EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: NEVHCV2016/0046**

Between **Tamarind Cove Marina Development**

Claimant

-and-

Director of Physical Planning
Nevis Island Administration

Defendants

Before: **His Lordship Justice Ermin Moise**

Appearances:
Mr. Sylvester Carrott with Ms. Barbara Hardtman and Mr. John Cato of counsel for the claimant
Ms. Jean Dyer with Mrs. Rhonda Nisbett-Browne of counsel for the defendants

2020: January, 27th – 29th
February, 19th, 20th, 21st (submissions)
May, 13th

JUDGMENT

[1] **Moise, J:** This is a claim for judicial review against the Director of Physical Planning and the Nevis Island Administration. By way of Fixed Date Claim Form filed on 24th October, 2018[1], the claimant seeks the following declarations:

(a) That the claimant's marina project had been approved, the claimant having complied with all the requirements of law, obtained all prior approvals, and having paid the substantial approval sum as calculated by or for the 1st defendant; which sum has been retained;

(b) That the failure of the 1st defendant to diligently consider the construction and engineering plans submitted to the Department of Planning on or about 11th May, 2015 in pursuance of the

[1] This was the final of a series of claim forms first lodged on 20th April, 2016 and amended thereafter.

approvals previously granted to construct a marina constitutes a breach of its statutory duty under the Nevis Physical Planning & Development Control Ordinance;

(c) That the continuing failure and/or refusal and/or delay of over 18 months constitute an abuse of power, negligence and bad faith;

(d) That the 1st defendant has failed in his duty to consider and assess the claimant's submission of the construction and engineering plans (in consequence with previous submissions) for the construction of the berths in the Marina, resulting in cessation of works at the Marina Site, thus occasioning inconvenience, much loss and damage to the claimant; and

(e) That the claimant had a legitimate expectation to equal treatment and protection under the law.

[2] In addition to these declarations, the claimant also seeks damages and costs. The matter came up for trial on 27th to 29th January, 2020; during which time the court heard from a number of witnesses. The parties have filed written submissions as directed by the court. Having considered the facts and the submissions from counsel for both sides, I have determined that the case should be dismissed; save for the repayment of the sum of $140,170.00 which the defendants have conceded was paid by the claimant in error. In addition, I have invited the parties to file further submissions on the issue of costs. These are the reasons for my decision.

The facts

[3] It is important to establish, in some detail, the facts upon which this claim is based, as they are quite extensive. Insofar as there may have been facts omitted from this judgment I assure the parties that all relevant facts have been duly considered in coming to my conclusions.

[4] The claimant, Tamarind Cove Marina Development Limited (TCMD), is duly incorporated under the provisions of the Companies Ordinance in Nevis. It was represented throughout these proceedings by its Chief Executive Officer, Mr. Kirtley Gregory Duporte-Hardtman (Mr. Hardtman). Mr. Hardtman swore to a number of affidavits and one witness statement in this matter. The claimant also relies on the witness statement of Mr. Errol Douglas, who is a civil engineer contracted by TCMD.

According to Mr. Hardtman's evidence, TCMD embarked on a project to construct a marina village and a marina at Jones Bay, Nevis. Upon completion, the village would consist of a 126 suite hotel along with 12 townhouses, a private member gaming club and other amenities. The marina would consist of 100 slips.

[5] It is Mr. Hardtman's evidence that this project involved the construction and sale of "dockominiums". This was in fact a term used and acknowledged by then Premier, Mr. Joseph Parry in his letter to the claimant on 14th June, 2010. Mr. Hardtman describes a dockominium as a combination of a condominium and the right to use a boat slip in a marina. He states that this project was approved by the Nevis Island Administration (NIA) on 14th June, 2010; at which point a concession list was granted to the claimant. This list was further modified on 6th March, 2012. According to Mr. Hardtman, the financing for this project would have been obtained through pre-sales, investors and lending institutions such as banks. As far as pre-sales are concerned, Mr. Hardtman states that the claimant *"since 2012 and as recent as August, 2018 has sold full ownership dockominiums to over 98 purchasers, and 18 as partial dockominiums."* In light of that, Mr. Hardtman states that the government has collected approximately $5,982,872.22 in stamp duties for the sale of these properties.

[6] However, the approval of the project by the NIA in 2010 did not authorize the construction of either aspect of the project. This was subject to approval by the Director of Physical Planning of the Environmental Impact Assessment (EIA), as well as the details of specific engineering and architectural plans for the construction of the various phases of the project. The EIA for the marina village was approved in 2011. I understand construction to have commenced on this aspect of the project and that pre-sales of units had already taken place. However, approval for the marina was a separate exercise which proved rather more complicated. As Mr. Hardtman rightly pointed out, this would involve the building of structures in the sea. An assessment of the impact on the environment would therefore include an impact on the marine life, the effect of sea and weather patterns, as well as navigational safety issues for boat users.

[7] The EIA for the construction of the marina was prepared by Smith Warner International Limited (SWIL) and approved by the Department of Planning on 11th November, 2014. It is however

important to repeat in detail, the content of the letter in which this approval was communicated to the claimant. The letter states as follows:

> *Please be informed that the Nevis Island Administration has concluded its evaluation of the Environmental Impact Assessment of the Tamarind Cove Marina Development Project with assistance from two experts from Barbados in Dr. Leo Brewster and Mr. Lester Toppin. The Department of Physical Planning fully endorsed the findings and recommendations of the evaluation as contained in the attached copy of the report. In light of this we approved your EIA on the condition that the findings and recommendations relating to your development be fully considered and included in your designs and the implementation of the marina project.*
>
> *We look forward to receiving a complete set of drawings and designs for this project and wish you every success during the implementation. The NIA seeks your full cooperation as we monitor and inspect the various stages in implementation.*

[8] Despite Mr. Hardtman's assertion that the EIA for the marina had been approved, the content of this letter makes it clear that this approval was subject to the implementation of the recommendations contained in the report of the experts commissioned by the Department of Planning. It must be observed that a project of this nature would naturally require a greater measure of circumspection on the part of the Department. The report commissioned places this into context when it states in its executive summary, that *"the proposed marina would result in the substantial and largely permanent physical alteration of the Jones Bay area, and also result in the alteration of the existing recreation and boating uses that currently occur in the area."* The authors of that report go on to note that *"the remedial costs of a poorly planned and executed development of this scale far outweigh the economic benefits it may accrue in the future."* It was therefore noted that it was "*not justifiable to cite a desire to begin construction quickly as there are still other potential investigations that will need further defining to provide further strengthening to the identified final design…"* One would hardly need the advice of an expert of any kind to fully appreciate and endorse these sentiments as expressed. For that purpose, the authors of the report made a number of recommendations which the Department of Physical Planning insisted had to be implemented in the final designs of the structures prior to the grant of approval.

[9] It would seem from the facts presented in this case, that the one issue which proved to be most contentious between the parties was the recommendation that the navigational entrance of the marina be shifted to the south, rather than the northern entrance insisted upon by the claimant. The report of 11th November, 2014 states that the entry of the marina, as put forward by the claimant *"goes against all existing marina design practices and principles and given the positioning of the entrance, disadvantages other bay users to the rest of the effective marine space within the bay."* The report goes on further to state as follows:

> *"From what has been presented the consultant has gone against their better judgment to accommodate the developer. The option being presented may be in the best interest of the developer, but is not in the best interest of navigation, based on established navigational practices for entries into ports, harbours and marinas. The rational (sic) for such traditional approaches has been clearly presented by SWIL. Such practices should be followed in order not to put the person using the marina at risk when entering or leaving the marina. The designs for the south facing option should also have been presented for consideration with the justification for the final choice made being presented. There are many different options that could have been used as navigational aids to assist with differentiating the navigation lanes and entry into the Sea Bridge Pier and the marina if it was considered a potential area of navigation concern. Concern has to be raised at this point to consider if there was not another hidden agenda or ulterior motive for the reorientation of the entry of the marina."*

[10] The specific concerns raised in this report related to comments made in the EIA about the appropriateness of a north facing marina entrance. The EIA stated that:

> *"The entrance to the marina was initially facing south. A south-facing entrance would have been preferable for the purposes of navigation as the vessel should typically be going against the prevailing wind direction for controllable navigation when entering the marina. However, the clients had concerns that a south-facing entrance would cause an interference with the users of the Sea Bridge facility, so they instructed that the design should be altered to have a north-facing entrance. In its current orientation, vessels will be entering the marina with the prevailing*

wind direction and as such this may be uncomfortable particularly under rough wave conditions."

[11] It is this comment in the EIA which prompted the authors of the 11th November, 2014 report to question the appropriateness of the marina entrance being placed towards the north. There was also a concern expressed that a northern entrance would *"[disadvantage] other bay users to the rest of the effective marine space within the bay".* Despite the expert initially including a south facing entrance, this was altered on the instructions of the claimant. What was recommended by the 11th November, 2014 report is that *"[t]he designs for the south facing option should also have been presented for consideration with the justification for the final choice made being presented."* There was also a recommendation that the plans be reviewed by a qualified coastal engineer.

[12] According to Mr. Hardtman, the claimant entered into a lease of the sea bed with the NIA in December of 2014. This was in order to advance the project as it was important to have some measure of ownership of the sea bed prior to seeking full planning permission. The marina site plan was presented to the Department of Physical Planning on 2nd February, 2015. This plan illustrated the manner in which the marina would be laid out in the water. It demonstrated the size of the marina, the orientation of the entrance into the marina and its proposed internal configuration. Notwithstanding the objections raised in the report of 11th November, 2014, the entrance to the marina in this design was facing north. There does not appear to have been an alternative south facing design for consideration as recommended by the 11th November, 2014 report. It is Mr. Hardtman's evidence however, that the site plan was stamped approved on 5th February, 2015. For reasons which are unclear to me, the same site plans were also stamped approved sometime in October, 2015. In addition to that, the sum of $140,170.00 was paid by the claimant after an invoice was issued by the defendants. The defendants have however acknowledged that the invoice was issued in error as it is not the practice of issuing invoices for applications approved in principle.

[13] On the basis of that approval, according to Mr. Hardtman, TCMD approached its engineers to provide the full structural engineering construction plans based on the approved site plan. The claimant also sought advice from a world renowned coastal engineer Professor Jentsje van der Meer. These engineering plans were lodged with the Department of Physical Planning on 11th May,

2015. Mr. Hardtman insists that there would have been a legitimate expectation that the detailed engineering plans would have been stamped approved if they were largely based on the broader site plan which had been approved by the department. It is Mr. Hardtman's evidence that based on these expectations, TCMD purchased neighbouring lands from the Sea Bridge Inc. to be a part of the marina south side revetment project. These lands were purchased for $10,965,239.33. In addition to that, TCMD ramped up its marketing campaign at significant costs to the company and its directors. Persons from other countries had commenced the purchase of units in the land based element of the project on the basis that the marina would be built. Some purchasers had already been granted citizenship in the Citizenship by Investment Programme to facilitate this and stamp duties for these purchases had been paid.

[14] Mr. Joel Williams, the current Director of Physical Planning, swore affidavits on 19th May, 2016, 17th March, 2017 and 15th January, 2019. He states that the laws of Nevis do not recognize the concept of dockominiums. He points the court to Mr. Hardtman's own affidavit where he states that the claimant *"since 2012 and as recent as August, 2018 sold ownership of dockominiums to over ninety-eight purchasers, and 18 as partial ownership dockominiums."* According to Mr. Williams therefore, this is a risk which the claimant took on its own volition in circumstances where the marina plans had not yet been approved. In fact, in 2012 the claimant had not even presented an Environmental Impact Assessment for the marina phase of the project; yet it began the process of selling dockominiums. Mr. Williams' argument is simply that there could not have been a legitimate expectation that the marina phase of the project would have been approved sufficient to justify the pre-sales of these units as dockominiums. I note myself that this claim was first lodged in April, 2016 and subsequently amended. Based on Mr. Hardtman's own evidence, it would seem that the claimant continued to sell "dockominiums" even after the commencement of these court proceedings.

[15] Mr. Williams also states that the claimant would have been fully aware that it was required to obtain approval of its detailed plans for the marina, notwithstanding that it had sought and obtained approval in principle of the marina site plan. According to Mr. Williams, an approval in principle is not permission to commence construction of a development. He states also that *"the stamping of the site plan was not indicative of final approval."* Insofar as that is the case, Mr. Williams states

that there could certainly not have been any expectation that the stamping of the site plans as being approved in principle meant that there was approval of the final design. He states that the application *"could not be approved with the north-facing entrance in light of the safety issues raised by the applicant's own consultant in its EIA."*

[16] In order to reconcile this issue, it is important to look in greater detail at the evidence presented in relation to the application for approval of the site plans. By way of letter dated 2nd February, 2015, Mr. Errol Douglas, Principal Consultant of the engineering firm EF Douglas & Associates, wrote to the Department of Planning. The site plans referred to by Mr. Hardtman were attached to that letter. Mr. Douglas, in seeking approval of those site plans, states that *"we seek further indulgence and support, as this approval will pave the way for us to generate the marketing data that is essential to **inform the final internal design and approach entrances to the marina** (my emphasis)."* Also attached to the letter of 2nd February, 2015 was a document described as an "overview of the marina". This overview goes on to provide some justification for the placement of the marina entrance to the north. As it relates to that issue, the document states as follows:

> *The original entrance of the marina was initially facing south; however, there was a concern by Smith Warner that that layout would cause an interference with the users of the Sea Bridge facility, thus the design was altered to have a north-facing entrance. Further Smith Warner's investigation revealed that in the initial designs featuring a parallel western breakwater beside the existing Sea Bridge pier, that the additional breakwater was redundant as proven by modeling. It is salient to note that further investigation of the orientation of the entrance to the marina revealed the following in addition to the points raised by Smith Warner to have the entrance at the North:*
>
> 1. *The bathymetry indicates that dredging would be required close to the toe of the existing western facing bridge rubble mound structure. This can lead to de-stablisation of the existing Sea Bridge western mount structure.*

[17] I note firstly, that Mr. Douglas' account of the concerns raised by SWIL in the EIA does not appear to be entirely accurate. It suggests that the concerns of the interference with the Sea Bridge facility were entirely that of SWIL. In fact a perusal of the EIA indicates that it was the claimant who

instructed on a change of the marina entrance. Mr. Douglas nonetheless made an attempt to justify retaining a northern entrance to the marina. However, in the overview of the marina he also indicated that *"it is the intention of the developer to follow the recommendations of the EIA and Environmental Management Plan as approved by the Department of Physical Planning in Nevis. In this regard, emphasis will be placed initially on the design and construction of the marina breakwater accompanied with required environmental monitoring. This would give the further opportunity to gather additional data and verify the modeling parameters used in the design."*

[18] To my mind, these representations, taken as a whole, clearly indicate that although approval was being sought of the site plans in principle, there was an understanding that there were issues which needed to be addressed before the final plans were approved. Nothing in this letter satisfies me that the approval of the site plans would have raised a legitimate expectation that the specific concerns outlined in the report of 11th November, 2014 no longer needed to be addressed before further drawings and designs were approved. It seems quite clear to me that this approval being sought at that stage was designed for a specific purpose and did not create the necessary expectation which Mr. Hardtman has insisted upon. When I consider the facts which followed the approval of the site plans, and further representations of the claimant's engineer, I become even more fortified in that view.

[19] After the lodgment of the engineering plans in May, 2015, the Department of Planning sought further advice from Mr. Lester Toppin on the issue. According to Mr. Williams, the department did not have the relevant expertise to fully consider this issue and again turned to Mr. Toppin for advice. On 7th August, 2015, Mr. Toppin presented a further report to the department. He was quite forceful in this report in stating that the recommendations made in the November, 2014 report were not followed by the claimant in its latest application for approval of the engineering designs. He noted that *"there has been a significant variation from the detailed work developed by Smith Warner International. As such this application has had to be treated as a new and independent application to build the marina. There has been very little attempt to address many of the conditions that were applied to the Smith Warner International design."* So forceful was Mr. Toppin in his objections that he recommended the engineering plans not be approved. He stated that the recommendations which were previously made *"are meant to be discharged in accordance with the*

conditions of approval as a means of guiding the planning process." The following passage from Mr. Toppin's report of August, 2015 is important, as it places these issues into context:

> *"It is clear that there are several significant changes made by EF Douglas Associates to the original design done by Smith Warner International. These changes have not been justified through the use of numerical modeling nor a detailed explanation presented as to the rationale for the changes. This is of significant concern. In reviewing the documents presented, it would appear that the granting of conditional approval for the development has been interpreted by the developer to mean that changes can be made to the previously approved design without consideration of any new impacts the changes will introduce. In reviewing this document, its new variations are so far away from the Smith Warner design that it has been deemed in our opinion to be a change in the scope of this project and as such it should be considered as a new application."*

[20] As it specifically relates to the orientation of the entrance to the marina, Mr. Toppin goes on to state that *"it is recognized that the entrance to the marina had been made wider but remains in our view oriented in the same general direction as per the original Smith Warner design. This was a cause for concern then, as it is even more so now, as the wider entrance provides greater opportunity for wind driven waves to enter the marina and therefore reduce the protective nature of the marina basin during storm events."* It must be remembered that Mr. Toppin's main objection to the entrance of the marina facing north was that this went against established practice, in that marina entrances are best suited to be against the prevailing winds. This was also the position of SWIL, who indicated in the original EIA that the best practice was disregarded upon the instructions of the claimant.

[21] Mr. Toppin's August, 2015 report was communicated to the claimant on 17th September, 2015. I note that this would have been beyond the 90 day period prescribed by the legislation during which a decision had to be communicated to the claimant. However, the claimant did not appear to have taken objection to this delay and, upon receipt of Mr. Toppin's report in September, 2015, sought additional advice from Professor van der Meer. His report dated 26th October, 2015 was presented to the claimant in which he states as follows:

"Only diffracted waves around the head will enter the marina. With traditional diffraction diagrams one may check the wave heights in the vicinity of the entrance. An alternative way is to use a numerical programme that can calculate wave penetration, including refraction, diffraction and reflection. Smith Warner International used already such a model and remodeling would show the influence of changing the entrance to the waves entering the marina, as well as the wave heights at the berths near the entrance. Knowing the wave heights could lead to an assessment of whether the berths at the entrance are protected sufficiently."

[22] I can find nothing in either of Professor van der Meer's reports which explicitly endorses the north facing entrance to the marina. It does seek however to explain the model used and in general suggested that the design in a broad sense was safe. It does also suggest that perhaps a remodeling can assist in showing the influence of changing the entrance as it relates to the waves entering the marina. I am uncertain as to whether this remodeling exercise was ever done. However, accompanying Professor van der Meer's report was a letter from the claimant's own engineer, Mr. Errol Douglas. Mr. Douglas sought to respond directly to the concerns raised by Mr. Toppin in his August, 2015 report. With particular reference to the issue of the marina entrance, and giving due regard to the opinion of Professor van der Meer, Mr. Douglas stated the following:

"Any project of this size and nature will require considerable dialogue, expansions, clarifications etc. Our comments do not form the basis to extrapolate that matters will be addressed on either an ad-hoc basis or that rash decisions will be made. The reviewer's remarks are unnecessarily negative and do not speak well to our professional ethics or the development of cohesive strategic working relationships on such a significant project. ***This can be clearly demonstrated by the fact that the eventual marina opening may have to be located to the south post a full detailed design and consideration of all the factors (my emphasis).*** *For practical purposes (including comfort of sea captains entering the marina), dredging requirements, the final orientation may designed at the south (sic). This underpins the statement and context of the statement that the recommendations will be followed as far as is practicable and achievable… We wish to take this opportunity once gain to state in a pellucid fashion that the developers aim to follow the recommendations in a pragmatic manner and comply with the regulations of the DPPNE."*

[23] It seems to me that as at 26th October, 2015, the issue of the orientation of the marina entrance remained a live one. The claimant's own engineer acknowledged, even after Professor van der Meer's input, that further dialogue was necessary in order to determine the appropriateness of maintaining a northern entrance to the marina. In fact, Mr. Douglas also made it clear in his letter of 26th October, 2015 that *"the design process is in no way complete and our submission was a request for* ***approval in principle*** *(my emphasis) to expedite both the design process and the funding of the project."* This directly contradicts Mr. Hardtman's evidence where he states that the full construction and engineering designs were presented in May, 2015. Mr. Douglas seems to suggest that what was being requested was approval in principle. I do not understand approval in principle to be a final determination of the general issues of concern to the department and I find much force in that reasoning from Mr. Douglas' own evidence when he insisted in the witness box that this process was an ongoing dialogue. Therefore, I accept the evidence of Mr. Williams where he states that the approval of the site plans in principle does not bind the department into approving the engineering plan, or any later designs, with a northern entrance. It could also not create any expectation in Mr. Hardtman's mind that this was a matter which had effectively been brought to a conclusion; especially in light of the representations of the claimant's own engineer.

[24] On 9th November, 2015 Mr. Toppin provided a final report to the Department of Physical Planning. In that report he notes that *"the documents presented have been reviewed and can be considered to have provided all the relevant information to allow the Planning Department to make a final informed decision given the significance of this project to Nevis."* He noted that *"the coastal engineer has indicated that the design is sound and should proceed. This has met with the required recommendations submitted in both the SWIL and Douglas reports that the design be reviewed by a qualified coastal engineer."* Mr. Toppin made a number of recommendations and conditions upon which he thought approval should be granted. He did not directly address the issue of the entrance to the marina. He did however indicate that he had reviewed Mr. Douglas' letter of 26th October, 2015 in which it was accepted that further consideration had to be given to that issue as the various design stages were pursued. What was clear is that there was now sufficient information for the department to make an informed decision; as least as it related to the approval of the engineering plans in principle.

[25] Contrary to the assertions made by the claimant, I do not take Mr. Toppins' report of 9th November, 2015 to mean that this issue was resolved to the extent that a northern facing entrance was to be accepted at this stage in the process as a matter of course. The claimant has consistently argued that this report has resiled from the earlier position that a north facing entrance to the marina may be unsafe. I do not find that to be the case as a matter of fact; especially as the report considered the representations of Mr. Douglas regarding the fact that this issue may have to be revisited as the design progresses. What Mr. Toppin did say was that he was satisfied that the matter had been reviewed by a qualified coastal engineer and that there was now sufficient information for the department to make a decision. In any event, notwithstanding the content of these reports, the final determination of that issue had to be made by the Director of Physical Planning, taking all of the information into account. Mr. Toppin's acceptance of the information presented by the claimant would have obviously included Mr. Douglas' own concession that the marina entrance may have to be oriented to the south in the final design when all considerations were made; including that of navigational safety.

The Development Advisory Committee

[26] During the course of these proceedings, the defendants disclosed the minutes of meetings of the Development Advisory Committee (DAC) which were held on 12th, 18th and 19th November, 2015. As will be addressed later in this judgment, it is the statutory duty of the DAC to consider planning applications and advise the Director of Physical Planning on whether such plans should be approved and on what conditions, if any. On 12th November, 2015 the DAC considered the claimant's application for approval of the engineering plans submitted on 11th May, 2015. During that meeting the only recommendation made was for the matter to be referred to the Nevis Air and Sea Ports Authority and the Cabinet of Ministers.

[27] The issue again came up before the DAC on 18th November, 2015. Present at that meeting was the Chairman, Mr. Ernie Stapleton and a number of persons representing various stake holders as provided for by the legislation. Also present was Ms. Suzanne Gordon from the Nevis Historical and Conservation Society. It was noted that the *"EIA analysis of the preliminary structure layout clearly states a south facing entrance would have been preferable for the purpose of navigation as vessels*

should typically be going against the prevailing wind direction for controllable navigation when entering a marina (as stated by Smith-Warner International). However, the clients made recommendations to change the layout to the north-facing so as to avoid any conflict with the Sea Bridge." At that meeting, the decision of the DAC was "to be determined". A further meeting was convened to consider the application on 19th November, 2015. The attendance was primarily the same, save that Mr. Dexter Boncamper was present on behalf of the Nevis Housing and Land Development Corporation. For the purpose of this judgment, it is important to highlight in some detail, the considerations of the committee during this meeting.

[28] During the course of that meeting three main issues were raised regarding the claimant's application. Firstly, it was observed that the project, as designed, extended beyond the boundaries of the sea bed lease which was signed between the parties. Secondly, there were concerns over issues raised by persons who reside in the area. Ms. Susan Gordon indicated that the residents were not opposed to the development as long as "it was done right". She insisted that there needs to be an audit of the development to determine why the original phase has not been completed. She questioned whether the project was sustainable. Ms. Gordon also indicated that the administration should consider a performance bond and that an audit ought to be done to consider whether there are funds available to complete the project. Thirdly, the committee considered that one of the property owners in the area was contemplating a development to the north of TCMD's project. In the end the DAC made the following recommendations:

(a) There is no objection to the project. We recommend approval of the project provided that the following are taken into consideration as listed below. The project should be implemented properly and in a sustainable manner.

(b) The recommendations of Mr. Toppin should be followed as per report(s);

(c) Opening/entry point for the marina should be moved to the south side for the navigational reasons stated in the EIA report. This may mean that the marina development may have to be shifted to the south of the sea-bridge pier;

(d) *Project should be within the area of the seabed lease. This may require that the project be made smaller without compromising its quality and marketability;*

(e) *Undertake due diligence of the developers and the projects. This will ascertain, among other things the proof of funding for completion of the marina;*

(f) *Require that TCMD complete the land based portion of the overall development before starting the marina portion, especially since the developments are under the same named entity.*

(g) *Ensure that the marina be constructed by a reputable marina construction company. This could also be part of the due diligence process;*

(h) *Performance bond for the marina development should be considered; and*

(i) *The NIA should employ an expert/consultant to ensure that the development follows guidelines and plans such as the environmental development plan, and is implemented according to the approved designs and conditions. This expert should be employed by the NIA but paid for by the developer.*

[29] From the evidence presented by the defendants, it is admitted that the DAC did not have Mr. Toppin's final report of 9th November, 2015 during their deliberations. Mr. Williams indicated that although the report was received on 9th November, 2015, it was not forwarded to DAC for consideration. The minutes also do not indicate whether the reports of Professor van der Meer and Mr. Errol Douglas of 26th October, 2015 were considered. However, reports from EF Douglas were referenced in an email sent by Ms. Susan Gordon subsequent to the meeting of 19th November, 2015. It is unclear as to which of these reports she was referring to. Further, it also does not appear that there was any formal communication of the recommendations of the DAC to the claimant. However, the claimant was in receipt of a letter from the Department of Planning dated 2nd February, 2016. This letter was signed by the then acting Director of Physical Planning, Ms. Renee Walters. It states that *"the marina segment of the Tamarind Cove Marina has been referred to the Cabinet of the Nevis Island Administration for final determination".* However, to date there has been no formal response from the Cabinet regarding this application. It is worth noting however, that Ms. Barbara Hardtman, acting as attorney for the claimant had responded to the Director's letter and

threatened that any attempt at seeking further changes to the design would be met with the initiation of litigation by the claimant.

Involvement of Ministers of Government

[30] Mr. Hardtman goes on in his evidence to state that in late November, 2015 he was invited to a meeting with Hon. Troy Liburd, who was then the Junior Minister in the Ministry of Planning. This ministry overseas the work of the Department of Physical Planning. According to Mr. Hardtman, the meeting was set up to discuss the marina plans. Taking the evidence from the affidavit of Mr. Hardtman filed together with the claim form, it would seem at first that the minister had intervened in the process by summoning him to a meeting to discuss the plans. Indeed, the claimant has hinged much of this claim on "unlawful ministerial interference." However, in his witness statement filed on 2nd April, 2019, Mr. Hardtman states that an attorney acting on behalf of the claimant had previously engaged Minister Liburd via WhatsApp message on 3rd November, 2015. That attorney was Ms. Barbara Hardtman. It is important to outline the content of that exchange in full. It goes as follows:

> ***Ms. Barbara Hardtman****: Mr. Liburd. I see you on line so let me ask you through this medium if the plans are ready. Greg told me yesterday that you said they would be ready today. I am to FedEx them to him today.*
>
> ***Minister Liburd****: I am in cabinet at the moment. I spoke with your brother, and told him that I was working to bring the matter to conclusion. I however did not commit to having it done by today. I did update him on some of what has been done and the progress. We must appreciate that I am giving this the highest priority, but need to allow a little time for process.*
>
> ***Ms. Barbara Hardtman:*** *Highest priority? By hiring Toppin who works for the Barbados govt as a surveyor? And holding up the plans from June, 2014.*
>
> *You do realize that there is no wiggle room for the NIA eh since the site plan was already stamped.*

Minister Liburd: *Miss Hardtman, it's not a case of wiggle room, this thing will be done. Just please afford me the time to have it done following the necessary procedure. I understand the frustration fully.*

[31] It seems to me that the claimant, through its agent, had had some direct communication with the minister prior to the meeting in late November, 2015. It is unclear as to who initiated this dialogue. However, Ms. Hardtman apparently did not think it inappropriate to directly communication with the minister concerning a prior commitment to look into the matter of the approval of the plans. Minister Liburd appears to have certainly communicated with Mr. Hardtman prior to 3rd November, 2015. It is unclear as to when this communication actually took place and at whose instance. However, having considered the evidence in totality I find that on balance there was mutual communication on this issue between Mr. Hardtman and Minister Liburd prior to the meeting in late November, 2015.

[32] During that meeting, according to Mr. Hardtman, Minister Liburd indicated that the NIA would be willing to stamp the engineering plans approved if the claimant would be willing to change the orientation of the marina to the south. Mr. Hardtman states that he enquired as to why this was necessary and was informed by the minister that pressure was being brought to bear by supporters of the government who lived on the hill overlooking the bay in which the marina was to be built. Mr. Hardtman then stated that he enquired as to whether there would be any compensation for the fact that the engineering plans would have already been designed with a north facing entrance on the basis of the previously approved site plan.

[33] There was a follow up meeting with Minister Liburd. This was attended by attorneys on behalf of the claimant. Also present was Mr. Ernie Stapleton and Mr. Denzil Stanley, Permanent Secretary and Principal Assistant Secretary in the Ministry of Planning respectively. At that meeting a request was again made for the reorientation of the entrance to the marina. Mr. Hardtman states that he requested that the NIA's position to be placed in writing. According to Mr. Hardtman, he had a third meeting with the minister on 15th January, 2016 at the Happy Endings Restaurant in Charlestown, Nevis. At that meeting he pointed out that he was aware that the request for the reorientation of the marina was made to advance the interest of a client of the law firm of Daniel Brantley & Associates;

of which the then Deputy Premier, Hon. Mark Brantley was the principal partner. Mr. Brantley was later appointed as Premier of Nevis in December of 2017 and testified in these proceedings in that capacity. Mr. Hardtman goes on in his evidence to state that if the claimant were to do what was requested of it, a new EIA had to be done and a completely new set of construction plans drawn up. A completely new marketing strategy had to be put in place.

[34] Minister Liburd in his own evidence stated that he was aware of the claimant's application for planning approval. He was aware that the application could not be approved due to the navigational concerns raised in the EIA and Mr. Toppin's reports. He also states that he was aware of the outcome of the meeting of the DAC. He states that subsequent to the DAC meeting he was contacted by Mr. Hardtman via telephone in November, 2015. During this conversation Mr. Hardtman raised a number of issues with him. It was Minister Liburd's evidence that Mr. Hardtman was upset, as he was of the view that the NIA was insisting on having the marina entrance redirected in order to accommodate another development in the area. According to Minister Liburd, due to concerns about the project and its relevance to Nevis, he went to meet with Mr. Hardtman in his office on that very day. The minister's evidence was that he was not aware of any other development. He denied much of what had been attributed to him by Mr. Hardtman; especially as it relates to the objections of the "people on the hill." Minister Liburd accepted that at least two meetings were initially held at the request of the Permanent Secretary in order to assist in resolving this issue.

[35] I generally accept the minister's evidence as being truthful. The content of Ms. Barbara Hardtman's WhatsApp exchange with Minister Liburd seems to indicate that there had been a prior conversation with Mr. Hardtman and the minister at the time of the meeting in late November, 2015. Mr. Hardtman's insinuation that he was invited to a meeting seems to suggest that this was initiated by the government in order to benefit another developer. However, I am of the view, and find as a matter of fact, that Mr. Hardtman and Minister Liburd had been in communication sometime prior to 3rd November, 2015. There appears to have been some expectation that Minister Liburd would have intervened in assuring that the plans were approved and returned to the claimant. That certainly seems to be the basis of the content of Ms. Hardtman's WhatsApp messages to the minister. It is unclear to me as to who initiated these conversations, but I do find that the claimant

was just as involved in engaging the minister's intervention to have the plans approved and returned to it.

[36] Subsequent to these meetings, the claimant received a letter from the then Premier of Nevis, Mr. Vance Amory. This letter was dated 10th December, 2015. Mr. Amory indicated that he was advised by Minister Liburd that the claimant had agreed to revert the entrance of the marina to the south. Premier Amory went on to state in his letter that the NIA wanted the entrance of the marina shifted from the north to the south to *"mitigate any deterioration in the marina and marine ecology in the Tamarind Bay area… This will make the government of Nevis more able to give the full support to the development of the Marina."* Mr. Hardtman claims to have been puzzled by the content of this letter as it contradicted Minister Liburd's assertion that the reason for the demands was to placate the *"people on the hill."* He states further that he never agreed to such a change during that meeting. I too share some confusion as to these representations made in this letter by Premier Amory, as Minister Liburd did not initially indicate in his own evidence that Mr. Hardtman had ever given him such assurances. He did however indicate that he had left the meetings with a view that the issue would have been settled but not that there was a formal agreement. As to whether the then Premier was mistaken is a matter this court is not in a position to reconcile, given that he was not called upon to give evidence on the issue.

[37] Mr. Hardtman also states that the reason given by the Premier for the change in orientation of the marina entrance was irrational, since the claimant was already in possession of an approved EIA and a site plan with the marina approved with the northern entrance. For my part, putting aside the allegation relating to the "people on the hill", I express significant doubt as to the accuracy of Mr. Hardtman's evidence regarding the reorientation of the entrance to the marina. Despite his insistence that this had already been approved, as late as 26th October, 2015, the claimant's own engineers accepted that this issue was still a live one. It was acknowledged that as the dialogue continued, the entrance of the marina may very well have to be oriented towards the south. In fact, in Mr. Douglas' affidavit of 1st April, 2019, he states that "*all engineered plans as presented were a basis for a continuing dialogue between the Department of Physical Planning, the claimant and its designers."* Even under oath at trial Mr. Douglas maintained that the process was one of a continuing dialogue with the department and accepted that these issues would have to be considered as the development progressed.

[38] Given the content of all documentary communication which had taken place up until 26th October, 2015, it cannot be said that the EIA and the site plans had been given final approval to the marina with a northern entrance. At most it can be said that such approval was approval in principle with a clear concern raised regarding the orientation of the marina entrance. Mr. Toppin's report of 9th November, 2015 did not necessarily resile from that position. However, even if it did, the final decision was not that of the experts but of the relevant authorities. It seems to me that even at that point, in January, 2016 when the Premier's letter had been received, there was a continued dialogue regarding the approval of the plans which included the issue of the orientation of the entrance to the marina. This request by the Premier would therefore certainly not come as a surprise to Mr. Hardtman in the manner described in his evidence. Further, the expense and challenges of redirecting the entrance to the south were possibilities already acknowledged by the claimant's engineer and ought to have been in the consideration of the claimant even as late as the beginning of 2016. I fail to see a basis for Mr. Hardtman's shock and surprise at these requests in light of the fact that the last official communication from the claimant to the Department of Planning clearly accepted that in the final analysis the entrance to the marina may have to be shifted towards the south. It is difficult to accept that the claimant had hinged its entire financial and marketing strategy on an issue which its engineer accepted in October, 2015 may have to change in the final analysis. The claimant certainly ought to have been prepared for such an eventuality.

[39] I also doubt very much that there would be a need for a new EIA, given that it had already been approved in principle and subject to the recommendations made by Mr. Toppin. I acknowledge that the Premier's letter may have been somewhat different from the concerns initially expressed. However, it seems clear to me that a northern entrance to the marina went against the established norms for navigational safety and was an issue still up for consideration with ultimate authority on the part of the Director of Physical Planning, and perhaps the cabinet in the final analysis, to make a final determination guided by the principles of fairness to the claimant on the one hand and in the interest of the public and other users of the area on the other. What must be observed however, is that Mr. Douglas insisted that what was being sought at that stage was approval in principle and a continued dialogue on the issue.

The People on the Hill/Tamarind Bay Group

[40] It is important at this stage to address, in more detail, the issues raised by the claimant as it relates to the "people on the hill" and the relevance of this to the facts of this case. On 11th March, 2015 a letter was written to the then Premier of Nevis, the Deputy Premier and the Minister of Lands by a number of persons described as the Tamarind Bay Group. These persons described themselves as a *"coalition of residents, property owners, abutters, sailors and people who are very concerned about the future of Nevis."* The letter indicated that whilst there was general support for the marina project undertaken by the claimant, there were concerns that the marina should be the correct size, location and scope to be financially viable, user friendly, safe and sustainable. The authors of this letter expressed the view that the design of the marina with a northern entrance will effectively make Tamarind Bay unusable and unsafe for Nevisian fishermen, snorkelers, kayakers, families and tourists making use of the bay. They were of the view that further development would be unlikely if the entrance remained oriented towards the north. A southern entrance was therefore the preferred option.

[41] The group also expressed the view that environmental pollution, financial viability and protection of crown lands ought to be given due consideration. There was also a complaint that there had simply not been transparency or community follow up in the process of approving the development. The group requested a meeting in order to discuss their concerns prior to the granting of planning permission. It is unclear to me as to whether this meeting ever took place. I note that the claimant indicated that public consultation did take place prior to the approval of the EIA. However I observe that many of the conditions placed on the approval of the EIA in principle, appear to be in line with the complaints of the Tamarind Bay Group. However, this letter was not written to the Director of Physical Planning, but rather to various ministers of government. It must however be noted, that this letter was signed on behalf of a number of persons including Ms. Suzanne Gordon and Mr. Robert Martin. It will be readily observed that this is the same Suzanne Gordon who sat as a member of the DAC at the meeting on 19th November, 2015 when various decisions were made regarding this development. In fact, subsequent to that meeting, Ms. Gordon wrote an email to the chairman of the DAC stating that:

"I had a couple of thoughts afterwards. In regard to the Seabed lease, I'm wondering if the government could end up having liability issues if the marina is not completed. My question is whether the government could be sued if the government knew or should have known things about them and allowed them to proceed; and allowed investors to become involved in something the government condoned on crown lands. If they get approval, they will start selling slips immediately (if they haven't already), which is what the Douglas' report said. My feeling is that they should not be able to start the marina, or sell slips until the land-based part of the development is finished and purchasers are assured of what the purchasers are buying. We should also require the full final plan rather than the piecemeal bits we have been getting."

[42] Mr. Hardtman goes on in his evidence to state that sometime subsequent to the meetings with Minister Liburd and receipt of the letter from the Premier, it was brought to his attention that a new hotel project with a pier was being "aggressively promoted" as being approved to be constructed on a 5.2 acre property to the north of that of TCMD. Mr. Hardtman states that this puzzled him as the seabed lease signed by TCMD and the NIA prohibits the construction of any structures which would block the entrance of TCMD's marina. Mr. Hardtman states that he decided to investigate this issue and discovered that the property was owned by a company called Nevis Resort Investor Limited (NRI). The name of the project was "Cades Beach Resort". According to the documents obtained from the Registry of Companies, the registered mailing address of that company was that of the law firm of Daniel Brantley & Associates; a firm whose senior partner and owner is Hon. Mark Brantley, who was at the time the deputy Premier of Nevis and Minister of Tourism in the cabinet of the NIA.

[43] Mr. Hardtman states that he subsequently met with Mr. Randall Oveson and his wife, who were the developers of this newly discovered project. It is the claimant's contention that Mr. Oveson is also known as Mr. Robert Martin, who was a member of the Tamarind Bay Group. Mr. Hardtman states that he showed Mr. Oveson the approved site plans which indicated that the entrance of the TCMD marina was to be facing north. According to Mr. Hardtman, Mr. Oveson was shocked as he was of the view that his development could not take place if the TCMD marina entrance was located to the north. However, as I have indicated, this site plan is not proof that the Department of Physical Planning or the NIA had firmly approved the location of the entrance of the marina to the north at that point. If Mr. Hardtman's representation to Mr. Oveson was that there was a firm approval of the

entrance of the marina oriented towards the north, then I am of the view that this would have been a misrepresentation to some extent; as there was an ongoing dialogue in which that issue had not been firmly resolved. That much was clearly acknowledged by the claimant's own engineer.

[44] Mr. Hardtman insists that if this development were to take place then it would impede access to the approved *"northern side entrance marina of the claimant."* He states further that this would have contravened section 2(ii) of the sea bed lease between the claimant and the NIA which states that NASPA *"undertakes to keep the remaining water way in the bay opposite to the entrance of the TCMD Ltd. Marina free and clear at all times..."* Mr. Hardtman insists that Minister Brantley (as he then was) was aware of the sea bed lease as he had negotiated the terms on behalf of the government. Further to that, he insisted that Mr. Brantley was actively advertising the project on behalf of his client. He states further that the Federal Government colluded in this by publicly advertising the project.

[45] However, after a careful perusal of the documentary evidence presented by the claimant, I am unable to accept these representations as put forward by Mr. Hardtman. Nothing presented satisfies me that Mr. Brantley or the Federal Government was actively advertising a hotel development on behalf of a client of Daniel Brantley's to the detriment of the claimant. It appears that sometime in January, 2016, the Federal Government and the NIA hosted a summit of four Caribbean countries which operate citizenship by investment programs. During that summit, some of the CIP programs of Saint Christopher and Nevis were highlighted. I take it that Mr. Hardtman suggests that the project of Mr. Oveson was among the highlights. Insofar as that is the case, I am not of the view that this advances the propositions put forward by the claimant any further. Nothing about this assertion suggests the unlawful ministerial interference Mr. Hardtman complains about. It is however important to assess, more directly, the evidence presented in relation to this project before going into more detail of Mr. Brantley's involvement in the matter.

[46] Included in the evidence presented in this case was a letter dated 8th December, 2015 written to the General Manager of the Nevis Air and Sea Ports Authority (NASPA) by the Assistant Secretary to the Department of Planning. That letter indicated that there were two applications before the department for the construction of docking facilities at Tamarind Bay and Jones Estate. One of these applications was the Island Water Sports Passenger Dock. The court is also in possession of

a letter dated 1st December, 2015 from Island Water Sports Inc. (IWS) which was addressed to the Director of Physical Planning. In that letter it was indicated that IWS had been in operation for over 10 years and has provided water taxi services between the islands of Saint Christopher and Nevis. Attached to the letter were drawings, a certificate of title, permission from the owner of the land for the project being undertaken and a completed application form. This project was to include the water taxi dock, a lounge area, beach bar, a real estate office and water sports facilities. On 30th November, 2015 Nevis Resort Investors LLC (NRI) wrote to the Department of Planning indicating that an agreement in principle had been entered into by NRI and IWS for the use of NRI's property to construct a pier for the use of water taxi services. It will be remembered that NRI is the company owned by Mr. Oveson, who the claimant insists is a client of the law firm of Daniel Brantley & Associates.

[47] For his part, Mr. Brantley states in his affidavit that he took a leave of absence from his law firm in January, 2013, after he was elected to the Nevis Island Assembly and appointed as a minister of government. He is therefore unaware of any application for the construction of a resort allegedly made by a client of the firm. He states further that it is an *"inviolable practice"* that when matters relating to clients from his law firm arise within the cabinet for consideration, he recuses himself. This is done so as to avoid any appearance of a conflict of interest. Mr. Hardtman exhibits documents form Mr. Brantley's *"official"* Facebook page which he alleges proves that this assertion from Mr. Brantley is wrong. On that page there are advertisements for job vacancies at Daniel Brantley and an indication that Mr. Brantley is a former managing partner in the law firm. A biography of Mr. Brantley also appears on the firm's page and Mr. Brantley is still outlined as the principal partner of the firm.

[48] For my part, I am not of the view that this evidence is of any assistance to the issues at hand. There is a significant leap between advertising a vacancy on a Facebook page and an allegation of an intervention being made to manipulate a process of planning permission in favour of Mr. Brantley's client. This is a significant allegation of misfeasance and nepotism for which more direct evidence must surely be presented. None of these exhibits satisfy me that the claimant's allegations of Mr. Brantley's involvement in this matter are made out; or that the process was being manipulated for Mr. Oveson's benefit. I accept Mr. Brantley's evidence where he states that he had no direct knowledge of the issue at the time. Further, as I will explore later on in this judgment, I can

find nothing offensive, whether legally or otherwise, about the authorities giving due consideration to the application for planning permission for the water taxi pier as presented by IWS. The claimant's project does not bind the Government to refrain from at least considering the further development of the bay area in any way. Certainly, clients of the law firm of Daniel Brantley cannot be prohibited from applying for planning permission merely because Mr. Brantley is now a member of the government. It would be right for him to recuse himself from all such considerations which appear before the cabinet. However, in the circumstances of this case there is no evidence that Mr. Oveson's development ever even came before the cabinet. The evidence presented has fallen short of the extent of the claimant's allegations.

[49] Mr. Joel Williams goes on to deny that the plans were withheld for the purpose of approving the project of a client from the firm of Daniel Brantley. He asserts that to date there has never been an application for the construction of a resort. He states that the NIA was constructing a water taxi pier at Oualie. The evidence does suggest that the government eventually constructed a pier at Oualie at a cost of $6,000,000.00. However, the information presented as it relates to that application of IWS does not satisfy me that a resort was to be built. The application put forward by IWS appears to be for the construction of a water taxi pier and other related amenities. Mr. Williams cites the various concerns raised in the EIA and Mr. Toppin's reports as the basis for the department's inability to approve the plans. For what it is worth, I accept that evidence as being truthful and find that there is insufficient evidence to conclude that there was any intervention in this process for the benefit of Mr. Oveson.

The Issues

[50] Although it may seem rather trite, it is often important to remind ourselves of the general parameters of the court's powers of judicial review. I say so as it would seem that the manner in which this claim has been pleaded and litigated, may not have given significant thought to those broad parameters. This makes it somewhat difficult to properly identify the issues in this case. At the pre-trial review, the then presiding judge sought to narrow down the issues which the court is called upon to consider. He expressed some reservation then as to whether leave ought to have even been granted to bring this claim in the first place. He nonetheless narrowed down the issues as follows:

"… the claimant complains that the defendant's failure to render a decision on its application for planning permission within 90 days of the planning department's receipt of the said application is a refusal of the same… The claimant wishes the court to review the process by which the planning department arrived at this refusal.

By operation of law the application would have been deemed on August 10th, 2015 having been made on 90 days. On 2nd February, 2016 the matter was referred to the cabinet. The Cabinet has not made a decision."

[51] The claimant, in its written submissions, expresses disagreement with the judge on that issue. Counsel for the claimant insists that the claimant has never considered the application to be refused. According to counsel, this is because the claimant has a legal obligation to over 100 dockominium purchasers which have been paid for. In addition, it is argued that the defendants never considered the construction plans as being refused, as the claimant has paid for the plans and never had those funds returned. Counsel for the claimant goes on to state that the 1st defendant unlawfully abdicated its statutory duty to approve the construction and engineering plans and to return them to the claimant. Counsel goes on to state that if the plans are not approved then the claimant is entitled to damages. However, in closing submissions counsel for the claimant conceded that much of what was sought as relief in the claim form is no longer relevant. Notwithstanding that concession, counsel continues to insist that *"the actions of the defendants are tortious and resulting in the destruction of the project. It follows that the claimant is entitled to damages";* which includes general damages.

[52] For my part I express similar difficulty as the judge did at the pre-trial review in understanding the manner in which this claim has been pleaded; especially as it relates to the remedies being sought and the arguments being put forward by the claimant. It is further compounded by counsel's abandonment of the express relief initially sought in the claim. This is a claim for judicial review. It must always be remembered that the court is a co-equal member of a tripartite system of government. In that system, the court does not function as the executive. Where the legislation empowers a particular body, such as the Director of Physical Planning, to perform a particular

function, the court never steps in to usurp that function in any way. The court's powers are generally to review the manner in which the body exercises its authority and to determine whether the decision made is irrational, illegal, or the process by which the decision was made was procedurally improper. Insofar as that it the case, the court may quash a decision of the executive and remit it back for consideration if necessary. The court may also mandate the exercise of that power in circumstances where the public body has failed or refused to do so. Despite the fact that the scope of judicial review may have increased in recent years, what the court never does is to exercise the power itself, to perform an executive function.

[53] It is perhaps for this very reason the most senior courts in the common law world have made it abundantly clear that judicial review is not the most appropriate forum for what are effectively private law claims. There is a distinction between the court's supervisory powers and its powers in private law. That distinction is important in preserving the separation of powers. In the Privy Council decision of ***Dunlop v. Woolahra Municipal Council***[2] their lordships upheld the decision of the judge in the court below where he held 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."*** Although the court was there addressing its mind to the issue of a right to be heard, I am of the view that the same principles apply to the present case. In the case of ***R. (On The Application of Quark Fishing Limited) v Secretary of State For Foreign and Commonwealth Affairs***[3] the House of Lords noted the following:

> ***"The fact that our courts were able to strike down the Secretary of State's instruction as wrong in law is not enough. Our 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 or under the Human Rights Act 1998."***

[2] (1982) A.C. 158
[3] [2005] UKHL 57

[54] As recent as 2013, the United Kingdom Supreme Court reinforced this principle in the case of ***The Financial Services Authority (a company limited by guarantee) v Sinaloa Gold plc and others and Barclays Bank plc[4].*** There the court dealt with the question of whether a public authority was required to give a cross undertaking as to damages when obtaining an injunction. Lord Mance, in considering the general position of public authorities to pay damages for breach of public law duties stated that:

> ***"Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty."***

[55] Rule 56.8 of the CPR allows the court, in a claim for judicial review, to grant damages as a remedy ***"if the – (i) claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or (ii) facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and (iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy***." The rule does not take away from the general common law position that damages is not readily available for a breach of public law duties unless the claimant was also able to bring an action in private law. I take this rule to mean that at the very least, there must be a substantive claim for judicial review. It ought not to be open to a litigant to commence an action for judicial review for what is primarily and substantively a means of seeking a private law remedy.

[56] In my view, litigants and attorneys alike must be guided by those parameters in order to ensure that claims which are brought before the court are not unnecessarily convoluted. In the US Supreme Court case of ***Doggett v. The US,*** Justice Clarence Thomas stated that ***"[o]ur constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its***

[4] [2013] UKSC 11

application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become obscured."[5] As it relates to judicial review claims outside of constitutional motions, I share a similar sentiment. It is not that the law must not continue to develop, but it has become increasingly difficult to determine whether actions brought before the court are, strictly speaking, judicial review claims at all.

[57] With this in mind, I express serious doubt as to whether this current case has been properly pleaded as a claim for judicial review, as opposed to a claim for a private remedy in tort. There was no request to quash any decision or to deem the actions of the Director of Physical Planning to be illegal, irrational or procedurally improper. Neither is there even a request for an order of mandamus, directing that the defendants exercise their discretion. The claimant has admitted to continuing the sale of "dockominiums" as late as 2018 and yet does not seem to be interested in having this matter remitted for further consideration by the defendants in order to have the plans approved. It seems to me that this is effectively a claim for damages predicated upon a breach of statutory duty and what has been described as "unlawful ministerial intervention". I take this notion of "unlawful ministerial intervention" to be, broadly stating, a claim for misfeasance in public office; despite the fact that this has not been specifically pleaded. I say so as it appears to be based on allegations of bad faith and counsel for the claimant has also noted in paragraph 40 of its closing submission that this is a case grounded, at least partially on misfeasance and maladministration.

[58] Taking all of this into consideration, I am of the view that the issues may have been narrowed down by too great an extent at the pre-trial review stage. Despite the challenges, it seems clear to me that the issues are much broader. The court brought this to the attention of counsel for both parties during the trial. The evidence led at trial and the submissions put forward by both parties draw me to the conclusion that it would not be prejudicial to broaden the scope of the issues considered by the court, notwithstanding the pre-trial review order. That much would only be fair to both sides, given the extent of and manner in which this matter has been litigated for the last 4 years. I also note that the judge at the pre-trial review made his comments in the preamble to his order. In my view therefore, it is important to address the issues in detail in order to attempt to bring closure to this matter.

[5] DOGGETT *v.* UNITED STATES No. 90–857 per dissenting judgment of Justice Clarence Thomas

The Law and Its application

[59] Section 5 of the **Nevis Physical Planning and Development Control Ordinance**[6] outlines the general powers of the Director of Physical Planning 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 application 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.***

[60] The general powers to approve or reject any plan for development in Nevis rest with the Director of Physical Planning or anyone so authorized in writing. Insofar as that is the case, section 15(1) of the Ordinance states that ***"[n]otwithstanding the provisions of any other law to the contrary, but subject to section 17, no person (including the Crown, the 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."*** In light of these provisions therefore, notwithstanding the fact that the claimant's project was approved by the NIA in 2010, there could be no commencement of construction until such time as the appropriate plans were approved by the Director of Physical Planning.

[61] Section 17 of the Ordinance outlines the necessary content of an application for permission to develop land. Prior to such an application, an applicant may seek from the Director of Physical Planning, the approval in principle of the relevant plans. Provision is made for such an application in section 18 of the Ordinance. I note that this section has since been amended as at 27th May, 2019.

---

[6] CAP6.09(N)

However, I will consider the legislation as it was at the time when the claimant would have made the various applications for approval. The legislation stated as follows:

> ***(1) Any person who intends to apply for permission to undertake the development of land within a period of a year may make application to the Director of Physical Planning for approval in principle of the proposed development before preparing detailed plans;***
>
> ***(2) An application for approval in principle must be made on the form prescribed by the Minister and be accompanied by such conceptual plans and other information as the director of physical planning requires for its evaluation;***
>
> ***(3) The Director of Physical Planning may grant approval in principle, with or without conditions, subject to the subsequent approval of any matter reserved until detailed plans have been submitted, or may refuse to grant approval in principle.***
>
> ***(4) Approval in principle granted under subsection (3) is not permission to commence development and the applicant must comply with the provisions of section 17(1) before such permission can be granted.***
>
> ***(5) Approval in principle granted under this section may be revoked or modified by the Minister without compensation, if in the opinion of the Minister after consulting the Director of Physical Planning a situation has subsequently arisen which constitutes a danger to national security, the environment, public health, safety or welfare or any other reason.***

[62] In addition, as both parties have recognized, the nature of the claimant's development required the approval of an Environmental Impact Assessment in accordance with the provisions of section 20 of the Ordinance. As counsel for the defendant rightly pointed out, approval in principle does not grant permission for the commencement of construction. It does not circumvent the need for the applicant to comply with the provisions of section 17 of the Ordinance. The Director of Physical Planning, upon the grant of approval in principle, may reserve certain issues for consideration upon the

presentation of the detailed plans envisaged in section 17 of the Ordinance. Therefore, when the claimant obtained approval in principle for the Environmental Impact Assessment, certain issues were specifically reserved for consideration when the final designs were presented to the department. One of those issues was the orientation of the entrance into the marina. Taking the representations of Mr. Douglas into account, I am of the view that even the site plans, as approved in principle, did not prevent the Director from giving full consideration to the issues contained in Mr. Toppin's initial report when the engineering plans were presented for approval. I understand Mr. Douglas to have also indicated that the engineering plans submitted in May 2015 were for the purpose of seeking approval in principle, as the dialogue between the claimant's experts and the Department of Physical Planning remained ongoing. He accepted that one of the ongoing issues was that of the orientation of the marina entrance which may have to be changed to the south as the plans develop.

[63] Section 21 of the Ordinance makes provision for the manner in which applications for planning approval are considered by the Director. The section states as follows:

> ***(1) When an application for permission to develop land is duly made, the Director of Physical Planning must have regard to the provisions of the physical plan for the area within which the land is situated, if any, and to any other material considerations, and subject to subsection (2), may grant permission either unconditionally or subject to conditions, or refuse permission.***
>
> ***(2) …***
>
> ***(3) The Director of Physical Planning must not determine an application, other than an application for a class of development mentioned in the Third Schedule, unless the application has first been referred to the Committee for review and the Committee has considered the application and advised the Director of Physical Planning accordingly and he follows that advice.***
>
> ***(4) The Director of Physical Planning must give the applicant notice in writing of the decision on the application and, in the case of an application for permission to***

develop land where permission is granted subject to conditions or refused, the notice shall state the reasons for the imposition of the conditions or refusal of the application, as the case may be.

(5) If, after examination of the plans submitted with the application form, the Director of Physical Planning considers it necessary, the plans may be returned to the applicant for amendment and, if this is done, the running of time for determination of the application will be suspended for the purposes of section 27 until the amended plans are resubmitted by the applicant.

(6) When permission is granted for any development subject to conditions, the Nevis Island Administration may enter into an arrangement or agreement with the developer in order to give effect to such conditions, if the Director of Physical Planning considers it necessary.

7) The Nevis Island Administration may require any developer to provide a bond in such sum, or any other instrument of guarantee of performance, as the Nevis Island Administration considers necessary to give effect to any permission to undertake development.

8) Notwithstanding anything that may be done under subsection (6) and (7), the Director of Physical Planning may at any time revoke permission to develop land or any part of that permission, without compensation, if the developer does not substantially comply with the conditions subject to which it was granted.

[64] In accordance with subsection (4) an application of the nature of the claimant's has to first be referred to the Development Advisory Committee (DAC) for consideration. The DAC, after considering the application must advise the Director. The Director, on the other hand, is obligated to follow the advice of the DAC. The Director must thereafter give notice in writing to the claimant, of the decision which has been made. By virtue of section 27 of the Ordinance, a limitation period of 90 days is established, within which the Director must issue a decision. This period may be extended by agreement with the applicant and such agreement must be placed in writing. If a

decision has not been made within that period, the applicant may invoke the provisions of section 29 of the ordinance. That section provides for a right of appeal against a decision of the Director to the Minister who must in turn refer the matter to the Development Appeal Tribunal. In other words, if the applicant has not received communication from the Director of Physical Planning within 90 days, he may deem the application to have been refused and avail himself of the appeal process contained in section 29 of the Ordinance.

[65] Before considering the relevance of these provisions to the facts of this case, it is important to highlight as least one more section of the Ordinance as it relates to the powers of the Director of Physical Planning. Generally, these powers conferred upon the Director are only exercisable by the Director (subject to the advice of the DAC), save and except as provided for by section 28 of the Ordinance. The section states that:

> ***(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 must be referred to Cabinet for determination.***
>
> ***(2) The decision of Cabinet on any application referred to Cabinet under this section is final.***

[66] Although neither party has brought this to the attention of the court, I take judicial notice of the fact that from 27th May, 2007 all applications for tourism development are referred to the Cabinet for approval. This was a measure put in place pursuant to section 28 of the Ordinance and has remained a practice to this day. However, as was noted by Ventose J in the case of ***Nevis Paradise Ltd. v The Nevis Island Administration et al***[7] the powers of the Cabinet pursuant to section 28 relate only to the final approval of development plans and not approvals in principle. This power is expressly reserved for the Director of Physical Planning upon the advice of the DAC. If Mr. Douglas is correct in his evidence where he states that what was sought on 11th May 2015 was approval in principle, then there certainly would not have been any authority on the part of the Cabinet to

[7] SKBHCV2017/0093

consider the approval of the plans and the matter ought therefore not to have been referred to Cabinet at that stage in the process.

The claimant's submissions

[67] In its submissions the claimant states that its complaint is *"about the deliberate and unlawful ministerial interference in a multi-million dollar development…"* Counsel for the claimant go on to submit that this interference has led to the breaches of statutory duty by the Minister, the Chairman of the DAC and the several persons who occupied the role of Director of Physical Planning from February, 2015 until August, 2017. However, I note that this claim was initially lodged in April, 2016. Therefore by August, 2017 the matter was before the courts for litigation, notwithstanding the fact that there were further amendments to the claim. Further to this, the court has been presented with a number of correspondences from various parties subsequent to the lodging of the claim. Some of these letters are headed "without prejudice". In my view, the later correspondence appear to be attempts at settling this matter without a trial and I am not of the view that the issues raised therein are up for consideration in these judicial review proceedings. The parties have conceded that much during the course of the trial.

[68] Counsel for the claimant argue that the ministers of the Cabinet of the NIA intervened in the planning process to advance the interest of a particular client of the law firm of Daniel Brantley, the current Premier's law firm, and an influential group of people known as the Tamarind Bay Group. The submissions go on to argue that this is in fact not a "non-determination" case. It is argued that Minister Liburd *"had called for the plans from the First Defendant. There was no ministerial direction pursuant to section 28 of the Ordinance."* Counsel states that *"indeed the defendant's case was that the site plan was only as approved in principle. However, from that point on Cabinet simply sat on the plans so that the first defendant could not make a determination."*

[69] Notably absent from the submissions of the claimant is any authority on this proposition as it relates to this argument of unlawful ministerial intervention. Counsel has also not expressly addressed the question of whether the provisions of the statute it claims to have been breached were designed to give a right to enforcement in private law. On the one hand it is denied that this is a *"non-*

determination case" but on the other it is argued that the ministers stepped in and prevented the Director from making a decision. Yet there is no request for the Director of Physical Planning to be ordered to do what was in his power to do. The court continues to express some difficulty in determining precisely what the claimant is requesting; given the fact that this is primarily a claim for judicial review. Counsel for the claimant contends that the actions of the ministers of Government are an abuse of power "which amounts to a tortious act." Yet there is very little by way of submission to establish precisely what this tort is and whether it has been established as a matter of law. This has meant that the court has had grave difficulty in determining the legal framework upon which these submissions of the claimant are based.

[70] According to the claimant, this ministerial intervention was allegedly for the purpose of benefitting a client of the firm of Daniel Brantley and the Tamarind Bay Group. This has led to a breach of statutory duty. As I have stated before, there appears to be some passing reference to misfeasance in the legal submissions of counsel filed after trial. Insofar as that is the case I take it that what is being argued by the claimant is that the ministers of Government are guilty of misfeasance in public office, as they have unlawfully interfered in the process for an improper purpose. This aspect of the case would no doubt be separate from the argument of breach of the statutory duty which rests primarily with the Director of Physical Planning, as I am also unable to find precisely what section of the Ordinance the ministers can be said to have breached. I say so as the ministers of Government could not be in breach of a statutory duty which they do not have. They may certainly act in a manner which is unlawful. The question is whether the actions of the ministers of Government amount to misfeasance sufficient to support a claim in damages. These are separate and apart from the actual claim for judicial review.

Misfeasance in Public Office

[71] In the text, ***Winfield and Jolowicz on Tort****,* the authors noted that the tort of misfeasance dates back to 17th Century. They describe the tort more generally in the following manner:

> ***"The purpose of the tort is to give compensation to those who have suffered loss as a result of improper abuse of public power, it being based on the principle that such power may be exercised only for the public good and not for ulterior and improper purposes. It***

applied to an unlawful (that is to say, unauthorised) act by a person holding a public … provided it is done with the requisite mental element. Although the mental element is restricted to intention or 'recklessness' the tort has a considerable reach, for there is no requirement that the actionable breach of statutory duty and a decision which is taken contrary to the requirements of natural justice. The mental element relates both to the validity of the act and its effects upon the claimant. As to the first, the officer must act and its effect upon the claimant. As to the first, the act is unlawful or be consciously indifferent as to its lawfulness – mere negligence is not enough. As to the effect on the claimant, there are two situations. The first is what has been called 'target malice', that is to say, the case where the defendant acts with the purpose of causing harm to the claimant. … This 'represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions'. In some circumstances the public officer may be exposed to an action for negligence; judicial review is, of course available on the basis of the invalidity of the act in question and without reference to fault, but there is no claim for damages unless there is a tort".

[72] These are, in general, the broad requirements for the tort of misfeasance in public office to be proven. There must be targeted malice or bad faith. It is not a case grounded in negligence or even illegality. I note that in the case of ***Attorney General v. Kenny D Anthony***[8] Webster JA states that ***"[t]here is no gainsaying the gravity of the allegation of bad faith, and the evidential burden on the respondent is commensurate with the seriousness of the allegation."*** In the case of ***Three Rivers District Council v. Governor and Company of the Bank of England***[9] the court stated that:

"The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading then at trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of

[8] SLUHCVAP 2009/031
[9] [1956] AC 736 at 770

dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence."

[73] Taking these authorities into account, I have some difficulty in accepting the submissions of the claimant in the manner in which it has been put forward as I am not of the view that the evidence is sufficient to find the level of bad faith and dishonesty alleged by the claimant. I say so for the following reasons:

(a) Contrary to the submission of the claimant, I can find nothing in the evidence to substantiate the notion that Minister Liburd or the cabinet had *"called for the plans from the First Defendant."* The submissions put forward on behalf of the claimant also stated that *"Mr. Liburd took it upon himself to deliberately interfere in the process at the behest of cabinet".* That statement in itself is inherently contradictory as on the one hand it is argued that the Minister took it upon himself to intervene, whilst on the other that this intervention was at the behest of the Cabinet. In fact, the evidence suggests to me on balance, that Mr. Hardtman was clearly engaged with Minister Liburd in conversation about this application even before any of the meetings with him had taken place. Minister Liburd did indicate that he held certain meetings with the claimant at the behest of the Permanent Secretary. I accept that evidence. Whether it was right or wrong to have done so is a different issue, but it does not constitute bad faith.

(b) I express deep reservations regarding the tone and content of the WhatsApp messages sent by Ms. Barbara Hardtman to Minister Liburd on 3rd November, 2015. It would seem to me that agents of the claimant had raised some expectation in their own minds that the minister would intervene to ensure that the plans were approved and returned to them; and yet they have required of this court to find that the minister unlawfully intervened in the process to benefit someone else. In fact, in these very messages it was Minister Liburd who seemed intent on pointing out to Ms. Hardtman that the matter had to go through a proper process before the plans could be approved. He seemed to have been requesting some time for this process to take place; much to the aggravation of Ms. Hardtman. This was notwithstanding the fact that Ms. Hardtman's messages to the minister were sent approximately only one week after Mr. Douglas had written to the Director of Physical Planning explaining that the orientation of the Marina may have to be shifted to the south when all factors were taken into consideration;

(c) There is also insufficient evidence to suggest that any minister had intervened in any way to benefit a client of Daniel Brantley. Merely because an application for planning permission was allegedly made by a client of that firm doesn't mean that there was any bad faith or dishonesty on the part of Minister Liburd; or any minister for that matter. There is nothing in law or otherwise to prevent an application from being made for the construction of the water taxi pier as was done. It is also unclear to me as to whether this application had ever been approved or had come before the Cabinet for approval. There is also no evidence to suggest that Minister Brantley had intervened in the process in any way for the benefit of his firm's client. The documentation put forward by the claimant to substantiate this notion falls woefully short of what would be required to prove bad faith in any way; and

(d) There was also nothing wrong with the objections raised by the Tamarind Bay Group. Persons living in the area would naturally have some concern as to how this project would affect the environment in which they live; especially when one considers the extent of the impact this would have had on the environment in general. I understand that there had already been a process of consultation at the time of the EIA. However, the group complained that there was inadequate consultation and the EIA itself made certain comments regarding the orientation of the marina which remained an issue of concern for the Tamarind Bar Group. I am of the view that it would only be right for the Department of Physical Planning, the DAC and, where necessary, the Cabinet of ministers to have taken the objections of this group into consideration; provided of course that the principles of natural justice were adhered to in the process. As I will address later in this judgment, I accept that there were certain procedural irregularities in the process adopted by the various parties involved. However, that is not enough to find the level of bad faith submitted by the claimant.

[74] Taking all of this into consideration, I am not of the view that there is evidence of bad faith here sufficient to ground a claim in misfeasance. I do not accept that there was an intervention by the

ministers of Government for the purpose of benefitting Mr. Oveson or the Tamarind Bay Group. In my view, the issue of contention between the parties was the orientation of the entrance into the marina. That seemed to have been the primary issue which concerned both defendants. In general I find this to be a legitimate issue for the Department of Planning to pursue. Despite the previous approvals by the NIA and the department, the claimant must appreciate that this project would have a significant impact on the environment and the issue of navigational safety for persons making use of the bay area. This was a substantial project and while the profits and benefits are important, the department had an overriding duty to ensure that the approved plans met the general standards of safety. What was being requested by the claimant was approval to construct an entrance to the marina which went against normal established practice for navigational safety. Notwithstanding the advice form the experts, this was an issue which the Director of Physical Planning, and where necessary the Cabinet of ministers, had to give detailed consideration to the extent that it was up to these authorities to determine whether the expert opinions should be accepted. The court is not best qualified to address this issue. I find that the various contentions of bad faith have made this matter unnecessarily complicated and shift the focus away from the actual issues in this case.

Breach of Statutory Duty

[75] The claimant has also pleaded that there has been a breach of statutory duty. It is not necessary to prove bad faith in order to establish a breach of this tort. In the case of ***London Passenger Transport Board v Upson***[10] the court stated that ***"[t]he statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty … It is not a claim in negligence in the strict or ordinary sense."*** Therefore, although ***"a breach of statutory duty is seen as a tort that is equivalent to the common law action in negligence … it is a distinct cause of action in tort."***[11] Lord Browne-Wilkinson sought to give further clarity on the applicable principles of this tort in the case of ***X (Minors) v Bedfordshire County Council***[12]. He states as follows:

---

[10] [1949] AC 155

[11] See the decision of Phulgence J in the case of Samanthia Charms Joseph v Digicel (St. Lucia) Ltd. SLUHCV2015/0637

[12] [1995] 2 AC 633

"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 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."

[76] Therefore, the fact that a duty is imposed on a public authority by way of statute does not automatically mean that it gives a right to a cause of action in private law. The question is whether, on a proper construction of the statute, parliament intended to confer such a right on a limited class of persons. The court may determine that issue by assessing whether there are remedies available within the statute, in circumstances where the public authority is said to be in breach. If there are such remedies then it is unlikely that the statute was designed to give rise to a cause of action in private law. Again the court expresses grave difficulty in reconciling this issue based on the submissions put forward by counsel for the claimant. Counsel, in their written submissions, have not specifically referred to the various criteria in this tort as set out by the authorities. Indeed, very little to no authority is referenced as to how the facts of this case prove the criteria set down in the law. The court is left to make whatever sense it can from the submissions put forward on behalf of the claimant and the facts of this case.

[77] In the submissions filed on 18th September, 2019, counsel for the claimant refer to the powers of the Director of Physical Planning as outlined in section 5 of the Ordinance. Reference is also made to section 28 of the Ordinance. However, counsel merely goes on to complain that the defendant did

not provide evidence as to whether the Cabinet had given any directive in accordance with section 28. Counsel goes on to argue that *"there is a duty on an administrative body in judicial review proceedings to assist the court and to give the court some kind of an explanation as demonstrated in ex parte Huddleston. The cabinet in this case has not shown any courtesy to this court."* That is the extent of the pre-trial submissions on the issue of the statutory powers available to the Director of Physical Planning and whether these give rise to any cause of action in private law. In further submissions filed on 21st February, 2020 counsel states that:

> *"… once it was accepted by the cabinet that it had no power to make a determination on the question of approval or refusal, it follows that it was unlawful for the cabinet to fail to return the plans to the first defendant for determination. And so the case goes beyond one of mere nonfeasance or non-determination of the application by the first defendant. Here the first defendant was prevented from making a decision by the cabinet of the second defendant and the first defendant by ceding the plans to the second defendant was abdicating its statutory duty."*

[78] Counsel goes on to note that *"… the first defendant was tasked with making a decision on the approval or refusal of the construction engineering plans, pursuant to section 5 of the ordinance, upon advice from the DAC. Neither the Premier nor Mr. Liburd was authorized to speak on behalf or instruct the director of physical planning whether to approve or refuse the approval of the construction plans. The cabinet does not have the legal authority to order the first defendant to approve or refuse the construction plans or any such plans*." The submissions go on to state that the *"unlawful interference sounds in damages because it is not simply an issue of a procedural misstep or mishap but a wholesale assault on the integrity and transparency of the planning process under the ordinance and a stark abuse of power which amounts to tortious conduct."* With the greatest respect to counsel, that is not an exposition on the test established by law. There is nothing here to address the question of whether the statute was designed to create a cause of action in tort in the first place. This is especially important considering that this is primarily a case of judicial review, where the court is empowered to make certain orders to address the alleged illegality and procedural challenges which the claimant complains of. Rather than seeking any of these orders the claimant has grounded its case on damages.

[79] Counsel for the defendants, on the other hand, argue that *"in order to succeed, the claimant must establish a breach of a statutory obligation which, on the proper construction of the statute, was intended to confer private rights of action upon a class of persons of whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection; and he must establish that the breach of statutory duty caused, or materially contributed to, that injury or damage, or (exceptionally) to the risk of that injury or damage."* In that regard, counsel argues that the duties of the Director of Physical Planning are enforceable by a statutory appeal procedure within the Ordinance. Counsel go on to state that *"the duties of the DPP under the Nevis Planning Ordinance lie in the field of public law and is enforceable only by the statutory appeal procedure under section 29 or the statutory claims procedure under section 44 or by the public law remedy of judicial review."* I find much force in this argument.

[80] I have already referred to the relevant sections as it relates to the powers of the Director of Physical Planning and the appeal procedure. Counsel for the defendant also points the court to the section 44(1) of the Ordinance which states that ***"[a] claim for compensation alleged to be payable under this ordinance must be in writing to the Minister within 6 months of the date upon which the act or circumstances which gives rise to such claim arose, unless the Minister in any particular case extends the period within which such a claim may be made."*** Subsection 5 states that ***"compensation payable under the ordinance is, in default of determination by agreement, to be determined by a panel of arbitrators…"*** The argument is simply that if the claimant wishes to make a claim for compensation then there is an adequate remedy available within the Ordinance. But that would relate only to compensation which is available under the Ordinance.

[81] Having considered these submissions, I am not of the view that the provisions of section 5 of the Ordinance are designed to give rise to a private law cause of action to any class of individuals. Adequate provision has been made for an appeal against the decision of the Director, even in the case of a failure to make a decision altogether. The legislation also states that an application for compensation may be determined by a panel of arbitrators if the Ordinance provides for it. In assessing the circumstances for which compensation is payable it is my view that Parliament has clearly not intended for the duties of the Directors of Physical Planning to give rise to rights to the claimant in private law. These are at times rather technical considerations which the department is

called upon to make, given the nature of these powers and it seems clear that Parliament did not intend to generally move such issues into court at the first instance.

[82] To my mind, despite the claimant's submission to the contrary, the fundamental argument here is that the Director of Physical Planning has failed to make a decision on an application for the approval in principle of the claimant's engineering plans. For reasons which I have explained later in this judgment, I am of the view that the deadline for the Director's decision was 24th January, 2016 and not 10th August, 2015 as argued by the defendant. However, at that point there was an adequate procedure within the legislation to which the claimant could have availed itself, if its main concern was the Director's failure to exercise his statutory powers. In my view the matter has become unnecessarily complicated because of the claimant's insistence on arguing on the one hand that this is not a "non-decision case" while maintaining on the other hand that it was a breach of the duty of the Director to fail to consider the very plans. I fail to see the distinction between the two. What the claimant could have done, after Mr. Douglas' letter of 26th October, 2015, was to allow for the 90 day period applicable within the law for the Director to have made a decision. If that decision was not made within that time, then an appeal was available to the claimant by the provisions of the statute.

[83] I make one other observation as it relates to the claim in tort. Counsel for the claimant states that *"since the actions of the Defendants were tortious and resulted in the destruction of the project it follows that the claimant is entitled to damages including $6,342,166.50 paid by the claimant to the 2nd defendant by way of stamp duty, the $140,170.00 paid as approval site plan fee and general damages. The object of such an award is to restore the claimant to the position it would have been in had the tortious conduct not occurred. This means all monies expended on the project to date. The court will note that the claimant now faces a litany of claims by the investors, one of whom is already suing with the assistance of the Premier's firm, Daniel Brantley. The claimant can only be restored to the position it would have been in if the court awards damages which will satisfy the claims from the investors and reflect the loss to the company."*

[84] The argument is that the failures of the defendants have in some way resulted in the cessation of works at the Marina site. However, I doubt very much that the evidence even establishes this very allegation. I say so for a number of reasons:

(a) Firstly, the claimant had an approved plan for the construction of the Marina Village phase of the project. By its own evidence, the village comprised 126 hotel rooms, 12 townhouses, a private member gaming club and other amenities. To my mind, the project seemed to have been so much broader than the use of marina slips. Whilst the claimant indicates that pre-sales was one way of funding the project, much evidence has not been given as to why this aspect of the project was completely abandoned on account of the discussions taking place between the parties regarding the orientation of the marina. Therefore, I do not conclude that the discussions which were taking place about the construction of the marina would have resulted in the cessation of works of the marina village itself. At the very least, sufficient evidence has not been provided to establish this link;

(b) Secondly, whilst I appreciate that there may have been certain irregularities in the process, there had never been a point in these deliberations where the claimant was being denied the right to construct a marina. There was a sticking point in the discussions regarding the orientation of the entrance. The claimant seemed bent on arguing that there was no basis to request a reorientation, despite its own expert's acceptance that the marina entrance may have to be oriented to the south as the development progresses. Mr. Hardtman conceded in evidence that he had no difficulty in placing the marina entrance to the south, but that was contingent upon the claimant receiving compensation from the government in order to do so, given that the plans were already designed with a north facing entrance. To my mind, it must be accepted that the duty to make that decision does not rest with the claimant or its experts. That was a decision for the relevant authorities to make. If there was a failure to make that decision or an insistence that the marina entrance be changed to a south facing entrance, then there were surely adequate provisions made within the legislation for the claimant to address its grievances. Further, I fail to see the basis of Mr. Hardtman's insistence in receiving compensation for the reorientation of the marina, given that his own expert was of the view that this may in fact have to be the end result when all factors were taken into consideration.

(c) Thirdly, when construction on the Marina Village commenced, the claimant had not obtained planning approval for the construction of the marina itself. Surely, the claimant must have expected that this process would be a complicated one. In fact, Mr. Hardtman had conceded that much in his evidence. There could certainly not have been any legitimate expectation at that point that a marina would have been constructed with a north facing entrance, given that not even the EIA had been presented at the point when "dockominiums" were already being sold. I have a great difficulty in accepting that a breach of statutory duty in these circumstances could give rise to the damages claimed; and

(d) Lastly, it appears that the claimant requests damages from this court, at least partially, as an indemnity against law suits from individuals; some of which have simply not been filed. Even if the court were to find that there was a breach of statutory duty, this certainly would not be the proceedings in which damages of this nature ought to be granted. If the claimant is of the view that the defendants ought to indemnify it against various law suits, the majority of which have not been identified in these proceedings, then it is open to the claimant to join the defendants in these proceedings in which an indemnity is being sought. This court ought not to give damages on an indemnity for potential law suits.

[85] Taking all of these into account, I am not satisfied that the provisions of the legislation give a right to a cause of action in tort. I agree with the submission of counsel for the defendant that this is a claim which ought to have been grounded in public law. However, even if there was a right in private law I am not of the view that there has been a direct causal link between much of the damages claimed as it relates to the dockominiums and the decisions or lack thereof on the Director of Physical Planning.

Procedural Irregularity and Illegality

[86] I turn now to consider the public law elements of this claim. Having considered the facts of this case, I am of the view that there were certain irregularities in the process adopted by the Department of Physical Planning. I find these to be as follows:

(a) The court expresses a number of concerns with the meetings of the Development Advisory Committee held between 12th and 19th November, 2015. Firstly, Suzan Gordon's presence and involvement in this meeting is particularly offensive. It is a well-established principle that when a public body is called upon to make a decision where the interest of a party is at stake, the rules of natural justice must be observed. One of those fundamental principles of natural justice is *nemo iudex in causa sua;* which means that no man should be a judge in his own cause. Ms. Suzan Gordon, as part of the Tamarind Bay Group, had certainly expressed deep reservations about certain aspects of this development. No doubt the DAC had a duty to take these objections into consideration. What it ought not to have done however, was to have one of those very persons sit as a participating member of the tribunal. The evidence clearly suggests that her participation in this committee was substantial and I am of the view that this was procedurally improper as it breached the rules of natural justice. I understand that a representative of the Conservation and Historical Society regularly sits on the DAC; despite changes to the legislation which no longer makes this mandatory. However, in the peculiar circumstances of this case, Ms. Gordon's presence and participation significantly undermined the integrity of the process sufficient to render it procedurally improper for her to have been a part of the proceedings;

(b) Following on from (a) above is the *audi alteram partem* rule. This simply means, hear the other side. The fact that the Tamarind Bay Group had raised such an objection to certain aspects of the claimant's application meant that the claimant ought to have been given an opportunity to respond to these issues. It is clear that the meeting of 19th November, 2015 considered the objections of the Tamarind Bay Group in significant detail. However, the evidence suggests that neither the letter written by the group, nor the issues raised therein, were disclosed to the claimant. I appreciate the fact that this letter was not written to the Director of Physical Planning, but the position was nonetheless put forward by Ms. Gordon during the course of the meetings of the DAC. She therefore ought to have recused herself. This was improper, as the claimant was not given an opportunity to address any of these concerns prior to the DAC coming to its own conclusions before advising the Director of Physical Planning;

(c) There is also a duty on the part of the DAC to consider all relevant information available prior to making a determination and advising the Director of Physical Planning. It is clear from the evidence that Mr. Toppin's letter of 9th November, 2015 was not before the committee when it considered the claimant's application. Despite the fact that the court has expressed the view that the letter may not have completely resiled from the issue of the orientation of the marina, it is nonetheless important to have considered the letter in light of Mr. van der Meer's findings and the representations of Mr. Douglas in his letter of 26th October, 2015. In fact it seems unclear from the minutes as to whether these representations were ever taken into account; and

(d) The decision of the Director of Physical Planning to refer the matter to the Cabinet appears to have also been ultra vires. According to the decision of Ventose J in the case of ***Nevis Paradise Ltd. v The Nevis Island Administration et al,*** an application for planning permission in principle cannot be referred to the Cabinet pursuant to the provisions of section 28 of the Ordinance. I appreciate that there is a contradiction between the evidence of Mr. Hardtman and that of Mr. Douglas, in that Mr. Douglas had made it clear in his letter of 26th October, 2015 that what was being sought with the engineering plans was approval in principle with a final determination on the issue of the orientation of the marina entrance to be made when all factors are considered. I will accept Mr. Douglas' evidence in that regard when he insists that what was taking place was an ongoing dialogue and what had been sought was approval in principle. He was the one who had directly written the Director of Physical Planning and I am of the view that his evidence is to be preferred. The plan therefore ought not to have been referred to the Cabinet and that stage in the process and the Director of Physical Planning ought to have made a decision on the advice of the DAC.

The Defendant's Submissions

[87] Having outlined these issues, it is important to examine the arguments put forward on behalf of the defendants. Counsel for the defendants highlights three main issues in defence of this claim. These are:

(a) That there was a deemed refusal of the application pursuant to section 27 of the Ordinance;

(b) That there are alternative remedies available to the claimant, enough to render judicial review proceedings inappropriate; and

(c) That there has been undue delay on the part of the claimant in bringing this action;

[88] I will address each of these submissions in turn.

Deemed Refusal

[89] In order to put this submission into context, it is important to return to the provisions of the legislation. Section 27 of the Ordinance states that ***"when an application for permission to develop land is duly made, the Director of Physical Planning must issue a decision within a period of 90 days from the date of receipt of the application, or such extended period as may be agreed in writing by the applicant."*** Subsection (2) goes on to state that ***"unless the Director of Physical Planning issues a decision within the period prescribed by subsection (1), the provisions of section 29 apply in relation to the application as if it had been refused."*** Section 29 (1) of the Ordinance states as follows:

> ***"If Permission for the development of any land is refused by the Director of Physical Planning, or is deemed to be refused under section 27(2) or is modified and revoked under section 33 or is granted by the Director of Physical Planning subject to conditions, the applicant may, within thirty days from the date of the decision, appeal in writing against that decision to the Minister, setting out the grounds upon which the appeal is made."***

[90] The defendants have gone further in their arguments to submit that *"it is common ground that the effect of section 27 of the Nevis Planning Ordinance is that where, as in this case, the DPP does not timeously issue a decision on an application for permission to develop land, the application is deemed to be refused by operation of law. As such Tamarind Cove's application was deemed to be refused on 11th August, 2015."* I do not agree with this submission.

[91] To my mind, what sections 27 and 29 of the Ordinance provide is an option to an applicant who has not received a response to his application within 90 days. If he has received no communication on his application he *"may"* invoke the provisions of sections 27 and 29 of the Ordinance by deeming the application to have been refused and appealing the decision to the Minister. Other than that, section 27 does not prescribe an automatic sanction for the failure of the Director of Physical Planning to issue a decision. If the applicant does not invoke sections 27 and 29 of the Ordinance, then there is nothing precluding the Director or the applicant from continuing a dialogue with a view to completing the application process. In my view, section 27 does not prevent the Director of Physical Planning from reengaging an applicant after the 90 day period has expired. This may be especially important in cases where the plans being considered are rather complex. This was precisely what took place in the present case. To my mind, despite the delay between 11th May and 17th September, 2015, the parties had reengaged in discussions relating to this application and I can find nothing in the legislation which prohibits this to the extent that the application ought to be deemed refused as a matter of law as at 11th August, 2015.

[92] In that regard, and giving due consideration to the express complaints of the claimant, I am of the view that the period under review in this case commences from 26th October, 2015 when the claimant's experts submitted further reports to the department in response to Mr. Toppin's report of 7th August, 2015. For what it's worth, the claimant's complaints, for the most part, relate to the period thereafter. Whilst I am of the view that the provisions of section 27 and 29 of the Ordinance are important in considering whether there was an alternative remedy available to the claimant, I thought it important to point out that I am not of the view that there is an automatic deemed refusal as a matter of law in such cases. In circumstances where the claimant does not exercise the option of filing an appeal, the parties are free to re-engage in discussions in considering the application. This is precisely what transpired in this case.

Alternative Remedies

[93] The defendants also rely on the provisions of sections 27 and 29 in their argument that there is an alternative remedy available to the claimant. I take that to be a separate argument form the automatic deemed refusal argument. Essentially, as the defendants have argued, this is a case

in which it is alleged that the Director of Physical Planning has not made a decision on the claimant's application. Where there is a non-decision, the Ordinance provides a remedy to the claimant in that the matter may be appealed to the Minister for further transmission to the Planning Appeals Tribunal once a 90 day period has elapsed. Given that the court has found that the period under review commenced on 26th October, 2015 then it would mean that the department would have had until 24th January, 2016 to make its decision. If the claimant was aggrieved by the delay in coming to this decision, then perhaps the argument may also be that an appeal could have been filed in accordance with the Ordinance after 24th January, 2016.

[94] As it relates to this issue I note that by way of letter dated 18th January, 2016, Ms. Barbara Hardtman wrote to the Director of Physical Planning and threatened that the failure of the Director to return *"the stamped drawings for the TCMD Ltd. Marina North side with immediate effect"* would result in the commencement of legal proceedings against the department. In that letter she referenced the 90 day limitation period. Yet the claimant never saw it fit to give effect to this very section by lodging an appeal in accordance with the legislation. To my mind, the difficulty with this case is that there appears to be a completely muddied series of facts which occurred after 26th October, 2015, when the claimant sought to satisfy the issues raised by Mr. Toppin in his report of 7th August, 2015. All of these developments have somehow taken place in circumstances where there was a remedy available to the claimant even prior the Director's letter of 2nd February, 2016.

[95] In light of these facts, I agree with the submissions of counsel for the defendant in that an appeal could have been lodged within the provisions of the Ordinance and the claimant chose not to do so. As at 24th January, 2016 the claimant had received no communication from the Director of Physical Planning of a decision made on its application. Rather than invoking the provisions of section 27 and 29 of the Ordinance, the claimant engaged in a series of discussions with Minister Liburd, The Premier of Nevis, Mr. Oveson and a range of individuals. All of these conversations took place even prior to the expiration of the 90 day period commencing 26th October, 2015 and seemed to have fixated primarily on retaining a northern entrance to the marina or obtaining compensation for its reorientation. It would be best practice for applicants in these circumstances to simply allow the process to take its course and rely on the provisions of the legislation. The appeals process within the legislation is certainly a more

appropriate one for the claimant to have engaged, given the technical nature of the main issue which was left to be resolved by the parties.

[96] However despite this, when one considers the number of irregularities which took place in this process it causes the court some concern. To my mind, the process by which the DAC came to its conclusion is troubling. Also, notwithstanding the fact that the court does not find bad faith, I do agree that Minister Liburd and Premier Amory ought really not to have been as involved in the process as that stage. Perhaps the Minister is correct when he states that he was simply trying to assist in resolving the matter. The Government may also argue that given the scope of this project there was an interest in ensuring that various considerations were made. However, the Director ought to have made a firm decision one way or another upon the advice of the DAC and communicate that decision to the claimant. The matter was referred to cabinet in circumstances where there was no statutory authority to do so, given that this was an application for approval in principle. These irregularities in the process are sufficient to have invoked the court's powers of judicial review, notwithstanding the availability of an appeal within the Ordinance. However, the difficulty is that the claimant does not seek any of the orders which the court is empowered to make to put matters right. Ideally, the decision of the DAC should be quashed as well as the decision to refer the matter to Cabinet. The matter should be remitted for consideration by the DAC prior to advising the Director of Physical Planning, who ought to be mandated to make a decision. However, the claimant is not interested in such orders.

Unreasonable delay

[97] Counsel for the defendants refers the court to the case of ***Roland Browne v The Public Service Commission***[13]***,*** where Edwards JA stated the following:

> ***It would seem therefore from the authorities mentioned that at the hearing of the judicial review claim, apart from considering the merits of the claim (usually on the grounds of either illegality, irrationality, and or unfairness) the judge may revisit the issue of unreasonable delay where the claim has merit in determining whether to***

[13] SLUHCVAP 2010/023

grant the relief sought. Where the claim lacks merit there is no need to apply the considerations under CPR 56.5. Even if the court accepts that the defendant has acted unlawfully, there is no unqualified right to any of the remedies claimed. In exercising its discretion as to whether to grant any relief the court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person, or substantially prejudice the rights of any person. To sum it up, despite the success of the judicial review claim, the relief may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule.

[98] It is therefore argued, that notwithstanding the fact that the claimant has been granted leave to pursue this claim, this court is still empowered to deny the remedies sought by the claimant on the ground that there has been an unreasonable delay in bringing the claim in the first place. Counsel also refers to the case of ***R v. Dairy Produce Quota Tribunal for England and Wales***[14] which in turn referenced the case of ***O'Reilly v Mackman***[15] where Lord Diplock stated that ***"[t]he public interest in good administration must require that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."*** Counsel therefor argues that *"parliament in its wisdom in recognizing that there is an interest in good administration and the need for citizens to know where they stand has mandated that an application is deemed to have been refused if it is not determined within 90 days…"* The submission goes on therefore to state that there has been significant delay in bringing this claim for judicial review, which was initially filed in April, 2016. The court is therefore asked to deny any remedies available to the claimant on the ground of delay.

[99] I take it that counsel's submissions were premised on the initial argument that the application of the claimant was deemed refused as a matter of law on 11th August, 2015. If that were the case

[14] [1990] 2 AC 738
[15] [1983] UKHL 1

then certainly the court would have been prepared to entertain this submission, given that the application for leave to apply for judicial review was filed some 8 months later. However, as I have stated earlier, the parties re-engaged on the application for planning permission in September, 2015. The claimant's response to the issues raised by the Department of Physical Planning was communicated on 26th October, 2015. The 90 day period would have therefore ended on 24th January, 2016 and not as the defendants have argued. The letter indicating that the application had been referred to the Cabinet was also sent on 2nd February, 2016. Therefore I do not find the period between then and the filing of the application for leave to have been so significant so as to deny any remedy on account of delay.

[100] However, I wish to make one point as it relates to the issue of delay and good administration. To my mind, what Lord Diplock indicates is that in cases where the actions of public authorities are being challenged in this way, the parties as well as the court, ought to do all in their power to prosecute such matters within reasonable time. Whilst there may not always be significant delay prior to commencing litigation, I am of the view that a delay in the process of litigation can also be very damaging to good administration. The CPR envisages that judicial review cases would be placed on a fast track by the lodgment of a Fixed Date Claim process once leave has been granted. This is designed to ensure that cases of this nature are heard and determined within reasonable time. Yet it seems to me that the culture of litigation which is practiced continues to undermine this clear intention. It is perhaps time for the courts to be seen less as *theaters of conflict* and more as a means of resolving disputes within a time frame which is reasonable to ensure the fairness of the proceedings[16]. It is inescapable that whilst the claimant has complained about the amount of time taken by the authorities to make a decision, it has taken even more time to litigate this matter in the courts.

[101] It is this reality which prompts me to consider the admonition of Justice Clarence Thomas where he speaks about the unnecessary complication of the law; and by extension its procedure. In this case for example, there has been no less than three amendments to the claim form. Some of this has come as a result of the court's own admonition to the parties, especially the claimant, in an attempt to bring the matter into focus. The court of appeal in June

[16] See "Securing Equality For All in the Administration Justice: Proceedings of the Caribbean Judicial Dialogue, Faculty of Law UWI, Mona, 2019, page 73

2018 made orders separating the judicial review and private law elements of this case. Yet, to my mind, the majority of these pleadings still seem bent on seeking what are effectively private law remedies.

[102] I am of the firm view that a careful and focused judicial review process, within reasonable time, would have been able to determine the issues in this case within the bounds of justice and good administration. But that would require pleadings and submissions which are properly focused on the issues at hand. The foundational principles of judicial review would have been more than sufficient to enable the claimant to outline its grievances on the one hand, the court to address the clear irregularities in the process on the other, and simply remit this matter back for consideration by the Department of Planning. After all, what the claimant wanted more than anything else was to construct a marina. It is unfortunate that it has taken four years to get to this point. The court has however taken great care to, as much as possible, address the detailed concerns and submissions of each party, so as to be fair and assist in bringing some measure of finality to this matter. However, it is worth pointing out that good administration is also undermined by unnecessarily complicated and extensively delayed judicial review proceedings.

Conclusion

[103] As I have indicated before, I am not satisfied that there is a basis for a claim of misfeasance in public office. Neither is there a claim for breach of statutory duty, as I am not of the view that the various sections of the legislation are designed to give rise to private law remedies. The legislation has made adequate provision for an appeal against the decision of the Director of Physical Planning and has provided a process for damages to be claimed if this arises by virtue of the legislation. In any event, I am not of the view that the claimant has made out its right to damages. The claimant's claim for damages is generally dismissed save for the fact that the defendants have accepted that the invoice for $140,170.00 was issued in error as there was only an application made for approval in principle of the site plans. It would only be fair therefore for the defendants to return this sum to the claimant, together with interest at the statutory rate.

[104] The court finds that there are procedural irregularities in this case. However, the claimant has not sought any remedies in public law as it relates to those irregularities in its claim form. In closing submissions, counsel for the claimant states that *"… it is clear that much of what the claimant sought when it issued its fixed date claim form may now in fact be irrelevant."* Counsel therefore seeks to move the court to rely on its request for *"any further and other relief which the court deems fit"* in making orders entirely different from what was requested in the claim form. Counsel therefore seeks the following orders and/or declarations:

(a) That the actions of the Ministers of the First Defendant and the cabinet in interfering with the duties of the First Defendant was and is unlawful;

(b) That the failure of the First Defendant to make a determination of the claimant's application for approval of the engineering construction plans was unlawful;

(c) That the first defendant and the Development Advisory Committee failed to have proper regard to the material before it including the 9th November, 2015 report by Mr. Lester Toppin;

(d) That the DAC meeting of 19th November, 2015 was unlawful;

(e) That since the site plan was an approval in principle only, the first defendant was not entitled to charge the claimant a fee of $140,170.00EC

[105] The question is whether a claimant can abandon his pleading and seek orders which were not initially sought in his claim form. In the case of ***Kirin – Amgen Inc. v Transkaryotic Therapies Inc. (No.2)***[17] Neuberger J noted the following:

> ***"In summary, it appears to me that where there is a claim for "further or other relief," then unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. First, relief will not normally be accorded in respect of a claim of a type which is not pleaded.***

[17] (2002) RPC 3

Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise"

[106] In the case of ***Bertha Francis v. First Caribbean International Bank (Barbados) Ltd***[18] Mason J, after assessing the decision of Neuberger J noted that ***"while the best practice would be to set out all the remedies that are being claimed against the Defendant, failure to specify a particular remedy will not limit any power of the court to grant such a remedy if the Claimant is entitled to it."*** Despite this, the court must also consider the question of whether the defendant would have had ample opportunity to address the court on whether the remedies now being sought should be granted; bearing in mind that judicial review remedies are generally discretionary. At the end of the trial in this case, the court made an order that the parties file and exchange additional submissions in writing. The defendants filed their submissions on 20th February, 2020. The claimant filed its submissions on 21st February, 2020. It is in these submissions that it is accepted that the relief sought in the claim form are now irrelevant. No explanation is given as to why this is the case. The court can find very little which emerged in the evidence at trial which so significantly alters the scope of the evidence previously disclosed. It is unclear as to why the claimant did not bring this change of position to the attention of the court prior to the filing of submissions. The defendants have therefore not had an opportunity to address this issue. This is yet another example of the shifting scope of this litigation which makes it difficult to reconcile.

[107] The court accepts, as it has outlined earlier, that there were certain irregularities and perhaps illegalities in the process adopted by the Director of Physical Planning and the DAC. However, to my mind, declarations to that effect would be meaningless unless the court was able to simply remit the matter back the DAC and the Director of Physical Planning for consideration.

[18] SLUHCV1998/0583

The claimant is simply not interest in this. What this case appears to be about more than anything else is a claim for damages. I have decided that the claim in tort must fail and in light of this I would decline to accede to the claimant's invitation to grant the declarations outlined in the submissions of counsel, except as it relates to the repayment of the sum of $140,170.00. I would also decline to grant the declarations prayed for in the statement of claim, given counsel's concession that they are now irrelevant and also because I am not satisfied that there was a basis for the grant of these declarations in the first place; certainly not in the manner in which they were pleaded.

[108] In the circumstances the claim is dismissed in its entirety; save that the defendants are ordered to return the sum of $140,170.00EC invoiced in error to the claimant, together with interest at the statutory rate. I have considered the provisions of rule 56.13(6) where it states that ***"the general rule is that no order for costs may be made against an 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."*** Given the manner in which this matter has been litigated it is my view that costs ought to be awarded to the defendants. However, given that neither party has addressed the court on the issue of costs and given the nature of the decision arrived at in this case, the parties are invited to file further submissions on whether costs should be awarded and on what basis it is to be calculated. These submissions are to be filed within 14 days from the date of delivery of this judgment.

Ermin Moise
High Court Judge

By the Court

Registrar