

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2018/0002

BETWEEN:

[1] SAMANTHA S. BASS
[2] HYATT A. BASS
[3] JULIAN CHRISTOPHER HUGH LETHBRIDGE
(as Independent Executors of the Estate of Anne Hendricks Bass, deceased)

Appellants

and

[1] DIRECTOR OF PHYSICAL PLANNING
[2] DEVELOPMENT ADVISORY COMMITTEE
[3] CARIBBEAN DEVELOPMENT CONSULTANT
LIMITED

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag]

Appearances:

Mr. Damian Kelsick with him Mr. Garth Wilkin for the Appellants
Ms. Jean Dyer for the first and second Respondents

2021: March 26;
September 22.

Civil appeal – Judicial review – Planning permission - Unreasonable delay – CPR 56.5 - Discretion of judge at substantive hearing to revisit issue of delay already canvassed at leave stage - Test for exercising discretion to revisit issue of delay at substantive stage – Whether unreasonable delay a bar to relief – Public interest considerations – Relief detrimental to good administration – Substantial hardship - Whether delay outweighed public interest considerations - Costs – Costs in judicial review applications - Whether learned judge erred in awarding costs to respondents

On 7th April 2015, the Director of Physical Planning (“Director of Planning”) and the Development Advisory Committee (“the Advisory Committee”) granted permission to Caribbean Development Consultant Ltd (“the Developer”) for a development project which included construction of villas on land along the coastal area at Long Haul Bay, Nevis (“the Project”). Prior to this, the original appellant, Mrs. Bass expressed her concerns to the Deputy Premier of Nevis, Mr. Mark Brantley, about the likely environmental impact of the Project and an offer was made to her for the sale of the lands the subject to the Project (“the Property”). Negotiations for the sale of the Property were held prior and after the permission was granted but no agreement was made in either instance. In September 2015, the appellant was informed that the Developer was no longer interested in selling the Property.

Construction began in December 2015 and in January 2016, Mrs. Bass sought leave to apply for judicial review. She contended that the Environmental Impact Assessment (“the EIA”) used in granting permission was defective. In granting leave, the learned judge observed that while there was delay in bringing the application, there was an objective reason for the delay and good administration required that both the Administration and the public know what impact such a project could have on the environment. He asserted that a reason for the delay lay on the part of the Administration and the Developer.

In her claim for judicial review, Mrs. Bass sought orders including an order for certiorari to quash the decision granting permission and an order requiring the Director of Planning and the Advisory Committee to instruct the Developer to remediate environmental damage caused by the construction.

The learned judge agreed that the EIA was ineffective. The learned trial judge however found that he had jurisdiction to revisit the issue of delay and found that Mrs. Bass was substantially responsible for the delay in bringing the claim. He considered that at the leave stage, Mrs. Bass’ evidence was uncontradicted and left the court with the view that she had been lulled into a sense of security, hence the delay for bringing the claim. New evidence arose at trial that showed that Mrs. Bass was responsible for the delay. The learned judge also found that the delay was detrimental to the administration of justice and the cause of substantial hardship endured by the Developer who had expended a considerable sum of money on the Project including sums on work permits and salary. It was also held that those factors outweighed the public interest considerations and costs were awarded to the respondents.

The appellant, dissatisfied with the ruling of the trial judge, appealed. The issues on appeal were whether the learned judge erred in finding that (i) he could revisit the issue of delay at the substantive hearing (ii) the appellant was responsible for the delay, (iii) the delay was a bar to the grant of relief, (iv) the delay outweighed the public interest considerations and (v) the appellant should pay the respondent’s costs.

Held: dismissing the appeal save in relation to the issue of costs and setting aside the learned trial judge’s order on costs; and ordering that each party bears their costs on appeal, that:

1. The court has a discretion to revisit the issue of delay in bringing an application for judicial review at the substantive hearing even if the issue was contested at the leave stage. The record shows that at the trial, there was evidence relating to the issue of delay before the learned judge which was not before him at the leave stage. There was therefore an evidential and legal basis for the learned judge to revisit the issue of delay at the substantive hearing.

Rule 56.5 of the **Civil Procedure Rules 2000** applied; **R v Lichfield District Council and Christopher J.N. Williams ex parte Lichfield Securities Limited** [2001] EWCA Civ 304 applied; **Roland Browne v The Public Service Commission** SLUHCVP2010/0023 (delivered 15th December 2010, unreported) considered.

2. The appellate court ought not to interfere with findings of fact unless compelled to do so and this extends to primary facts, the evaluation of those facts and the inferences to be drawn from them. In this case, the judge's findings that the appellant was substantially responsible for the delay was a finding of fact based on the oral and documentary evidence before him and there was no discernible error of law or principle. There is therefore no basis to interfere with that finding.

Ming Siu Hung and others v JF Ming Inc and another [2021] UKPC 1 applied.

3. CPR 56.5 gives the judge a discretion to refuse to grant relief where there was delay in instituting the proceedings and the grant of relief would likely be detrimental to good administration and would be likely to cause substantial hardship or substantially prejudice the rights of any person. The learned trial judge considered the considerable sums the Developer had expended on the Project, the contracts entered into with third parties and the engagement of Government Departments in granting of citizenships to third parties who had purchased units. The judge therefore had enough evidence on which he could have made his finding.

Rule 56.5 of the **Civil Procedure Rules 2000** applied; **R v Lichfield District Council and Christopher J.N. Williams ex parte Lichfield Securities Limited** [2001] EWCA Civ 304 considered.

4. Public interest considerations do not automatically trump inexcusable delay. The court has a discretion and the manner of the exercise of such a discretion will depend on the circumstances of the case. The weight to be given to public interest considerations would depend on the nature of the considerations having regard to the circumstances of the case. In this case, while the protection of the marine environment was a public interest, the judge considered all the relevant factors before him. Accordingly, there is no basis for the Court to interfere with the exercise of the judge's discretion.
5. The general rule under CPR 56.13(6), is that the judge has a discretion to order costs if he finds an applicant for an administrative order acted unreasonably in making the application or in conduct of the application. Where there is no application for costs, as was the case in this appeal, if a judge is mindful to award costs under the rule, then the learned judge must invite submissions on the issue before exercising his discretion. The fact that the claim was meritorious, but relief only refused because of the delay, was a relevant factor the judge ought to have considered in exercising his discretion. The judge having failed to do so, he erred in his award of costs against the appellant and the court's order must be set aside.

Rule 56.13(6) of the Civil Procedure Rules 2000 considered; **R v Pembrokeshire County Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile** [2005] EWHC 1872 (Admin) (26 July 2005) considered; **Maharaj v National Energy Corporation of Trinidad and Tobago** [2019] UKPC 5 considered.

JUDGMENT

- [1] **THOM JA:** This appeal concerns the effect of delay in an application for judicial review.

Background

- [2] On 7th April 2015, the Director of Physical Planning (“Director of Planning”) and the Development Advisory Committee (“the Advisory Committee”) decided to grant planning permission to Caribbean Development Consultant Ltd (“the Developer”) for a development project which included construction of villas on land along the coastal area at Long Haul Bay, Nevis (“the Project”).
- [3] Prior to the grant of permission, the original appellant Mrs. Bass indicated to the Deputy Premier of Nevis, Mr. Mark Brantley, her concerns about the likely environmental impact of the Project. Subsequently, the Developer through the law firm of Brantley and Associates, offered to sell the land the subject of the Project (“the Property”) to Mrs. Bass. Negotiations were held but no agreement was reached.
- [4] After the decision to grant permission in April 2015, there were further negotiations for sale of the Property. Again, no agreement was reached. By letter dated 29th September 2015 Brantley and Associates wrote to Mrs. Bass informing her that the developer was no longer interested in selling the Property.
- [5] The Developer commenced construction in December 2015.
- [6] In January 2016, Mrs. Bass sought leave to apply for judicial review. After a contested hearing at which the issue of delay in the making of the application was

raised by the respondents, the learned judge in granting leave to Mrs. Bass to seek judicial review, found as follows at para 123:

“In the present case, there was an objective reason for the delay. That reason for a substantial portion of that delay lay at the feet of both the Administration and the Developer. Of considerable significance is that the impact of the grant of permission could hardly equate with that found in **Maile**. The applicant and the Intervening Party agreed that the Developer had spoken of the downturn in the economy and that it does not intend to build any other buildings. In this case, the deficiencies in the [Environmental Impact Assessment] EIA was not simply made to object to the grant of planning permission but really to argue that without knowing the risks involved, a project of this nature might have a detrimental impact on the marine environment. There is also considerable evidence from persons who have identified themselves as experts about the impact this project may have on the marine environment. These matters underscore the public interests involved. Further, in my view, it is also in the public interests in an island economy such as Nevis, largely dependent on tourism and sustainable development that planning permission must be approached reasonably having regard to all relevant considerations and proper principles. This would ensure that where an EIA is required it objectively treats it in a comprehensive manner with the subject matters so that the Administration and the public could reasonably know what impact such a project would have on the environment. This in fact inures to good administration. It is therefore in the public interests that these matters be fully at a substantive hearing notwithstanding the delay.”

- [7] In her claim for judicial review Mrs. Bass sought several orders including an order certiorari to quash the decision granting permission to the Developer for the development of the Project, an order mandamus requiring the Director of Planning and the Advisory Committee to instruct the Developer to remediate environmental damage caused by the construction of the Project, an order prohibiting the Director of Planning and the Advisory Committee from granting any planning permission unless the application for such permission includes remedial action for the environmental damage caused by the construction of the Project, an order prohibiting the Director of Planning and the Advisory Committee from granting any planning permission to the Developer unless they take into consideration a complete and adequate EIA, and an order that the Director of Planning and the Advisory Committee pay the costs.

- [8] The learned judge identified two issues to be determined on the claim, the first being whether the decision to use the EIA to grant planning permission was so unreasonable that no reasonable Director of Physical Planning could have relied on it to grant permission. The second issue was whether the court is permitted to revisit the issue of delay and consider whether it should operate as a discretionary bar to the grant of relief.
- [9] The learned judge having reviewed the evidence and considered several authorities dismissed the claim and awarded costs to the respondents.
- [10] In relation to the first issue, being the deficiency of the EIA, the learned judge found that no reasonable Director of Planning or Planning Authority would have relied on such a deficient EIA to grant planning permission. The learned judge found this to be a grave error. In his words, “This defies logic.” In finding that Mrs. Bass had made a meritorious claim for judicial review, the learned judge affirmed his views at the leave stage that although the laws of Nevis do not specify what the contents of the EIA must be, it is implied that the EIA must be comprehensive in relation to the likely impact the Project will have on the environment.
- [11] In relation to the second issue, the learned judge having considered the decision of the English Court of Appeal in **R v Lichfield District Council and Christopher J.N. Williams ex parte Lichfield Securities Limited**,¹ found that he could revisit the issue of unreasonable delay. He found further that Mrs. Bass was substantially responsible for the delay in making the claim. The learned judge found that the delay was detrimental to good administration and there was substantial hardship experienced by the Developer who had expended a considerable sum of money on the Project including sums on work permits, wages and salary, they having received planning permission. The Court also found that in view of these factors the delay in bringing the claim outweighed the public interest considerations.

The Appeal

¹ [2001] EWCA Civ 304.

[12] The appellant being dissatisfied with the decision of the learned judge outlined four grounds in her notice of appeal being: (a) The learned judge erred in finding that he could revisit the issue of delay at the substantive hearing; (b) The learned judge erred in finding that the appellant was responsible for the delay and the delay was a bar to the grant of relief; (c) The learned judge erred in finding that the delay outweighed the public interest considerations; (d) The learned judge erred in awarding costs to the respondents.

[13] By order of this Court dated 10th March 2021, Samantha S. Bass, Hyatt A. Bass, Julian Christopher Hugh Lethbridge as Independent Executors of the Estate of Anne Hendricks Bass, deceased were substituted as the appellants in the appeal.

Issue A- Whether The Judge Erred In Revisiting The Issue Of Delay.

[14] The relevant provision is rule 56.5 of the **Eastern Caribbean Civil Procedure Rules 2000** (“CPR 2000”) which reads as follows:

- (1) In addition to any time imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considered that there has been unreasonable delay before making the application.
- (2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to-
 - (a) be detrimental to good administration; or
 - (b) cause substantial hardship to or substantial prejudice the rights of any person.

[15] It is common ground that pursuant to CPR 56.5 the issue of delay may arise both at the leave stage and at the substantive hearing. This is illustrated in the decision of this Court in **Roland Browne v The Public Service Commission**² where this Court adopted the following reasoning of Lord Bridge in **R v Dairy Produce Quota**

² SLUHCVP2010/0023 (delivered 15th December 2010, unreported).

Tribunal for England and Wales Exp. Caswell³ and the earlier decision of R v Stratford-on-Avon District Council, ex parte Jackson:

“...section 31(6) [of the English Supreme Court Act 1981] applies both to applications for leave to apply and to applications for substantive relief... [and] section 31(6) looks to certain effects of delay as grounds for refusing leave, or substantive relief, as the case may be”. Lord Bridge therefore approved Lord Ackner’s interpretation of section 31(6) in R v Stratford-on-Avon District Council who said as follows at page 1325 of his judgment[:] “The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.” Lord Bridge concluded: “I respectively agree. First, when section 31(6) and (7) refer to ‘an application’ for judicial review, “those words must be read as referring where appropriate, to an application for leave to apply for judicial review [page 747]Questions of hardship or prejudice, or detriment under section 31(6) are I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply...but even then, it may be thought better to grant leave where there is considered to be good reason...leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application.”⁴

The learned judge then concluded that:

“It can therefore be said in my view, that with the presence of the words ‘or grant relief in any case’ in CPR 56.5(1) that CPR 56.5(1) applies to applications for leave to apply for judicial review and also to the substantive judicial review claim for relief.”⁵

- [16] It is also common ground between the parties that the principles which should guide a judge in exercising the discretion to revisit the issue of delay are set out in the decision of the English Court of Appeal in **R v Lichfield District Council and Christopher J.N. Williams ex parte Lichfield Securities Limited**.⁶

³ [1990] 2 A.C. 738.

⁴ SLUHCVP2010/0023 (delivered 15th December 2010, unreported).

⁵ Ibid.

⁶ [2001] EWCA Civ 304.

[17] In **R v Lichfield** the court was of the view that where the issue of delay has been contested at the leave stage, while the judge hearing the substantive matter has a discretion to revisit the issue it should only be done:

“(i) if the judge hearing the initial hearing has expressly so indicated; (ii) if new and relevant material is introduced at the substantive hearing; (iii) if exceptionally, the issues as they have developed at the full hearing put a different aspect on the question of promptness; (iv) if the first judge has plainly overlooked some relevant matter or otherwise reached a decision *per incuriam*.”⁷

[18] At the substantive hearing the learned judge considered whether, having considered the issue of delay at the leave stage where the issue of delay was contested, and he having found that there was undue delay caused mainly by the respondents, but notwithstanding having granted leave, he was permitted to revisit the issue of delay and determine whether it should operate as a bar to the grant of relief. The learned judge dealt with this issue at paragraphs 46 – 60 of his judgment. Essentially the judge found that he could do so because (a) new evidence emerged at the trial during the cross examination of Mrs. Bass and the evidence of Mr. Brantley revealed that Mrs. Bass was substantially to be blamed for the delay; and (b) Mr. Brantley’s evidence showed that he was not an agent of the Developer.

[19] Mrs. Bass contended that the learned judge erred in revisiting the issue of delay since the case does not fall within the confines of **R v Lichfield**. The learned judge did not identify which of the three categories of **R v Lichfield** was applicable and further even if the learned judge proceeded under the second category, there was no new evidence on which the learned judge could have relied to revisit his decision. Essentially what the learned judge did was to form a different view on the same evidence, in other words he simply changed his mind and this he was not permitted to do, it was argued. Mr. Damian Kelsick who appeared for Mrs. Bass further submitted that the respondents did not seek to lead evidence from Mr. Brantley at the leave stage but at the substantive hearing his affidavit was tailored to meet the deficiencies in the respondents’ case as identified by the learned judge in his judgment at the leave stage. Also, it was

⁷ Ibid.

never the case of Mrs. Bass that Mr. Brantley was acting as agent for the Developer and in any event nothing in the case turned on the issue of agency.

[20] Ms. Jean Dyer who appeared for the respondents contends that the case fell within the second and third category of **R v Lichfield**. Ms. Dyer referred the court to the transcript of the proceedings below where the learned judge engaged Mr. Kelsick on what he considered to be new evidence. She submits that at the leave stage Mrs. Bass was not cross-examined, however at the substantive hearing her credibility was tested under cross-examination and she was found not to be a credible witness. Ms. Dyer further submits that Mr. Brantley's affidavit evidence was in response to the third affidavit of Mrs. Bass which was filed in reply at the leave stage where she sought to explain why the proceedings were not instituted earlier. Mr. Brantley's evidence gave the judge a view of both sides of the context of the exchanges between Mr. Brantley and Mrs. Bass. Mr. Brantley's evidence showed that (i) he was not the agent of the Developer but merely acted as a conduit for the Developer; (ii) Mrs. Bass did not engage the Nevis Administration until a few days before she instituted these proceedings; (iii) the claim of Mrs. Bass that she assumed that the 1st and 2nd respondent would have taken steps to address her concerns was incorrect.

[21] I am persuaded by the arguments of Ms. Dyer on this issue. While the learned judge did not specifically state that the case fell within a particular category of **R v Lichfield**, a careful reading of the judgment in particular paragraphs 46 and 47 show that the learned judge was of the view that the case fell within the second and third category. The learned judge stated:

"46. When this matter was traversed at the leave stage, the Claimant's evidence had been uncontradicted and the court was left with the view that the Nevis Island Administration including the first and second Defendants had somehow allowed the Claimant to (sic) lulled into a sense of security. Further, that Mr. Mark Brantley, the Deputy Premier had himself acted as an agent of the Developers."

"47. New evidence at the trial especially the evidence of the Claimant under cross-examination and that of Mr. Brantley revealed that this factual impression was not only wrong but that the claimant was herself substantially the cause of her own delay. Further, having regards to the evidence, while the court is satisfied that the Claimant intended that Mr. Brantley should use his position as Deputy Premier to somehow revoke

the Defendant's grant of permission, her assumptions on this were unjustified. In this context the Developers' own role in the delay did not excuse the claimant's substantial delay."

[22] I also do not agree with Mr. Kelsick's second argument that there was no new evidence at the substantive hearing and that the learned judge did not refer to any. The learned judge did refer to new evidence which was before him at the trial. This is illustrated in paragraphs 49, 51, 53, 55, 56 and 59 of the judgment. They read as follows:

"49. ...There were public consultations on the proposed development, but the Claimant did not participate. A comment from her on this was that 'she received no notice of a public hearing' on the project. But she herself stated in that email sent to Mr. Brantley dated the 4th August 2014, that... 'but just Monday and again today – I received from the Nevis Historical Society a proposed plan for development called Candy Resort to which we are encouraged to respond.' This court has found that before planning permission was granted, she took no steps to discover whether her concerns were being addressed. She stayed aloof of the process."

"51. ...Evidence at the trial showed that Mr. Brantley had no communication with the Defendants on any of the concerns which were raised with him."

"53. ...What is also significant for this court is that under cross examination, when asked what [it] was (sic) that she expected Mr. Brantley to do with her concerns, she stated, 'that was a matter for him'. She also gave evidence that he was 'welcome to use the information (of her concerns) however he thought best'. These statements and her evidence generally convinced this court that she knew of the separation of roles between the Deputy Premier and the Defendants."

"55. ...In cross-examination she accepted that Mr. Brantley never addressed her concerns in that he never gave her any indication that he was going to take any steps related to those concerns."

"56. ...At the trial the court became satisfied that the Claimant was aware that Mr. Brantley was again not speaking for the developers. He had made this quite clear to her. I accept his evidence on this."

"59. As regard her belief that Mr. Brantley was communicating her concerns to the planning(sic) she accepted in cross-examination that when she sent her email dated 26th June 2015 to Mr. Brantley she was merely expressing a preliminary concern. She accepted that she was not ready to take any 'official action.'"

- [23] The above passages show that at the trial there was evidence relating to the issue of delay before the learned judge which was not before him at the leave stage. There was therefore an evidential and legal basis for the learned judge to revisit the issue of delay at the substantive hearing.

Issue B – Delay

- [24] The learned judge having determined that he could revisit the issue of delay, considered the issue and determined that Mrs. Bass was substantially responsible for the delay and that the delay was unreasonable. The learned judge also found that the delay was a bar to relief.

Whether Delay Unreasonable

- [25] The learned judge based his finding that Mrs. Bass was substantially responsible for the delay on the evidence of Mr. Brantley and Mrs. Bass under cross-examination and the documentary evidence adduced by them. He found that after permission was granted in April 2015, Mrs. Bass sought and received legal advice as early as 25th June 2015. She decided not to take legal action but instead she raised her concerns about the Project with Mr. Brantley who took no steps to address her concerns except informing her that the Developer was interested in selling the Property. The learned judge also found that Mr. Brantley was not the Developer's agent. He did not participate in the discussions for the sale of the Property. In September 2015 when negotiations for the sale of the Property failed, Mrs. Bass was aware that her concerns about the environmental impact of the Project were not addressed, but Mrs. Bass still did not take any action. Rather, Mrs. Bass waited for more than an additional three months and only instituted proceedings after work commenced on the Project.
- [26] Mr. Kelsick contends that the learned judge erred in so finding. The main thrust of the argument is that the learned judge's findings at the leave stage where he found that "...a substantial portion of the delay lay at the feet of both the Administration and the Developer" was correct. There was no evidential or legal basis for the learned judge to change his finding.

[27] Ms. Dyer in response submits that having regard to the evidence at the substantive hearing, it was open to the learned judge to find as he did. Learned counsel referred to the following passage in **R v Secretary of State for Trade and Industry ex p. Greenpeace Ltd.**:

“...a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely awaits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late.”⁸

[28] Counsel submitted that Mrs. Bass having waited for more than three months after she was aware the sale negotiations had failed and only instituted the proceedings when the construction commenced, her conduct was unreasonable and the learned judge was correct in finding that the delay was unreasonable.

[29] The appellant’s complaint relates to findings of fact made by the learned judge. Appellate courts have been warned on several occasions of the need for caution when asked to interfere with findings of fact made by a lower court. Most recently, the Privy Council in **Ming Siu Hung and others v JF Ming Inc and another**⁹ reiterated this principle at paragraph 20 referring to the following passage from the judgment of Lewison LJ in **Fage UK Ltd v Chobani UK Ltd**:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. The best known of these cases are **Biogen Inc v Medeva Plc [1977] RPC 1; Piglowska v Piglowska [1999] 1 WLR 1360**....and most recently and comprehensively **McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477**.”¹⁰

[30] In the case at bar, the learned judge based his findings on the oral and documentary evidence of both Mr. Brantley and Mrs. Bass. Unlike at the leave stage both Mr. Brantley and Mrs. Bass were cross-examined. As found earlier, the evidence at the leave stage was not the same at the substantial hearing. The learned judge considered the evidence of Mr. Brantley and Mrs. Bass and

⁸ [1998] Env LR 415 at 424.

⁹ [2021] UKPC 1.

¹⁰ [2014] EWCA Civ 5.

analysed the documentary evidence adduced by both parties in making his finding of fact. There is no discernible error of law or principle.

- [31] Mrs. Bass did precisely what Laws LJ warned against in **ex p. Greenpeace Ltd.** Mrs. Bass had legal advice since June 2015. While Mrs. Bass cannot be faulted for entering into discussions to purchase the Property as this was a possible way of amicably resolving her concerns, and I hasten to add that amicable resolutions of matters is always encouraged by the court, however when it becomes clear that the matter would not be resolved amicably (as was the situation in this case when Mrs. Bass was notified on 29th September, 2015 that the Developer was no longer interested in selling the Property), then it behooves the aggrieved party to act with alacrity. Mrs. Bass failed to do so. In those circumstances there is no basis to interfere with the findings of the learned judge.

Whether the Delay Amounted to a Bar to Relief

- [32] CPR 56.5 gives the judge a discretion to refuse to grant relief where there was delay in instituting the proceedings where the grant of relief would likely be detrimental to good administration and would be likely to cause substantial hardship or substantially prejudice the rights of any person.
- [33] The learned judge having found that there was delay, exercised his discretion and refused relief. In making his determination, the learned judge considered the effect the length of the delay and the impact the delay will have on good administration if the decision was to be reopened. The learned judge took into consideration the considerable sums the Developer had expended on the Project, the contracts entered into with third parties, the engagement of Government Departments in granting citizenship to third parties who had purchased units. The learned judge also took into account the public interest considerations and determined that notwithstanding the considerable public interest considerations, delay was a bar to the grant of relief.
- [34] Mrs. Bass contends that the learned judge erred in the exercise of his discretion in several respects. Mr. Kelsick firstly submits that the only period which the learned judge was required to consider in exercising his discretion was from the

date of the decision 15th April 2015, to the date of the instituting of the proceedings, 18th January 2016. The respondents do not dispute this submission and I agree. However, Mr. Kelsick submits that the learned judge erred when he considered the issues up to the time of the trial. He referred the court to the evidence that the construction did not halt on the Project until January 2017, and contends that a developer should not be able to benefit from its decision to continue with its project when the developer is aware that the decision to undertake the Project has been challenged in court. Further, there was no evidence before the learned judge that the citizenships were granted during the period, or that the developmental expenditure and contracts were entered into during the period.

- [35] Ms. Dyer in response submits that the evidence of Ms. Byron of the sale of units and grant of citizenship was not challenged under cross-examination. Ms. Dyer further submits that the evidence of Mrs. Bass in her witness statement at paragraph 37 supports the respondents' case. Mrs. Bass stated:

"In December 2015, many Asian workers were brought to the Candy Development site and suddenly began excavation and construction. The workers were working day and night including through the Christmas and New Year's holidays. The construction proceeded quickly and in January 2016, the foundation and parts of walls for at least six buildings had already been constructed."

- [36] Paragraphs 68 through 71 of the judgment support Mr. Kelsick's submission that the learned judge considered the issue of hardship beyond the filing of the proceedings. In paragraph 70 the learned judge stated:

"After months of work, stoppage has also caused workers being laid off and an adverse impact on cash flow. Foreign workers being laid off and some have had to return to their countries. This has resulted in the loss of approximately EC\$90,000.00 in application fees for work permits and housing costs for workers. To date, the developers have spent over \$2,000,000.00 in wages and salaries and paid over EC\$400,000.00 in social security and related payments. There is presently a monthly maintenance costs of approximately EC\$23,000.00. The delay has also caused deterioration and destruction of materials and tools. This is estimated at approximately EC\$583,000.00."

- [37] In my view the learned judge erred in so doing. However, it is not every error would result in an appellate court interfering with the exercise of a judge's discretion. I agree with Ms. Dyer that there was the evidence of Mrs. Bass of

the development of the Project within the period on which the learned judge could have made the finding that he made. It could also be reasonably inferred that the Developer would have also expended sums on preparatory work to enable the construction to commence.

[38] Mr. Kelsick submits further that the only evidence which was before the learned judge which could have negatively impacted good administration was the evidence of Ms. Renee Williams the Director of Planning(ag) who stated in her witness statement that if the planning permission was rescinded there would be financial implications and the confidence of potential investors may be impacted. However, the learned judge ought to have weighed this against the detrimental effect on good administration if a project which could damage the marine environment is allowed to proceed without an assessment of the impact on the environment.

[39] Mr. Kelsick further submits that the Court must have regard to the learned judge's finding on the merit of the claim and to the relief that was being sought by Mrs. Bass, being, she was not seeking the destruction of the buildings already constructed, but a proper EIA and implementation of the EIA. In those circumstances, counsel argued, there could be no hardship and it was in the interest of good administration that relief should have been granted to correct the abuse of public power.

[40] Ms. Dyer referred the court to the reliefs sought in the claim and submits that the relief now sought was not included in the claim. Further, since the institution of the proceedings, the Developer submitted a supplementary EIA to the Planning Department as stated in Ms. Byron's witness statement at paragraph 26 which reads:

"In April 2016, after the High Court had originally dismissed the application by [Mrs.] Bass for permission to apply for judicial review, CDCL commissioned a supplementary environmental impact assessment ("SEIA") with particular focus on drainage, coastal and marine areas of the Candy Resort project. The new SEIA was submitted to the Physical Planning Department on or around 15th August 2016 and was previously entered into evidence in these proceedings. CDCL

remains committed to adhering to the mitigating measures recommended in the SEIA.”

Counsel further submits that in view of the prejudice that would be suffered by the Developer and other third parties (those who purchased units), the learned judge was correct not to grant the relief sought.

[41] I agree with Mr. Kelsick that abuse of public power must be corrected by the court, but in this case while the learned judge found that the claim was meritorious, he made no finding that there was abuse of public power. This argument did not form a ground of appeal and was not raised in the court below. I add further that not every error of public administration amounts to an abuse of public power. Thus, while I agree with counsel’s point that the court has the power to rectify such abuse, Counsel has failed to convince this Court that there was such an abuse of public power in this case. The authorities have all determined that good administration requires that there must be decisiveness and finality to decisions of public authorities. It is important to good administration that citizens, residents, and as in this case investors, know how they can conduct their affairs once permission has been granted and more so when a reasonable period has elapsed and there has been no challenge to the legality of the decision.

[42] I agree with Ms. Dyer that the ambit of Mrs. Bass’ challenge was not as restricted in the lower court as submitted by Mr. Kelsick. The ambit of the challenge was much wider and encompassed quashing and recall of the decision granting permission for the Project. The learned judge’s exercise of discretion was made on that basis. The learned judge cannot be faulted for so doing. This case was unlike **R v Lichfield** where the ambit of the challenge before the lower court was restricted to the contribution formula and was not extended to the quashing of the grant of planning permission. The Court in endorsing this approach stated: “It permits the court to get to the bad parts of the curate’s egg and to avoid the commonly heard argument as to the potentially far-reaching effects of granting relief.”¹¹ I also endorse this approach. Counsel should always seek to advance

¹¹ [2001] EWCA Civ 304.

the appropriate relief to correct the errors of the decision and not adopt the broad-brush approach in seeking the full gamut of reliefs available in administrative law.

- [43] Additionally, the evidence of the SEIA while it was not referred to by the learned judge in his judgment when considering relief, (I hasten to add that a judge is not required to include in the judgment every bit of evidence that is considered in coming to the decision) provided a basis for the judge to exercise his discretion in the way that he did having regard to the finding of detriment to good administration and hardship and prejudice to the Developer and third parties.

Public Interest

- [44] It is common ground between the parties that delay could in certain circumstances be a bar even where there are public interest considerations. Both parties referred to the case of **R v Pembrokeshire County Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile**.¹² However, they disagree on whether this was such a case.

- [45] The learned judge acknowledged that public interest considerations could impact the grant of relief. He noted that in **ex parte Hardy and Maile**, the court had refused to grant leave to apply for judicial review because the public interest considerations did not outweigh the hardship and prejudice that would be suffered by the interested parties. The learned judge was of the view that the situation in the case at bar was similar to the situation in **ex parte Hardy and Maile**. He found that while the environmental impact was no doubt of considerable public interest and Mrs. Bass was genuinely concerned about the environmental impact, and notwithstanding the considerable public interest, Mrs. Bass had not acted reasonably in delaying for several months after the decision to institute proceedings. Having regard to the substantial hardship likely to be caused to the Developer and third parties and the adverse impact on the good administration of Nevis, he refused to grant relief.

¹² [2005] EWHC 1872 (Admin) (26 July 2005).

- [46] Mrs. Bass complains that the learned judge erred in so finding. The thrust of Mr. Kelsick's argument is that the learned judge considered the issue of the public interest and the impact on the marine environment of Nevis at the leave stage and found that notwithstanding the delay, leave should be granted. He submits that it was not open to the learned judge to simply change his mind at the substantive hearing. Further, at the substantive hearing, the witnesses for the respondents, being Mr. Brantley, Mrs. Renee Williams and Ms. Byron all testified about the importance of the marine environment of Nevis. Mr. Kelsick contends that the learned judge gave no or too little weight to this evidence.
- [47] Ms. Dyer in response referred to paragraph 38 of the decision of the Privy Council in **Maharaj v National Energy Corporation of Trinidad and Tobago**¹³ and submits that the learned judge was not required to consider public interest consideration since there was no statutory requirement to do so as exists in the legislation in England. Mr. Kelsick in his reply submissions contends that the learned judge did not err in considering the public interest considerations as they were relevant in determining whether relief should be granted. I agree.
- [48] Counsel submits alternatively, that even if the learned judge was required to consider public interest considerations, then in keeping with the learning in **ex parte Hardy and Maile** public interest considerations would be relevant particularly in non-planning cases and development cases and where there was no significant prejudice to the interests of third parties and good administration. Based on the circumstances of this case, this being a case of planning permission, and having regard to the hardship and prejudice that would be suffered, the learned judge did not err in refusing to grant relief.
- [49] In my view having regard to the earlier finding in relation to the correctness of the judge's decision that the delay was unreasonable, while there is considerable public interest in the marine environment of Nevis, that does not mean that automatically the public interest considerations would trump

¹³ [2019] UKPC 5.

inexcusable delay. The court has a discretion and the manner in which the court's discretion is exercised will depend on the circumstances of each case.

[50] As stated earlier in this decision, appellate courts have been warned on numerous occasions and quite recently in the Privy Council decision of **Ming** of the need to exercise restraint when reviewing the exercise of discretion of a judge. In his judgment at the leave stage in considering the issue of public interest, the learned judge at paragraph 123, expressed the view that the impact of the Project on the marine environment was of considerable public interest and therefore it was in the public interests that the complaints of Mrs. Bass be fully ventilated at a substantive hearing notwithstanding the delay. At the substantive hearing the issue was fully ventilated.

[51] The weight to be given to public interest considerations would depend on the nature of the considerations having regard to the circumstances of the case. It is common ground that the marine environment is important to Nevis. Therefore, likely negative impact on the marine environment resulting from a project would be of public interest. While the learned judge found that the EIA was deficient and did not address the likely impact of the Project on the marine environment, the learned judge did not make a similar or any finding on the SEIA which as was stated earlier was prepared after the judge had granted leave and was critical of the EIA. We were not referred to any evidence which showed that the SEIA suffered from the same or similar deficiencies as the EIA or otherwise. In my view the learned judge considered all of the relevant factors in exercising his discretion. I can find no basis to interfere with the exercise of the judge's discretion.

Issue C- Costs

[52] The learned judge having found that delay was a bar to the grant of relief found that Mrs. Bass' conduct had grounded a cost order to all the respondents including the Developer. The conduct which the learned judge found gave rise to the award of costs to the Director of Planning and the Advisory Committee are firstly, that Mrs. Bass was aware of public consultations in relation to the proposed development and she failed to participate. Secondly, although she

had received legal advice on how to proceed, she decided to engage with politicians rather than the public officers of the Planning Department. In relation to the Developer, the learned judge found that by intervening, they contributed to the outcome of the case, they showed the hardship which resulted to third parties, and they consented to cease work on the Project pending the determination of the case.

[53] The appellant contends that the learned judge erred in awarding costs to the respondents. She advanced four reasons why the learned judge erred. Firstly, the general rule being no order for costs against a claimant for judicial review, there was no application by the respondents for an award of costs. Secondly, the learned judge being mindful to award costs did not give the appellant an opportunity to make submissions on the issue. Thirdly, the learned judge in exercising his discretion failed to consider that delay was argued at the leave stage and it was determined that it was reasonable to pursue the claim in the public interest and leave was granted to pursue the claim. Fourthly, the learned judge found that the claim was meritorious.

[54] The respondents acknowledge that the issue of costs was not raised by the respondent and that there were no submissions by either party on the issue. However, they contend that in circumstances where the delay in the proceedings was substantial, it was unreasonable for Mrs. Bass to pursue the claim. The learned judge therefore did not err in the exercise of his discretion.

[55] The issue of costs is dealt with in CPR 56.13(6). It states:

“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.”

[56] It is well settled that the section gives the learned judge a discretion to order costs against a claimant where the claimant acted unreasonably in the conduct of the application. The issue is whether the learned judge properly exercised his discretion in awarding costs to the respondents. It is also well settled as stated

earlier that an appellant court will not lightly intervene with the exercise of discretion by a lower court unless it was wrong in principle.

[57] I agree with the submission of the appellant on this issue. The general rule being that there should be no order for costs against an applicant for judicial review, where there is no application for costs and a judge is mindful of awarding costs on the basis outlined in the section, then the learned judge is required to invite submissions on the issue before exercising the discretion to make an award for costs. It is not disputed that no such opportunity was given to the parties. On this basis the award should be set aside.

[58] I am also in agreement with the appellant that the learned judge erred in failing to consider the fact that he had found that the appellant's claim that the EIA that was conducted in relation to the Project was woefully inadequate and that there was merit to the challenge against the decision. The fact that the claim was meritorious, but relief was only refused because of delay was a relevant factor which the learned judge ought to have considered in determining whether Mrs. Bass' conduct in pursuing the claim was unreasonable or whether the general rule should apply. In my view in failing to so do, the learned judge erred in the exercise of his discretion.

Conclusion

[59] In view of the reasons stated above I will dismiss the appeal save in relation to the issue of costs. The learned judge's order on costs is set aside. Each party shall bear their costs on the appeal.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

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

By the Court

Chief Registrar