluent quality produced etc.) complete details on design loading, i.e. average daily flows, maximum daily flows etc. Maintenance schedule and training for plant operators, methods of disposal of effluent, methods of disinfecting effluent. Capacity of the area to contain the proposed liquid waste generated;*
- (iii) *Fire safety – consult with the fire department.*

[6] The terms of reference for the EIA were submitted by Caribbean Architects and Planners, who were engaged by the claimant to conduct the assessment. On 23rd May, 2014, the claimant submitted the EIA for approval. By way of letter dated 20th June, 2014, attorneys acting for the claimant wrote to the Permanent Secretary of the Ministry of Physical Planning enquiring as to the status of the application. Mrs. Cozier indicated in this letter that the claimant had obtained the necessary funding and was hoping to have commenced construction in early January, 2014. It is unclear to me as to whether Mrs. Cozier was referring to Phase 2 of the project. If so, it seems to

me to have been an entirely unrealistic time frame within which to commence a project of that nature after only applying for approval in December, 2013.

- [7] Mrs. Cozier also complained that although the concerns raised by the DAC were addressed by the claimant, there had at that point been no further communication on the matter. I do note however, that this letter was written only less than one month after the EIA was submitted for approval. The Permanent Secretary responded to Mrs. Cozier's letter on 7th July, 2014 and stated as follows:

*"Please be informed that the normal process is being followed with regards to the submission of your plans. It is my understanding that the EIA for the project is under review and until that aspect is completed and the issues are sorted out, approval cannot be granted to commence the activities on the proposed project site. **Kindly note that correspondences regarding decisions for your project application will be done through the department of physical planning as this is the normal practice** (my emphasis)."*

- [8] On 8th July, 2014, the Director of Physical Planning wrote to counsel for the claimant regarding concerns raised with the EIA. The letter stated as follows:

"We are concerned that the quality water treatment does not possess the required technical expertise for designing a sewage treatment plant. The review done by the sanitary engineer Mr. Alphonsus Daniel reinforces that this system design is inadequate for the proposed project. The design evaluated in the EIA was for 12 rooms, however, the phase 2 actually comprises 16 units. These additional 4 units should have been included in the EIA.

We recommend the system be redesigned and evaluated by a qualified sanitary engineer."

- [9] On 16th July, 2014, Ms. Lilith Richards of Caribbean Architects and Planners submitted a report with adjustments and clarifications based on the issues raised by the Director of Physical Planning. Ms. Richards indicated that Mr. Alphonsus Daniel had reviewed the plans and provided remedial measures. It was her submission that those measures would be included in the site plan and sanitary drawings should the EIA be approved. She also indicated that *"according to our*

discussions, Ms. Michelle Walters and myself, the 16 units stated above refer to 16 bedrooms. We acknowledge this flaw and provide the attached adjustments by quality water treatment, as guided by Mr. Alphonsus Daniel to verify that the plant can adequately treat wastewater from the additional 4 bedrooms.”

[10] In his affidavit in support of this claim, Mr. Williams complains that no response was received from the Director of Physical Planning after Ms. Richards’ letter of 16th July, 2014. On 8th September, 2014, attorneys for the claimant wrote to the Permanent Secretary of the Ministry of Planning. This was notwithstanding the Permanent Secretary’s previous letter requesting that correspondence be channeled through the Department of Physical Planning. In that letter it was stated that “... *the application at caption represents phase 2 of a larger project of which phase one has already been approved by the department of physical planning, and which has obtained the relevant funding and was ready to move into construction phase in January, 2014. It is now almost ten months behind schedule.*” The Permanent Secretary was therefore requested to grant approval of the project so that construction could commence by 25th September, 2014.

[11] I pause here to again express some difficulty with this expectation as put forward by Mrs. Cozier in her letter. It would seem to me to be entirely unrealistic to expect that construction of the buildings could have commenced even before the statutory deadline for considering the Environmental Impact Assessment had elapsed, much less the actual approval of the plans themselves. In addition, the court can find no reason to conclude that the time taken to complete approval of Phase 2 of the project would have had any impact on the commencement of construction in Phase 1; especially since it was her assertion that finances were already available to commence construction. Whatever delays which stood in the way of commencing construction of Phase 1 had nothing to do with the process of approval for Phase 2.

[12] On 29th September, 2014, the Permanent Secretary responded to this letter and stated the following:

“We note with interest your reference to Phase 1 in your letter to the Permanent Secretary. We therefore hesitate to grant approval for phase 2 as the timeframe you had to start phase 1 has elapsed. In addition, the approval for phase 1 was granted with the understanding that the land

transfer was in process at the time of the approval. However to date the department of physical planning and the ministry have no copies of the official legal documents for phase 1 showing ownership by the developers.

In light of the above we would feel more contented if you would finalise matters for phase 1 before we can grant final approval for phase 2 as you seem to be looking at the project in its totality”

[13] In response, attorneys for the claimant wrote to the Minister of Planning on 28th October, 2014 as an appeal against the representations made in the Permanent Secretary’s letter of 29th September, 2014. It was Mrs. Cozier’s position that the content of the letter amounted to a refusal of the application for planning approval and she therefore sought, on behalf of the claimant, to have the matter listed before the Physical Planning Appeals Tribunal. When no response to that letter was forthcoming, Mrs. Cozier again wrote to the Minister on 11th November, 2014. It was her submission then that the matter was “*clearly one of urgency.*” A mere week later, on 18th November, 2014 Mrs. Cozier wrote yet another letter to the Minister, repeating her request.

[14] It is Mr. Williams’ evidence that, despite these letters, the matter was not referred to the Tribunal. On account of that, the claimant filed an application for interim relief before the court. This application was dismissed by Williams J on 4th February, 2015. However, the court took the position then, that the matter was really one for the Appeals Tribunal and an order was made directing that the matter be referred to the Tribunal. I understand the court’s position then to be based on the claimant’s insistence that the letter dated 29th September 2014 amounts to a dismissal of the application for planning approval within the meaning of the legislation. Mr. Williams stated that a further application was filed seeking the court’s intervention in ensuring that the Tribunal was constituted. It appears that at the time of Mrs. Cozier’s letter to the Minister an appeal tribunal was not then in place and some time needed to be taken in order to ensure that it was properly constituted. That much was stated in the affidavit of Minister Alexis Jeffers filed in these proceedings.

[15] The evidence suggests that on 24th February, 2015, the Permanent Secretary wrote to counsel for the claimant indicating that the Tribunal had been established. The names of persons constituting

the Tribunal were highlighted in that letter. Mrs. Cozier was also informed that the Tribunal would meet soon to consider the appeal. The Permanent Secretary also noted that the date of 26th February, 2015 was suggested as a tentative date for the hearing of the appeal and that Mrs. Cozier would be kept informed of those developments. In response to that letter, Mrs. Cozier wrote a letter of her own, objecting to a number of issues. She expressed some concern as to whether the list of persons constituting the Tribunal had been gazetted and also objected to one of the members selected to sit on the Tribunal.

[16] It would seem that the process of appointing this Tribunal had not been complete, as the list of persons identified was only published in the gazette on 26th March, 2015. The appeal was subsequently listed for hearing on 27th April, 2015 and was adjourned to 28th May, 2015 with orders for the filing of affidavits and other evidence in the matter. At the hearing on 28th May, 2015, the Permanent Secretary in the Ministry of Planning produced the minutes of the meeting of the DAC during which the claimant's application was considered. According to Mr. Williams, the Permanent Secretary maintained a position that the application was not refused but rather deferred and not yet referred to the Cabinet for approval. After hearing arguments from both sides, the chairman of the Tribunal invited the parties to arrive at a consent position. In the end a consent order was signed on the following terms:

- (a) The department of physical planning submit application #176-13 to the Cabinet of the Nevis Island Administration for consideration on or before 10th June, 2015;*
- (b) That application #176-13 be considered no later than 25th June, 2015;*
- (c) That the Cabinet's decision be communicated to the applicant by 6th July, 2015; and*
- (d) That any issues raised by Cabinet be addressed by the parties by 20th July, 2015.*

[17] On 25th June, 2015 the Director of Physical Planning wrote to counsel for the claimant and indicated that the Cabinet had considered the plans. The following was stated:

"Please be informed that it was decided by the Cabinet of the Nevis Island Administration (NIA) that the proposal could not be approved as submitted given that the drawings are for a four (4)

story building in the Pinneys area. This type of building does not fit into the plan for Nevis. However, the NIA is prepared to look at building plans that reflect a height of not more than thirty (30) feet from the ground to the highest points. This will be consistent with the existing buildings that form part of the Pinneys Beach Hotel.”

[18] The claimant was certainly unhappy with this decision and on 3rd July, 2015 counsel wrote to the Director of Physical Planning enclosing correspondence from its architects which highlighted the following:

(a) The units comprised three (3) levels, not four(4);

(b) The height of each building was approximately 50 feet, which legally fell within Group E (Type 2) classification of the building regulations for the Federation of Saint Christopher and Nevis; and

(c) Identical buildings of the same height had been approved by the department of physical planning in 2011 for phase 1 of the claimant’s project.

[19] It is the claimant’s case that there was no response to its letter of 3rd July, 2015. The Appeals Tribunal reconvened on 22nd July, 2015. At that hearing, counsel for the 1st defendant submitted that there was nothing left for the Tribunal to decide. On 23rd July, 2015 the chairman of the Tribunal submitted a decision in which he stated that *“it is the tribunal’s position that the appeal before the tribunal was disposed of by virtue of the consent order entered into between the parties, the terms of which have been fulfilled. Consequently there are no further issues that arise on the appeal for consideration by the tribunal”*. In light of this, Mr. Williams states that he does not *“believe that the defendants ever intended to grant planning permission to the claimant for phase 2 of its project.”* He goes on to state that *“the decision of the defendants to refuse, and to continue to refuse, the grant of planning approval to the claimant is unlawful, unreasonable and in clear contravention of the provisions of the planning ordinance and the building regulations and has consequently caused the claimant substantial economic loss.”* On that basis, the claimant sought not only to reengage the claim which had initially been filed prior to the proceedings before the

Tribunal, but also amended the claim to include a judicial review of the Tribunal's decision as well as that of the Cabinet of Ministers.

The Defendants' Evidence

[20] The Permanent Secretary in the Ministry of Physical Planning swore to an affidavit on 3rd February, 2017. He states in that affidavit that, contrary to the evidence of Mr. Williams, the claimant's project was never approved by the Federal Government as a project within the Citizenship by Investment Program. It was Mr. Stapleton's evidence that such approval was only *"granted in principle and subject to the submissions of the plans and approval of the Unit for product standards."* This, he states, had not yet been done. Mr. Stapleton also denies that Phase 1 of the claimant's project had been approved by the Director of Physical Planning in Nevis. He states that the plans for Phase 1 of the project had been reviewed by the DAC and the following three issues were raised:

- (a) *The ownership documents presented were inadequate;*
- (b) *The elevation design not in keeping with the surrounding area; and*
- (c) *Maximum height of the building should be thirty-five feet.*

[21] Mr. Stapleton states that these concerns were raised with the claimant in a letter dated 3rd August, 2011. I do note however, that subsequent to the letter of 3rd August, 2011, the DAC met yet again to consider the claimant's plans for Phase 1 on 14th September, 2011. On that date it was determined that 6 conditions should be recommended upon approval of the claimant's plans. I note that not one of those 6 conditions related to the height of the buildings. The decision was communicated to the claimant on 17th October, 2011 in a letter which stated that *"... planning approval was granted with conditions by the Development Advisory Committee (DAC) at its meeting held on 14th September, 2011. Please note that this approval is for Phase 1 only as Phase 2 is subject to a separate submission for approval."* Attached to that letter was a list of the 6 conditions referred to. Not one of those conditions was designed in any way to demand an alteration to the height of the buildings. In fact, as it related to building heights, all that was raised was the limitations of the Fire Department when it comes to firefighting capabilities for buildings beyond the normal two-story height. What was recommended by the DAC was the use of sprinklers above the normal height, in order to alleviate the challenges faced by the Fire Department.

[22] As it relates to this issue of the height of the building as asserted by Mr. Stapelton, the claimant led evidence from Mrs. Fonsonia O'Garro-Lewis, who is an architect engaged with the project. Mrs. Lewis indicated that she had extensive discussions with the Fire Department regarding the issues of fire safety for Phase 1 of the project. It was appreciated that the Fire Department had limited capacity as it relates to buildings beyond two stories. However, after those discussions, sprinklers were recommended and the plans were approved subject to that condition. I accept the evidence of Mrs. Lewis and therefore do not agree with the assertion that the claimant's plans for Phase 1 were not approved. It is clear that the plans were approved subject to certain conditions. For reasons which are important to the outcome of this case, I also find as a matter of fact, that none of those conditions was a reduction in the height of the buildings.

[23] In his evidence as it relates to Phase 2 of the project, Mr. Stapleton states that during the meeting of the DAC on 18th February, 2014, a number of concerns were raised. He then wrote to counsel for the claimant on 20th February, 2014, highlighting those issues. In that letter three issues were raised for the claimant's attention. These were highlighted in paragraph 5 of this judgment. I note again that none of these related to the height of the buildings. The issues of fire safety were raised. However, the recommendations then were simply to consult with the Fire Department. It was Mrs. Lewis' evidence that this consultation did take place and various recommendations were made as to how the limitations of the Fire Department can be addressed.

[24] Mr. Stapleton goes on in his evidence to state that in considering whether to grant planning approval for Phase 2 of the project, the Department of Physical Planning considered that the claimant had failed to fulfill all conditions attached to Phase 1. He states that as a result, a letter was written to the claimant advising that matters for Phase 1 should be finalized before planning approval is granted for Phase 2. Mr. Stapleton insisted that this was not a refusal of the application, but rather a deferral of the decision until the issues of Phase 1 were sorted out. In addition to Mr. Stapleton's evidence the defendants also filed evidence of Ms. Rene Walters, who was then acting Director of Physical Planning. Her evidence largely corroborates that of Mr. Stapleton and need not be repeated here in any detail.

[25] Evidence was also given by Mr. Ricaldo Caines, who was the chairman of the Physical Planning and Development Appeals Tribunal. He states that the members of the Tribunal were appointed by

instrument issued on 1st March, 2015, under the hand of Mr. U-Thant Troy Liburd, who was the Junior Minister of Physical Planning. The appointments were published in the gazette on 26th March, 2015. Mr. Caine's evidence is not complicated in any way. He simply expresses the view that having arrived at a consent position, the issues raised on the appeal before the tribunal were resolved. The application itself was referred to cabinet for its decision. Once this was done as agreed to, there was nothing further for the Tribunal to consider. This much was communicated to the claimant in the Tribunal's final report.

[26] I note at this stage, that the defendants had initially filed an affidavit from Mr. U-Thant Troy Liburd, who was the Junior Minister with responsibility for Physical Planning. However, having examined the affidavit, the court pointed counsel for the defendants to section 62 of the Constitution of Saint Christopher and Nevis which is also applicable to the functions of the Nevis Cabinet. In essence it must be observed that to some extent, what is under review here is a decision of the Cabinet of Ministers. Yet the minutes of Cabinet's deliberations were not disclosed. Further, the constitution prescribes the manner in which decisions of the Cabinet are to be communicated and who is authorized to speak on behalf of the Cabinet of Ministers. The issues here are not merely what was formally communicated to the claimant in the letter from the Director of Physical Planning in keeping with the Ordinance, but details of the deliberations which took place within the Cabinet. After taking time to consider the issue, counsel decided that they no longer wished to lead evidence from the Minister. The court enquired of Mrs. Cozier as to whether she none-the-less wished to cross examine Mr. Liburd, given the fact that he had already filed an affidavit in the matter. Mrs. Cozier declined to do so.

[27] Further, on the date of trial, counsel for the claimant sought to lead evidence from Mr. Dwight Cozier by way of witness summons within the provisions of Rule 33 of the CPR. The court did not oblige in granting such a request. As I noted during the hearing, Mr. Cozier is an officer of the claimant company as well as an employee of the law firm which represented the company throughout these proceedings. If indeed Mr. Cozier had information which was important to the claimant's case or to the case in general, I fail to see why an affidavit or other documentation was not disclosed during the case management phase. Although there was no requirement to seek leave of the court to issue the summons, I share a view similar to that of Mohammed J in the case

of ***Mable Phillip v Corrine Clara***¹. To allow such evidence at this stage without so much as a witness statement or affidavit amounts to trial by ambush and does not further the overriding objective. The purpose of Rule 33 of the CPR is not to circumvent the rules as it relates to disclosure and the exchange of witness statements or affidavits prior to trial.

The Issues

[28] The claimant has raised a plethora of issues in its claim against the defendants. These are rather extensive and I propose to address them under 5 broad headings. They are:

- (a) Whether the decision to defer the claimant's application until the finalization of Phase 1 of the project was in fact illegal, irrational or procedurally improper;
- (b) Whether the decision of the Appeals Tribunal contained in letter dated 23rd July, 2015 is illegal, irrational and/or procedurally improper;
- (c) As a preliminary issue to (a) and (b) above, the court must consider whether the claimant's claim for a review of those decisions are up for consideration by the court in light of the consent order and the decision of the Cabinet of Ministers;
- (d) Whether the decision of the Cabinet of Ministers contained in letter dated 25th June, 2015 is illegal, irrational or procedurally improper;
- (e) Whether there has been a breach of statutory duty entitling the claimant to damages;

The Law

[29] Perhaps it is important to outline, in some detail, the legislative provisions in force in relation to the grant or refusal of planning permission in Nevis. In accordance with section 15(1) of the **Nevis Physical Planning and Development Control Ordinance**² "*notwithstanding the provisions of any other law to the contrary, but subject to section 17, no person (including the Crown, the*

¹ GDAHCV 2013/0362 see paragraphs 29 and 30

² CAP6.09(N)

Nevis Island Administration and any Statutory Undertakers) may commence or carry out development of any land in the Island of Nevis without the prior written permission of the Director of Physical Planning.” It is therefore in the office of the Director of Physical Planning that the power to approve or deny planning permission is placed. Section 5 of the Ordinance outlines the general powers of the Director of Physical Planning and states as follows:

(1) The Director of Physical Planning shall sign and issue all notices granting or refusing permission for the development of land, enforcement notices, stop notices and other documents to be issued with respect to classes of applications as defined in the Third Schedule of this Ordinance. For all other classes of applications, the Director of Physical Planning will act in accordance with the decisions of the Development Advisory Committee.

(2) The functions conferred upon the Director of Physical Planning by this Ordinance, other than the powers mentioned in subsection (1), may be exercised by any other public officer who is authorized to perform those functions by the Director of Physical Planning in writing.

[30] Section 17 of the Ordinance makes provision for the actual content of the application for permission to develop land. It is not necessary to repeat the section in any detail. However, in my view, mere fulfillment of the provisions of section 17 of the Ordinance does not entitle an applicant to the grant of planning permission. It is merely an initiation of the process in which the Director of Physical Planning is called upon to exercise his or her discretion as provided for in section 21 of the Ordinance. In addition to the information contained in section 17 of the Act, the Director of Physical Planning may request further information from the applicant. In accordance with section 19(2) of the Ordinance, ***“[i]f further information is requested by the Director of Physical Planning under this section or section 20, the application must be treated for the purposes of section 27 as having been made on the date when the information requested from the applicant is received.”***

[31] Section 20 of the Ordinance makes provision for an Environmental Impact Assessment to be carried out. This, to my mind, is a very important part of the process for approval of plans for

developments such as that of the claimant. Expedience should never outweigh careful consideration of the impact a development of this nature would have on the environment. The Director of Physical Planning must therefore ensure that a proper assessment of the EIA is carried out notwithstanding the applicant's insistence on dealing with the matter with any sense of urgency. No doubt there should be no unnecessary delay so as to undermine the duty to deal with applications in a timely and efficient manner, but the Director must never abdicate his/her duty to ensure that plans which are approved are carefully considered for their impact on the environment.

[32] Section 21 of the Ordinance outlines the issues which the Director of Physical Planning must consider when determining an application for planning approval. Again I do not find it useful to repeat the content of this section in full. In accordance with section 27 of the Ordinance, the Director of Physical Planning must ***"issue a decision within a period of ninety days from the date of receipt of the application, or such extended period as may be agreed to in writing by the applicant."*** This includes the time period within which applications such as that of the claimant must be referred to the Development Advisory Committee. The Committee must consider the application and provide advice to the Director, who must act upon that advice. Where the Director does not issue a decision within that period of time, the applicant may deem the application to have been refused and lodge an appeal with the Minister who in turn must refer the matter to the Planning Appeals Tribunal. However, I do note, as indicated earlier, that this period is subject to any request for information from the applicant in accordance with section 19(2) and/or 20 of the Ordinance. The time period runs again from the date on which the information requested is provided to the Director.

[33] Outside of the Director's powers, section 28 of the Ordinance makes provision for the applications for land development to be referred to Cabinet for approval. The section states as follows:

(1) The Minister may give directions to the Director of Physical Planning requiring that a particular application or all applications of a specific class or in respect of any particular area specified in the direction by be referred to Cabinet for determination;

- (2) Any direction given by the Minister to the Director of Physical Planning under this section must be published in the gazette and in at least one newspaper in general circulation in the Island of Nevis;***
- (3) When an application is referred to Cabinet pursuant to directions given under this section, the Director of Physical Planning must give notice to the applicant in writing that the application has been referred to Cabinet;***
- (4) The provisions of section 21(1) apply, with any necessary modifications, to the determination of an application by Cabinet as they apply to the determination of an application by the Director of Physical Planning, and Cabinet must request from the Director of Physical Planning his recommendation as to whether planning permission would have been granted if the application had not been referred to Cabinet under this section;***
- (5) On determination of any application referred to Cabinet under this section, the Minister must by notice in writing under the hand of the Permanent Secretary inform the applicant and the Director of Physical Planning of Cabinet's decision and the reasons for that decision;***
- (6) The decision of Cabinet on any application referred to Cabinet under this section is final.***

[34] I note that whilst an appeal provision is in place for decisions of the Director of Physical Planning, a decision of the Cabinet in accordance with section 28 is final.

Preliminary Issues

[35] Having outlined the legislative provisions in force as it relates to the grant of planning permission, I wish to address a number of preliminary issues arising from the evidence in this case. It is my view that the court ought to provide some general guidance on such cases as there appears to be a tendency to unnecessarily complicate the judicial review process. This not only leads to unnecessary delay, but it may at times lead to a general confusion on the part of those who exercise executive functions as to the manner in which their powers are to be exercised.

[36] Firstly, in its amended claim, the claimant seeks the following relief:

- (a) *A declaration that the 1st defendant's decision, as set out in the letter from his permanent secretary dated 29th September, 2014, to refuse planning permission for application 176-13 ... was contrary to law, null, void and of no legal effect;*
- (b) *A declaration that the 1st defendant's arbitrary and capricious decision to refuse planning permission to the claimant is an abuse of discretion, an abuse of process and an abuse of power and is designed to cause the claimant undue financial hardship and loss; and*
- (c) *An order of certiorari to remove into the high court of justice and to quash the decision of the 1st defendant to refuse planning permission to the claimant in application number 176-13 made by the claimant ...*

[37] As one of its grounds for seeking the orders referred to above, the claimant states that the 1st defendant is the Minister *"responsible for the granting of written permission to undertake the development of land under and by virtue of section 15(1) of the Nevis Physical Planning and Development Ordinance."* As it relates to the claim against the 2nd defendant, I note that no specific relief has been sought. However, the claimant has also based its claim on the ground that the 2nd Defendant is *"the government department charged with the responsibility for physical planning and development control..."* In her closing submissions, counsel goes on to state that *"when a statute (as in this case the Nevis Physical Planning and Development Control Ordinance) creates a body (in this case the Department of Physical Planning) to perform some task on behalf of the executive, such as the granting of licenses (or permission as in this case) it is likely also to lay down a procedure that the body should follow in performing its functions."*

[38] In its pleadings the claimant goes on to state that *"the 3rd defendant was at all material times the government official carrying out the functions of the department of physical planning of the 5th Defendant and charged with the responsibility for physical planning and development control..."*

[39] From the onset I wish to state that these pleadings and submissions have completely misrepresented the nature of the powers contained in the Physical Planning and Development Ordinance. In fact, section 15(1) of the Ordinance makes it clear that the authority to grant or refuse planning permission rests with the Director of Physical Planning and not the Minister. The section goes as far to state that even the crown and the NIA are subject to the authority specifically granted to the Director in accordance with the Ordinance. It is therefore entirely inaccurate to state that the Minister is responsible for the *“granting of written permission to undertake the development of land”* in Nevis. Where the legislation creates a statutory office, such as that of Director of Physical Planning, the powers contained therein are exercised only by the holder of that office. In fact, it may be argued, and it is my view, that the purpose of establishing such an office is, at least partially, to insulate this aspect of the executive function from any direct interference by the political officers of government. Whilst the minister does have an administrative duty towards the functioning for the Department in general, I am not of the view that the Minister is liable, whether vicariously or otherwise, for the exercise of the powers conferred upon the Director of Physical Planning. He may do well to refrain from any attempts to influence the decision of the Director of Physical Planning except in circumstances where the Ordinance so allows him. It would suffice for the Director to be directly challenged in his or her official capacity.

[40] In addition to this, the claimant has insisted, during the course of these proceedings, that Minister Alexis Jeffers is the substantive minister with responsibility for the Department of Physical Planning. Minister Jeffers insists that he is not. In fact, the evidence suggests that whilst Mr. U-Thant Troy Liburd is referred to as a Junior Minister within the Cabinet, his instrument of appointment under the hand of the Governor General is somewhat identical to that of Minister Jeffers. Minister Jeffers states that given the nature of the portfolios, the Department of Physical Planning has always been placed within the express purview of Minister Liburd. It is he who reports to the Cabinet on issues relating to Physical Planning and Development. In fact, the instrument establishing the Appeal's Tribunal was gazetted under the hand of Minister Liburd.

[41] In my view, I find this argument between the parties to be rather unnecessary in resolving the substance of the dispute in this case. It is not for the court to determine the manner in which ministerial portfolios are assigned or arranged within the Cabinet of Ministers. If the ministers state

that the portfolio is assigned and arranged in such a way so as to separate the responsibilities in that manner, then that is a matter entirely for them; as long as it is in keeping with the wishes of the Premier who advises the Governor General on such issues. What compounds the problem is the claimant's insistence on specifically naming the ministers as litigants in the matter. It is not necessary to do so. It would suffice if the action is simply brought against the Minister of Physical Development and Planning for the purpose of calling into question any action or lack thereof of this specific office. In addition, given that the claimant had written to Minister Jeffers in order to initiate an appeal against the decision of Mr. Stapleton, it would suffice if Minister Jeffers had simply indicated that Minister Liburd takes the lead on such matters and refer the matter to him for consideration. I cannot help but comment that such issues sometimes make the process of litigation rather more complicated and protracted than is reasonably necessary to resolve the substantive issues in the claim.

[42] Further, as it relates to the specific circumstances of this case, it may be somewhat misleading to state that the Department of Physical Planning is "*charged with the responsibility for physical planning and development control*" in Nevis. Insofar as physical planning and development control encompasses a rather broad prerogative of the executive, this comment may be accurate. However, the process for approval of plans for physical development in Nevis is outlined in the Ordinance. There is not one single section in the Ordinance which grants any powers to the Department of Planning as an identifiable legal person. Those powers are vested in the office of the Director of Physical Planning. The Director carries out the functions conferred upon him or her by statute and is directly accountable for the performance of that function. The Ordinance clearly outlines the powers of the Director and prescribes a process by which the exercise of those powers may be appealed.

[43] Contrary to the submissions of counsel, the Ordinance does not establish a Department of Physical Planning; neither does it confer any specific powers on that department. The Department merely exists for the purpose of assisting in the carrying out of those functions; among other things. In light of that I am not of the view that the Department of Physical Planning is a juridical person for the purpose of the Ordinance. There is therefore no basis, or even any need, for an action to have been brought specifically against the 2nd Defendant. Doing so adds nothing to the substance of this claim. In addition to this, I am not of the view that the Minister is responsible for the exercise, or

lack thereof, of the powers of the Director of Physical Planning as conferred upon that office by the Ordinance.

As a preliminary issue to (a) and (b) in paragraph 28, the court considers whether the claimant's claims against those decisions are up for review in light of the consent order and the decision of the Cabinet of Ministers

[44] The court states from the outset that it agrees with the submissions of counsel for the defendants, that the issues arising from the letter of 29th September, 2014 and the matters before the Appeals Tribunal are no longer up for consideration. In any event, bearing in mind that judicial review remedies are discretionary, I would not be inclined to grant the remedies being sought by the claimant in relation to this letter, given the circumstances of the facts presented in this case.

[45] Firstly, the claimant continues to insist that the content of letter dated 29th September, 2014 was a refusal of the claimant's application for planning approval of its development plans. It was this insistence which prompted Williams J to conclude that a refusal of planning permission ought properly to be placed before the Appeals Tribunal for consideration and not the court. This is because the Ordinance provides an appeal as an avenue for an applicant whose application for planning permission is refused by the Director of Physical Planning. As it relates to the proceedings before the Tribunal, counsel argues that *"the fourth defendant never determined the issues on the appeal placed before it by Order of the Court dated 4th February, 2015."* She goes on to argue that the Cabinet *"arrived at its decision without having regard to the grounds of appeal, which grounds were sent by order of the court to the 4th defendant on 4th February, 2015."* I do not agree with these submissions.

[46] Firstly, I do express some doubt as to whether the content of Mr. Stapleton's letter was in fact a refusal of permission within the meaning of the Ordinance. I say so because Mr. Stapleton was in fact the Permanent Secretary in the Ministry and not the Director of Physical Planning. I express doubt as to whether he had the authority to make the determination made in his letter. However, I do note that the evidence suggests that there was no substantive holder of the office of Director of Physical Planning at the time and that Mr. Stapleton, on occasion, would carry out those functions.

In the end Ms. Rene Walters also took on the role on an acting basis. Nonetheless, it was counsel for the claimant who insisted that this amounted to a refusal and the court obliged in making certain orders remitting the matter to the Tribunal for consideration. Insofar as that is the case, I am of the view that the events which transpired at the Tribunal did put the issues in Mr. Stapleton's letter to rest and I would decline to grant any remedies revisiting the issues in these judicial review proceedings.

[47] I am of the view that the submissions put forward by counsel for the Tribunal are correct where it is argued that the issues had in fact been addressed. Regardless of the challenges which may have been faced with the establishment of the Tribunal, the evidence suggests to me that the Tribunal was constituted and did in fact convene to consider the claimant's appeal. It is clear from the facts that the parties were granted an opportunity to file affidavit evidence and place their submissions before the Tribunal. In the end the chairman determined that the appeal would best be resolved if the parties had arrived at a consent position. This was in fact the outcome of the appeal.

[48] When one examines the nature of the consent order it clearly cannot be said that the Tribunal did not determine the issues before it. Mr. Stapleton's letter of 29th September, 2014 sought to place a hold on any further processing of the claimant's application until the issues relating to Phase 1 of the project were finalized. This moratorium would undoubtedly result in the application not being placed before the Cabinet for final consideration in accordance with section 28 of the Ordinance. I note that in Mr. Stapleton's evidence he stated that after the drafting of the consent order the application was referred to the Cabinet along with the recommendations of the DAC. In my view therefore, the consent order amounted to a revocation, or at least a withdrawal, of the terms of Mr. Stapleton's letter; which in itself formed the very basis of the appeal. By referring the application to Cabinet, the issues in Mr. Stapleton's letter, and by extension the appeal, were put to rest; save and except for the enforcement of the consent order.

[49] Further, Counsel for the claimant seems to suggest that the Cabinet failed in its duty to consider the grounds of the appeal which was before the Tribunal. However, to my mind, the appeal was never placed before the Cabinet for its consideration. The terms of the consent order are quite clear. What was placed before the Cabinet was "*application #176-13*" with a mandate that "*it be considered no later than 25th June, 2015.*" In any event, I express significant doubt that the Cabinet

would have had any authority whatsoever to consider issues raised on an appeal. Cabinet's powers as it relates to applications for planning approval are as outlined in section 28 of the Ordinance. It does not sit as an appeal tribunal. In addition to that, section 28 of the Ordinance clearly states that a decision of the Cabinet is final. In that regard, it is more than doubtful that the Tribunal would have had any authority to reconsider the application in light of the express decision of the Cabinet as there is no appeal against the decision of the Cabinet provided for within the Ordinance. In my view, there could have been no useful purpose in continuing this process when the Cabinet had made it quite clear that it simply would not consider an application for planning approval for the buildings unless the height was reduced to 30 feet. Whether that was a rational decision or not is another issue, but the chairman of the Tribunal was quite right when he determined that there was nothing left for the Tribunal to consider at that point, given the express terms of the Cabinet's conclusion.

[50] Having come to these conclusions, the court declines to grant declarations and orders as they relate to issues (a) and (b) as outlined in paragraph 28 of this judgment. If the claimant is correct that the content Mr. Stapleton's letter of 29th September, 2014 was a refusal of the application for planning approval, then that was a matter for the Tribunal to consider. This was done and the parties arrived at a consent position on the matter. In addition to that, the court finds no fault with the decision of the Tribunal when it stated that there was nothing left to consider in light of the decision arrived at by the Cabinet of Ministers of the NIA in keeping with the powers conferred upon that institution by section 28 of the Ordinance.

Whether the decision of the Cabinet of Ministers contained in letter dated 25th June, 2015 is illegal, irrational or procedurally improper

- *Illegality*

[51] Counsel for the claimant makes two broad complaints regarding the manner in which the Cabinet came to its conclusions. Firstly, it is argued that *"cabinet came to its decision based on fresh (albeit wrong) considerations, that it did not hear the claimant on, despite the fact that the claimant had a clear proprietary interest in the approval of the application and stood to suffer significant loss and damage if the application was not approved..."* Secondly, it was also argued that the *"decision of*

the Cabinet ..., as set out in the letter dated 25th June, 2015, was illegal because the Cabinet refused to take into consideration any of the relevant issues raised on the appeal before the 4th defendant, as set out in the claimant's letter to the 1st defendant on 28th October, 2014, but instead raised another issue completely unrelated to the appeal (and therefore an irrelevant consideration) which had never been raised before."

[52] Counsel for the claimant refers the court to the oft-cited case of ***Council of Civil Service Unions v. Minister of the Civil Service***³ where Lord Diplock stated that ***"[by] illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision making power and must give effect to it."*** Counsel also goes on to refer to the case of ***Padfield et al v. Minister of Agriculture***⁴ where the following was noted:

"Unlawful behavior by the Minister may be stated with sufficient accuracy for the purpose of the present appeal... (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law or (c) by taking into account some wholly irrelevant or extraneous consideration or (d) by wholly omitting to take into account a relevant consideration..."

[53] Very importantly, counsel refers the court to the case of ***Wheeler v. Leicester City Council***⁵ where Browne-Wilkinson LJ elaborated on the principle of illegality by stating that ***"it is now clearly established that the exercise of a discretionary power is unlawful if those exercising the discretion had regard to legally irrelevant matters or failed to take into account legally relevant matters."*** I am of the view that this dictum is important as it ensures that the separate grounds for judicial review are not unnecessarily conflated. The ultimate issue when considering the judicial review of an executive action on the ground of illegality is the question of whether the decision maker acted within the bounds of his authority and properly directed himself on issues of law. By emphasizing the need to have regard to ***legally relevant*** and ***legally irrelevant*** issues, Browne-Wilkinson LJ places this argument into context. This is distinguishable from the court's powers to review a decision for its irrationality, where the decision may be quashed if the decision maker failed to take into account relevant issues and/or took into account irrelevant issues which

³ [1984] UKHL 9

⁴ [1968] 1 All ER 694

⁵ [1985] 2 All ER

may not fall within the specific requirements of the law but nonetheless affect the rationality or reasonableness of the decision. These are separate issues.

[54] I am not of the view that the decision of the Cabinet ought to be viewed as an illegality. In fact, I am of the view that counsel for the claimant may have misrepresented the issues which the Cabinet was called upon to consider. Firstly, as I have indicated earlier, it is entirely misconceived to state that Cabinet had failed to consider the issues which were before the Appeal Tribunal. I say so because Cabinet had no authority to do so; neither on the basis of the consent order nor the statute itself. I wish to add that it is important to protect an institution such as the Planning Appeals Tribunal from direct interference by the political branches of government. It would in fact be improper for Cabinet to consider matters which are properly before an appeal tribunal of this nature. It must be observed that the issue which was up for consideration before the Tribunal was the content of Mr. Stapleton's letter of 29th September, 2014 and its impact on the approval process. The consent order had effectively addressed this issue.

[55] Secondly, as I have indicated earlier in this judgment, I can find nothing in the consent order, which was agreed to by the parties, which referred the issues on appeal to the Cabinet. What was referred to the Cabinet was the application for planning approval itself. Cabinet's powers to address the issues in the application are as contained in section 28 of the Ordinance. In coming to its conclusion, the Cabinet was not barred in any way from raising issues which had not previously been raised before, as the section does not seem to fetter the discretion of the Cabinet in this way; although it does require that the Cabinet consult with the Director of Physical Planning. Whilst I agree that the decision may be an unreasonable one and perhaps procedurally improper in some respects, I would not quash this decision on the ground of illegality as I can find no basis to conclude that the Cabinet had overstepped the boundaries of its lawful authority; at least not on the evidence presented to me.

- ***Irrationality***

[56] It is on the ground of irrationality that I find myself in agreement with the submissions of counsel for the claimant. As a ground of judicial review, the principle of irrationality requires that the court considers whether the decision of the Cabinet was ***"so outrageous in its defiance of logic or of***

accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.⁶ In determining whether the decision of the Cabinet falls within this criteria, the court must give due consideration to the issues which the Cabinet considered when it came to its conclusion. In the case of ***Attorney General v. Kenny D Anthony***⁷ the court of appeal came to consider the review of a decision of the Cabinet of Ministers in Saint Lucia. In coming to the conclusion that the decision was irrational, Webster JA noted that:

On any view of the evidence the decision is so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the decision that the Cabinet made on 26th June 2008. The decision was simply devoid of any rational basis. There is no reference in the Cabinet Minutes of 26th June 2008 that the minutes of 5th July 2007 contained an error, and that the Second Decision was in essence a correction of the First Decision. Given the fact that neither Minister Chastanet nor any officer within the Ministry considered that the house at Bonne Terre was a part of Tuxedo Villas, it is difficult to rationalise how a mere ‘noting’ of that fact without any proper consideration of this addition could suffice as a basis for arriving at the Second Cabinet Decision.

[57] As I have observed earlier, the role of the court is not to substitute its own decision for that of the Cabinet of Ministers. The question is not whether the court would have arrived at the same decision had it been empowered to do so. The issue is an assessment of the rationale for the decision of the Cabinet. In the circumstances of the case I am of the view that no rational basis has been provided for the decision arrived at. It must be observed that the decision of the Cabinet would have required that the claimant reduce the size of the buildings for which it was seeking approval by 40%. To my mind, this was an outright rejection of the application for planning approval, as it required such a drastic alteration to the structure of the buildings that the Cabinet ought reasonably to have given consideration to certain issues which, as far as the evidence has proven, it did not.

⁶ Council of Civil Service Unions v. Minister of Civil Service [1985] AC 374

⁷ SLUHCVAP 2009/031

[58] Firstly, I agree entirely with the submissions of counsel for the claimant, that in October, 2011 planning permission had in fact been granted for the construction of buildings in Phase 1 of the project of the very same design as was being considered by the Cabinet of Ministers in Phase 2. I do not accept the submissions of counsel for the defendants where it is argued that the issue of the height of the buildings had been raised during Phase 1 to the point where planning permission had been denied on that basis. I find as a matter of fact, that during the application for Phase 1 of the project, the main issue raised as it relates to the height of the buildings related to the issue of fire safety. These issues had been resolved as a result of discussions between the Fire Department and the claimant's architects. That much can be gleaned from the content of letter dated 17th October, 2011 in which planning approval was granted.

[59] During discussions relating to Phase 2 no issue as it relates to the height of the buildings had been raised in direct relation to any specific "plan for Nevis". Again the evidence suggests that fire safety was the main issue and that too had been addressed with discussions between the parties. The claimant is correct in stating that the issue of height had been raised for the first time in the letter from the Director of Physical Planning articulating the Cabinet's position. Despite an attempt by counsel for the claimant to address the Cabinet's concerns by way of letter, the claimant's concerns were thereafter ignored. This is simply not good enough, as the claimant ought really to have been further engaged on the issue since the Cabinet had in fact raised it for the first time in light of what it had considered to be the "plan for Nevis".

[60] During the course of the proceedings, the parties sought to lead evidence on whether the buildings for which approval was being sought fell within Group E (Type 2) classification of the Building Regulations for Saint Christopher and Nevis. It would seem that in accordance with that code, a building of that classification may be as much as 60 feet tall. Counsel for the defendants argued that in fact the buildings for which the claimant sought approval fell within Group E (Type 3) classification for which a maximum height of 35 feet applies. As per the code, I understand the difference between the classifications to be that buildings within Type 2 are of semi-fire resistant material and not ordinary masonry. Counsel for the defendants requests of this court to determine that the building did not fall within the correct classification so as to warrant a height of 50 feet. However, it does not appear to me that a determination of this issue had been made at any stage in the application process and certainly did not form the basis upon which the Cabinet had come to its

conclusion. I would therefore decline to make such a determination of fact as I rather doubt that it is within my powers to do so. In fact I would go on to state that since Mrs. Cozier had raised this issue in her letter of 3rd July, 2015 in response to the Cabinet's decision, she ought to have been given a listening ear by the authorities on that issue in keeping with the general principles of natural justice.

[61] It is my view that the question of whether the buildings fall within a specific classification is one for the Director of Physical Planning to decide on upon the advice of the DAC. After considering that issue the matter may be referred to the Cabinet in accordance with section 28 of the Ordinance with the advice of the Director. The facts of this case are somewhat compounded by the fact that the application for planning approval never got beyond the stage of an application for approval of the Environmental Impact Assessment, far less the approval of the plans itself. This was derailed by Mr. Stapleton's letter of 29th September, 2014 and Mrs. Cozier's insistence that it amounted to a rejection of the application sufficient to invoke the appellate process provided for within the legislation. Despite this, the parties agreed at the Appeals Tribunal to refer the application to the Cabinet having never raised the issue of the classification of the building prior to that point.

[62] The court's sole purpose is to determine whether the decision of the Cabinet was illegal, irrational or procedurally improper. These are not the proceedings in which the parties are capable of resolving the dispute as to the classification of the buildings. In any event it appears to me, at the very least, that the regulations do in fact make provision for buildings which are above the 30 foot height insisted upon by the Cabinet. If the issue is one of fire-resistant material then I fail to see why the relevant authorities could not request further alterations to the plan to bring it into conformity with the regulations. That is a matter which ought to have been ventilated in the process. What the Cabinet did however, was to make it clear that it would simply not consider an application for planning approval unless the height was reduced to 30 feet. At no point in the evidence provided was it proven that the Building Regulations formed the basis of the Cabinet's decision.

[63] The defendants also sought to raise issues regarding the cultural heritage of Nevis and its impact on property development. Exhibited at the hearing was a document entitled "Preserving Charlestown's Heritage". It was argued that the buildings did not conform to the current architecture in Charlestown and that the Cabinet was therefore correct in its refusal to grant permission to the claimant. However, to my mind, it is not open to respondents in judicial review proceedings to make

up the reasons for their decisions after the fact. What is under review is the decision which had been made and the reasons put forward at the time of arriving at the conclusion under review. Although the Cabinet did state that the buildings did not conform to the plans for Nevis, the letter presented to the claimant did not go much further than that, except to say that it would be willing to approve plans in line with the existing structures on the claimant's property. I have not been presented with any plan for Nevis which would so prohibit the claimant from developing its property in the manner applied for. This is especially the case as the claimant had already obtained approval for Phase 1 of the project for the construction of buildings of a similar height. In addition to that, the Cabinet seems to have randomly selected a maximum height of 30 feet without providing any justification for this. The preservation of Charlestown's heritage cannot emerge in these proceedings as a justification for the Cabinet's decision without it having been considered in the application process.

[64] It is my view that, given Cabinet's request for such a radical and drastic reduction in the height of the buildings, no rational basis has been provided for its decision. I am of the firm view, that the decision of the Cabinet was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I would therefore quash that decision as one which was irrational.

- **Procedural Impropriety/Natural Justice**

[65] I am also of the view that the Cabinet of Ministers has breached its obligation to uphold the principles of natural justice. It is more than unfortunate that Mrs. Cozier's letter of 3rd July, 2015 was completely ignored. I entertain no doubt, having reviewed the evidence, that the basis of the Cabinet's decision was not one which had been raised with the claimant before. The claimant ought then to have been given an opportunity to make representations as to why such a drastic alteration to the plans was not warranted. It must be observed that the claimant was seeking to develop its own private property. The powers contained in the Ordinance as it relates to the development of property are of extreme importance. However, this does not mean that the Director of Physical Planning or the Cabinet ought to exercise those powers in a manner which is entirely arbitrary without giving an applicant a meaningful opportunity to be heard. These principles were certainly

not observed in the manner in which the Cabinet exercised its powers pursuant to section 28 of the Ordinance and I am satisfied that the decision communicated in letter dated 25th June, 2015 ought to be set aside on that basis.

Whether there has been a breach of statutory duty entitling the claimant to damages

[66] In its pleadings, the claimant has sought damages for breach of statutory duty as well as general damages. Despite this, very little has been put forward by way of written submissions as to the basis upon which the court is to award such damages; bearing in mind that these are judicial review proceedings. In its pre-trial skeleton submissions, counsel does not address this issue at all, save to mention that the claimant seeks such damages. In the post-trial written submissions counsel simply states the following:

It is also open to the Court to award damages to the Claimant if it finds that the Defendants, or any one or all of them, breached its duty to the Claimants.

It is the Claimant's submission that the Defendants did indeed breach their statutory duty to the Claimant entitling the Claimant to damages for breach of statutory duty.

In tort a defendant is liable for all of the reasonably foreseeable damage suffered by the Claimant as a result of his actions.

In this respect it is respectfully submitted that the Defendants, as admitted by the Permanent Secretary at trial, were well aware that Phase 2 of the Claimant's project was a project under the Citizenship by Investment initiative.

Accordingly, the Defendants should be held liable to pay any and all loss suffered by the Claimant as a result of their actions herein.

[67] This court has had occasion in recent times to address what is a growing trend of claims which seek damages in judicial review proceedings without providing the court with any justifiable basis

for doing so. It must be noted that “[o]ur law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort.”⁸ The courts have gone on to say that “the failure by a public authority to give a person an adequate hearing before deciding to exercise a statutory power in a manner which will affect him or his property, cannot by itself amount to a breach of a duty of care sounding in damages.”⁹ In order to claim damages the claimant must either prove that the public authority is guilty of misfeasance in public office or that the actions amount to liability in tort. In this case the claimant simply pleads breach of statutory duty without addressing the peculiar criteria of this tort.

[68] The mere fact that a statute places a duty on a public officer does not necessarily give rise to liability in private law. It is for the claimant to prove that the duty imposed by the legislature is such that it was intended to give rise to private law rights to a specific class of persons of whom the claimant is one. In the case of *X (Minors) v Bedfordshire County Council*¹⁰ Lord Browne-Wilkinson states as follows:

“The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. ... If a statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by those means and not by private right of action: ... However the mere existence of some other statutory remedy is not necessarily decisive. It

⁸ R. (On The Application of Quark Fishing Limited) v Secretary of State For Foreign and Commonwealth Affairs [2005] UKHL 57

⁹ Dunlop v. Woolahra Municipal Council (1982) A.C. 158

¹⁰ [1995] 2 AC 633

is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.”

[69] It is unfortunate that counsel for the claimant has not addressed this specific criterion in her submissions. In my view, it is not for the court to attempt to make the claimant's case. It is the duty of counsel to properly present the claimant's case in order to satisfy the court that there is an entitlement to the remedies being sought. The submissions filed have fallen short of that responsibility. In any event, I am not satisfied that there has been a breach of statutory duty in this case. Firstly, I am of the view that the Ordinance has made adequate provision for alternative remedies in circumstances where the Director of Physical Planning has breached his or her duty to consider applications for approvals for land development. In fact, the claimant made use of these avenues by engaging the appellate process within the legislation.

[70] In addition to that, I note that the claimant, in its pleadings, relies on section 3 and 4 of the Physical Planning and Development Ordinance in support of the proposition that there was a duty to ensure that the process was fair, open, accessible, timely and efficient. However, a careful assessment of that particular section indicates that this was outlined as an objective of the Ordinance itself and not necessarily a duty imposed on anyone. No doubt, the Ordinance goes on to state that these objectives must be given a purposive and liberal construction and interpretation to best attain the objectives. But it is the Ordinance itself which establishes a fair, open and accessible process for considering development plans. The Ordinance goes on to establish time limits and provides a right of appeal if these limits are not adhered to. It also makes provisions for damages to be claimed before a specific tribunal in circumstances where the ordinance determined that damages are payable as a result of the actions of the Director of Physical Planning.

[71] Insofar as it relates to the powers of the Minister, section 4 states that he must ensure consistency and continuity in the administration of the Ordinance with the objectives set out in section 3. In my view however, these duties as imposed by the legislation are rather broad in nature and seem to me to be designed to guide the Minister in the performance of his duties rather than giving rise to a cause of action in private law to any limited class of individuals. I am of the view that the performance of that duty fall squarely within the realm of public law.

[72] The claimant also raises the issue of the Minister's powers to establish the Appeal's Tribunal in accordance with section 7 of the Ordinance. My understanding of the facts is that at the time of the claimant's letter to the Minister, no tribunal was in place. The reasons for this have not been provided in the evidence. However, in my view, the claimant took the appropriate steps and sought administrative orders from the court demanding that the Tribunal be established. These orders were complied with, albeit with some delay, given the need to engage persons who are willing to serve on the Tribunal and to ensure that the instruments were signed and gazetted. There was an initial 4 month period between Mrs. Cozier' letter to the Minister and the establishment of the Tribunal. It did however take an extra month for the Tribunal to be gazetted. This does not appear to me to be so inordinate so as to amount to a breach of statutory duty. In any event I am not of the view that this section is designed to give rise to a remedy in private law to a limited class of persons of whom the claimant is one and therefore not satisfied that the delay in establishing the tribunal gives rise to a cause of action in private law.

[73] I am also not satisfied that the facts of this case are such that there has been a breach of statutory duty. I express the view that the range of physical development plans for which approval may be sought are very broad. The Director of Physical Planning will have to consider plans for construction of buildings ranging from a simple bungalow to those for major hotel and other infrastructural development. The duty to act in a manner which is timely and efficient will be affected by the individual circumstances of the case. When one examines the nature of the plans put forward by the claimant, the court must reinforce the notion that whilst the plans must be considered in a timely manner, the Director must give due consideration to a number of important factors in that process; one of which is an Environmental Impact Assessment.

[74] In my view, I can find no unnecessary delay in the process prior to Mr. Stapleton's letter of 29th September, 2014. In fact, the evidence reveals that the claimant's plans were considered within the 90 day period of its filing on 13th December, 2013. After consideration by the DAC certain information was requested, including the EIA. It was therefore for the claimant to supply that information to the satisfaction of the Director. When the EIA was filed, certain issues were raised and the claimant's expert accepted that these issues needed to be addressed. When the claimant wrote the Permanent Secretary in September, 2014 demanding approval of the plans, the statutory limitation had not yet elapsed, given the specific provisions of section 19(2) of the Ordinance. No

doubt Mr. Stapleton's letter placed a moratorium on the process. However, this was placed before the Tribunal and the issues were resolved. To my mind, the fundamental issue in this case is the question of the rationality and procedural propriety of the decision of the Cabinet. There has been no breach of statutory duty.

[75] However, even if the court had held that there was a breach of duty, I am of the view that the claimant has not sufficiently pleaded the damages which are being claimed. The statement of case, inclusive of Mr. Williams' affidavit in support, does not particularize those damages. I note that in paragraph 10 and 11 of the affidavit of Mr. Williams filed on 27th October, 2016 he highlights the costs of architectural and engineering designs and the expected cost of sale of the condominiums. This does not appear to have been pleaded as the actual damages being claimed. There is generally no particularization of the special damages in the pleadings.

[76] This also highlights the challenges in claiming damages in judicial review proceedings. On the one hand the claimant wishes for an order of mandamus directing that the plans be approved. On the other hand it claims damages and has presenting nothing other than the costs of the architectural and engineering plans as well as the expected sale price of the condominiums. If the court were to oblige in taking steps to ensure that the plans are properly considered by the Director of Physical Planning, then what exactly would the damages be and how are they to be quantified? The claimant simply has not particularized this, nor has counsel addressed it sufficiently in her submissions.

[77] In addition, the statement of case merely states that the claimant seeks general damages with no particularization of these heads of damages. In the case of ***Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack***¹¹ the Privy Council made it quite clear that ***"where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed."*** Whilst it may be a practice in personal injury cases to merely state that a claimant is seeking general damages to be assessed, it must be observed that the heads of damages in such cases are very well established. In addition, in keeping with the CPR, claimants in personal injury cases also attach a brief description of the injuries suffered and other evidence sufficient to allow the defendant to be in a position to

¹¹ [2010] UKPC 15

appreciate the general nature of the case against him or her. In cases such as the present, it is entirely unclear as to what the heads of general damages are. Not only has this not been adequately pleaded, but counsel does nothing in her submissions to assist the court in determining what these heads of damages are; bearing in mind that there has been no bifurcation of this case.

Conclusions

[78] Having assessed the facts and the relevant law I have determined that the claimant succeeds in its submission that the decision of the Cabinet of Ministers dated 25th June, 2015 is irrational and procedurally improper. I am however not of the view that the decision contained in Mr. Stapleton's letter and the issues before the Appeals Tribunal warrant the intervention of the court at this stage. I am also not of the view that a sufficient case has been made out for damages to be awarded on the allegation of a breach of statutory duty.

[79] In its pleadings the claimant requests that the court grants an order of mandamus compelling the defendants, and in particular the 1st defendant, to grant planning approval to the claimant in accordance with section 15(1) of the Ordinance. I have already noted that the 1st defendant has no legislative authority to grant planning approval to the claimant; neither can he demand this from the Director of Physical Planning. I note that during the course of the hearing counsel for the claimant was careful to point out that the claimant was not requesting that the matter be referred back for consideration but that the decision be moved into court and the order of mandamus granted. However, the matter is only moved into court for the purpose of quashing the decision if there are grounds for so doing. The court does not act as the Director of Physical Planning or the Cabinet in consideration of development plans. To demand, by way of an order of mandamus, that the discretion be exercised one way or another would serve the purpose of usurping the authority of the Director of Physical Planning and the Cabinet. That is not the role of the court. I am therefore minded to modify the request put forward by the claimant by quashing the decision of the Cabinet and referring the matter back for consideration of the claimant's application as the claimant continues to express an interest in having the plans approved.

[80] I would add at this stage, given the amount of time which has elapsed and the fact that the application never got passed the stage of approval of the EIA, that the application should be

reverted to the Director of Physical Planning to give full consideration without the moratorium initially set out in Mr. Stapleton's letter of 29th September, 2014. Once the Director has arrived at a position, the matter may be referred to the Cabinet for reconsideration, bearing in mind the express concerns raised by the court in this judgment.

[81] In the circumstances I make the following orders and declarations:

- (a) The decision of the Cabinet of Ministers as contained in letter dated 25th June, 2015 is hereby quashed on the ground that it is irrational and in breach of the rules of natural justice;
- (b) That the claimant's application number 176-13 is to revert to the Director of Physical Planning for reconsideration in light of the findings of the court;
- (c) The remaining remedies sought by the claimant are all dismissed with no order as to costs;
- (d) The claimant is awarded costs as against the 5th defendant only. If the parties are unable to agree on reasonable costs, the claimant is at liberty to file an application for the assessment of the costs by a judge or master in chambers.

**Ermin Moise
High Court Judge**

By the Court

Registrar